

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 18th April, 2012
% *Date of Decision: 29th May, 2012*

+ **CEAC NOs.11/2011**

HARSH INTERNATIONAL (KHAINI) PVT. LTD. Appellant
Through: Dr.Seema Jain with Mr.Ajay K.Jain
and Mr.Dushyant K.Mahant,
Advocates

VERSUS

COMMISSIONER OF CENTRAL EXCISE Respondent
Through: Mr. Satish Kumar, Sr. Standing
Counsel

+ **CEAC NOs.12/2011**

HARSH INTERNATIONAL PVT. LTD. Appellant
Through: Dr.Seema Jain with Mr.Ajay K.Jain
and Mr.Dushyant K.Mahant,
Advocates.

VERSUS

COMMISSIONER OF CENTRAL EXCISE Respondent
Through: Mr. Satish Kumar, Sr.Standing
Counsel

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest? Yes

R.V. EASWAR, J.:

COMMON FACTS

The following substantial question of law was framed by us on 20th December, 2011 in both the appeals:-

“Whether the appellant is liable to pay tax, penalty and interest on the cenvat credit which was taken on capital goods which were subsequently sold under Rule 3(5) of the Cenvat Credit Rules, 2004?”

2. The brief facts leading up to the filing of the present appeals may be noticed. M/s. Harsh International Pvt. Ltd., one of the appellant, herein, is a company engaged in the manufacture of chewing tobacco. It was registered under the Central Excise Law for the manufacture of chewing tobacco under the brand name of “Mehak Chaini Khaini”. The company was availing the Cenvat credit on the capital goods under the Cenvat Credit Rules, 2004. On 1st July, 2007, it informed the Central Excise Authorities that pursuant to the withdrawal of the licences issued by the licensor, it has stopped production and clearance of the goods and

that the factory would remain closed for an indefinite period and all manufacturing activity would stand suspended from 30th June, 2007. By letter dated 18th July, 2007, the appellant also surrendered in original the registration certificate issued by the Central Excise Authorities stating that it was no longer required. In the months of June and July, 2007, it sold the capital goods such as “old used filter pouch packing machine”, “old used HFFs machine PK 85”, “old used dust collector”, “old used packing and sealing machine”, “old used air compressor”, “old used grinder” and some other used machines to its sister concern, viz., Harsh International (Khaini) Pvt. Ltd., the other appellant herein, and did not pay any excise duty thereon, taking the position that under Rule 3(5) of the Cenvat Credit Rules, 2004 used capital goods, did not affect any duty nor was it required to reverse the cenvat credit which it availed of at the time of purchase between 2003 and 2005.

3. In the course of the scrutiny of the assessee’s records, it was found by the Central Excise Authorities that the appellant had availed of the credit under the Cenvat Credit Scheme on capital goods. The appellant was asked to furnish the details of the credit as required by Rule 3(5) of the Cenvat Credit Rules, 2004, hereinafter referred to as the “Rules”. On verification of the detailed furnished by the appellant, it was noticed by the Central Excise Authorities that the appellant-assessee had removed almost all the capital goods in respect of which Cenvat Credit was availed of without intimating the Central Excise Department, even before

surrendering the registration certificate and without payment of an amount equal to the credit of cenvat availed thereof. Accordingly, Harsh International (Pvt.) Ltd. was asked to show cause why no payment of the amount equivalent to the credit availed of in respect of the capital goods was paid by them when such goods had been removed. In response thereto the assessee informed the Central Excise Authorities that it was not liable to reverse the Cenvat Credit on the removal of the capital goods since such goods had been put to use by it.

4. By the same show-cause notice, M/s. Harsh International (Khaini) Pvt. Ltd. was also asked to showcase against confiscation of the goods already seized on 07.04.2008. Its contention was that since no excise duty was payable, there no justification for confiscating the goods.

