IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Excise Appeal No.40180 of 2016

(Arising out of Order in Original No. LUTC/482/2015-C dated 5.11.2015 passed by the Commissioner, Large Taxpayer Unit, Chennai)

M/s. Caterpillar India Pvt. Ltd. **Appellant**
Melnalathu,
Tiruvallur 602 004.

Vs.

Commissioner of GST & Central Excise **Respondent**
Chennai Outer Commissionerate
Newry Towers, II Avenue
12th Main Road, Anna Nagar
Chennai – 600 040.

APPEARANCE:

Shri Raghavan Ramabhadran, Advocate for the Appellant
Smt. K. Komathi, ADC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 40464/2023

Date of Hearing: 29.05.2023
Date of Decision: 22.06.2023

Per Ms. Sulekha Beevi C.S.,

Brief facts are that appellants are engaged in manufacturer of 'Earth Moving Machinery' viz. Dumpers, Loaders, Excavators and are registered with the Central Excise Department. They are availing the facility of CENVAT credit of duty paid on inputs, capital goods and service tax paid on input services. During the course of verification of records of appellant by the Audit Wing of the Large Taxpayer Unit (LTU), Chennai, it was noticed that appellants have been receiving engines without payment of duty from their sister unit located in Hosur under Rule 12BB of the Central Excise Rules, 2002 (CER, 2002). The

said engines are used in the manufacture of Earth Moving Machinery by the appellant and the finished goods are cleared on payment of appropriate duty. On detailed verification it was noticed that the Earth Moving Machinery manufactured out of such intermediate goods (engines received from sister units without payment of duty) have not been cleared within a period of six months from the date of receipt of such intermediate goods as mandated under Rule 12BB of CER, 2002. On being pointed out, the appellant paid total duty along with interest for the intermediate goods received by appellant during the period May 2010 to November 2013 as mandated under Rule 12BB of CER, 2002.

2. Apart from this, it was noticed that appellant had availed CENVAT credit during the period January 2014 to July 2014 on the duty paid under Rule 12BB on the clearances of engines from their Hosur Unit. It appeared that the said credit was availed under the provisions of section 12A of CENVAT Credit Rules, 2004 (CCR, 2004). The department was of the view that credit can be availed only on inputs and not on intermediate goods. The engines received from Hosur Unit being only intermediate goods and not inputs for further manufacture of Earth Moving Machinery, the credit was not eligible.

3. Show Cause Notice dated 14.10.2014 was issued invoking the extended period proposing to demand the duty payable under Rule 12BB on intermediate goods along with interest and for imposing penalty. The Show Cause Notice also proposed to deny the CENVAT credit wrongly availed and to recover the same along with interest and for imposing penalty. After due process of law, the original authority confirmed the demands along with interest and imposed penalties in

regard to both the demands. Aggrieved by such order, the appellant is now before the Tribunal.

4. The learned counsel Shri Raghavan Ramabhadran appeared and argued for the appellant. It is submitted that being an LTU, the appellant manufactures the engines at its Hosur Unit and stock transfers the engines to its Tiruvallur Unit without paying excise duty on the engines in terms of Rule 12BB of CER, 2002. The appellant undertakes the stock transfer under a transfer challan. The engines are then used in the appellant unit (Tiruvallur Unit) in the manufacture of final products viz. Earth Moving Machines (EMMs).

5. According to Rule 12BB of the CER, the EMM (final products) using the engines (intermediate goods) ought to have been cleared on payment of appropriate duties of excise within 6 months from the date of receipt of the stock-transferred engines i.e., the intermediate goods. The issue under dispute revolves around the duty demand on engines stock-transferred between the Appellant's sister unit under Rule 12BB of the CER, 2002. As the finished products were not cleared within a period of 180 days as required under Rule 12BB, the Appellant paid duty and interest on the stock-transferred engines on being pointed out by audit. On the duty so paid, the appellant availed credit since the engines were inputs used to manufacture the EMM. The dispute now relates to penalty proceedings initiated over the duty paid under first proviso to Rule 12BB of the CER and also on the validity of the credit availed by the Appellant.

6. During the period 2012-13 there was an industry-wide slowdown in the production and sales of Off-Highway Truck and hence there were

some delays in dispatching the EMMs out of the Tiruvallur unit within six months as mandated in Rule 12BB of the CER. Further, some of the stock-transferred engines could not be used to manufacture EMM and were lying in the Tiruvallur unit. Considering the above, the Appellant wrote to the Department under Letter dated 03.06.2014 stating that the Appellant would not be continuing with the procedure under Rule 12BB of the CER w.e.f. 01.06.2014 and that all engines thereafter would be transferred from Hosur unit to Tiruvallur unit on payment of applicable excise duty.

