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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-30-2010

Judge : The Honourable Mr. Ashok Jindal, Member (Judicial)

Appeal No. : Appeal No. E/72/09 - Mum (Arising out of Order-in-Appeal No. PIII/186/08 dated 30.09.2008 pa

Appellant : Trinity Auto Components Ltd.

Respondent : Commissioner of Central Excise, Pune lii

Advocate for Pet/Ap. : Shri Bharat Raichandani, Advocate for Appellants. Shri K. Lal, SDR for Respondents.

Judgement :

Per : Ashok Jindal

The appellant has filed this appeal against the confirmation of duty demand of Rs.1,63,644/- together with interest and equivalent amount of penalty.

2. The facts of the case are that the appellant had imported some machinery in 1995 on which it availed CENVAT credit of the CVD paid on the same. The CVD was paid on the purchase value of the machine at Rs.13,02,717/-. After using the said machine for about 8 years, it was cleared on the transaction value of Rs.3 lakhs and excise duty was paid on the same. A show-cause notice was issued to the appellant on 01.05.2007 demanding duty of Rs.1,63,644/- being the difference

between the credit originally taken in 1995 and duty paid at the time of clearance in 2003. Interest was demanded and penalty was also proposed. The department took a view that the appellant should have reversed the duty equivalent to the credit taken originally as per the provisions of Rule 2/ Rule 3 (4) CENVAT credit Rules, 2002. Both the lower authorities confirmed the duty demand, interest and penalty. Aggrieved by the same, the appellant came in appeal before me.

3. Heard both sides.

4. Shri Bharat Raichandani, learned Advocate appearing on behalf of the appellant submitted that the impugned order is liable to be rejected as the provisions of Rule 3(4) of the CENVAT credit Rules, 2002 are not applicable to the appellant's case and the show-cause notice issued is beyond the period of limitation. He submitted that in this case, the capital goods were removed on 09.07.2003 which were shown in their ER-1 returns and on 21.02.2006, an audit took place in the premises of the appellant wherein the issue of clearance of capital goods was raised by the audit party, the show-cause notice was issued only on 01.5.2007, beyond the period of limitation. The allegation of suppression of fact is not tenable as ER1 return clearly shows the removal of capital goods. Moreover, while conducting the audit by the department the issue was raised by the Audit party and the allegation was denied by the appellant that the different duty is not payable. The show-cause notice issued after a period of one year is barred by limitation. With regard to the merits of the case, it is submitted that the said machine was imported on 10.10.1995 and the approximate life of the machine at that time was 7 years. The machine was sold after 8 years due to wear and tear and it was found that there were too many sharp corners forming folds and heavy cracks in the forgings produced by the said machine. The machine was not sold as such, it was sold as used machine. The provisions of Rule 3(4) of the CENVAT credit Rules, 2002 are not applicable to this case. To support the contention, he placed reliance on Cummins India Ltd. vs. CCE - 2007 (219) ELT 911 (Tri. Mumbai) wherein it was held that 'as such' would be that capital goods are removed without putting them to use. The said order was confirmed by the Hon'ble High Court of Bombay reported in 2009 (234) ELT A120 (Bom.). He further relied on CCE vs. Raghav Alloy (P) Ltd. - 2009 (93) RLT 603 (CESTAT-Del.) on the

identical facts wherein the Tribunal held that the capital goods cleared in 2009 after used for 9 years, CENVAT credit need not to be reversed, duty on transaction value at rate in force at time of removal to be paid. He further submitted that in case of CCE, Kanpur vs. Geeta Inds. (P) Ltd. - 2010 (249) ELT 99 (Tri. Del) wherein the Tribunal has observed that '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. Hence on merit also the demand is not sustainable.

5. On the other hand Shri Kishori Lal, learned DR appearing on behalf of the Revenue submitted that this issue has been squarely covered by the case of Modernova Plastyles Pvt. Ltd. vs. CCE, Raigad as reported in 2008 (232) ELT 29 (Tri. LB). He submitted that in paragraph 1 and 2 of the said order the Tribunal has considered the meaning of the expression 'as such'. The Tribunal has observed the expression 'as such' has to be interpreted as commonly understood, which is in the 'original form' and 'without any addition, alteration or modification.' It does not have any connection with the goods (capital goods) being new / unused or used. Finally the Tribunal held that the explanation as such not having any communication 'as such' to be interpreted as commonly understood, which is in the 'original form' and without any addition, alteration or modification. The CENVAT credit availed is to be reversed when capital goods removed whether used or not. He further submitted that in case of Modernova Plastyles Pvt. Ltd., although the issue in respect of Rule 4(5)(a) of CENVAT credit Rules, 2004 and in this case the issue involved with regard to Rule 3(4) of CENVAT credit Rules, 2002 the common word defined by the Tribunal is 'as such'. No different meaning can be given in different rules of the same statute. Hence the credit is not available to the appellant. He further submitted that the goods were removed in 2003 and the show-cause notice issued in May 2007 is well within the period of limitation as the appellant is not disclosed the removal of capital goods under which rules in their ER1 return.

