CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

CHENNAI

REGIONAL BENCH - COURT No. III

Excise Appeal No.41262 of 2015

(Arising out of Order-in-Original No.05/2015 dated 27.03.2015 passed by Commissioner of Central Excise, Coimbatore)

M/s. Lakshmi Machine Works Ltd., ... **Appellant**
Unit -1, Perianaickenpalayam,
S.R.K.V. Post, Coimbatore – 641 018.

VERSUS

Commissioner of CGST & CE, Coimbatore .... **Respondent**
6/7, A.T.D. Street, Race Course,
Coimbatore – 641 018.

APPEARANCE :

Shri. M. Saravanan, Consultant, for the Appellant
Shri. Anoop Singh, Authorised Representative for the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI.C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER No.40977/2024

DATE OF HEARING : 22.07.2024
DATE OF DECISION : 29.07.2024

Per Ms. Sulekha Beevi. C.S

Brief facts are that the appellant is engaged in the manufacture of Parts of Textile Machinery falling under Chapter Heading 84.48 of the Central Excise Tariff Act 1985. During the course of scrutiny of accounts by the Internal Audit team it was noted that the appellant had cleared capital goods used in the factory on which Cenvat credit had been availed. As per Rule 3 (5) of Cenvat Credit Rules, 2004 the appellant has to reverse the credit while removing the capital goods. Rule 3(5A) provides for reversal for credit in case of used capital goods. The provision of the third proviso to Rule 3 (5) as it existed upto 16.03.2012 and Rule 3 (5A) of Cenvat Credit Rule 2004 effective from 17.03.2012 stipulates that the if the capital goods on which cenvat credit has been taken are removed after being used, the manufacturer shall pay an amount equal to the Cenvat credit taken on the said capital goods reduced by specified percentage for each quarter of a year or part thereof from the date of taking the Cenvat credit. The relevant provisions read as below: -

> *(ii)* ***<u>The provisions of third proviso to Rule 3(5) of Cenvat Credit Rules, 2004 as its existed upto 16.03.2012 read as under:</u>***
>
> *(5) When inputs or capital goods, on which CENVAT credit has been taken, are removed <u>as such</u> from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output services, as the case may be, <u>shall pay and amount equal to the credit avalled</u> in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9;*
>
> *Provided that such payment shall not be required to be made where any inputs [or capital goods) are removed outside the premises of the provider of output service for providing the output service:*
> *Provided also that if the capital goods, on which CENVAT credit has been taken, <u>are removed after being used</u>, the manufacturer or provider of output service <u>shall pay an amount equal to the CENVAT credit taken on the said capital goods reduced by 2.5 percent for each quarter of a year or part thereof from the date of taking the Cenvat Credit</u>.*
>
> ***<u>With effect from 17.03.2012 Rule 3(5A) Cenvat Credit Rules, 2004 read as follows:</u>***
>
> *Rule 3 (5A) If the capital goods, on which CENVAT credit has been taken, are <u>removed after being used</u>, whether <u>as capital goods or as scrap or waste</u>, the manufacturer or provider of output service <u>shall pay an amount equal to the CENVAT credit taken on the said capital goods reduced by the percentage</u>*

<u>points calculated by straight line method as specified below for each quarter of a year or part thereof from the date of taking the CENVAT credit</u>, namely:-

(a) …………..

(b) for capital goods, other than computers and computer peripherals 2.5ts for each quarter.

<u>Rule 4(2) of Cenvat Credit Rules, 2004 read as under:</u>

(2)(a) The CENVAT credit in respect if capital goods received in a factory or in the premises of the provider of output service or outside the factory of the manufacturer of the final products for generation of electricity for captive use with the factory,) <u>at any point of time in a given financial year shall be taken only for an amount not exceeding fifty percent of the duty paid on such capital goods in the same financial year</u>:

Provided that the CENVAT credit in respect of capital goods shall be allowed for the whole amount of the duty paid on such capital goods in the same financial year such capital goods are cleared as such in the same financial year.

……..
……..

