

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
SINGLE MEMBER APPEAL BRANCH

Appeal No. E/2479/2007 – SM [BR]

Date 03/09/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E. KANPUR
117/7, SARVODAYA NAGAR, KANPUR 208005.
C.C.E. KANPUR

Appellant
Vs
Respondent

M/S GEETA INDUSTRIES (P) LTD.

I am directed to transmit herewith a certified copy of Final order No. 1105 / 2009 - SM[BR] dated 28.8.2009
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944


Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent

M/S GEETA INDUSTRIES (P) LTD.

UNIT-II, A-4 & 5, PANKI, SITE-V, KANPUR

2. Adv. / Consult SHRI BIPIN GARG ADV.

B-1/1289-A, VASANT KUNJ NEW DELHI

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4 J.C.D.R.

5 Bar association, CESTAT, New Delhi

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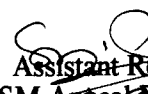
13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026

14 Easy Service Tax Online Dot Com Pvt.Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

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Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

E/2479/07-SM

**(Arising out of Order-in-Appeal No.214-
CE/Apl/KNP/2007 dt.8.6.07 passed by
Commissioner(Appeals), Kanpur)**

CCE, Kanur

Appellant

Versus

M/s. Geeta Inds. (P) Ltd.

Respondent

Appearance

Sh. S.N.Srivastava, DR For Appellant

Sh. Bipin Garg, Adv. for Respondent

Coram: Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

hearing
Date of Order: ~~11.8.09~~ 11/8/09
final Order No. ~~1105/2009 SM (B)~~
Date of decision: 28/8/09

Per Rakesh Kumar:

The respondents are engaged in the manufacture of Disposable Plastic Containers chargeable to Central Excise Duty under heading 39239090 of Central Excise Tariff and are availing Cenvat credit facility under Cenvat Credit Rules, 2004. In July & Aug'99, the respondent purchased two automotive thermo forming machines and in Dec'2000, they purchased one vacuum forming machine. Total value of the machines purchased was Rs.16.65 lakhs and total duty involved was Rs.2,65,048/-. Cenvat credit in respect of these items of capital goods was taken

by them as per the provisions of Central Excise Rules, 1944 at that time. After about 5 years used, one machine was sold by the respondent on 22.4.05 in Rs. one lakh and the other two machines were sold in Rs.1,75,000/-. However, at the time of removal of these machines, in respect of which Cenvat credit had been taken, the respondent paid duty on the transaction value at the rate of 16% advalorem and on this basis, total duty of Rs.44,000/- was paid. The Department was of the view that since the capital goods had been removed as such, in terms of the provisions of Rule 3(5) of Cenvat Credit Rules, 2004 which were in force at that time, the respondent should have reversed the full Cenvat credit originally taken at the time of receipt of the machines and since the credit originally taken was Rs.2,65,048/- and the duty paid at the time of removal of these machines on sale was only Rs.44,000/-, the department demanded the balance amount of Rs.2,21,048/- alongwith interest and also proposed imposition of penalty. After issue of SCN, the matter was adjudicated by the Asstt. Commissioner vide order-in-original No.93/Demand/ACK-1/06 dt.20.3.07 by which Cenvat credit demand of Rs.2,21,048/- alongwith interest under Section 11AB was upheld against the respondent and besides this, penalty of equal amount under ~~Rule~~ 15 of Cenvat Credit Rules, 2004 was imposed. On appeal by the respondent against this order of the Asstt. Commissioner, the Commissioner(Appeals) vide order-in-appeal No.214/CE/Apl/KNP/2007 dt.8.6.07 set aside the order-in-original and in arriving at this reason, he relied upon the Tribunal's judgment in the case of Madura Coats Pvt. Ltd. vs CCE,

Tirunelveli reported in 2005(190)ELT.450(Tri.-Bang.) in which it was held that no demand is sustainable in the absence of any provisions to demand duty on removal of used cenvated capital goods under Rule 3(5) of Cenvat Credit Rules,2004. It is against this order of the Commissioner(Appeals) that the present appeal has been filed by the Revenue.