7. The learned counsel referred to Rule 12BB of CER, 2002 which reads as under:-

> ***"12BB. Procedure and facilities for large taxpayer***
>
> *Notwithstanding anything contained in these rules, the following procedure shall apply to a large taxpayer.*
>
> *(1) A large taxpayer may remove excisable goods, except motor spirit, commonly known as petrol, high speed diesel and light diesel oil (hereinafter referred to as the intermediate goods), without payment of duties of excise, under the cover of a transfer challan or invoice, from any of his registered premises, (hereinafter referred to as the sender premises) where such goods are produced, manufactured or warehoused to his other registered premises, other than a premises of a first or second stage dealer (herein after referred to as the recipient premises), for further use in the manufacture or production of such other excisable goods (hereinafter referred to as the subject goods) in recipient premises subject to condition that-*
>
> *(a) the subject goods are manufactured or produced using the said intermediate goods and cleared on payment of appropriate duties of excise leviable thereon within a period of six months, from the date of receipt of the intermediate goods in the recipient premises; or*
>
> *(b) the subject goods are manufactured or produced using the said intermediate goods and exported out of India, under bond or letter of undertaking within a period of six months, from the date of receipt of the intermediate goods in the recipient premises, and that any other conditions prescribed by the [3][Principal Commissioner of Central Excise or Commissioner of Central Excise, as the case may be], Large Taxpayer Unit in this regard are satisfied:*
>
> ***Explanation 1.*** *The transfer challan or invoice shall be serially numbered and shall contain the registration number, name, address of the large taxpayer, description, classification, time and date of*

removal, mode of transport and vehicle registration number, quantity of the goods and registration number and name of the consignee:

Provided that if the subject goods manufactured or produced using the said intermediate goods are not cleared on payment of appropriate duties of excise leviable thereon or are not exported out of India within the said period of six months, duties of excise payable on such intermediate goods shall be paid by the recipient premises with interest in the manner and rate specified under section 11AA of the Act:"

8. The Appellant, without prejudice, paid excise duty amounting to Rs. 3,97,08,057/- and interest of Rs. 1,11,95,739/- for the period from May 2010 to November 2013 and paid duty of Rs, 3,31,81,659/- and interest of Rs. 10,35,828/- for the period from December 2013 to May 2014 for the engines cleared from Hosur unit to Tiruvallur unit.

9. Being eligible, the Appellant then availed credit of Rs. 7,28,89,714/- of the duty paid on the engines as per Rule 12A of the CENVAT Credit Rules, 2004. Thereupon the Show Cause Notice dated 14.10.2014 has been issued which has culminated in confirming the demands in toto.

10. The two issues under dispute as confirmed by the impugned OIO and the reasons for confirmation are tabulated below.

Demand	Summary of Findings in impugned Order-in-Original
Demand of duty under Rule 12BB of the CER along with interest.	The Appellant has not disputed the allegation that they have received the goods under Rule 12BB of CER without payment of duty. They have failed to manufacture and clear the finished goods within the mandatory period of six months. (Para 9). The twin conditions mentioned in Rule 12BB of CER i.e., finished goods must be manufactured by the recipient using the intermediate goods; such finished goods must be cleared on payment of duty to DTA/ exported under bond or LUT within 180 days is not adhered to. Therefore, the Appellant was held liable for payment of duty on the inputs received, along with interest. (Para 10)

Demand	Summary of Findings in impugned Order-in-Original
Denial of Credit of duty paid under Rule 12BB on clearance of intermediate products (engines).	Engines are not inputs but are intermediary products manufactured by the Hosur Units using their own inputs. The amount paid under Rule 12A (1) of the CCR and the proviso therein pertains only to 'inputs cleared as such' and not to 'intermediary/ finished goods.' The Appellants are not eligible to avail the above credit. (Para 14) The Appellant had availed credit of duty based on debit entries in their CENVAT register, which is not a document prescribed under Rule 9 of the CCR. (Para 16)
Interest and Penalty	Liable to pay interest and penalty. Reliance was placed on *CCE Vs. Rajasthan Spinning & Weaving Mills & CCE Vs. Lanco Industries Ltd.* (Para 19)

11. The learned counsel submitted that the demand raised invoking Rule 12BB against the appellant which is the Tiruvallur Unit is against provisions contained in Central Excise Act, 1944 and CER, 2002 and therefore cannot be sustained. The first proviso to Rule 12BB of the CER stipulates that if the final goods manufactured using the intermediate goods are not cleared on payment of appropriate duties within six months from date of receipt of the intermediate goods, the recipient unit shall pay the applicable excise duty on the intermediate goods along with interest in the manner and rate specified under Section 11AA of the Central Excise Act, 1944. The Appellant had remitted the applicable excise duty and interest on the stock-transferred engines (intermediate goods) even prior to issuance of the SCN albeit under protest. It is settled law that once the tax was paid, an assessee would be entitled to avail credit of the same, thereby leading to a revenue neutral situation. In such circumstances there can be no question of demand of tax and consequently interest and penalty

cannot be sustained as well. In this regard, reliance is placed on the following decisions:

a) International Auto Ltd. Vs. CCE (2005) 183 ELT 239 (SC)

b) British Airways vs. CCE (2014) 36 STR 598 (Tri.-Del.)

