IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
EASTERN ZONAL BENCH: KOLKATA

<u>Ex.Appeal Nos.306,307/09</u>

(Arising out of Order-in-Appeal Nos.19-20/CE/B-II/2009 dated 03.03.2009 passed by Commr. (Appeals) of Central Excise, Customs & Service Tax, BBSR)

M/s Shree Salasar Castings Pvt. Ltd.
Shri Ashok Kr.Agarwal

Applicant (s)/Appellant (s)

Vs.

Commr. of Central Excise, Cus. & Service Tax, BBSR II

Respondent (s)

<u>Appearance</u>:

Shri Kartik Kurmy, Advocate for the Appellants(s)
Shri H. S. Abedin, Asstt.Commr. (AR) for the Revenue

CORAM:

HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

<u>Date of Hearing : 16.01.2019</u>
<u>Date of Decision : 16.01.2019</u>

<u>ORDER NO.FO/75156-75157/2019</u>

<u>Per Bench :</u>

The present appeals are filed against the Orders-in-Appeal Nos.19-20/CE/B-II/2009 dated 03.03.2009.

2. The appellant is a manufacturer of M.S.Ingots. For the purpose of such manufacture, they used ingot moulds to cast the molten metal emanating from the induction furnace. Ingot moulds are purchased from outside and the Excise duty paid on such moulds is availed as cenvat credit on capital goods in terms of the Cenvat Credit Rules, 2004. Such Ingot Moulds are repeatedly used in the manufacture and after they become unusable, they are cleared from the factory.

The Departmental Officers noticed that such Ingot Moulds were cleared by issue of trade invoices describing them as "Rejected/Defected Ingot Moulds" without reversal of cenvat credit availed on such capital goods. Accordingly, Department formed the view that the appellant was required to reverse an amount equal to the cenvat credit availed on such capital goods in terms of the provisions of Rule 3 (5) of the Cenvat Credit Rules, 2004. On these lines, show-cause notice was issued for the period 2005-2007 and the demand for differential duty was confirmed by the original authority. The appeals filed against the Order-in-Original were also rejected by the Commissioner (Appeals) by passing the impugned order. This order is under challenge in the present appeals.

3. The appellant is represented by Shri Kartik Kurmy, ld.Advocate and Revenue is represented by Shri H.S.Abedin, ld.D.R.

4. The ld.Advocate submitted that Revenue is not justified in raising the demand for reversal of cenvat credit on clearance of such worn out Ingot Moulds for the following main reasons :

(i) He took us through the provisions of Rule 3 (5) of the Cenvat Credit Rules, 2004 as it stood during the period of dispute i.e.2005-06 to 2006-07. Rule (3) and Rule 3(5) read as follows :

> *"Rule 3. (1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of-*
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> *(2) – (4)..*
>
> *(5) 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 :

Provided that such payment shall not be required to be made where any inputs are removed outside the premises of the provider of output service for providing the output service :

Provided further that such payment shall not be required to be made when any capital goods, are removed outside the premises of the provider of output service for providing the output service and the capital goods are brought back to the premises within 180 days, or such extended period not exceeding 180 days as may be permitted by the jurisdictional Deputy Commissioner of Central Excise, or Assistant Commissioner of Central Excise, as the case may be, of their removal.

(ii) The ld.Advocate submitted that in terms of the above Rules, an assessee was required to reverse an amount equal to the credit availed in respect of capital goods only when such capital goods are removed **as such**. Emphasizing the words "as such", he submitted that the ingot moulds were removed after putting them to use repeatedly in the factory for manufacture. As such, the capital goods are cleared after they have exhausted their normal life and there is no requirement to reverse cenvat credit in respect of such clearance.

(iii) He relied on the following decisions :

(a) CCEx. Vs. Solectron Centum Electronics Ltd. : 2014 (309) ELT 479 (Kar.) ;

(b) Cummins India Ltd. Vs. CCEx. : 2007 (219) ELT 911 (Tri.-Mum.) ;

(c) Hans International (Khaini) Pvt. Ltd. Vs. CCEx. : 2012 (281) ELT 714 (Del.) ;

(e) Greenply Indus.Ltd. Vs. CCEx. : 2010 (259) ELT 103 (Tri.-Del.).

(iv) In view of the above, he submitted that the demand is not sustainable.

5. The ld.D.R., however, justified the impugned order. He refers to the findings of the original authority in which it has been recorded that ingot moulds, which were cleared from the factory, after availing the cenvat credit as capital goods, were described as “Defective/Rejected”. This indicates that such capital goods have been cleared since they were found rejected/defective. For clearance of such capital goods, the same are required to be considered as cleared “as such” and reversal of cenvat credit availed is fully justified.