2. Heard both sides.

2.1 Shri S.N.Srivastava, Ld. DR pleaded that the capital goods had been purchased by the respondent in the year 1999-2000 in brand new condition and have been sold after 5 years' use; that the capital goods have been sold as capital goods, not as scrap and thus the capital goods have been cleared as such; that in view of this, as per the provisions of sub-rule 5 of Rule 3 of Cenvat Credit Rules,2004, the credit originally taken in respect of these capital goods was required to be reversed and since as against credit of Rs.2,65,048/- originally taken, only an amount of Rs.44,000/- has been paid at the time of removal of the capital goods, the balance amount of Rs.2,21,048/- had been correctly demanded; that the term "as such" in sub-rule (5) has to be interpreted as "in original form", "without any addition, alteration or modification" and it has no connection with the capital goods being or not being used and that in this regard, he relies upon the Tribunal's Larger Bench judgment in the case of Modernova Plastyles Pvt. Ltd. vs CCE, Raigad reported in 2008-TIOL- 1771-CESTAT-MUM-LB[2008(232)ELT-29]

2.2 Shri Bipin Garg, Advocate, the Ld. Counsel on behalf of the respondent, pleaded that the capital goods have been cleared

after about 5 years' use; that the capital goods were disposed off by the respondent and same had become obsolete and for this reason, the same were sold at a much lower price of Rs.2,75,000/- as against the original price of Rs.16.65 lakhs; that the respondent have correctly paid duty on the transaction value which is the depreciated value of the goods, and that when the capital goods, in respect of which Cenvat credit has been taken, are cleared after some years of use on the depreciated value, not on the original price, the Cenvat credit originally taken is not required to be reversed and that in this regard, he places reliance on the Tribunal's order No.393/09-SM dt.23.4.09 in the case of CCE, Chandigarh vs M/s. Raghav Alloys (P) Ltd. in which reliance has been placed on Tribunal's judgment in the case of Cummins India Ltd. vs CCE, Pune-III reported in 2007(219)ELT.911 which has been upheld by the Hon'ble Bombay High Court vide judgment reported in 2009(234)ELT.A.120.

3. I have carefully considered the submissions from both the sides and perused the records. In this case, two machines had been purchased in new condition in Rs.15 lakhs during July & Aug'99 and one new machine had been purchased in Dec'2000 in Rs.1,56,550/- and total Cenvat credit taken on three machines at that time was Rs.2,65,048/-. These three machines after about 5 years' use were disposed off by the respondent during April-June'05 period. One machine was sold in Rs.1 lakh on 22.4.05 and the other two machines were sold in Rs.1,75,000/- in June'05 and the total duty paid is at the rate of 16% on the transaction value i.e. Rs.44,000/-. According to the Department since the

capital goods have been sold as capital goods not as a scrap, this is a case where cenvated capital goods have been removed as such and for this reason the credit originally taken should have been reversed.

4. The Ld. Commissioner(Appeals) has set aside the Asstt. Commissioner's order relying upon Tribunal's judgment in the case of Madura Coats Pvt. Ltd.(supra) wherein it was held that the removal of cenvated capital goods after some years of use is not the same as removal of capital goods as such and that in case of removal of capital goods which have been used after their installation, the provisions of Rule 3(4) of Cenvat Credit Rules,2001/2002 (corresponding to Rule 3(5) of the Cenvat Credit Rules,2004) would not apply. However, this decision has been over-ruled by the Larger Bench of the Tribunal in the case of Modernova Plastyles Pvt. Ltd.(supra) wherein the Tribunal held that the expression "as such" has to be interpreted as commonly understood, which is in the original form or without any addition, alternation or modification and has nothing to do with the capital goods being new or unused or used. Thus when capital goods in respect of cenvat credit has been taken, are cleared after some years of use as capital goods, the provisions of Rule 3(5) would be applicable. The *question arises* as to in such a situation, whether the Cenvat credit originally taken is required to be reversed or the credit required to be reversed should be reduced in proportion to the period for which the goods have been used.