c) Jet Airways (India) Ltd. vs. Commissioner (2017) 7 GSTL J35 (SC)

d) CCE, Vadodara-II vs. Indeos ABS Limited 2011 (254) ELT 628 (Guj.) & Order of the Hon'ble Supreme Court dismissing Revenue Appeal

e) CCE vs. Ultratech Cement 2016 (343) ELT 164 (Tri.-Chennai.)

f) Jay Yushin Ltd. vs. Commissioner of Central Excise, New Delhi 2000 (119) E.L.T. 718 (Tribunal-LB)

g) Standard Grease & Specialties Pvt. Ltd. vs. CCE & ST 2014 (303) E.L.T. 434 (Tri.-Ahmd.) and the Order of Hon'ble Bombay High Court dismissing Department Appeal

h) Mahindra & Mahindra Ltd. vs. CCE 2015 (324) E.L.T. 189 (Tri.-Mumbai.).

i) Scope E Knowledge Center Private Limited vs. Commissioner of Service Tax 2023 (3) TMI 695

j) Hindalco Industries Ltd. vs. CCE 2023 (5) TMI 720

12. It is assertively and vehemently argued that penalty under Sec. 11AC of the Central Excise Act, 1944 cannot be invoked in cases when there is failure to pay duty or short-payment of duty in situation falling under Rule 12BB of CER, 2002. The Finance Minister during Budget Speech 2005-2006 had announced to set up a facility for LTUs by way of introducing a self-contained code through insertion of Rule 12BB to CER, 2002 and Rule 12A to CCR, 2004. These provisions contemplate a special procedure along with consequences, for non-compliance of the same as applicable to LTUs notwithstanding other general provisions. Further, instructions to such LTUs were also issued by CBEC vide Circular No. 834/11/2006-CX dated 05.10.2006.

13. On a bare reading of Rule 12BB of CER, it can be understood that on compliance with the conditions contained therein the liability to pay duty and interest on intermediate goods is shifted on the recipient premises.

14. Further, Explanation 3 to Rule 12BB of the CER borrows only the mode of recovery prescribed under Section 11A (duty) and Section 11AA (interest) of the Central Excise Act, 1944. It is submitted that the mode under Section 11AC (penalty) of the Act is not borrowed in Rule 12BB of CER much less the power to invoke Section 11AC of the Act for imposing penalty. It is urged by the learned counsel that this shows the clear intention of the Legislature and Executive not to levy penalty for the violation of Rule 12BB. In this regard, the learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in *Khemka & Co. (Agencies) Pvt. Ltd. vs. State of Maharastra* reported in *(1975) 2 SCC 22* to highlight the interpretation of the legal maxim, *Expressio unius exclusion alterius.* The legislative intent can be safely presumed to be to confine penalties mentioned specifically in law. In the present case the mode of imposing penalty under Section 11AC of the Act cannot sustain and much less be invoked, when Rule 12BB of CER does not contemplate the same. The decision of the Hon'ble Supreme Court in the case of CCE, Jaipur Vs. Raghuvir (India) Ltd. – 2000 (118) ELT 311 (SC) was also relied.

15. Further, the learned counsel relied on the following decisions to highlight that under a self-contained code, no action outside it would be attracted:

a) Collector of Central Excise vs. Raghuvar (India) Ltd. (2000) 5 SCC 299.

b) Hans Steel Rolling Mill vs. CCE (2011) 3 SCC 748.

c) Oswal Paper & Allied Industries vs. CCE 2006 (206) ELT 991 (Tri.-Del.)

d) Systematic Steel Industries Ltd. vs. CCE 2010 (262) E.L.T. 317 (Tri. Ahmd).

e) Dyna Lamps & Glass Works Ltd. vs. Commissioner of Customs, Chennai 2003 (157) E.L.T. 73 (Tri.-Chennai.).