(b) <u>The balance of CENVAT credit may be taken in any financial year subsequent to the financial year in</u> which the capital goods were received in the factory of the manufacturer, or in the premises of the provider of output service, if the capital goods, other than components, spares and accessories, refractories and refractory materials, moulds and dies and goods falling under [heading 6805, grinding wheels and the like, and parts thereof falling under heading 6804] of the First Schedule the Excise Tariff Act, are in the possession of the manufacturer of final products provider of output service in such subsequent years)

2. As per the above rules, the Cenvat credit of duty paid on capital goods is to be taken in two different financial years unless the same capital goods are cleared as such in the same financial year. If the capital goods are cleared after use in the factory, in terms of Rule 3 (5) / 3 (5 A), an amount equal to Cenvat credit has to be paid prior to 16.03.2012. Rule 3(5A) which was introduced w.e.f. 17.03.2012

provides that the amount of Cenvat credit availed shall be reduced by 2.5% per quarter of the year or part thereof as depreciation for calculation of the amount that has to be reversed when used capital goods are removed. According to department, the appellant had arrived the amount to be reversed / payable on removal of used capital goods by reducing 2.5% per quarter from the date of receiving the capital goods in the factory. The appellant thus arrived at the amount to be reversed by adopting the depreciation per quarter on the entire 100% of the amount from the initial date of credit availment. The appellant had availed only 50% credit in the first financial year and balance 50% was availed in the subsequent financial year. The provision states that the depreciation has to be calculated from the date of availing the credit. According to department, the appellant cannot avail 2.5% depreciation on the entire 100% of the credit and instead is eligible to avail depreciation of 2.5% on 50% from the date of availing the initial credit. Thus, the appellant had reversed / paid less duty while removing the used capital goods. A show cause notice for the period September 2011 to November 2012 was issued to the appellant raising a demand of Rs.57,25,245/- being the Cenvat credit that has to be reversed on various capital goods removed during the disputed period. After due process of law, the original authority confirmed the demand, interest and imposed penalties. Aggrieved by such order, the appellant has preferred this appeal.

3. The Ld. Consultant, Shri M. Saravanan, appeared and argued for the appellant. The appellant had cleared the used capital goods from

their Ring and Spindle unit to Unit 1 after deducting 2.5% per quarter of usage as allowed under Rule 3 (5) / 3 (5A) of CCR 2004 on the 100% of Cenvat credit from the date of availing the credit. The workings for amount of duty payable arrived at by the appellant with regard to capital goods transferred by invoice number AT100380 dated 11.08.2012 for illustration is as under:-

Sl. No.	Particulars	Invoice No.	Dated	Amount (Rs.)
1	Clearance Details	AT 100380	11.08.2012	Duty reversed Rs.2,54,334/-
2	Purchase Details	No.2060392	06.11.2008	Credit availed Rs.4,06,932/-
LMW Workings for Duty payment				
Machinery usage period			No of quarter	
November 2008 and December 2008			0.5	
January 2009 to December 2009			4	
January 2010 to December 2010			4	
January 2011 to December 2011			4	
January 2012 to March 2012			1	
April 2012 to June 2012			1	
July 2012 and August 2012			0.5	15

4. From the above table, it is evident that the appellant has worked out the percentage of deduction as 37.5% on the total Cenvat credit taken by them in November 2008. However, the department had worked out the deduction percentage for the first 50% credit and for

the balance 50% taken separately by reckoning the date of availing the credit subsequent year as detailed below:-

Department workings		
	First 50%	Second 50%
Date of taking the credit	22.11.2008	21.04.2009
Machinery usage period	No of quarter	No of quarter
November 2008 and December 2008	0.5	0
January 2009 to March 2010	1	0
April 2010 to December 2010	3	3
January 2010 to December 2010	4	4
January 2011 to December 2011	4	4
January 2012 to March 2012	1	1
April 2012 to June 2012	1	1
July 2012 and August 2012	0.5	1
Total usage period	**15**	**14**
Allowable Reduction as per quarter as per Rule 3 (5)/(5A) of CCR 2004	2.5%	2.5%
	37.5%	35
Credit taken amount	2,03,466	2,03,466
Less: Allowable deduction	76,300	71,213
Balance Duty payable	**1,27,166**	**1,32,253**
Total Duty payable		**2,59,419**

Workings for differential duty payable	
Duty paid by LMW	2,54,333
Duty payable as per department workings	2,59,419
Difference duty payable	-5,087

From the above table, it is evident that the difference in duty relates to the deductible percentage for the second 50%. The department has worked out 35% (for the second 50%) as against the allowable deduction of 37.5% calculated by appellant from the date of availing the credit which is 22.11.2008.

5. The Ld. Consultant argued that the Rule prescribes for calculating deduction from the date of taking the credit on the capital goods. In this case, appellant has initially availed 50% credit on 22.11.2008. The appellant is eligible for deduction from this rate which would be at the rate of 37.5% and not 35% as alleged by the department.

6. It is submitted that merely because the credit is allowed in two instalments, as under Rule 4 (2) of CCR 2004, the allowable deduction percentage cannot be calculated from the subsequent year of availing credit as such deduction (depreciation) is allowed for the usage period of the machine. In this case, the appellant started using the machine from November 2008 onwards. Hence, deduction percentage should be calculated from the period of using the machine which is November 2008 onwards only. This apart the credit relates to machine as a whole and therefore, the date of availing first 50% credit availed is to be reckoned for arriving at the deduction percentage for the entire capital goods. Therefore, the impugned differential duty demand cannot sustain.