5. During the period from 1.4.2000 to 1.3.03, ^{as per} Rule 57AB(1c) of Central Excise Rules,1944, / Rule 3(4) of Cenvat Credit

Rules, 2001/2002, where the inputs or capital goods in respect of which Cenvat credit has been taken are cleared as such, the manufacturer would be required to pay an amount equal to the duty at the rate prevailing on the date of clearance and on the value determined under the provisions of Section 4 of Central Excise Act, 1944. In case of removal of used capital goods, as per the Board's Circular No. 643/3/02-CS dt. 1.7.02, depreciation as per the rates fixed in the Board's letter No. 495/16/93 dt. 26.5.93 was to be allowed. This took care of the situation like the one in this case where the cenvated capital goods have been cleared after being used for some years as the cenvated credit required to be reversed was the duty payable on the depreciated value. During the period prior to 1.4.2000, Rule 57S(2)(b) of Central Excise Rules, 1944, provided that if cenvated capital goods are cleared after being used, the manufacturer who had taken the capital goods Cenvat credit shall be required to pay at the time of removal, an amount *as per the provisions of Rule 57S(1)(ii), of the credit originally taken* reduced by 2.5% for each quarter of a year or part thereof from the date of taking the credit (i.e. 10% for every year of use) and Rule 57S(2)(c) provided that if capital goods are cleared as waste and scrap, the manufacturer shall pay an amount equal to duty leviable on transaction value. However, w.e.f. 1.3.03, sub-rule 4 of Rule 3 of Cenvat Credit Rules, 2002 (corresponding to Rule 3(5) of Cenvat Credit Rules, 2004) was substituted by a new rule according to which when the inputs or capital goods are cleared as such from a factory, a manufacturer will have to pay an amount equal to the credit availed in respect of such inputs or

capital goods. When Cenvat Credit Rules, 2002 were replaced by the Cenvat Credit Rules, 2004, sub-rule 5 of the Rule 3 contained the same provisions. W.e.f. 16.5.05^a, new sub-rule 5A of Rule 3 was introduced in Cenvat Credit Rules, 2004ⁿ which was identical to old Rule 57S(2)(c) of the Central Excise Rules, 1944 and w.e.f. 13.11.07, 2nd proviso was added to Rule 3(5) of Cenvat Credit Rules, 2004, which was identical to old Rule 57S(2)(b) of the Central Excise Rules, 1944. The question now arises as to whether during the period from 1.3.03 to 12.11.07, when Rule 3(4) of Cenvat Credit Rules, 2002/Rule 3(5) of Cenvat Credit Rules, 2004 provided for payment of an amount equal to the Cenvat Credit taken when the inputs or capital goods are cleared as such and there were no specific provisions in respect of clearance of cenvated capital goods after some use, whether the amount equal to the Cenvat credit originally taken would be required to be paid even if the capital goods have been cleared after some use.

6. During the period of dispute, Rule 3(4) of the Cenvat Credit Rules, 2002 was as under:

"When inputs or capital goods, on which Cenvat credit has been taken, are removed as such, the manufacturer of final products 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 7".

Rule 3(5) of Cenvat Credit Rules, 2004 contained similar provisions.

At that time, the 2nd proviso to Rule 3(5) providing for payment of reduced amount, as per the formula prescribed in the proviso in the case of removal of capital goods after being used, was not there. As discussed above, during the period from 1.4.2000 to 28.2.03, the provisions of Rule 57AB(IC) of Central Excise Rules, 1944/Rule 3(4) of Cenvat Credit Rules, 2001/2002 took care of a situation when cenvated capital goods were cleared after being used, as at the time of clearance of used capital goods, an amount to duty chargeable on the assessable value determined under Section 4 of the Central Excise Act, 1944 was payable and for determining the assessable value, depreciation as per the Board's circular No.495/16/93 dt.26.5.93 ^{way} to be allowed and during the period prior to 1.4.2000 ~~and~~ and period from 13.11.07, there are separate provisions in respect of clearance of cenvated capital goods after being used.

6.1 The "inputs" generally get used up hundred percent and loose their identity when the same are used ^{or in} in relation to the manufacture of finished products and when unused inputs are cleared as such, full Cenvat credit originally taken in respect of them would be required to be reversed. But, unlike inputs, the 'capital goods' get used up over a period of time. The capital goods loose their identity when the same have become totally unserviceable and unfit for further use and have to be scrapped. But between the unused stage and fully scrapped stage, the capital goods are still identifiable as capital goods. Tribunal in case of CCE, Ludhiana vs Nahar Fibres reported in

