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

EASTERN ZONAL BENCH: KOLKATA

Appeal Nos. E/272/2009 & E/655/2009

(Arising out of Orders-in-Original No. 01/MP/Aykut/2009 dated 30/01/2009 and 21/MP/Aykut/2009, both passed by Commissioner of Central Excise, Patna.)

M/s. I.O.C Ltd. Appellant (s)
Vs.
Commissioner of Central Excise, Patna Respondent (s)

Appearance
Shri Chandan Kumar, DGM (F) for the Appellant
Shri H. S. Abedin, A. C. (A. R.) for the Revenue

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

Date of Hearing-15.11.2018

ORDER NO. FO/77269-77270/2018
PER CORAM

The appellant is engaged in the manufacture of petroleum products falling under chapter 27 of the Central Excise Tariff. They were availing the Cenvat Credit of duty paid on inputs and capital goods in terms of Cenvat Credit Rules, 2004 Sub rule 5A to Rule 3 of the Cenvat Credit Rules, 2004 was inserted with effect from 16/05/2005. The said sub rule reads as follows:-

"(5A) If the capital goods are cleared as waste and scrap, the manufacturer shall pay an amount equal to the duty leviable on transaction value."

2. During the course of audit of the Books of Accounts of the appellant, it was noticed that the appellant had cleared waste and scrap of capital goods, during the period 16/05/2005 to 31/03/2007. It was

further noticed that they did not pay Central Excise duty on the transaction value of the goods cleared as required under Rule 3 (5A) ibid. Accordingly Show Cause Notice dt. 05/03/2008 was issued proposing to demand Central Excise Duty. A separate Show Cause Notice dt. 05/03/2009 was issued for demanding duty of the waste and scrap of capital goods cleared during the period 01/02/2008 to 30/11/2008. The demands raised by Show Cause Notices as above were decided by the Adjudicating Authority by issue of Orders-in-Original dt. 30/01/2009 as well as 16/09/2009. These Orders-in-Original are challenged in the appeals before us. Since the issue involved in both appeals is identical, both are taken up for decision to this common order.

3. Heard Shri Chandan Kumar, DGM (F) on behalf of the appellant as well as Shri H. S. Abedin, Ld. DR representing Revenue.

4. Submissions advanced on behalf of the appellant are summarized below:-

(i) The majority of the items mentioned in the Show Cause Notices and said to have been cleared were not capital goods within the meaning of Rule (2) (a)(A) of the Cenvat Credit Rules, 2004. Most of the items were items on which no Cenvat Credit was availed by the appellant. For example, the appellant has never availed Cenvat Credit on Steel Structural and Support items falling under Chapter 72 and 73. Likewise they have never availed credit on locomotives which were purchased in 1979, much prior to MODVAT/CENVAT Credit Scheme. Some of the items are in the nature of drums packs etc. in which various consumable items were purchased. Clearance of such Waste and Scrap will not be covered by Rule 3(5A).

(ii) It was also submitted on behalf of the appellant that Rule 3 (5A) only envisages payment of duty on transaction value only in respect of such capital goods which are still recognizable as capital goods. He submitted that the items which are cleared cannot be reused as capital goods or even as excisable goods. Consequently, there is no justification for demand of duty.

(iii) He also submitted that it is for the Revenue to prove that the appellant had availed Cenvat Credit on the items on which demand has been made. In this connection, he relied on the decision of the Hon'ble Supreme Court in the case of Commissioner of Customs vs Auto Ignition Ltd. reported as 2008 (226) ELT 14 (SC).

(iv) He submitted that the Revenue has failed to discharge the burden of proof in this regard. He also relied on the decision of the Ahemdabad Bench of the Tribunal in the case of Shriram Alkali & Chemicals Vs. Commissioner of Central Excise, Surat reported in 2010 (259) E.L.T. 77 (Tri.-Ahemdabad).

5. The Ld. DR justified the impugned orders.

6. Heard both sides and perused the record.

7. The demand for Central Excise Duty has been raised on the basis of Rule 3(5A) of the Cenvat Credit Rules, 2004. This Sub rule requires,

Payment of an amount equal to the duty leviable on transaction value, if capital goods are cleared as waste and scrap. Along with Show Cause Notices, the Revenue has also attached long list of goods claimed to have been cleared by the appellant without payment of duty. The appellant had strongly resisted the demand for duty. It has been submitted that the Revenue has failed to establish whether any Modvat/Cenvat Credit was availed on these items, necessitating application of Rule 3 (5A).

It is further submitted that most of the items in the list were not even capital goods but were various types of waste and scrap which did not arise in the factory in the course of manufacture.

8. We have perused the list of goods attached to both the Show Cause Notices. No doubt, such items are unusable waste and scrap. These are mostly worn out items such as scrap cables, components, railway railings plastic drum etc. None of the items are recognizable as capital goods. Further Revenue has failed to undertake any exercise to establish whether any credit was availed by the appellant on such items in the first place.

9. We have perused the decision of Hon'ble Supreme Court in the case of Auto Ignition Ltd. (Supra). The Apex Court has taken the view that in the absence of any proof, demand raised by issuing Show Cause Notices cannot be sustained. The Hon'ble Supreme Court has observed as follows:-

> *"We agree with the view taken by the Tribunal that in the absence of any such proof, demand raised by issuing the show cause notices cannot be sustained. Moreover, the onus*

to prove that the assessee had availed of the Modvat credit was on the Revenue. Accordingly, we do not find any error in the impugned order of the Tribunal and consequently do not find any merit in these appeals. The appeals are, therefore, dismissed leaving the parties to bear their own costs."

10. By following the above decision of Hon'ble Supreme Court, we find no justification for the demand of duty. The impugned orders are set aside and 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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