CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 359 of 2012

(Arising out of Order-in-Original No. 22/COMMR/M-III/PKA/2011-12 dated 30.11.2011 passed by the Commissioner of Central Excise, Mumbai-III)

M/s. Crompton Greaves Ltd. **Appellant**
1st floor, CG House, Dr. A.B. Road,
Worli, Mumbai 400 030.

Vs.

Commissioner of Central Excise, Mumbai-III **Respondent**
3rd & 4th floor, Vardaan Centre,
MIDC, Wagle Industrial Estate,
Thane (W), Mumbai 400 604

Appearance:

Shri Aditya Chitale, Advocate, for the Appellant
Ms. Anuradha Parab, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

Date of Hearing: 27.06.2022
Date of Decision: 14.07.2022

FINAL ORDER NO. A/85625/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against order in original No 22/COMMR/M-III/PKA2011-12 dated 30.11.2011 of the Commissioner of Central excise Mumbai III. By the impugned order following has been held:-

"Order

A. I determine and demand Rs.86,55,477/- (Rupees Eighty six lakhs fifty five thousand four hundred seventy seven only) in terms of rule 14 of the Cenvat Credit Rules, 2004 read with the then section 11A(2) of the Central Excise Act, 1944 raised in the show-cause notice dated 12.11.2010 against M/s Crompton Greaves Ltd (Large Machine Division) in terms of the provisions rule 14 of the CCR, 2004 read with the provisions of the then section 11A of the CEA, 1944] and order recovery thereof.

B. The assessee is also ordered to pay interest in terms of Rule 14 of the CESVAT Credit Rules, 2004 read with the then section 11AB of the CEA, 1944.

C. I also impose penalty of Rs. 86,55,477/- (Rupees Eighty six lakhs fifty five thousand four hundred seventy seven only) on the assessee M/s Crompton Greaves Ltd. (Large Machine Division) in terms of rule 15 of the CCR, 2004 read with the then section 11AC of the CEA, 1944. I also give the assessee the option of payment of 25% of the penalty as available under the then section 11AC if they pay the duty confirmed within thirty days of the receipt of this order along with the interest u/s 11AB of the CEA, 1944. Needless to mention the reduced penalty of 25% also needs to be paid within the period of thirty days as mentioned in the then in the then section 11AC of the CEA, 1944.

D. *The assessee M/s Crompton Greaves Ltd. (Large Machine Division) is directed to pay the adjudged amounts forthwith."*

2.1. Appellant is registered manufacturer of Electric Motors and Generators and parts thereof falling under Chapter 85 of the CETA, 1985 and availing Cenvat Credit facility.

2.2 During the scrutiny of ER-1 returns for the period November 2005 to October 2006 it was observed that appellants cleared capital goods from their factory to their M-7 Division at Mandideep (M.P) and to other customers. Range Superintendent had under his letter dated 08.08.2006 asked the assessee to intimate the practice following for arriving at the assessable value of the capital goods cleared. The assessee on 8.09.2006 informed that the method followed by them for arriving at the assessable value of Capital goods cleared is original cost less 70% depreciation i.e. 30% of original cost on which duty had been paid. The Range Superintendent had thereafter vide his letter dated 11.09.2006 asked the said assessee to intimate the system of depreciation adopted by them and to furnish the statement showing the original value of each machinery and value arrived at by them for payment of duty and to furnish original purchase invoices of the capital goods. The appellant vide letter dated 10.10.2006 informed that the system of depreciation adopted by them on capital goods is WDV and that they have not taken CENVAT credit on capital goods as they

were purchased by them prior to 1994 and it is very difficult to locate the purchase invoices of these capital goods. However, they informed that they will furnish the statement showing the original value of each machinery as per their Books of Accounts and the value arrived at by them for payment of duty on these capital goods. Vide a further letter dated 27.08.2007 the Range Superintendent also asked the assessee to furnish the documentary evidence in support of their contention that the capital goods in question cleared by them were very old and that no Modvat/Cenvat credit was availed by them on the said capital goods, otherwise to pay an amount as per the provision of rule 3(5) of the CCR, 2004. On 27.06.2007, the appellant furnished statement showing capital goods cleared for the period from January -2006 to October 2007 along with photocopies of clearance invoices for the said period. In the said statement, the assessee has mentioned original cost of capital goods, various percentages of depreciation claimed from original cost such as 70%, 64%, 44%, 50% etc. and the assessable value so arrived at and the duty paid thereon

2.3 After correspondences made, appellant vide their letter dated 19.12.2007 furnished revised statement but did not furnish the documentary evidence on the basis of which they have shown the original cost/value of the capital goods cleared and also did not furnish the purchase invoices in respect of the said capital goods; also did not clarify as to which provisions of the CEA, 1944 and the Rules framed thereunder they had arrived at the Assessable value and discharged duty.

2.4 Thereafter, vide their letter dated 26.05.2008 appellant furnished statement showing the original cost of machineries/capital goods cleared, as available in their SAP system.

2.5 Since the appellant did not furnished any documentary evidence in support of their contention that they have not availed any Cenvat/Modvat credit on these capital goods, revenue was of the view that appellant have to pay an amount equal to the credit availed in respect of such capital goods and which would be equivalent to the duty payable on the basis of original cost/value of the capital goods in question as shown in

the purchase invoices. Based on the statement furnished by the appellant vide their letter dated 26.05.2008, the differential amount of Central Excise duty of Rs.86,55,477/- was worked out.