2007(228)ELT.855, has held that the expression – “as such” in Rule 3(4) of the Cenvat Credit Rules, 2001/2002, which deals with both inputs or capital goods, is capable of being construed so as to refer only to the identity of such goods i.e. when these are capital goods, they remain such capital goods at the time of removal. A Larger Bench of the Tribunal in the case of *Modernova Plastyles Pvt. Ltd. vs CCE, Raigad (supra)* has held that the expression “as such” in Rule 4(5)(a) and ^{Rule 3(4)(c)} of the Cenvat Credit Rules, 2004 means without any addition, modification or alteration, it does not have any connection with the goods being used or unused and that the “capital goods removed as such” can be the unused as well as used conditions. It is only when the capital goods have become scrap, that their identity changes and they cease to be the capital goods. Since in respect of removal of unused capital goods as such, full amount of credit taken is required to be reversed and in case of removal of fully scrapped capital goods removed as scrap, as per the provisions of Rule 3(5A), only an amount equal to the duty on the transaction value of the scrap is required to be paid, in the case of removal of capital goods after use, which are still identifiable as capital goods, though used, it would be logical to insist on proportionate credit depending upon the period of use i.e. the quantum of credit to be reversed should be determined by reducing from the credit originally taken at the time of receipt, an amount in proportion to the period of use and in this regard, it would be fair and reasonable to adopt the formula prescribed in old Rule 57S(2)(b) of Central Excise Rules, 1944 and 2nd provision

to the Rule 3(5) of Cenvat Credit Rules, 2004, even though such provision was not there during the period of dispute. If the Department's view is accepted and literal meaning of Rule 3(4) of Cenvat Credit Rules, 2002/Rule 3(5) of Cenvat Credit Rules, 2004 is adopted, it would lead to absurd results, as even when the cenvated capital goods are cleared as used capital goods after, say, ten years of use, at a small fraction of their original price, still full Cenvat credit originally taken would be required to be reversed, which would defeat the very purpose of grant of Cenvat credit facility in respect of capital goods.

6.2 As per "Maxwell on The Interpretation of Statutes", 12th edition by P.St. J. Langan, (page 228) -

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of apparent purpose of enactment, or to some inconvenience or absurdity, which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an *unusual* meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify; and that the modifications made are mere corrections of careless language and really give the true meaning. When the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsmen's unskilfulness or ignorance of the law, except in a case of necessity or the absolute intractability of the language used".

This passage has been quoted with approval by Hon'ble Supreme Court in the case of Tirath Singh vs Bachitta Singh reported in AIR 1955 SC - 830. Thus when adhering to the ordinary meaning of the words used and to the grammatical construction, leads to any manifest absurdity or repugnance, the language of the statute can be modified to avoid such inconvenience.

6.3 Hon'ble Supreme Court in a recent case of CCE vs M/s. Gujarat Narmada Fertilizers Co. Ltd. reported in 2009 TIOL 96-SC-CX has observed that "litigation on interpretation of CENVAT credit Rules has risen on account of various conflicting decisions given by the various benches of CESTAT, the reason being that the Rules have not been properly drafted." The absence of provisions during the period from 1.3.03 to 12.11.07 in respect of quantum of Cenvat credit to be ^{reversed} if cenvated capital goods are cleared after use, as capital goods, (as a result of which if literal interpretation of Rule 3(4) of Cenvat Credit Rules, 2002/Rule 3(5) of Cenvat Credit Rules, 2004 is adopted, full cenvat credit originally taken would be required to be reversed, even if the capital goods are cleared after long period of use at a small fraction of their original price, while during the period prior to 1.3.03 and during the period from 13.11.07 either there were separate and specific provisions for Cenvat credit reversal in the case of removal of capital goods after use, providing ^{for} reversal of proportionate credit depending upon the period of use, ^{or} the provision regarding removal of Cenvat credit were so worded that the same took care of the case when the capital goods are

