CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. 02

Service Tax Appeal No. 87085 of 2018

(Arising out of Order-in-Appeal No. PK/21/ME/2018 dated 17.01.2018 passed by Commissioner of GST & Central Excise (Appeals), Mumbai)

Idea Cellular Ltd. .....**Appellant**
10 Floor Birla Centurion Century Mills Compound, Pandurang Budhkar Marg, Worli
Mumbai - 400 030.

VERSUS

Commissioner of CGST & Central Excise, Mumbai .....**Respondent**
4th Floor. C.Ex., Building, Churchgate,
Mumbai 400 020.

Appearance:

Shri Manoj Chauhan, C.A. for the Appellant
Shri O.M. Shivakikar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

FINAL ORDER NO. A/88601/2018

Date of Hearing: 11.10.2018
Date of Decision: 11.10.2018

PER : S.K. MOHANTY

Brief facts of the case are that the appellant is engaged in providing various taxable services, defined under Section 65 of the Finance Act, 1994. For the purpose of providing the taxable services, the appellant got itself centrally registered with the Service Tax department. The appellant availed CENVAT Credit of Central Excise duty paid on the inputs and capital goods used for providing the output services. During the disputed period, the appellant had removed the capital goods from its premises, which were destroyed due to flood. Since the appellant did not reverse CENVAT Credit on the capital goods, the department issued show-cause notice dated 21.10.2011, proposing for reversal of CENVAT Credit along with interest and proposals were also made for imposition of penalty on the appellant. The matter was adjudicated against the appellant, wherein CENVAT Credit demand of Rs.4,13,103/- was confirmed along with interest and penalties were imposed under Section 76 and 78 of the Finance Act, 1994. On appeal, the learned Commissioner (Appeals) vide impugned order dated 17.01.2018 has upheld the adjudged demands confirmed by the original authority. Hence, the appellant has preferred this appeal before the Tribunal.

2. Learned Consultant appearing for the appellant submits that due to flood, the capital goods installed within the business premises of the appellant was destroyed in July, 2007 and as a result, the same were sold as waste and scrap. He further submits that since the capital goods were removed as waste and scrap prior to the period 13.11.2007, the proviso clause appended to Rule 3(5) of the Cenvat Credit Rules, 2004 should not be applicable and the appellant was not required to reverse CENVAT Credit in terms of the un-amended provisions of Rule 3(5) of the Rules, existed at the material time. The learned Consultant has relied upon the judgment of Hon'ble Bombay High Court in the case of *Cummins India Ltd. – 2009 (234) ELT A120 (Bom.)*, to state that the capital goods removed as waste and scrap cannot be considered as removal "as such" for the purpose of reversal of CENVAT Credit as contemplated under Rule 3 (5) of the Rules.

3. On the other hand, learned D.R. appearing for Revenue reiterates the findings recorded in the impugned order. He further

submits that since the capital goods were not used for the intended purpose and the same were removed by the appellant from its business premises, the CENVAT Credit availed on such capital goods should be reversed in the prescribed manner as provided in the proviso clause inserter in Rule 3(5) of the Rules. To support such claim, the learned D.R. has relied upon the judgment of the Hon'ble Madras High Court in the case of *Commissioner of Central Excise, Salem v. Rogini Mills Ltd. – 2011 (264) ELT 367 (Mad.)* and also Larger Bench decisions of this Tribunal in the case of *Modernova Plastyles Pvt Ltd. v. Commissioner of Central Excise – 2008 (232) ELT 29 (Tri.LB) and Commissioner of Central Excise, Hyderabad v. Navodhaya Plastic Industries Ltd. – 20133 (298) ELT 541 (Tri. LB).*

4. Heard both sides and perused the records.

5. In this case, the appellant had removed the capital goods, which were put to use for the intended purpose within the registered premises. Such removal of capital goods was owing to the reason that the same were destroyed due to flood and were not usable as such and accordingly, removed as waste and scrap. Sub-rule (5) of Rule 3 of the Cenvat Credit Rules, 2004 deals with the situation of removal of Cenvat availed inputs and capital goods from the factory by the manufacturer or premises of the output service provider. The said rule mandates that the service provider shall pay an amount equal to the credit availed on the capital goods, when the same were removed "as such" from its premises. Sub-rule (5) of Rule 3 *ibid* was amended on 13.11.2007, in inserting the proviso clause thereto. The effect of the proviso is that when the Cenvat availed capital goods are removed after being put to use, then the output service provider shall pay an amount equivalent to CENVAT Credit taken on the said capital goods, reduced by 2.5% of each quarter or part thereof from the date of taking CENVAT Credit. The issue involved in

this appeal for consideration is, whether the proviso clause inserted in Rule 3(5) *ibid* (with effect from 13.11.2007) will have the application, in the case where capital goods were removed from the premises of the appellant as waste and scrape in the month of July 2007.

6. During the period July 2007, the proviso clause was not inserted in the said Rule. The un-amended Rule 3(5) *ibid* effective during the material time only required that equal amount of Cenvat credit should be reversed in case of removal of capital goods "as such" from the premises of the output service provider. The fact in this case is not in dispute that the capital goods after being put to use were destroyed due to flood and since those capital goods were no more required for achieving the objective or purpose of the appellant, the same were removed as waste and scrap from the premises of the appellant. Under such circumstances, it cannot be said that the capital goods were removed "as such" by the appellant. Thus, reversal of equal amount of CENVAT Credit as provided under Rule 3(5) ibid cannot be insisted upon inasmuch as the period of dispute is prior to such date of insertion of the proviso clause. I find support from the judgment of the Hon'ble Bombay High Court in the case of *Cummins India Ltd. (supra)* wherein, it has been held that the expression "as such" would mean without putting the capital goods to use. In this case, since the capital goods were removed as waste and scrap after installing them in the premises of the appellant, the provisions of Rule 3(5) *ibid* should not be applicable either for reversal of equal amount of CENVAT Credit or for payment of amount on percentage basis, as contained in the proviso appended thereto. The judgments relied upon by the learned D.R for Revenue are distinguishable from the facts of the present case inasmuch as the subject matter of dispute in those decided cases was confined to reversal of CENVAT Credit under Rule 4(5)(a) *ibid* and not under Rule 3(5) *ibid*, which is the subject matter of dispute in this appeal. Further, applicability of the proviso clause under Rule 3(5) *ibid*

existed prior to 13.11.2007 was not also the issue of dispute in those decided cases. In view of the fact that the capital goods were removed by the appellant prior to the date of insertion of the proviso clause in Rule 3(5) *ibid*, its case does fall within purview of such rule.

7. Therefore, the impugned order demanding CENVAT Credit is set aside and the appeal is allowed in favour of the appellant. It is made clear that since the impugned order is set aside in its entirety, there is no question of imposition of any penalty on the appellant and as such, the same is also set aside.

(Dictated and pronounced in the open court)

(S. K. Mohanty)
Member (Judicial)

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