IN THE HIGH COURT OF BOMBAY AT GOA

EXCISE APPEAL NO. 4 OF 2009

M/s. BETTS INDIA PVT LTD.

L-28, Verna Industrial Estate

Verna- Goa. ... Appellant

Versus

COMMISSIONER OF CENTRAL EXCISE

Ice House, Patto, Panaji,

Goa – 403 001. ... Respondent

Mr. P. Faldessai, Advocate for the appellant.

Ms. Shubhangi Sawant h/f. Ms. Asha Desai, Counsel for the respondent.

Coram:- M. S. SONAK &

NUTAN D. SARDESSAI, JJ.

Date:- 24th September, 2019

ORAL JUDGMENT:(Per M.S. Sonak, J.)

Heard Mr. P. Faldessai, learned Counsel for the appellant and Ms. Shubhangi Sawant h/f. Ms. Asha Desai, learned Counsel for the respondent.

2. This appeal was admitted on 22/04/2009 on the following substantial question of law:

> *Whether proviso added in 2007 to sub-rule (5) of Rule 3 to Cenvat Credit Rules, 2004 is clarificatory in nature and, therefore, operating retrospectively as also whether in absence of said proviso the words "as such" appearing in sub-rule (5) of Rule 3 contemplated the removal of cenvated capital goods without use shall be the substantial question of law for adjudication in this appeal?*

3. According to us, the proviso added in 2007 to sub Rule 5 of Rule 3 to the Cenvat Credit Rule, 2004 is clearly clarificatory in nature. In case of ***WPIL Ltd., Ghaziabad v/s. Commissioner of Central Excise, Meerut, UP***[1], the Apex Court has held that a clarificatory notification would take effect retrospectively, since such a notification merely clarifies the position and makes explicit what was implicit. Applying this ruling of the Apex Court the only substantial question of law framed in this appeal is required to be answered against the appellant and in favour of the Revenue.

4. Mr. Faldessai, learned Counsel for the appellant, however, points out that the substantial question of law as framed also entitles the appellants to argue on the effect of the absence of the words "*as such*" in the proviso to sub Rule 5 of Rule 3 of the Cenvat Credit Rules, 2004. He submits that in the present case the

1 2005(3)SCC73

capital goods were not exported by the appellant but were merely taken out from their unit from Goa to their unit in Himachal Pradesh. He submits that this distinguishing feature was not noticed by the Tribunal and therefore, the impugned judgment and order made by the Tribunal warrants interference.

5. According to us, the record is quite clear that the capital goods were removed or were cleared from the appellant's unit in Goa. In fact, in paragraph 4 of the impugned judgment and order, the Tribunal has recorded that the appellants are not disputing the fact that the words "*as such*", would include the used capital goods also and therefore, the credit is required to be reversed on the clearance of such capital goods. The only dispute raised by the appellant was regards the quantum of credit required to be reversed. It was the contention of the appellant that since the capital goods were used, the entire credit was not required to be reversed.

6. According to us, the aforesaid issue stands answered against the appellants by the Full Bench decision in case of ***Cummins India Limited vs Commissioner Of Central Excise***[2]. Besides, we note that in the case of ***Union of India through Maritime Commissioner of Central Excise v/s. Sterlite Industries (I) Ltd. &***

2 2007 (219) ELT 911

Anr.[3], a similar contention, this time raised on behalf of the Revenue, was negatived by the Division Bench of this Court by observing the following:

> *"7. The last contention of the revenue is that since the imported capital goods has been used by the assessee for several years, it cannotbe said that the capital goods are 'removed as such' as provided under Rule 3(5) of 2004 Rules. There is some dispute as to whether the capital goods imported by the assessee were put to use before they were exported. Assuming that the said capital goods were used by the assessee before export, it would still be export of the capital goods imported by the assessee. In other words, the duty paid capital goods when exported as capital goods even after put to use for some time, Rule 3(5) of 2004 Rules would be applicable, because in such a case the capital goods even after put to use for some time continue to be capital goods.*
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> *8. The expression "removed as such" in rule 3(5) of the CENVAT Credit Rules, 2004 simply means that when inputs or capital goods are removed as inputs or capital goods as such, the assessee shall pay an amount equal to the credit availed in respect of such inputs or capital goods. In other words, inputs / capital goods on the date of removal must be in the same form as they were on the date on which they were brought into the factory. Normal wear and tear of the inputs / capital goods does not make them different from the original inputs / capital goods. Moreover, it is not the case of the revenue that on account of the user, the character of the capital goods has changed. Therefore, where duty paid inputs / capital goods brought into the factory are subsequently cleared for export, then Rule 3(5) of 2004 Rules would apply. Hence, the Joint Secretary to the Government of India was justified in holding that user of the capital goods before export does not in any way affect the duty liability on export of such capital goods and consequently does not affect the right of the assessee to claim rebate of duty paid on export of such capital goods."*

3 2017(354) ELT 87

7. According to us, the aforesaid observations in *Sterlite Industries (I) Ltd.*(supra) afford a complete answer to the contention now raised by Mr. Faldessai, learned Counsel on behalf of the appellant.

8. Accordingly, we hold that the substantial question of law is required to be answered against the appellant and in favour of the Revenue. By doing so, we hereby dismiss this appeal.

9. In the peculiar facts and circumstances of the present case, there shall be no order as to costs.

NUTAN D. SARDESSAI, J. **M. S. SONAK, J.**

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