2.6 Alleging that the appellant suppressed the aforesaid facts from the department inasmuch as they had not shown the original purchase price value of the capital goods cleared during the period from November 2005 to October 2006 in their relevant clearance invoices and ER-1 returns but had cleared the capital goods on a depreciated value without any basis as provided in law for such depreciation, and by contravening the provision of rule 3(5) of the CCR, 2004, a differential Central Excise duty demand of Rs.86,55,477/- was issued on 29.05.2008 for recovery in terms of Rule 14 of CCR, 2004 r/w proviso to section 11A(1) of the CEA, 1944. Interest u/r 14 of CCR, 2004 r/w s. 11AB of the CEA, 1944 is also sought to : be recovered along with penalty u/r 15 of CCR, 2004 r/w 11AC of the CEA, 1944.

2.7 The show cause notice was adjudicated as per the impugned order. Aggrieved by the order appellants have filed this appeal.

3.1 We have heard Shri Aditya Chitale, Advocate for the appellant and Ms Anuradha Parab, Assistant Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned Counsel submits:

- The Appellant had removed the capital goods from their Kanjur factory after payment of excise duty at their depreciated/written down values was known to the Department. These clearances were duly reflected in the monthly returns filed by them. Thus there has been no suppression or wilful short payment or fraud or misstatement or contravention of law by them justifying invocation of extended period as per Section 11A while issuing the Show Cause Notice dated 12.11.2010.
- The capital goods which were removed by them in 2005-2006, were installed at their Kanjur factory in 1976 were "put to use" in the process of manufacture of the said large

machines. As a result of being "put to use the said capital goods had depreciated in value over a period of time.

- These capital goods were purchased by them when their factory was set up and started functioning in 1976 and removed from the factory almost 30 years later in 2005-2006. They did not have in their custody the original purchase invoices evidencing the purchase of the said capital goods and payment of excise duty up on them
- The scheme of Modvat/ CENVAT credit did not exist in the statue when the Appellant purchased the said capital goods in 1976 after payment of excise duty. Thus there was no occasion for them to take Modvat/ CENVAT credit of the excise duty paid by them as the scheme of MODVAT Credit was introduced in respect of inputs only in 1986 and extended to Capital Goods in the year 1994.
- They had correctly cleared the said capital goods from their Kanjur factory after reversing/paying excise duty on the said capital goods at their depreciated/written down value.
- The matter is revenue neutral, as whatever duty that the Appellant may have paid/reversed on the said capital goods was very much available to them by way of Cenvat credit when the said capital goods entered their own factory at Mandideep, Madhya Pradesh.
- He relied on the following decisions in support of his contentions:
    - Moser Baer India Ltd. [2010 (250) E.L.T. 79 (Tri. - Del.)]
    - Cummins India Ltd. [2007 (219) E.L.T. 911 (Tri - Mumbai)]
    - Rogini Mills Ltd. 2011-TIOL-05-HC-MAD-CX
    - Rajalakshmi Paper Mills Ltd. 2009 (234) E.L.T. 536 (Tri. - Chennai)
    - Trinity Auto Components Ltd. [2010 (257) E.L.T. 548 (Tri. – Mumbai)
    - Greenply Industries [2010 (259) E.L.T. 103 (Tri. - Del.

3.2 Arguing for the revenue learned authorized representative while reiterating the findings recorded in the impugned order submitted that,

- in terms of provisions of Rule 3 (5) of the CENVAT Credit Rules, 2004 as it existed then appellants should have cleared these capital goods after reversal of the credit determined on purchased value of the goods removed.
- Revenue has through various communications dated 27.08.2007, 29.08.2007, 14.02.05 and 24.03.2008 asked the appellants to submit the original purchase invoices to establish their claim that these capital goods were procured by them prior to coming of the CENVAT/ MODVAT credit scheme into existence. However appellants have failed to provide the said invoices
- The fact that appellants themselves cleared these goods on payment of the duty/ reversing the credit on the depreciated value establishes that these goods were received subsequent to the credit scheme coming into force. In some case appellant have cleared the goods on 0% depreciation also.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 For confirming the demand Commissioner has in the impugned order stated as follows:

"13. The assessee has, as mentioned, contested the demand notice on the ground that the capital goods were installed in the factory prior to the coming into force of the MODVAT rules; no purchase invoices are traceable; they were removed to their own factory at Mandideep, Bhopal and reinstalled there in 2005/2006; concept of revenue neutrality also applies. The Hon'ble Bombay HC decision in Cummins India 2010(250)ELT 79 was also cited in favour and it was also emphasized that while transferring capital goods to Bhopal the department was informed and hence extended period could not be invoked.

14. I find that it is not the case that the assessee that they did not pay any Central Excise duty while clearing the "used capital goods". It is apparent from the Annexure "A" appended to the demand notice that against each of the 249 entries mentioned therein detailing the removal of capital goods/machinery cleared, the depreciation rates claimed vary from 0%, 61.67%, 61.69%,

70%, 88.50%, 58%, 50%. 64%, 44%, 42.53%, 62%, 46%, 65.43% and also 93.60% etc. The differential duty has been computed by adopting the Original cost/value and calculating the differential duty at BED @16% and Edu. Cess @2%.