5. The central excise authorities were not satisfied with the assessee's reply. By order dated 30th September, 2009 the Commissioner (Central Excise) ("CCE") adjudicated upon the assessee's case. He held that the capital goods were consigned to M/s Harsh International(Khaini) Pvt. Ltd., Kundli (Sonipat) and that they were removed without payment of the appropriate amount and thus there was a violation of the Rules. The goods were accordingly liable to be confiscated under Rule 15. The goods had been seized on 7th April, 2008 and on 26th May, 2008 they were provisionally released on execution of bond equal to the value of the goods and on furnishing bank guarantee of Rs.20 lacs. After noticing

these facts, the CCE recorded the following findings, rejecting the contentions of the appellant to the contrary: -

1. *The capital goods were cleared neither as waste or scrap but as used capital goods which did not exhaust their useful life at the time of clearance.*
2. *The departmental understanding of the relevant rule was that even after use, the identity of the capital goods does not change, and, therefore, they remain “as such” and , therefore, their clearance will be treated as clearance of capital goods and the assessee would be liable to pay an amount equal to the credit availed in respect of such capital goods. The removal shall also be made under in invoice.*
3. *The capital goods have been removed without intimating the department.*
4. *The used capital goods were removed by the assessee in June and July 2007. It was only from 13.11.2007 that an amendment was made to the relevant rule which added a proviso to the effect that if the capital goods, of which cenvat credit has been taken, are removed after being used, the manufacturer will be*

liable to pay a reduced amount of the cenvat credit taken on the capital goods, such reduction being 2.5% for each quarter or a year or part thereof from the date of taking the cenvat credit. Therefore, prior to the said date it did not matter that the capital goods were removed after being put to use, because even after being put to use, they still retained their character as capital goods.

6. The CCE also referred to certain decisions of the CESTAT in support of his view that even though the capital goods were removed after being used, they still retained their character as capital goods “as such” within the meaning of Rule 3(5) of the Cenvat Credit Rules. He, therefore, held that by not reversing the Cenvat Credit the appellant committed a violation of the aforesaid Rule. He also noted the amendment made to the Rule with effect from 13.11.2007 by which a proviso was added to the Rule which gave a concession in the case of capital goods removed after being used. According to the CCE in cases of removal of capital goods from the factory prior to 13.11.2007, central excise would become payable as per rule 3(5) even if they had been removed after being used.

7. On the aforesaid basis the CCE passed an order on 30.09.2009. This is a common order passed by him against Harsh International Pvt. Ltd. and Harsh International (Khaini) Pvt. Ltd., the appellants in the

present appeals. As regards Harsh International Pvt. Ltd., the direction was to pay excise duty of ₹58,88,038/-, which is the amount equal to the credit of the duty, and the interest thereon at the applicable rate. It was also directed to pay a penalty of ₹58,88,038/- in addition to the duty and the interest. As regards the other appellant, namely, Harsh International (Khaini) Pvt. Ltd., it was directed by the CCE to pay a penalty of ₹2,90,000/- under Rule 25 of the Central Excise Rules, 2002 and was also given the option to redeem the capital goods on payment of redemption fine of ₹9,15,500/- under Section 34 of the Central Excise Act. M/s. Harsh International Pvt. Ltd. was given the benefit of paying only 25% of the penalty if they make the payment of duty and the interest within 30 days from the date of communication of the order. It was clarified that the benefit of reduced penalty will be available only if the amount of penalty determined as above is also paid within the period of 30 days.

8. The appellants carried the matter in appeal before the CESTAT. The CESTAT disposed of the appeals by a combined order passed on 16.12.2010. According to the CESTAT, both before and after the amendment, the basic requirement of Rule 3(5) relating to payment and reversal of the credit of excise duty remained constant in the sense that the obligation to pay the duty or to reverse the credit equivalent to what was availed of, related to the capital goods in the months of June and July, 2007. Thus capital goods had been used by Harsh International Pvt. Ltd., after they were purchased during the period 2003-05. In June and July,

2007 the capital goods were sold to Harsh International (Khani) Pvt. Ltd. The Rule, as it stood amended with effect from 6.5.2005, according to Tribunal, was clear in the sense that capital goods removed “as such” from the factory was liable to excise duty or to reverse the cenvat credit. It was only from 13.11.2007, when the proviso was added to the Rule, that used capital goods were subjected to a concessional rate of duty, that is, an amount equal to the cenvat credit taken in respect of the capital goods and reduced by 2.5% for which quarter of the year or part thereof from the date of taking the credit. In this view of the matter, the Tribunal observed as follows:-

“10. Plain reading of above provisions of law discloses that at the relevant time, that is, when the capital goods were removed as such from the factory by the appellants, they were required to pay an amount equal to the credit availed by them in respect of such capital goods. Once it is apparent that the appellants had not paid such amounts, there was clear violation of the Rule in force at the relevant time.”