16. The learned counsel submitted that it would be pertinent to note that the Appellant paid the duty and interest as contemplated in 1st proviso to Rule 12BB of CER and as such there is no contravention of Rule 12BB of CER. Assuming without admitting that Section 11AC of the Act is applicable in Rule 12BB cases, it is not the allegation of the Department that the Appellant availed the LTU facility under Rule 12BB of CER fully knowing, or believing that the conditions contained therein would not be capable of being fulfilled. It is a fact that the Appellant was not in a position to clear certain manufactured EMMs/manufacture the EMMs using the engines (intermediate goods under Rule 12BB) on account of a market slump during the disputed period. Therefore, even if for argument sake, it is assumed that penalty provision under Section 11AC of the Act is provided for in Rule 12BB cases, the same cannot be invoked on the facts of the present case. In this regard, reliance is placed on the following decisions:

a) Maruti Udyog Limited vs. Commissioner of Customs Kandla 2001 (132) E.L.T. 340 (Tri.-Mumbai.)

b) Suncity Synthetics Ltd. vs. Commissioner of Customs 2001 (132) E.L.T. 684 (Tri. Mumbai.).

c) Commissioner of Customs, Bangalore vs. Indo Nissin Foods Ltd. 2013 (294) E.L.T. 259 (Tri.-Bang.)

17. Without prejudice to above, it is submitted that the Appellant had intimated the department of payments of duty and interest vide letter dated 03.06.2014. In such cases, no Notice ought to have been issued in the first place, as stipulated in Section 11A(2) of the Act. To support this argument, the judgment in the case of *Rashtriya Ispat Nigam Ltd. vs. CCE (2003) 161 E.L.T. 285* was relied. In such cases, no penal consequences ought to visit the Appellant and the penalty proceedings in the present case ought to have been dropped.

18. On the second issue as to the demand raised denying the CENVAT credit availed by appellant, the learned counsel explained that the department has denied credit on a wrong notion that the engines cleared from the Hosur Unit and received by appellant in their Tiruvallur Unit are not 'inputs' but only intermediate goods under Rule 12A of the CCR, 2004. The engines are 'intermediate goods' only for the purposes of Rule 12BB of the CER. In fact, if the Appellant had not adopted the option under Rule 12BB, the very same engines would have been subjected to excise duty as final products on the hands of the sender premises. It is submitted that once the Rule 12BB benefit is held inapplicable to the Appellant and consequently duty and interest is paid on the engines, the same Rule 12BB cannot be used to deny CENVAT credit to the Appellant. That once duty has been paid on the engines, Rule 12BB of the CER has no application. The learned counsel referred to Rule 12A which provides for availment of credit by LTU.

19. Rule 12A of CCR, 2004 reads as under:-

> *RULE 12A. Procedure and facilities for large tax payer. –*
>
> *Notwithstanding anything contained in these rules, the following procedure shall apply to a large taxpayer, -*

(1) A large tax payer may remove inputs, except motor spirit, commonly known as petrol, high speed diesel and light diesel oil or capital goods, as such, on which CENVAT credit has been taken, without payment of an amount specified in sub-rule (5) of rule 3 of these rules, under the cover of a transfer challan or invoice, from any of his registered premises (hereinafter referred to as the sender premises) to his other registered premises, other than a premises of a first or second stage dealer (hereinafter referred to as the recipient premises), for further use in the manufacture or production of final products in recipient premises subject to condition that –

(a) the final products are manufactured or produced using the said inputs and cleared on payment of appropriate duties of excise leviable thereon within a period of six months, from the date of receipt of the inputs in the recipient premises; or

(b) the final products are manufactured or produced using the said inputs and exported out of India, under bond or letter of undertaking within a period of six months, from the date of receipt of the input goods in the recipient premises, and that any other conditions prescribed by the [Principal Commissioner of Central Excise or Commissioner of Central Excise, as the case may be], Large Tax payer Unit in this regard are satisfied.

Explanation 1. – The transfer challan or invoice shall be serially numbered and shall contain the registration number, name, address of the large tax payer, description, classification, time and date of removal, mode of transport and vehicle registration number, quantity of the goods and registration number and name of the consignee :

Provided that if the final products manufactured or produced using the said inputs are not cleared on payment of appropriate duties of excise leviable thereon or are not exported out of India within the said period of six months from the date of receipt of the input goods in the recipient premises, or such inputs are cleared as such from the recipient premises, an amount equal to the credit taken in respect of such inputs by the sender premises shall be paid by the recipient premises with interest in the manner and rate specified under rule 14 of these rules.

Provided further that if such capital goods are used exclusively in the manufacture of exempted goods, or such capital goods are cleared as such from the recipient premises, an amount equal to the credit taken in respect of such capital goods by the sender premises shall be paid by the recipient premises with interest in the manner and rate specified under rule 14 of these rules.

Explanation 2. – If a large tax payer fails to pay any amount due in terms of the first and second provisos, it shall be recovered along with interest in the manner as provided under rule 14 of these rules :

Provided also that nothing contained in this sub-rule shall be applicable if the recipient premises is availing following notifications of Government of India in the Ministry of Finance (Department of Revenue), -

(2) The first recipient premises may take CENVAT credit of the amount paid under first proviso to sub-rule (1) as if it was a duty paid by the sender premises who removed such goods on the basis of a document showing payment of such duties.