15. The very fact that the assessee chose to pay Central Excise duty on the depreciated value at the time of removal of these "used capital goods" explains the intention on their part for not following the correct and legal procedures. Obviously, had they been so sure about the fact that all these machines belonged to the pre-Modvat/Cenvat era, they could have merely removed these "used capital goods" from their factory under a challan more so since they were not their "manufactured final products". Having not chosen to do the same, the assessee resorted to the "depreciation method" for arriving at the assessable value of these capital goods.

16. It also needs mention that the Annexure "A" to the demand 'notice, as mentioned in the preceding paragraphs, shows that in some cases the assessee has chosen to have "0% depreciation". This very fact clearly indicates that these capital goods were not old so as to have any depreciation in value. I, therefore, do not find any merits in the submissions made by the assessee that these capital goods are old and belong to the era when no Modvat/Cenvat credit could have been possibly availed by them. No positive evidence was submitted to support their claim.

17. The provisions of rule 3 (5) of the CCR, 2004 which apply to the material period are clear in this regard. It reads,-

*(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."*

(Emphasis & underlining supplied)

17.1 The issue is no longer res integra. I am guided in this regard by the Larger Bench decision of the Hon'ble CESTAT in the case of M/s Modernova Plastyles Pvt. Ltd. 2008(232)ELT 29 (Tri-LB) and wherein while distinguishing the Hon'ble Bombay High Court decision in Cummins India, it has been held thus -

"2. 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. In Sarkar's "Words & Phrases of Excise, Customs & Service Tax", the expression was such" has been defined as "in or by itself alone". It does not distinguish between a new/unused and a used product. In the case of BILT Industrial Packaging Co. Ltd. v. CCE, Salem - 2007 (216)ELT 217, the Tribunal has brought out how, in Rule 575(2) as it earlier stood, the expressions "without being used" and "after being used" were mentioned, and subsequently these two clauses were merged into one by using the expression "as such" which clearly shows that the expression is intended to cover both capital goods cleared without use and cleared after being put to use. Ever since the inception of the Modvat/Cenvat Scheme, capital goods, whether used or unused, were allowed to be removed from a factory only on payment of duty or on reversal of Cenvat credit taken. Initially, used capital goods could be removed after reversing proportionate credit depending upon the period of use, as per Notification 23/94-C.E. dated 20-5-1994. This system was later changed to charging duty on used capital goods, cleared on the transaction value as per Notification 6/2001-C.E. dated 1-3-2001 and w.è.f. 13-11-2007 vide Notification 39/2007-C.E., the concept of reversal of proportionate credit has been reintroduced. If the expression "as such" is held to cover only unused or new capital goods, manufacturers who wish to remove used capital goods to job workers' premises for testing, repairing reconditioning etc., would not be able to avail of the facility under Rule 4(5)(a). Further, if the expression was such" is interpreted to mean new or unused capital goods, then the question of testing, repairing or reconditioning them does not arise and the terms 'testing', 'repairing' and 'reconditioning' would become redundant, and any interpretation which results in rendering any portion of rule or legislation redundant, should be avoided, as held by the apex court in Amrit Paper v. CCE, Ludhiana - 2006 (200)ELT 365 (S.C.) and Rajesh Kumar Sharma v. UOI - 2007 (209)ELT 3 (S.C.).

3. The decision of the Tribunal in Cummins India Ltd. v. CCE, Pune-III - 2007 (219) ELT 911, which has been upheld by the Bombay High Court's order dated 23-7-2008 in Central Excise Appeal No. 232 of 2007, only deals with the provisions of Rule 3(4)(C) and does not consider the provisions of Rule 4(5)(a) and, therefore, cannot be said to cover the present issue.

4. ...

5. In the light of the above, we answer the question referred to us by holding that reversal of credit availed on capital goods is required when capital goods are removed, whether used or not."

17.2 The Larger Bench decision has been followed in the following cases –

a. Harsh International Pvt Ltd. vs CCE Delhi II 2011 (269) ELT 225 (Tri-Del)] "Penalty - Cenvat/Modvat - Capital goods - Reversal of credit on removal of capital goods from factory - As per Rule 3 of Cenvat Credit Rules, 2002, at the relevant time, when capital goods were removed as such from factory, assessee required to pay an amount equal to the credit availed by them in respect of such capital goods - Plea that, removal of goods was not with any intention of avoiding revenue liability, needs to be proved by assessee - Mere contention that on account of frequent changes in provision of law, assessee failed to discharge revenue liability is devoid of any substance - Assessee having failed to discharge revenue liability, by reversing credit taken, liable to penalty - Rule 15 of Cenvat Credit Rules, 2004. [paras 4, 5, 8, 10, 11, 12, 19]"

b. CCE, Goa vs. Betts India Pvt. Ltd. 2009(240)ELT 119(Tri-Mum) -

"Cenvat/Modvat - Capital goods cleared after put to use - Reversal of credit - Quantum - Respondent cleared used capital goods to own unit on depreciated value under Rule 57-S(2) of erstwhile Central Excise Rules, 1944 and reversed the credit accordingly - Revenue contends that entire credit availed at the time of receipt of capital goods required to be reversed - Rule 57-S(2) ibid not applicable as was in statute book at the time of receipt of capital goods and not at the time of clearance of goods - Rule 3(5) of Cenvat. Credit Rules, 2004 in existence then - Accordingly entire credit availed required to be reversed -

Demand upheld - Interest payable on the amount of demand - No penalty imposable as it is a question of interpretation - Sections 11A, 11B of Central Excise Act, 1944 - Rule 3(5) ibid. [para 4]"

18 Accordingly, I find that the method of computation of the duty liability adopted in the Show Cause cum demand notice of demanding duty on the original value of the capital goods is proper in law in the facts and circumstances of the case.