9. As regards the contention that Rule 3(5) as it existed prior to 13.11.2007 did not apply to used capital goods, the Tribunal referred to the larger Bench decision in the case of ***Modernova Plasty Pvt. Ltd. CCE, Rigad 2008 (232) ELT 29*** and held that in this decision it has been clearly held that the expression “as such” cannot be restricted to mean only new or unused capital goods. The interpretation of the words “as such” sought

to be placed by the assessee was not, therefore, accepted by the Tribunal. Several orders of the Tribunal were cited before the Tribunal in support of the assessee's interpretation, but the Tribunal felt bound by the decision of the larger Bench (Supra) and was unable to give effect to the assessee's submissions. The Tribunal ultimately concluded the appeals against the assessee in the following manner:-

“19. Once the provision of law clearly required the appellants to pay an amount equal to the credit availed in respect of capital goods which were removed as such, and that the same was required to be paid at the time of such removal of the goods, and admittedly the appellants having not complied with the said obligation, the consequences provided under the statutory provisions are bound to follow. It cannot be held in such circumstances that the removal of the goods was not with any intention of avoiding the revenue liability. As in case of claim of exemption from payment of duty, the burden lies upon the assessee to establish that the assessee falls within the four corners of the provision granting the exemption, similarly in a case of non-payment of duty or discharge of any revenue liability, it is for the assessee to establish that he or she was not liable to discharge such revenue liability for valid reasons. Mere contention that on account of frequent changes in the provision of law, which itself is devoid of substance, cannot be a justification to avoid the penal liability resulting from failure to discharge the revenue liability by the assessee.”

Thus, the appeals were dismissed.

10. It is against the aforesaid common order passed by the CESTAT that both the assesses are in appeal before us.

DECISION IN THE CASE OF M/S. HARSH INTERNATIONAL PVT. LTD.

11. In the case of Harsh International Pvt. Ltd., the first question is whether it is liable for the duty of ₹58,88,038/- under Section 11A of the Act. According to Rule 3(5), as it stood amended with effect from 6.5.2005, the following was the position:-

“When inputs or capital goods, on which cenvat credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, 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 9” (underlining ours)

12. On 13.11.2007 a proviso was added to Rule 3(5) and the same is as follows:-

*“**Provided** further that if the capital goods, on which CENVAT Credit has been taken, are removed after being used, 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:*
for each quarter in the first year
@ 10%
for each quarter in the second
year @ 8%
for each quarter in the third year
@ 5%
for each quarter in the fourth and
fifth year @ 1%
(b) *for capital goods, other than computers and computer*
peripherals @ 2.5% for each quarter.” (underlining ours)

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) ELT 161 (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 23.07.2008. 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.

16. As a result, there is no question of paying any penalty under Section 11AC of the Act or any interest on the duty. Thus the appellant is not liable to the payment of duty, interest or penalty. The substantial question of law is answered in the negative, in favour of the appellant and against the Central Excise Department.

DECISION IN THE CASE OF M/S. HARSH INTERNATIONAL (KHAINI) PVT. LTD.

17. The substantial question of law to be framed in this appeal would be: -

“Whether the appellant is liable to pay redemption fine under Section 34 of the Act and interest under Rule 25 of the Central Excise Rule, 2002 in respect of the used capital goods confiscated from it?”

18. The above question of law is substituted in the place of substantial question of law already framed which does not seem to bring out the controversy arising in the appellant’s case properly.

19. Since we have held that there is no liability to pay excise duty on the used capital goods, as a consequence the goods are not liable to be confiscated. They are, therefore, liable to be released without payment of any redemption fine. Moreover, there is also no question of the appellant paying any penalty under Rule 25 of the Central Excise Rules, 2002. The capital goods if still under seizure are directed to be returned to the appellant without payment of any redemption fine. The question of law is answered in the negative and in favour of the assessee.

20. In the result both the appeals are allowed with no order as to costs.

R.V. EASWAR, J.

SANJIV KHANNA, J.

MAY 29, 2012
Bisht