*(3) **CENVAT credit of the specified duties taken by a sender premises shall not be denied or varied in respect of any inputs or capital goods,** -*

(a) removed as such under sub-rule (1) on the ground that the said inputs or the capital goods have been removed without payment of an amount specified in sub-rule (5) of rule 3 of these rules; or

(b) on the ground that the said inputs or capital goods have been used in the manufacture of any intermediate goods removed without payment of duty under sub-rule (1) of rule 12BB of Central Excise Rules, 2002.

Explanation. - For the purpose of this sub-rule ¯intermediate goods‖ shall have the same meaning assigned to it in sub-rule (1) of rule 12BB of the Central Excise Rules, 2002.

***** ***** ******

(5) A large tax payer shall submit a monthly return, as prescribed under these rules, for each of the registered premises.

(6) Any notice issued but not adjudged by any of the Central Excise Officer administering the Act or rules made thereunder immediately before the date of grant of acceptance by the [Principal Chief Commissioner of Central Excise or Chief Commissioner of Central Excise, as the case may be], Large Tax Payer Unit, shall be deemed to have been issued by Central Excise officers of the said Unit.

(7) Provisions of these rules, insofar as they are not inconsistent with the provisions of this rule shall mutatis mutandis apply in case of a large tax payer."

20. It is submitted that Rule 12A of the CCR does not stipulate anywhere that the duty paid by the Appellant is not eligible for credit. While Rule 12A(1) of the Credit Rules permits the removal of inputs, as such, to sister units without reversal of credit as mandated under Rule 3(5) of the Credit Rules, the first proviso to Rule 12A(1) of the Credit Rules requires the recipient unit to pay the amount mandated under Rule 3(5) of the CENVAT Credit Rules in case of non-fulfilment of the condition. Rule 12(A)(2) of the Credit Rules expressly permits

the recipient unit to take CENVAT credit of the amount paid under first proviso to 12A(1) as if it was a duty paid by the sender premises who removed such goods on the basis of a document showing payment of such duties. Therefore, there is no embargo in CENVAT Credit Rules, 2004 for taking credit of the duty paid on intermediate goods transferred between sister units.

21. It is submitted that the impugned OIO does not reason why the 'Engine' is not an input in essence, for the EMM. The engines being termed as 'Intermediary Goods' in the context of Rule 12BB of the Central Excise Rules does not mean that the same is ousted from being an 'Input' under Rule 12A or Rule 3 of the Central Excise Rules, 2002. The Appellant paid duty of Rs. 7,28,89,714/- along with applicable interest. Once the duty is paid, there is nothing that disqualifies the Appellant from claiming the credit. Further that no other person could have availed this credit and there is no possibility of any double credit or revenue leakage. LTU scheme is a benevolent scheme and a trade facilitation measure which has to be applied with a taxpayer-friendly approach as emphasised in the Circular No. 834/11 dated 05.10.2006.

22. The other reason for denying the credit is that the credit has been availed on debit entries made by the appellant in their CENVAT register which cannot be considered as documents for taking credit. The learned counsel submitted that it was not practically possible for the appellant to have duty paid documents as given in Rule 9 of CENVAT Credit Rules, 2004 to avail the credit during the removal of engines from Hosur Unit to the appellant unit without payment of duty as under Rule 12BB. The appellant thereafter has paid the duty. The

credit was availed on the basis of debit entry made in the CENVAT account. The learned counsel submitted that the adjudicating authority ought to have considered firstly, whether it was possible for the Hosur Unit (sister premises) operating under Rule 12BB to comply with Rule 9 of CCR, 2004. Secondly, whether such a procedural infraction of non-compliance with Rule 9 can lead to denial of substantive benefit under the CENVAT credit scheme when the duty paid is not disputed.

23. Rule 12BB facility enables the sender premises to remove manufactured intermediate goods to the recipient premises without payment of duty. In these circumstances, an assessee would not be in a position to issue a document under Rule 9 of CCR evidencing payment of duty. Therefore, it is submitted that the Appellant in the present case was not able to issue a document in terms of under Rule 9 of CCR so as to comply with the procedural requirements for availing credit.

24. The learned counsel submitted that an assessee cannot be compelled to do something which is impossible. The legal maxim *lex non cogit and impossiblia* was referred. The learned counsel relied on the following decisions:-

a) Commissioner of Central Excise vs. Chemplast Sanmar Ltd. 2009 (239) E.L.T. 398 (SC)

b) CCE, Jaipur vs. Goyal Products Ltd. 2015 (325) E.L.T. 165 (Tri.-Del.)

c) Jindal Steel & Power Ltd. vs. CCE, Raipur 2015 (329) E.L.T. 595 (Tri.-Del.)

d) Laxai Avanti Life Sciences Pvt. Ltd. vs. CC.C.Ex. & ST 2017 (350) E.L.T. 443 (Tri.-Hyd.)

e) Schwing Stetter (I) Pvt. Ltd. vs. C.CE&ST, LTU, Chennai 2018 (364) E.L.T. 653 (Tri.-Chennai.)