19. Coming to the plea of the demand having been hit by the bar of limitation, it is my considered view that in the era of self-assessment, when full faith and trust have been reposed in the assessee, there is a clear case of total breach of trust and fraud played on revenue. If material particulars are not being submitted by the assessee justifying their action of payment of duty on depreciated value, it is incumbent on the department to re-work the duty liability based on the original value of machinery and in the event of such a non disclosure in the returns, the same amounts to suppression of material facts with intention to evade payment of duty and thus extended period has correctly been invoked. Also such an evasion of duty with clear malafide intention also attracts the provisions of mandatory penalty and mandatory interest in terms of the then sections 11AC and 11AB of the CEA, 1944.

20. Revenue neutrality also cannot come to the rescue of the assessee. Once the same is upheld then every case of recovery of non-payment/short payment of Central Excise duty would be an exercise in nullity. The question of revenue neutrality for non demanding of the duty is not envisaged under the provisions of Section 11A or for that matter under rule 14 of CCR, 2004. Also the concept of revenue neutrality is alien to statutory authority like me. I have to decide the case on the basis of the Central Excise law and the Rules made there under.

20.1 I rely on the following case laws in this regard –

++ Mahindra & Mahindra 2005(179)ELT 21(SC)

++ Dharampal Satyapal 2005(183)ELT 241(SC)

++ Dharampal Premchand Ltd. 2011(265)ELT 81(Tri-Del)

++ Baba Asia Ltd. 2011 (267) ELT 115 (Tri-Del)

21. Further, I hold that equitable consideration have no place in tax law also there is no intentment in interpretation of law. It has to be interpreted as "written" i.e. literal meaning of the law to be taken into consideration – nothing to be read into it or implied as held in the following decisions of Hon'ble Supreme Carl High Court.

++ Jessop & Company Ltd. 2010(250)ELT 490(Cal)

"Interpretation of tax statutes - Intentment - Court to examine what is stipulated as far as interpretation of revenue law is concerned - Nothing can be read into a provision and application by implication does not arise - Regard should be to strict letter of law - Equitable considerations have no place · Interpretations cannot be based on assumption or presumption - Intention of Legislature as reflected in statute to be considered - To ascertain exact meaning of legislation, language used should be of prime consideration. [para 10]"

++ Basal Wire Industries 2011(269)ELT 145(SC)

'Interpretation of statutes - Words used in section, rule or notification - They cannot be rendered redundant and should be given effect to. (para 34)"

++ Doaba Steel Rolling Mills 2011(269) ELT 298(SC)

"Interpretation of Statute - Taxing Statute - Intention of Legislature is primarily to be gathered from the words used in statute - Assessee once shown to be falling within letter of law, he must be taxed however great hardship it may appear to the judicial mind - Taxing statute should be strictly construed. (para 19)"

++ Steel Strips 2011(269)ELT 257(Tri-LB)

++ Shanker Raju 2011 (271) ELT 492 (SC).

"Interpretation of statutes - Intention of legislature - In Court of law or equity, what legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact either in express words or by reasonable and necessary implication - Where legislature clearly declares its intent in scheme of a language of statute, it is duty of Court to give it full effect without scanning its wisdom or policy, and without engrafting, adding or implying anything which is not

congenial to or consistent with such express intent of legislature - Hardship or inconvenience cannot alter meaning employed by legislature if such meaning is clear on face of statute - If statutory provisions do not go far enough to relieve hardship, remedy lies with legislature and not in hands of Court. (para 26)"

4.3 Appellants have during the course of arguments have submitted a timeline in respect of the procurement of the Capital goods by them and the clearance of same by them to their Mandideep unit. The time line submitted is reproduced below:

Sr. No.	Date	Particulars	Reference
1	1976	Large Machine Division of the Appellant started its operations at Kanjur, Mumbai and was manufacturing large machines. at the time of setting up of the factory and starting of operations, the Appellants had purchased after payment of excise duty several capital goods at their factory such as, capacitor banks, C.I. bed plates, looping machines and accessories, power analysers, transformers with OLTC, tape winding and tensioning machines, measuring instruments, cables, lathe machines, TOS cylindrical grinding machines, etc. All the said capital goods were used by the Appellants in the manufacture of their finished products, viz. large machines. the said capital goods were	

		installed by the Appellants at their said factory for the purpose of manufacture of the said large machines. when the said capital goods were purchased by the Appellants after payment of excise duty, there existed no Rules under which a manufacturer could avail the credit of any excise duty on any capital goods purchased by it.	
2	1976 onwards till 2005-06	the said capital goods were "put to use" by the Appellants in the manufacture of the said large machines.	
3	1976 onwards till 2005-06	as a result of the said capital goods being put to use, their value depreciated with every year of use in the manufacture of the said machines, the depreciated value of the said capital goods was reflected in the annual books of accounts of the Appellant from 1977 till 2004-05.	
4	1986	for the first time, Modvat Credit Rules were introduced in the statute under which a manufacturer was entitled to take Modvat credit of the excise duty paid on the capital goods purchased by it.	
5	2004-05	the Appellant decided to close the said Large Machine	

