

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD
REGIONAL BENCH - COURT NO. 3**

EXCISE Appeal No. 12157 of 2016-DB

[Arising out of Order-in-Original/Appeal No AND-EXCUS-000-COM-017-16-17 dated 13.10.2016 passed by Commissioner of Central Excise-ANAND]

Orient Glaze Pvt Limited

Survey No. 760, Village Radhu,
Kheda-Dholka Road, KHEDA
GUJARAT-387560

.... Appellant

VERSUS

Commissioner of Central Excise & ST, Anand

Office of the Commissioner, Central Excise, Customs
& Service Tax, Central Excise Building, Nr. Juna
Dadar, Behind Old Bus Depot Anand

.... Respondent

APPEARANCE :

Shri Anil Gidwani, Advocate for the Appellant
Shri P. Ganesan, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

DATE OF HEARING : 06.02.2024

DATE OF DECISION: 23.04.2024

FINAL ORDER NO. 10911/2024

RAMESH NAIR :

The issue involved in the present case is that whether the appellant is liable to pay duty on waste and scrap of fire brick after use in the kiln during the period 2010-11 (upto February 2015) in terms of Rule 3 (5A) of Cenvat Credit Rules, 2004.

2. Shri Anil Gidwani, Learned counsel appearing on behalf of the appellant at the outset submits that after use of the fire brick on which credit was taken on capital goods became waste and scrap and the same is not usable even as waste and scrap and the same is thrown outside the factory. Excise duty under Rule 3 (5A) of Cenvat Credit Rules, 2004 by calculating the same, deducting 2.5% per quarter is not required to be paid.

2.1 He submits that the appellant have correctly paid the duty on the transaction value. He placed reliance on the judgment in the case of Birla Corporation – 2003 (162) ELT 499 (Tri. Del).

2.2 He submits that though the above decision is in respect of Rule 57 (2) (c) of Central Excise Rules, 1944 but the provisions of Rule 3 (5A) of Cenvat Credit Rules, 2004 and Rule 57 S (2) (c) of Central Excise Rules, 1944 are *Pari-Materia*, therefore, the judgment is directly applicable.

3. Shri P. Ganesan, Learned Superintendent (AR) appearing on behalf of the Respondent reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both sides and perused the records. We find that the demand of duty invoking Rule 3 (5A) of Cenvat Credit Rules, 2004 was confirmed in respect of waste and scrap of fire brick on which Cenvat credit under capital goods was availed. For ease of reference Rule 3 (5A) of the relevant period is reproduced below:-

Rule 3 Cenvat Credit – from 17.03.2012 to 26.09.2013;

(5) When inputs or capital goods, on which....

[(5A) If the capital goods, on which CENVAT credit has been taken are removed after being used, whether as capital goods or as scrap or waste, the manufacturer or provider of output services shall pay an amount equal to the CENVAT Credit taken on the said capital goods reduced by the percentage points calculated by straight line method as specified below for each quarter of a year or part thereof from the date of taking the CENVAT Credit, namely

(a) for computers and computer peripherals

(b) for capital goods, other than computers and computer peripherals for each quarter 2.5% for each quarter.

Provided that if the amount so calculated is less than the amount equal to the duty leviable on transaction value, the amount to be paid shall be equal to the duty leviable on transaction value. (Substituted (w.e.f. 17.03.2012) by Notification No. 18/2012-C.E.(N.T.), dated 17.03.2012.

Period from 27.09.2013 onwards:

(5) When inputs or capital goods, on which.....

Rule 3. Cenvat Credit-

(5A) (a) If the capital goods, on which.....

(i) for computers and computer peripherals.

for capital goods, other than computers.....

(b) If the capital goods are cleared as waste and scrap, the manufacturer shall pay an amount equal to the duty leviable on transaction value. Substituted by Notification No. 12/2013-C.E.(N.T.), dated 27.09.2013)

4.1 In view of the above rule though it provides that in case of removal of capital goods as waste and scrap, the assessee is required to pay the duty after reducing 2.5% per quarter for the period of use of capital goods. However, the appellant have taken the support of decision of Birla Corporation Limited (Supra) which deals with the provisions of 57S (2)(c) of Central Excise Rules, 1944 which reads as under:-

RULE 57S. Manner of utilisation of the capital goods and the credit allowed in respect of duty paid thereon. –

(1) The capital goods in respect of such credit of specified duty has been allowed under rule 57Q may be –

(i) used in the factory of the manufacturer of the final products; or

(ii) removed, after intimating the Assistant Commissioner of Central Excise having jurisdiction over the factory and after obtaining dated acknowledgement of the same, from the factory for home consumption or of export, on payment of appropriate duty of excise leviable thereon or for export under bond, as if such capital goods have been manufactured in the said factory.