25. To support the argument that substantive right of CENVAT credit cannot be denied on procedural requirements, the learned counsel relied on the following decisions:-

a. Cosmos Casting India Ltd. vs CCE (2011) 23 STR 144 (Tri.-Del.)

b. Formica India Division vs. CCE 1995 (77) E.L.T. 511 (SC)

c. Sharda Motor Industries Ltd. vs. Union of India 2011 (267) E.L.T. 634 (Bom.)

d. Commissioner of Central Excise vs. MRF Limited 2009 (244) E.L.T. 601 (Tri.-Chennai.)

26. The issue whether debit entries made in CENVAT account along with document on the basis of which such debit entry was made is sufficient to satisfy the requirement under Rule 9 of CCR, 2004 was discussed by the Tribunal in the case of CCE, Jaipur – II Vs. Rajasthan Spinning & Weaving Mills Ltd. – 2012 (280) ETL 463 (Tri. Del.) and K.M. Sugar Mills Ltd. Vs. CCE – 2012 (26) STR 455 (Tri. Del.).

27. In para 17 of the Order-in-Original, the adjudicating authority has taken the view Rule 12A has an overriding effect over the rest of the CENVAT Credit Rules, 2004. The learned counsel submitted that in such a situation, credit cannot be denied as Rule 12A (2) grants benefit of availment of credit based on entries in CENVAT Register. The Appellant has rightly availed the CENVAT Credit of Rs. 7,28,89,714/- and the demand in this regard may be dropped.

28. Further, the demand for interest and the penalty imposed alleging wrong availment of CENVAT credit is not sustainable. It is submitted that once the demand for reversal of credit is unsustainable, there is no question of levy of interest and penalty on the credit availed. The Appellant had no intention of suppressing any facts. The Appellant

made complete disclosures in its periodical returns filed with the Department. The relevant details were available with the Department for scrutiny all along. It is submitted that when an Assessee had bona fide belief that they would be eligible for CENVAT credit and when all the information required under law have been furnished, question of suppression does not arise. The Show Cause Notice itself relies on the details maintained by the appellant and then there cannot be any suppression or manipulation to evade payment of tax, and the extended period of limitation cannot be invoked. Reliance is placed on the decision of the Hon'ble Tribunal, New Delhi in *CCE, Raipur v. Orion Ferro Alloys (P) Ltd. (2010) 259 ELT 84 (Tri. -Del.)*.

29. The following decisions was also relied.

a) Pushpam Pharmaceuticals Co. vs. CCE (1995) 78 ELT 401 (SC)

b) Continental Foundation Jt. Venture v. CCE (2007) 216 ELT 177 (SC)

c) CCE vs. Damnet Chemicals Pvt. Ltd. (2007) 216 ELT 3 (SC)

d) Padmini Products Ltd. vs. CCE (1989) 43 ELT 195 (SC)

e) Uniworth Textiles Ltd. vs. CCE (2013) 288 ELT 161 (SC)

30. The arguments put forward by the learned AR adverting to Section 11AC(b) of the Central Excise Act, 1944 was countered by the learned counsel by stating that in the said clause (b) reference is made to clause (5) of Section 11A of the Act. Clause (5) of section 11A of the Act requires a finding to be made during the course of audit that the duty was not paid with intent to evade for reasons stated in clauses (a),(b),(c),(d) and (e) of sub-section (4) of Section 11A of the Act. Whereas in the present case, the appellant is required to pay duty for non-fulfilment of condition required under Rule 12BB. The learned

counsel prayed that there are no grounds for invoking extended period and the penalty imposed and the interest demand may be set aside.

31. The learned AR Ms. K. Komathi appeared and argued for the Revenue. It is submitted by the learned AR that 12BB is a facility provided to a Large Taxpayer and is subject to the condition mentioned therein. If the condition is not fulfilled, the unit is liable to pay duty and the provisions for short-payment and non-payment of duty are automatically attracted. The condition is that the recipient (the appellant unit) has to manufacture and clear the finished products using the intermediate product (engine) received from sister unit within a period of six months from the date of receipt of the intermediate goods. The following events have to take place to satisfy Section 12BB procedure:-

> (i) finished goods should have been manufactured by the recipient using the intermediate goods
>
> (ii) such finished goods should have been cleared on payment of duty to DTA or exported under bond within a period of six months from the date of receipt of intermediate goods.