		Division at Kanjur, Mumbai and shift all activity of manufacture of large machines to their other factory located at Mandideep in Madhya Pradesh.	
6	Nov 2005 to Oct 2006	in view of the above, all the said capital goods were removed by the Appellants from their Kanjur factory for onward delivery to the Appellant's said other factory at Mandideep. in the beginning as the said capital goods were purchased almost 30 years before in 1976, the purchase invoices of the said capital goods were not traceable in the factory/office of the Appellant. as the said the purchase invoices from 1976 were not traceable, the Appellants paid/reversed excise duty upon the same based upon the depreciated/written down value of the said capital goods.	
7	Nov 2005 to Oct 2006	once the said capital goods were delivered to the Appellant's said other factory at Mandideep, Madhya Pradesh, the Appellant availed the Cenvat Credit at the excise duty paid/reversed by them	when they were removed from the Appellant's Kanjur factory.

8	Nov 2005 to Oct 2006	at all material times the Appellant had fully informed the Department about the payment/reversal of excise duty on the depreciated value of the said capital goods in the monthly returns filed by them during the said period. The Department therefore had full knowledge of the removal of the said capital goods and payment/reversal of excise duty there upon at their depreciated value. This is also evident from the correspondence referred in the show cause notice, viz. the Appellant's letter dated 08.09.2006 referred in para 2 of the show cause notice.	From Ex A pg. 18 to Ex E pg.23
9	08.08.2006 to Nov, 2010	correspondence ensued between the Department and the Appellant on the to issue	
10	12.22.2010	Show cause notice issued to the Appellant inter alia contending that the Appellants should have reversed/paid excise duty on the capital goods removed by them from their Kanjur factory on the basis of the original cost/value of the capital goods and on that basis a demand was raised on the Appellants for differential duty of Rs. 86,55,477/- with interest and	Ex. F Pg. 28

		penalty thereupon.	
11	12.01.2011	Appellant replied to the Show cause notice.	Ex. G Pg. 39
12	30.11.2011	Impugned order passed by the Respondent confirming the demand raised in the show cause notice.	

4.4 From the above time line as submitted by the Appellant it transpires that Appellant has cleared the capital goods which have been procured them in the year 1976 and thereafter for setting up their production facility at Kanjur. Subsequently during the period these capital goods were dismantled and removed by the appellant to their Mandideep unit after reversal of the credit on the depreciated value of the capital goods. It is fact of common knowledge that the Scheme of MODVAT Credit was introduced in the Year 1986 for the inputs and was in the year 1994 extended to the Capital Goods. Subsequently the scheme of MODVAT Credit was changed to CENVAT Credit scheme, and the scheme as was prevalent during the relevant period the scheme applicable was as laid down by the CENVAT Credit Rules, 2004. Commissioner has in the para 13, noted the above fact. In the case of the capital goods when the MODVAT Credit scheme was introduced, it was provided that person claiming the credit in respect of the Capital Goods was required to intimate about the receipt of Capital Goods and installation of the same to jurisdictional officers. Hence all the information in respect of the Capital Goods against which the MODVAT/ CENVAT Credit has been taken will be available with the revenue authorities. Rather than positively rejecting the submissions made by the appellant in respect of the receipt of capital goods prior to introduction of MODVAT/ CENVAT Credit scheme, Commissioner have used the factum of payment of the amount computed on the depreciated/ book value of these capital goods for rejecting the claim made by the appellant. In view of Commissioner, if the machines were procured prior to introduction of the MODVAT/ CENVAT Credit Scheme, where was the requirement for payment of any duty/ reversal of amount. Is it mandatory in any law that the appellants were required to

maintain the invoices of the capital goods procured by them some thirty years. All the capital goods which have been received by the appellants would have been received by the appellant at appropriate time and installed in their factory. These capital goods are duly reflected in the balance sheet and the written down value of these capital goods get reflected in the balance sheet as capital assets. It is not even the case of the revenue the capital goods which have been cleared by the appellants do not form the part of the capital assets on the basis of their written value. No evidence or even the averment has been made in the show cause notice or the impugned order that these capital goods are the one against which the appellant had taken MODVAT/ CENVAT Credit and have been cleared by them as such without being put into use. In the view of this we are not in agreement with the findings recorded by the adjudicating authority in this regard.