removed after being used), is obviously due to a drafting mistake having crept in, in course of drafting and redrafting of rules relating to Cenvat credit several times – substitution of Rule 57A to 57V of Central Excise Rules, 1944 by Rule ~~57AA~~ to Rule ~~57AK~~ of Central Excise Rules, 1944 w.e.f. 1.4.2000, thereafter replacement w.e.f. 1.7.01 of Central Excise Rules, 1944 by Central Excise Rules, 2001 and Cenvat Credit Rules, 2001, replacement w.e.f. 1.3.02, of Cenvat Credit Rules, 2001, by Cenvat Credit Rules, 2002 and thereafter replacement w.e.f. 10.9.04, ^r Cenvat Credit Rules, 2002 by Cenvat Credit Rules, 2004 and several amendments in between. Had this not been a drafting mistake, the provisions identical to old Rule 57S(2)(c) and 57S(2)(b) of Central Excise Rules, 1944 would not have been introduced in Cenvat Credit Rules, 2004 w.e.f. 16.5.05 and 13.11.07 respectively. From this, it is clear that it was not the intention of the rule making authority to insist on reversal of full cenvat credit originally taken in respect of some capital goods, if the capital goods are cleared after being used for some time and as mentioned above, if in such a situation, reversal of cenvat credit originally taken is insisted, it would lead to absurd results and defeat the very purpose of extending cenvat credit facility to capital goods. Therefore, with regard to removal of cenvated capital goods as capital goods, but after being used, the words – “shall pay an amount equal to the credit availed in respect of such capital goods”, in Rule 3(5) of Cenvat Credit Rules, 2004/Rule 3(4) of Cenvat Credit Rules, 2002, must be interpreted as – “shall pay an amount equal to the credit availed in respect of such capital

goods, reduced by an amount in proportion to the period of use", as only by adopting this interpretation, Rule 3(5) of Cenvat Credit Rules, 2004/Rule 3(4) of Cenvat Credit Rules, 2002 would make sense in respect of removal of cenvated capital goods after being used. As discussed in para 6.1 above, for determining the abatement on account of period of use, the formula prescribed in old Rule 57S(2)(b) of Central Excise Rules, 1944 as well as in 2nd proviso to Rule 3(5) of Cenvat Credit Rules (introduced w.e.f. 13.11.07) can be adopted.

7. In case of Cummins India Ltd. vs CCE, Pune-II reported in 2007(219)ELT.911, capital goods received in 1996, in respect of which Cenvat credit had been taken, were cleared after about 7 years' use in March, 2003 at much reduced value on payment of an amount equal to duty on the transaction value, instead of the Cenvat credit originally taken, as demanded by the Department. The Tribunal in this case, set aside the demand for differential amount. The Tribunal's judgment, has been upheld by Hon'ble Bombay High Court vide judgment reported in 2009(234)ELT.A-120.

8. The findings in para 3 to 7 can be summarized as under:

(1) With regard to capital goods, the words - "as such" in Rule 3(4) of Cenvat Credit Rules, 2002/Rule 3(5) of Cenvat Credit Rules, 2004, refer to the identity of the goods as capital goods and it covers unused capital goods as well as used capital goods.

(2) During the period from 1.3.03 to 12.11.07 in case of removal of cenvated capital goods after being used, only proportionate cenvat credit depending upon the period of use,

determined as per the formula prescribed in old Rule 57S(2)(c) of Central Excise Rules, 1944/2nd proviso to Rule 3(5) of Cenvat Credit Rules, 2004 (introduced w.e.f. 13.11.07) would be required to be reversed, not the Cenvat Credit originally taken.

9. In this case, since the cenvated capital goods have been cleared after about five years of use, it would be fair and reasonable to insist on reversal of 50% of the cenvat credit originally taken. Tribunal's judgment in case of CCE, Chandigarh vs M/s. Raghav Alloys(P) Ltd. (order No.393/09-SM(BR) dt.23.4.09 is not applicable to the facts of this case, as in that case, the cenvated capital goods had been cleared after nine years of use.

9.1 Since out of 50% of Rs.2,65,048/- i.e. Rs.1,32,524/- which was required to be reversed, only an amount of Rs.44,000/- has been paid by the Respondent, the balance amount of Rs.88,524/- would be recoverable from them with interest. In view of reduction in Cenvat Credit demand, there is a case for reduction of penalty also.

10. In view of the above discussion, the impugned order in appeal is not correct and the same is set aside. The order-in-original is restored with modification that the amount payable by the Respondent is Rs.88,524/- alongwith interest and the penalty on the respondent under Rule 15 is reduced to Rs.10,000/-. The Revenue's appeal stands disposed off as above.

(Pronounced in the open Court..28/8/09)

(Rakesh Kumar)
Member Technical

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