32. Only if the above events are fulfilled, there is relief from payment of duty for clearances of the engines to appellant unit. In the present case, the appellants admit that they failed to comply the condition. When the intermediate goods are lying unused or the finished products manufactured using the intermediate goods are lying uncleared, the condition required under 12BB cannot be considered as satisfied. The legislative intent was to give a facility to the LTU to defer the payment of duty on intermediate goods (engines) till the same has been used in manufacture of finished products. This does not mean that there is a waiver from payment of duty on intermediate goods. The duty demand

raised in the Show Cause Notice is on the intermediate goods (engines) and not on the finished products. The intermediate goods having cleared without payment of duty from the Hosur Unit and the finished products not having cleared from appellant unit within six months as stipulated in 12BB, the demand of duty along with interest raised in the Show Cause Notice is correct and within the provision of law.

33. With regard to the demand raised denying the credit, the learned AR submitted that the appellant has paid the duty much later only after being pointed out by the Audit Wing. After paying the duty on engines, appellant made a debit entry in their CENVAT account so as to avail credit of the duty paid on the engines. It is pertinent to note that the engines were cleared to the appellant unit without payment of duty. Rule 12A(1) provides that the first recipient unit may take CENVAT credit of the duty paid by the sender premises (Hosur Unit) on the basis of document showing payment of duty. Rule 12BB uses the word 'intermediate goods'. However, Rule 12A of CENVAT Credit Rules, 2004 uses the word 'inputs'. Thus, credit can be availed only on 'inputs' and not on 'intermediate goods'. In the present case, the credit has been rightly denied invoking Rule 12A of CCR, 2004 and therefore the demand raised is proper.

34. In regard to penalty, the learned AR argued that the violation and non-payment of duty would not have come to light but for the verification of accounts by the Audit Wing. The provision contained in sec. 11AC of CEA, 1944 for imposing penalty in cases of short-payment of duty is equally applicable to the duty demand raised for violation of provisions of Rule 12BB. The Act has overriding effect over the Rules

and the Act has to prevail. The learned AR prayed that the appeal may be dismissed.

35. Heard both sides.

36. The first issue is with regard to demand of duty on engines with interest and the equal penalty imposed under sec. 11AC of the Central Excise Act, 1944. Though there is a demand of duty on engines (intermediate goods) raised in the Show Cause Notice, the learned counsel for appellant has submitted that they are not contesting the demand and has confined the arguments on the demand of interest and imposition of equal penalty under section 11AC of the Central Excise Act, 1944. The second issue is the demand of wrongly availed credit with interest and penalty.

37. The issues that arise for consideration are

(i) Whether the appellant is liable to pay interest for the delay in payment of duty on engines.

(ii) Whether the penalty imposed under Sec. 11AC of the Central Excise Act, 1944 in regard to non-payment of duty on engines is sustainable.

(iii) Whether the credit availed by the appellant on the duty paid on engines is eligible?

(iv) Whether the duty demand, interest and penalty imposed denying the CENVAT credit availed of the duty paid on engines is sustainable.

38. In regard to issues (i) and (ii), the appellant has paid duty of Rs.3,97,08,057/- on the engines along with interest of Rs.11,95,739/.

The appellant is now contesting only the demand of interest on the above duty and the penalty imposed.

39. The demand of duty on engines has been raised on the appellant invoking Rule 12BB(1) of the Central Excise Rules, 2002 r/w section 11A(4) of Central Excise Act, 1944. The demand of interest is raised invoking section 11AA of the Central Excise Act, 1944.

40. Rule 12BB has already been noticed. This Rule is a facility given to LTU to defer the payment of excise duty on the intermediate goods cleared to the sister units. When the engines were cleared and stock transferred from the Hosur Unit to the appellant unit, the excise duty was not paid by the Hosur unit. Rule 12BB allows this facility of clearances without payment of duty on complying the condition that the intermediate goods have to be cleared or used further in the manufacture of finished products by the recipient unit and such finished products should be cleared within a period of six months. In the present case, it is an admitted fact that the condition has not been satisfied. Rule 12BB casts the liability on the recipient unit. The appellant is therefore liable to pay duty on the engines. It is also an admitted fact that there is delay in making the payment. Rule 12BB not only defers the payment of duty but also shifts the liability on the recipient unit. The Rule itself states that if the condition is not satisfied the duty along with interest has to be paid by the recipient unit. We therefore do not find any grounds to interfere with the demand of interest and we uphold the same.

41. The Show Cause Notice has proposed to impose penalty under section 11AC of the Central Excise Act, 1944 for short-payment of duty

on engines. It is argued that Rule 12BB is a self-contained code and though the said Rule has adopted, the provisions of Section 11A (for duty demand) and 11AA for (interest demand) is silent as to 11AC and that therefore penalty under section 11AC is not invokable. The learned counsel has relied on the decision of the Hon'ble Supreme Court in the case of CCE, Jaipur Vs. Raghuvir (India) Ltd. – 2000 (118) ELT 311 (SC) to argue that Rule 12BB is a self-contained code and as it does not mention sec. 11AC, the said section cannot be invoked for imposing penalty. In the judgment referred to by the learned counsel, it is held that section 11A would have no application for any action to be taken under Rule 57-I of the Central Excise and Salt Rules, 1944 prior to the amendment on 6.10.1988 and that Rule 57-I are not in any manner subject to Sec. 11A of the Act. The said decision has analyzed the provisions for recovery of credit wrongly availed under the MODVAT scheme. The said scheme is for avoiding the cascading effect of duty. Availment of credit is a right accruing on fulfilment of conditions. Rule 12BB offers a facility of deferred payment of duty. It is postponement of the liability to pay duty. Rule 12BB cannot stand on its own as it does not completely waive the liability to pay duty. It only defers it.