6. On careful examination of the records and considering the arguments advanced by both the parties, I find that in this case the show-cause notice was issued to the appellant for contravention of Rule 3(4) of the CENVAT credit Rules, 2002 wherein the question arise that the scope of expression capital goods cleared as such it is alleged that when the capital goods cleared as such and would be required to reverse as per Rule 3(4) of CENVAT credit Rules. It is not in dispute that the demand confirmed against the appellant for contravention of Rule 3(4) of the CENVAT credit Rules, 2002. The adjudicating authority relied on the decision of Madura Coats Pvt. Ltd. vs. CCE - 2005 (190) ELT 450 (Tri. Bang) wherein the Tribunal held that duty on used cenvated capital goods is not required to be paid when they are sold. What is important to note that used capital goods referred to capital goods which have become scraps and which cannot be used for the purpose for which they are meant to be used. If they are still in a usable condition, they will not fall in the category of used goods. It was observed by the adjudicating authority that the appellant has intentionally paid less amount of duty while clearance of the goods hence the extended period of limitation was rightly invoked. The Commissioner (Appeals) has relied on the decision of the Madura Coats Pvt. Ltd (supra) and confirmed the demand with regard to the limitation. He also found that there was suppression of facts as no intimation of clearance was given until detected by the Department. In this case, I find that the appellant has filed their ER1 return regularly and in the returns for the year 2003 it is clearly mentioned that removal of capital goods worth Rs.3 lakhs and duty was paid thereon. This fact was well within the knowledge of the department. Moreover during the course of Audit on 21.01.2006, the query was raised and the appellant filed the reply on 17.02.2006. As per para 3 of the reply, the appellant has stated as under:-

Purported short reversal on capital goods clearances - As mentioned in the audit para relevant capital goods vizeducer Roller Machine was purchased by us in 1995 vide Bill of Entry No. 2494 dated 10.10.1995 and was used for over 10 years for manufacturing dutiable final products. The machine had outlived its life and it was no more usable for the standard and quality of the goods being manufactured by us. Therefore it was sold at a price of Rs.3,00,000/- as scrap and we paid the duty on such selling price. In this situation it cannot firstly be said that we sold capital goods. What we sold was scrap and it attracted duty at the price at which it

was sold. Secondly it is a settled law that capital goods sold after use cannot be called as sold 'as such', as held by the Hon'ble Tribunal in case of Madura Coats Ltd. vs. CCE 2005 (190) ELT 450. Therefore also we are not liable to pay differential duty on the difference between the selling price and purchase price as observed by audit.'

6.1 From the perusal of the para 3 it is clear that the appellant had explained the short reversal of the credit and the fact was well within the knowledge of the department, but the department has failed to issue show-cause notice within one year of the audit conducted by the department. The demand is time barred.

6.2 On merit also, in the case of Cummins India Ltd (supra) the Tribunal has held that the plain and simple meaning of the expression 'as such' would be that capital goods are removed without putting them to use. Admittedly, in the present case capital goods stand used for a period of more than 7 to 8 years. As such, the interpretation given by the authorities below would lead to absurd results if an assessee is required to reverse the credit original 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.' Further, in the case of Madura Coats Pvt. Ltd (supra) the Tribunal has held that 'the Board Circular dated 1.7.2002 is applicable only when capital goods removed and not to used cenvated capital goods. It was held that the appellant is not required to pay duty when the used machine sold.' The decision of the Cummins India Ltd (supra) was confirmed by the Hon'ble High Court of Bombay. Relying on the same, the Tribunal passed the order in the case of CCE vs. Raghav Alloy (P) Ltd. - 2009 (93) RLT 603 (CESTAT-Del.) and CCE, Kanpur vs. Geeta Inds (P) Ltd. - 2010 (249) ELT 99 (Tri. Del.). Further the reliance by the learned DR in the case of Modernova Plastyles Pvt. Ltd (supra) is not applicable to this case. As in the case of Modernova Plastyles Pvt. Ltd., the Tribunal in para 3 of the order has clearly observed that the decision of the Tribunal in the case of Cummins India Ltd (supra) which has been upheld by the Hon'ble High Court of Bombay only deals with the provisions of Rule 3 (4) (c) of CCE, 2002 and does not consider the provisions of Rule 4(5)(a) of

CCR, 2004 and therefore cannot be said to cover the present issue. In the case of Modernova Plastyles Pvt. Ltd. the issue before the Larger Bench was in relation to interpretation of the expression 'as such' in Rule 4(5)(a) of CENVAT credit Rules, 2004. When the Larger Bench has clearly distinguished the Rule 4(5)(a) of CENVAT credit Rules, 2004 and Rule 3(4) of CENVAT credit Rules, 2002, the decision of the Modernova Plastyles Pvt. Ltd. is not applicable to the facts of this case. Hence, on merits also the appellant is not required to reverse the CENVAT credit as held in the case of Cummins India Ltd.(supra), which is squarely applicable to this case.

7. With these observations the appellant succeed on both the grounds. Accordingly, The appeal is allowed and the impugned order is set aside.

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