7. Further, the entire machineries were transferred to their own unit and whatever duty paid on these machines was availed as Cenvat credit in Unit 1. The situation is revenue neutral and therefore, extended period cannot be invoked as held in the following decisions.

a. CCE Versus Gujarat Glass Pvt Limited - 2013 (290) ELT 538 (Gujarat).

b. CCE Versus Coca-Cola India Pvt Limited 2007 (213) ELT 490 (S.C.)

c. Birla Corporation Limited Versus Commissioner of Central Excise Raipur (2004) 152 ELT 428 (Tribunal - New Delhi).

8. The learned consultant submitted that in the case of Anglo French Textiles versus CCE Pondicherry 2018 (316) ELT 1016 (Tribunal Chennai), a similar issue was considered. The demand was raised on account of valuation of goods transferred to sister unit. The Tribunal set aside the demand on the ground of revenue neutrality. This decision was upheld by the Hon'ble Apex Court as reported in 2018 (360) ELT A 301 (SC).

9. It is argued that the issue involved is purely interpretational in nature, and the department has not established any positive act of suppression against the appellant. The demand has been raised as a result of audit conducted. The entire figures have been taken from the accounts maintained by the appellant. The appellant has already paid the duty amount calculated by applying the deduction from the initial date of availing the credit. Show cause notice has been issued, and on the ground of the difference in the method of calculation in arriving

at the amount to be paid when used capital goods are removed from the factory. The issue being purely interpretational, the invocation of extended period may be set aside. The Ld. Consultant prayed that the appeal may be allowed.

10. The Ld. AR Shri. Anoop Singh appeared and argued for the department. It is submitted that both Rule 3 (5) as well as Rule 3 (5A) of CCR 2004 are very clear that the relevant date for computation of depreciation for payment of an amount equal to the Cenvat credit availed on capital goods removed from factory after being put into use, is the date of taking the Cenvat credit. The show cause notice has clearly mentioned these provisions as well as Rule 4 (2) of CCR 2004. Rule 4 (2) provides that the Cenvat credit for capital goods received in the factory shall be taken only for an amount not exceeding 50% in the same financial year and balance may be taken in any financial year subsequent to the one in which capital goods have been received in factory. Therefore, it is clear that for computation of the amount of credit to be reversed on removal of used capital goods, the date of taking the credit and not the period for which the goods were in the factory has to be the basis. The ordinary meaning of the words used in the Rules is very clear and does not give rise to any ambiguity.

11. The Ld. AR referred to the decision of the Larger Bench of the Tribunal in the case of CCE Versus Navodhaya Plastic Industries Ltd. 2013 (12) TMI 82 Cestat Chennai. Paragraph 7, 8 and 9 of the said

judgment of the Larger Bench was referred to by the Ld. AR, which reads as under:-

> ***7.*** *During 1-9-2004 to 13-11-2007 the provision in force read as under :*
>
> ***With effect from 10-9-2004, when new Cenvat Credit Rules, 2004 were introduced, the relevant rule, i.e. Rule 3(5), read as below :***
>
> *When inputs or capital goods, on which Cenvat credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9.*
>
> ***8.*** *During the period when similar provision was in force C.B.E. & C. had issued Circular No. 643/34/2002-CX., dated 1-7-2002 to the effect that credit amount to be reversed will be reduced by 2.5% per quarter of use of the machinery.*
>
> ***9.*** *After 13-11-2007 the applicable provisions read as under :*
>
> ***With effect from 13-11-2007, the following provision has been introduced in Rule 3(5) ibid.***
>
> *Provided also that if the capital goods on which Cenvat credit has been taken are removed after being used, the manufacturer or provider of output service shall pay an amount equal to the Cenvat credit taken on the said capital goods reduced by 2.5 per cent for each quarter of a year or part thereof from the date of taking the Cenvat credit.*

12. It is pressed that the changed legal position uses the words, "**from the date of taking the Cenvat credit**", in place of "2.5% per quarter **of use** of the machinery". The findings rendered by the Commissioner are therefore legal and proper. It is prayed that the appeal may be dismissed.

13. Heard both sides.

14. The issue to be decided is whether the amount arrived at by the appellant for clearances of capital goods on which credit was availed is correct or whether the demand of differential duty alleging that the

appellant has to apply 2.5% deduction only on 50% of the credit availed from the date of availing credit is legal and proper? The relevant provisions under Rule 3 (5) and Rule 3 (5A) and Rule 4(2) have been already reproduced above.