42. Be that as it may, the appellant has paid the duty with interest before issuance of Show Cause Notice. Sub-section (2) of section 11A provides that no notice shall be issued and no penalty shall be imposed if the duty is paid as under clause (b) of sub-section (1) of section 11A.

> *"Clause (b): The person chargeable with duty may before service of notice under clause (a), pay on the basis of*
>
> *(i) his own ascertainment of such duty or*
>
> *(ii) the duty ascertained by the Central Excise officer, the amount of duty along with interest payable thereon under section 11AA.*

Sub-section (2) the person who has paid the duty under clause (b) of sub-section (1), shall inform the Central Excise Officer of such payment in writing, who on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty so paid or any penalty leviable under the provisions of this Act or the rules made thereunder."

43. At the cost of repetition, it has to be stated that the duty with interest has been paid and the appellant has informed the department vide letter dated 3.6.2014. In spite of that, the Show Cause Notice has been issued on 14.10.2014 for the period May 2010 to November 2013 invoking the extended period. It is alleged in para 4 of the Show Cause Notice that the appellants had not cleared the engines / or the finished products manufactured using the engines within a period of six months as required under Rule 12BB; that it would not have come to light but for verification of audit party. Sub-section (2) of Section 11A provides that when the duty is paid on being pointed out by the Central Excise Officer and is intimated to the department, no Show Cause Notice shall be issued and that no penalty shall be leviable. Moreover, the duty demand, in the present case, is on the engines. The duty liability for manufacture and clearance of engines is on the Hosur unit and not on the appellant. Only because appellant opted for the facility of Rule 12BB, the duty burden is shifted to the appellant unit. In such circumstances, when the duty liability is paid with interest, the penalty levied under Sec. 11AC is unwarranted. In the peculiar facts of this case, we are of the considered opinion that the penalty imposed requires to be set aside which we hereby do.

44. The second issue is with regard to the denial of CENVAT credit. The appellant has availed credit of the duty paid above. The

department has denied the credit alleging that if assessee adopts Rule 12BB the engines are 'intermediate goods' and not 'inputs'. It is also alleged that as there is no duty paying documents, the credit is inadmissible.

45. As per Rule 12BB, the burden to pay the duty on the stock transferred goods is shifted to the recipient unit. The stock transferred goods are referred to as 'intermediate goods' in Rule 12BB. The word 'intermediate goods' is used in the Rules for sake of convenience taking into the varieties and variable complexities of materials that may require to be stock transferred in the process of manufacture of products. This cannot mean that 'engines' which is otherwise an input for manufacture of Earth Moving Machine, loses its nature of being an input by opting Rule 12BB. We do not find any logic or legality in this view of the department.

46. The second ground on which the credit is denied is that there are no duty paying documents. Only if the engines are stock transferred on payment of duty to the Hosur unit, the appellant will receive duty paid invoices. While following the procedure under Rule 12BB, there is no occasion to pay duty to Hosur unit and thus no occasion to receive duty paid documents. After paying the duty on the engines, the appellant has availed credit by making debit entry in the CENVAT register. Rule 12A provides for the method of removing inputs as such under cover of a transfer challan for compliance of sub-rule (5) of Rule 3 of CENVAT Credit Rules, 2004 and then avail credit in CENVAT register. When Rule 12BB allowed removal of engines without payment of duty to the sister concern, under the cover of transfer challan and

when the duty on the engines is not disputed, we find no reason to disallow the appellant the substantive right of credit. The department has raised this demand of duty on engines for not having followed Rule 12BB and then denied credit for having followed Rule 12BB, which appears to be rightly unreasonable and unjustified. We have no hesitation to hold that the credit is eligible.

47. From the foregoing, the impugned order is modified to the extent of the following:-

(i) The duty demand on engines sustained

(ii) The demand of interest on the above duty demand on engines is sustained

(iii) The penalty imposed under sec. 11AC in regard to the duty demand on engines is set aside.

(iv) The denial of credit and the demand, interest and penalty thereupon is set aside.

48. In the result, the appeal is partly allowed in above terms with consequential relief, if any, as per law.

(Pronounced in open court on 22.6.2023)

(**M. AJIT KUMAR**)
Member (Technical)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

Rex