4.5 Issue in dispute vis a vis the value which should be taken for determination of the amount to be reversed under Rule 3 (5) of the CENVAT Credit Rules, 2004 has been decided by various authorities. Appellant have in their submissions made relied upon the following decisions which hold as follows:

a. In case of Moser Baer tribunal held as follows:

"4. After hearing from both sides and on perusal of record, it appears that the appellant availed the credit on capital goods prior to 1-4-01 and used in the manufacture of finished goods during the relevant period. Thereafter they removed the capital goods to their new unit for use in the manufacture of finished goods as their old unit is closed down. Thus it is a case of transfer of capital goods inter-unit. Therefore, the case may be decided on the issue of revenue neutrality. The Hon'ble Supreme Court in the case of Textile Corpn. Marathwada Ltd. (supra) held that admittedly, the assessee has paid the duty at the final stage and if the assessee has to pay the excise duty on each and every stage of manufacturing, it would be entitled to Modvat credit and the whole exercise would be revenue neutral. The Tribunal in the case of Hindustan Zinc Ltd. (supra) held as under :

"4. We, after hearing both sides, find that the appeal can be disposed of on the point of revenue neutrality. Admittedly, the

duty paid by the appellant was being availed as Modvat credit, which the other unit was in a position to utilize. The Tribunal in the case of PTC Industries Ltd. v. C.C.E., Jaipur-I - 2003 (159) E.L.T. 1046 (Tri.-Del.) has held that whatever duty is paid by one unit on sale of goods to the assessee's another unit is being available as credit to the other unit, there was no warrant for demanding duty. In the present case, we find that the zinc concentrate was only being transferred to the appellant's own unit and was not being sold at all. Whatever duty was being paid by the appellant was available as credit to them and nothing would go into the Revenue's pocket. The entire excise is revenue neutral as neither the assessee stands to lose anything by paying higher duty nor the Revenue stands to gain anything by the appellant's adoption of lower assessable value. As such, we are of the view that demand is unwarranted and unsustainable on this count alone. We, accordingly, set aside the impugned order and allow the appeal with consequential relief to the appellant."

5. In the present case, the appellant removed the capital goods to their new unit, where it was used in the manufacture of dutiable final product. Therefore, the appellant is eligible to avail the credit which is demanded in the present case. The entire exercise is revenue neutral and is futile. Therefore, the demand of duty and penalty are not warranted on the ground of revenue neutrality."

b. In case of Cummins India Ltd, tribunal held as follows:

"2. The dispute in the present appeal relates to the issue as to whether the appellants were required to pay duty at the assessable value of the capital goods or they were required to reverse the quantum of credit originally availed by them at the time of receipt of capital goods. Both the authorities below have held that since the capital goods have been cleared by the appellant, they are required to reverse the original quantum of credit availed by them in terms of provisions of Rule 3(4) of Cenvat Credit Rules, 2002.

3. After hearing both the sides I find that the said rules require reversal of credit in respect of the capital goods which are removed "as such". The plain and simple meaning of the

expression "as such" would be that the 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 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. The same view was held by the Tribunal in the case of Madura Coats P. Ltd. v. CCE, Tirunelveli - 2005 (190) E.L.T. 450 (Tri.) = 2005 (70) RLT 730 (CESTAT - Ban.). As such I find no justification for the confirmation of differential amount. The impugned orders are accordingly set aside and appeal allowed with consequential relief to the appellants."

This decision has been upheld by the Hon'ble Bombay Court as reported at [2009 (234) ELT A120 (BOM)}.

c. In case of Rogini Mills, Hon'ble Madras High Court held as follows:

"5. Though the contention of the learned Standing Counsel appears to be very sound in the first blush, we are not in a position to accede to the said submission. Rule 3(4)(c) of the 2004 Rules reads as under :

"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 7.1."

6. In the first place, the provision for reversal of the Cenvat credit availed has been provided for under Rule 3(4)(C) of the 2004 Rules. When we peruse the order of the Principal Bench, New Delhi in its order reported in 2009 (242) E.L.T. 124, we find a reference to the Board's Circular No. 643/34/2002-C.X., dated 1-7-2002, a Board's letter bearing No. 495/16/1993-Cus., VI, dated 26-5-1993 and also a provision, which was added to Rule

3(5) of Cenvat Credit Rules 2004 (corresponding to Rule 3(4) of Cenvat Credit Rules, 2002), which stipulated that the capital goods on which Cenvat credit had been taken or removed after being used, the Manufacturer should pay an amount equal to the Cenvat credit taken on the said capital goods reduced by 2.5% for each quarter of a year or part thereof from the date of taking the Cenvat credit. The Board's Circular dated 1-7-2002 stated that the capital goods on which Cenvat credit had been taken or cleared under Rule 3(4), 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 the Central Excise Act and the depreciation as per the rates fixed in the Board's Letter dated 26-5-1993 should be allowed.

7. On a conjoint reading of Rule 3(4) with the provision added to Rule 3(5) with effect from 13-11-2007, the Board's Circular dated 1-7-2002 along with Board's letter dated 26-5-1993, it is quite clear that the inputs or capital goods when disposed of after putting it into some use over a period of time, then the assessee would be entitled to reverse whatever Cenvat Credit availed on the value to be assessed on the date of such subsequent sale as capital goods. Such a conclusion by relying upon the above referred to Board's Circular and the letter as well as the addition of proviso to Rule 3(5) with effect from 13-11-2007, is the manner in which the expression 'as such' used in Rule 3(4) can be interpreted. Consequently, the interpretation put in the order of the Principal Bench reported in 2009 (242) E.L.T. 124 merits acceptance. The order of the Tribunal impugned in this appeal applying the said ratio of the Principal Bench is, therefore, perfectly justified."

d. In the case of Rajalakshmi Paper Mills Pvt Ltd, CESTAT Chennai bench held as follows:

"2. I have considered the case records and the submissions made by both sides. It is seen that the Commissioner (Appeals) passed the impugned order relying on a decision of the Bangalore Bench of the Tribunal in the case of Madura Coats Ltd. [2005 (190) E.L.T. 450 (Tri.-Bang.)]. In the said decision, the Tribunal had held that Rule 3(5) of the Cenvat Credit Rules,

2004 applied only to capital goods removed 'as such' and not to the used cenvated capital goods. The Revenue has no case that the above decision of the Tribunal has been appealed against and stay was obtained from the competent court. The relevant paragraph of the decision of the Tribunal is extracted below :-

"5. We have gone through the records of the case very carefully. The Commissioner (Appeals) has given a clear finding that there is no provision to demand duty on removal of used Cenvated capital goods. He has also referred to the Board's Circular dated the 1st July 2002. We want to make it clear that the above Circular is applicable only to capital goods removed as such and not to the used cenvated capital goods. In other words, the appellant is not required to pay duty when the used machinery is sold. Hence, the appeal is allowed with consequential relief."

3. As the capital goods had been cleared after use for about 8 years by the assessee, the impugned goods are not capital goods "as such". As the impugned order has been passed relying on the ratio of a decision of the Tribunal which has not been unsettled by an order of a superior court, the appeal filed by the Revenue has to be held as devoid of merit. Accordingly, the appeal filed by the Revenue is dismissed."

e. Distinguishing the decision of Larger Bench in case of Modernova Plastyles Pvt. Ltd. [2008 (232) E.L.T. 29 (Tribunal-LB)] relied upon by the Commissioner in para 17.1, CESTAT has in case of Greenply Industries held as follows:

"15. It is true that the Larger Bench while dealing with the scope and ambit of the expression "as such" has observed that the said expression has to be interpreted as commonly understood, which is in the "original form" and "without any addition, alteration or modification" and that the said expression has no connection with the goods as being new or unused or used, however, it is to be noted that the Larger Bench was dealing with the said expression as used in Rule 4(5)(a) of the said rules and the said rule reads thus :-

"The CENVAT credit shall be allowed even if any inputs or capital goods as such or after being partially processed are sent to a job worker for further processing, testing, repair, reconditioning or

any other purpose, and it is established from the records, challans or memos or any other document produced by the assessee taking the CENVAT credit that the goods are received back in the factory within one hundred and eighty days of their being sent to a job worker and if the inputs or the capital goods are not received back within one hundred and eighty days, the manufacturer shall pay an amount equivalent to the CENVAT credit attributable to the inputs or capital goods by debiting the CENVAT credit or otherwise, but the manufacturer can taken the CENVAT credit again when the inputs or capital goods are received back in his factory".

16. Plain reading of the said rule would disclose that it relates to the situation whereby the capital goods are removed either in the original form or after being partially processed to be sent to the job worker for further processing, testing, repair, reconditioning or for any other purpose. In comparison, the Rule 3(5) refers to the situation which may arise not necessarily in relation to any processing or acting upon the capital goods for any purpose but even for the purpose of discarding the capital goods. Being so, the expression "as such" in Rule 3(5) cannot be understood in the same way as is to be understood in relation to the use thereof in Rule 4(5)(a). Though, it is similar expression, the same has to be understood with reference to the context in which it has been used and that has been elaborately discussed by the Tribunal in Geeta Industries case, which do not require any further elaboration. Besides as already pointed out above decision in that regard in Cummins India Limited has been upheld in recent judgement by the Bombay High Court. The decision of the Bombay High Court is binding upon the Tribunal. The decision of the Larger Bench is not directly on the issue involved in the matter. Hence, the point for consideration has to be answered in favour of the appellants. Being so, the impugned order cannot be sustained and is liable to be set aside while confirming that the duty liability in relation to the goods removed by the appellants was correctly assessed by the appellants and was paid appropriately."

4.6 Decision in case of Harsh International relied by the adjudicating authority has been reversed by the Hon'ble Delhi

High Court as reported at [2012 (281) E.L.T. 714 (Del.)], holding as follows:

"13. M/s. Harsh International Pvt. Ltd. admittedly sold the capital goods in June and July, 2007 to M/s. Harsh International (Khaini) Pvt. Ltd. The dates of sale thus fall prior to the amendment made with effect from 13-11-2007. The Tribunal has rightly pointed out that the case of Harsh International Pvt. Ltd. falls under Rule 3(5) as it stood amended from 6-5-2005 but before being amended on 13-11-2007. However, we note that the view taken by the Tribunal in the impugned order is that the words "as such" appearing in Rule 3(5) also took in the used capital goods. Thus according to the Tribunal, used capital goods when removed continued to remain capital goods "as such" and therefore the Cenvat credit availed of on the capital goods has to be repaid. Thus the substantial question of law raised in the appeal is whether used capital goods on which Cenvat credit was availed are capital goods removed "as such". The words "as such" have been interpreted by the Punjab & Haryana High Court in Commissioner of C. Ex., Chandigarh v. Raghav Alloys Ltd., 2011 (268) E.L.T. 161 (P & H) = 2012 (26) S.T.R. 87 (P & H) to refer to "unused" capital goods and do not take in the used capital goods. It has been observed as under :-