15. Rule 4(2) provides that an assessee can avail Cenvat credit of duty paid on capital goods only on 50% in the first financial year. If the capital goods are cleared after use in the factory, in terms of Rule 3(5) / 3(5A), an amount equal to the Cenvat credit availed as reduced by specified percentage is payable by the assessee. The entire controversy revolves around the date from which the deduction of 2.5% has to be applied. The appellant is of the view that since 2.5% deduction is allowed by way of depreciation for the used capital goods, they are eligible for deduction of 2.5% from the date on which the initial credit was availed. Thus, they have availed deduction of 2.5% on entire 100% of the capital goods. The department is of the view that since the appellant is eligible to avail credit of 50% of the duty in the first year and the balance 50% is availed only in the subsequent year, the appellant is not eligible for deduction of 2.5% on the 50% pertaining to the second year from the date of availing initial credit. The working given in the table above would bring out the issue clearly.

16. The appellant has availed Cenvat credit of 50% of the duty on capital goods on 22.11.2008. The balance 50% was availed only on 21.04.2009 (subsequent year). The appellant has calculated 2.5% deduction on the entire 100% from 22.11.2008 whereas, department

is of the view that for the first year, the appellant cannot avail 2.5% deduction. Several capital goods have been removed during the disputed period and there is difference in the total amount that has to be paid due to the controversy of applying the deduction of 2.5%.

17. The provisions under Rule 3 (5)/3(5A) as noticed above would show that, the words used are from the date of availing credit. Though the capital goods are received in the factory and the appellant may have put to use, the legislature in Rule 3 (5A) has consciously used the words "from the date of availing the credit". It has not used the words 'from the date on which the capital goods were put to use' or from the date of receiving the capital goods in the factory. It can be seen that <u>the date of availing the credit</u> has been made the relevant date for applying the deduction of 2.5%. The appellant has sought to apply the deductions on 100% from the date of availing the initial credit itself. It is argued by the Ld. Consultant that the appellant would have been eligible to avail the credit of 100% on the same date, but for the restriction contained in Rule 4 (2) of CCR 2004. It may be true that though capital goods are received at the same time, Rule 4 (2) restricts the availment of credit to 50% of the duty paid on capital goods in a financial year. The legislature while introducing Rule 3 (5A) was fully conscious of the existence of Rule 4 (2) also. Nothing can be read to be added in to the provisions of law, when the ordinary meaning does not give rise to any ambiguity.

18. Though the Ld. Consultant relied upon the decision in the case of Mahindra Ugine Steel Co. Ltd., Vs Commissioner of Central Excise & ST, Nashik - 2019 (2) TMI 755 (Cestat – Mumbai) dated 29.01.2019, the facts of the case are not so clear as to whether the issue considered is the same.

19. The Ld. Consultant has argued on the ground of limitation. It is submitted that the capital goods having been removed to appellant's own unit, even if the appellant pays duty, the other unit of the appellant would be eligible for credit and situation is entirely revenue neutral. To support this contention the Ld. Consultant has relied upon the decision in the case of Anglo French Textiles Vs. CCE, Puducherry 2018 (360) ELT 1060 (Tri. Chennai) which has been affirmed by the Hon'ble Apex Court as reported in 2018 (360) ELT A 301 (S.C.).

20. The issue is purely interpretational in nature. The question underlying is whether the appellant is eligible to avail 2.5% deduction from the date of availing the credit or from the date of use of the capital goods in the factory. The duty payable on removal of capital goods has always been under controversy. An almost similar issue was referred to the Larger Bench in the case Novodhaya Plastic Industry Ltd., (supra). The meaning of the word "removal of capital goods as such" was considered by the Larger Bench.

21. In the present use, the appellant has paid the duty as quantifed by them applying 2.5% deduction from the initial date of availing the credit. The differential duty demand has been raised alleging that the

appellant has not eligible to avail 2.5% deduction on 50% for the first year. The issue is purely interpretational and the situation being revenue neutral, we are of the considered opinion that the invocation of extended period cannot sustain. In the present case the show cause notice dated 28.07.2014 is issued for the period September 2011 to November 2012. Though department has invoked the extended period there is no positive act of suppression established against the appellant. The entire figures have been taken from the accounts maintained by the appellant. As the appellant had paid the amount as calculated by them and also filed ST3 returns reflecting such reversal of credit on capital goods, we do not find any grounds bringing out wilful suppression of facts on part of the appellant. The show cause notice in our view is time barred.

22. The appellant succeeds on the ground of limitation. The impugned order is set aside on the ground of limitation. The appeal is allowed with consequential reliefs, if any.

(Order pronounced in the open court on 29.07.2024)

(VASA SESHAGIRI RAO)
Member (Technical)

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

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