6. Heard both sides and perused the records.

7. The legal provision dealing with the clearance of capital goods, after availing the cenvat credit, is covered by Rule 3(5) ibid. This sub-rule provides that cenvat credit availed on capital goods is required to be reversed at the time of removal of capital goods “as such”. It is further seen the above sub-rule was further amended by Notification No.39/2007-CE (NT) dated 30.11.2007, by which, a proviso was inserted to specify that in respect of clearance of capital goods, after being used, the manufacturer was required to reverse the amount equal to the cenvat credit taken, reduced by 2.5% for each quarter of year or part thereof. Further, it is noticed that the period of dispute is prior to insertion of proviso above. As such, after perusing of the

various case laws cited by the appellant, we note that the identical issue stands decided by the Hon'ble Karnataka High Court in the case of Solectron Centum Electronics Ltd. (supra). While ordering that there is no need for reversal of cenvat credit availed on capital goods, if cleared after use, the Hon'ble High Court of Karnataka, observed as follows :

> ***"9.*** *The next question is whether the assessee was not liable to pay any duty when capital goods after it is being used was removed to the EOU unit.*
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> ***10.*** *Rule 3 sub-rule (4) of Cenvat Credit Rules, 2002 reads as under :*
>
> *"(4) When inputs or capital goods, on which : CENVAT credit has been taken, are removed as such from the factory, the manufacturer of the 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."*
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> ***11.*** *The liability to pay duty on capital goods arises after the capital goods have been removed as such. The word "as such" is being the subject matter of interpretation by the various Courts. Punjab and Haryana High Court in the case of Commissioner of Central Excise, Ludhiana v. Khalsa Cotspin (P) Ltd., reported in 2011 (270) E.L.T. 349 (P & H) has held as under :*
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> *"The assessee having validly availed cenvat credit, same is required to be reversed only if goods were cleared in the same position without payment of excise duty. In the present case, it has been held by the Tribunal that goods were not cleared in the same position but after having been used and in such situation Rule 3(5) of the Rules will not apply."*

12. *Bombay High Court in the case of Cummins India Ltd. v. Commissioner of Central Excise, Pune-III reported in 2007 (219) E.L.T. 911 (Tri.-Mumbai) confirmed the order of the Appellate Tribunal which has held as under :*

"The plain and simple meaning of expression "as such" would be that capital goods are removed without putting them to use. Admittedly, in the present case capital goods have been used for a period of more than 7 to 8 years. As such, interpretation given by the authorities below would lead to absurd results if an assessee is required to reverse the credit originally availed by them at the time of receipt of the capital goods, when the said capital goods are subsequently removed as old, damaged and unserviceable capital goods. This would defeat the very purpose of grant of facility of Modvat credit in respect of capital goods and would not be in accordance with the legislative intent."

13. *The Delhi High Court in the matter of Harsh International (Khaini) Pvt. Ltd. v. Commissioner of Central Excise reported in 2012 (281) E.L.T. 714 (Del.), after referring to the various judgments held as under :*

"In the present case the appellant purchased the capital goods in the period between 2003 and 2005 and used them in its factory till they were sold to M/s. Harsh International (Khaini) Pvt. Ltd., in June and July, 2007. Thus the capital goods were used for a period of 2 to 4 years. They cannot, therefore, be stated, to be sold "as such" capital goods. They were sold as used capital goods."

14. *Therefore, it is clear, till the law was amended as on 13-11-2007 in respect of used capital goods, there was no liability to pay duty. In fact, this is evident from the fact that in Cenvat Credit Rules, 2004, the proviso was added making the position clear which was not there in the earlier orders. The proviso reads thus :*

"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."

This proviso was added by a Notification No. 39/2007 dated 13-11-2007. Therefore, prior to 13-11-2007, there was no duty payable in respect of capital goods which was used before it is removed. In that view of the matter, second question of law is answered in favour of the assessee and against the Revenue."

8. By respectfully following the above decision, we set aside the impugned order and allow the appeal filed by the appellant company.

9. Since the demand itself is set aside, there is no justification for imposition of any penalty on the Director, Shri Ashok Kr.Agarwal. Hence, penalty is also set aside.

10. In the result, both the appeals are allowed.

(Dictated and pronounced in the open court)

Sd/	Sd/
(P.K.Choudhary)	**(V.Padmanabhan)**
Member (Judicial)	**Member (Technical)**

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