"8. We have heard arguments of both the Ld. Counsel. The Tribunal has rightly noted that unlike inputs, which get consumed 100% with the same are taken up for use in relation to manufacture of finished goods, capital goods are used over a period of time. The capital goods lose their identity as capital goods only when after use over a period of time, the same has become in-serviceable and fit to be scrapped. The object of Cenvat Credit on capital goods is to avoid the cascading effect of duty. If even after use for a couple of years, the Cenvat Credit is required to be reversed then it would certainly defeat the object of the scheme. To avoid misuse of the scheme in the Rules, it has been provided that if the machines are cleared as such the Assessee shall be liable to pay duty equal to amount of Cenvat Credit availed. The machines which are cleared after utilization cannot be treated as machines cleared as such. With effect from 13-11-2007, a proviso has been added to Rule 3(5) of the Cenvat Credit Rules providing that if the capital goods on which

Cenvat credit has been taken are removed after being used, the manufacturer shall pay the amount equal to Cenvat Credit taken on the said capital goods reduced by 2.5% for each quarter of year or part thereof from the date of taking the Cenvat Credit. The board has also in the Circular dated 1-7-2002 clarified that in the case of clearance of goods after being put into use, the value shall be determined after allowing the benefit to depreciation as per rates fixed in Boards' Letter dated 26-5-1993. The Respondent has utilized the machinery for nine years and paid duty on transaction value. The machine cleared after putting into use for nine years cannot be treated as Cleared 'as such'. Insertion of proviso w. e. f. 13-11-2007 makes it clear that there is difference between machines cleared without putting into use and cleared after use. The Bombay High Court has upheld the view of the Tribunal in the case of Cummins India Limited v. CCE, Pune-III, 2007 (219) E.L.T. 911 (Tri.-Mumbai). The Tribunal in the case of Nahar Fibres has also dismissed Appeal of the Revenue and there is nothing to show that the said decision of the Tribunal has been set aside by any Court."

9. In these circumstances, we are of the considered opinion that the Appeal of the Revenue is bereft of merits so deserves to be dismissed.

10. The questions raised by Revenue are answered in favour of Assessee and Appeal is dismissed."

14. Our attention was drawn to the judgment of the Bombay High Court in the case of Cummins India Ltd. v. CCE, dated 23-7-2008. The High Court has affirmed the order of CESTAT, holding that the view that used capital goods cannot be said to be capital goods removed "as such" for the purposes of Rule 3(5), "is in consonance with the law". This judgment of the Bombay High Court has been noticed by the Punjab & Haryana High Court in the above decision.

15. 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. We agree with the Bombay and Punjab & Haryana High Courts and hold that the appellant was not liable to pay excise duty in accordance with Rule 3(5) when it removed the used capital goods and consigned them to M/s. Harsh International (Khaini) Pvt. Ltd."

4.7 Larger Bench of Tribunal has in case of Navodhaya Plastics [2013 (298) E.L.T. 541 (Tri. – LB)], held as follows:

"10. *The use of capital goods is to spread over many years. A decision to the effect that assessees can bring in capital goods, use it for a few days and then remove it without reversal of any Cenvat credit taken is not consistent with the overall scheme of Cenvat credit and can lead to abuse of the scheme. Considering this aspect and the legislative history and the Circular of C.B.E. & C., we are of the view that we should respectfully follow the decision of the Hon'ble Madras High Court in the case of Commissioner of Central Excise, Salem v. Rogini Mills Ltd. (supra) and the reference made to this Larger Bench is answered accordingly".*

4.8 In view of the decisions as above and noting the fact that the capital goods were removed by the appellant after having been put to use for considerable period of time, the approach adopted by the appellant to reverse the amount determined on the basis of book value of the capital goods, or depreciated value of capital goods cannot be faulted with.

4.9 it is settled principle that one who makes the assertion needs to establish the same by producing necessary evidence. In the present case revenue for applying the provisions of Rule 3 (5) of CENVAT Credit Rules, 2005, is arresting that-

a. Appellants have taken CENVAT/ MODVAT Credit in respect of these capital goods.

b. These Capital Goods have been removed by the appellant as such without being put into use.

Revenue stand has been that the appellants have not satisfied them that in the instant case these conditions were not satisfied by producing the relevant documents. However revenue has not produced a single instance by referring to the credit account of the appellants to establish that these capital goods are the one

against which they have actually taken the credit, and these goods have been cleared as such. On the contrary they have hypothetically calculated the amount of the credit to be reversed by denying the depreciation as claimed by the appellant while clearing these capital goods to their Mandideep unit. The fact of utilization and condition of these capital goods could have been easily verified by the revenue authorities at the time of their clearance from the Kanjur Marg unit of the appellant or could have been subsequently verified at the Mandideep unit. However we do not find any attempt whatsoever being made in this direction.

4.10 In view of the discussions as above we are not in position to sustain the impugned order on merits of the case.

4.11 Further we find exercise in the case to be completely revenue neutral as the quantum of duty/ credit reversed will be available as credit to the appellant unit at Mandideep. Since we find that impugned order cannot be sustained on merits, we are not inclined to discuss the issue of revenue neutrality and invocation of extended period of limitation for making these demands.

5.1 Appeal is allowed setting aside the impugned order.

(Order pronounced in the open court on 14.07.2022)

(Sanjiv Srivastava)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

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