(2) In a case, -

(a) where capital goods are removed without being used from the factory for home consumption, on payment of duty, or for export on payment of duty excise, such duty of excise shall in no case be less than the amount of credit that has been allowed in respect of such capital goods under rule 57Q;

(b) where capital goods are removed after being used in the factory for home consumption on payment of duty of excise or for export under rebate on payment of duty of excise, such duty of excise shall be calculated by allowing deduction of 2.5 per cent of credit taken for each quarter of a year of use or fraction thereof, from the date of availing credit under rule 57Q; and

(c) where capital goods are sold as waste and scrap, the manufacturer shall pay the duty leviable on such waste and scrap.

4.2 It can be seen that the provisions for payment of duty on waste and scrap of capital goods in both the above rules are almost *Pari-Materia*, therefore, the decision of Birla Corporation is applicable. The said judgment is reproduced below:-

“3. Appellant is engaged in the manufacture of cement. The main machinery employed for manufacture of cement is Kiln. The shell of which is made of steel and in order to protect the Kiln from being damaged by high temperature, the inner shell is lined with refractories known as firebricks which are classifiable under heading 6901.90 as fireclay bricks. These firebricks are designed to withstand a very high temperature of about 1500°C without cracking or breaking. Over a period of time, they lose their thermal resistance and become useless. At this point of time, the entire layer of firebricks is broken and dismantled from the kiln shell and new layer has to be fixed. The average life of the firebricks in cement industry is 6 to 9 months.

4. The firebricks which became waste and scrap are being sold. It can be used only for the purpose of re-processing to extract the chemicals which can be recycled and used in the manufacture of fresh firebricks. There is no entry in the tariff imposing any duty on waste and scrap of firebricks and, therefore, it is a non-excisable commodity. Two show cause notices dated 9/10-3-99 were issued to the appellant for the period 1-4-94 to 31-7-97 seeking to recover central excise duty on waste and scrap of firebricks sold by the appellant during the above period. Appellant submitted its reply contending that no duty is liable to be demanded in respect of waste and scrap of firebricks. Under the impugned order, Commissioner confirmed duty and imposed penalty. Commissioner took the view that since the appellant is selling the waste and scrap as used firebricks, they are classified under sub-heading 6901.90 as fireclay bricks and in the light of the provisions contained under Rule 57S, duty has to be discharged on these used firebricks.

5. It is contended on behalf of the appellant that in the order impugned, the Commissioner has admitted that after life span is over, firebricks are to be removed from the kiln with the help of hammers, hydraulic and pneumatic jacks. After dismantling, they no longer remain fire bricks but remain as broken, unshaped fire bricks. The finding of the Commissioner that the appellant is bound to pay duty in view of the provisions contained under Rule 57-S(2)(C) is totally unsustainable. The learned counsel placed reliance on two decisions of the Tribunal namely *Knit Foulds Pvt. Ltd. v. C.C.E., Chandigarh* - [1997 \(95\) E.L.T. 517](#) and *Orient Paper Mills v. CCE, Indore* - [\[2001 \(136\) E.L.T. 445 \(T\) = 2000 \(41\) R.L.T. 943\]](#).

6. We heard the learned Departmental Representative also.

7. There is merit in the contention raised by the appellant that no duty under Rule 57S(2)(C) can be demanded from the appellant in the facts of this case. It is clearly admitted by the Revenue also that periodically fire bricks from the kiln are to be dismantled and then removed as it became useless. Process of dismantling is also not in dispute. The firebricks which are being dismantled from the inner shell of the kiln can be treated only as waste and scrap. It is not disputed that waste and scrap of fire bricks is not dutiable commodity. If that being so, we find no justification for the demand made against the appellant. The ratio of the decisions cited by the appellant is also supportive of the above view. We, therefore, set aside the impugned order and allow the appeal.”

4.3 In view of the above decision the principal bench of Tribunal held that the use of fire brick which is dismantled from the under shell of kiln is not liable to duty as waste and scrap. Since the fact of the present case is identical to the above decision and the view taken by the Tribunal on the identical facts, the duty on waste and scrap is not liable to be paid.

5. Following, the above decision, in the present case also the appellant is not liable to pay the duty confirmed by the lower authority. Hence, the impugned order is set aside. Appeal is allowed.

(Pronounced in the open court on 23.04.2024)

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

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