आयुक्त (अपील) का कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
07926305065- टेलेफैक्स07926305136

DIN: 20230864SW0000421649

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/CEXP/152/2023-APPEAL /4697

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-002-APP-71/2023-24
दिनाँक Date : 18-08-2023 जारी करने की तारीख Date of Issue 21.08.2023

आयुक्त (अपील) द्वारा पारित
Passed by Shri Shiv Pratap Singh, Commissioner (Appeals)

ग Arising out of Order-In-Original No. 39/AC/Dem/NA/2022-23 दिनाँक: 13.01.2023 , issued by The Assistant Commissioner, CGST, Division-V, Ahmedabad North

घ अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

M/s. Shakti Polyweave Pvt. Ltd. Plot No. 401/4&5, GIDC, Dholka, Ahmedabad-382225

2. Respondent
The Assistant Commissioner, CGST, Division-V,Ahmedabad North 2nd Floor, Shahajanad Arcade, Memnagar,Ahmedabad - 380052

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत् नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद –380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(7) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER IN APPEAL

M/s. Shakti Polyweave Pvt Ltd., Plot No.401/4&5, GIDC, Dholka, Ahmedabad-382225 (hereinafter referred to as *'the Appellant'*) have filed the present appeal against the Order-in-Original No. 39/AC/Dem/NA/2022-23, dated 13.01.2023, (in short *'impugned order'*) passed by the Assistant Commissioner, Central GST, Division-V, Ahmedabad North (hereinafter referred to as *'the adjudicating authority'*). They were holding Central Excise Registration No.AACCS1107MXM001.

2. The facts of the case in brief are that the Appellant are engaged in the manufacture of PP/HDPE Woven Fabrics and Sacks (Laminated & Un-laminated) falling under Chapter 39 of CETA, 1985 and were availing the benefit of Cenvat facility. During the course of audit it was found that the said appellant had sold capital goods which were installed and used for production of PP woven fabrics by the appellant and thereafter the same were removed and sold by the appellant vide Miscellaneous invoices without payment of duty to Shri Ambica Polymers P. Ltd., Kheda and M/s. Texprosel, Narol, Ahmedabad. The documents also revealed that one of the buyers Shri Ambica Polymers P. Ltd. purchased the said Capital Goods as machinery. It, therefore, appeared that the appellant cleared the capital goods as such, whether new or used, the Cenvat credit taken shall have to be reversed. In terms of CBEC Circular No. 643/34/ 2002-CX. dated 1.7.2002 and Customs Circular No. 495/16/93-Cus VI dated 26.05.1993, the term "as such" includes used capital goods also. Statement of Shri K. L. Sharma, Authorized Person, of the appellant was recorded under Section 14 of the CEA, 1944 on 24.07.2007, wherein he stated that the capital goods were cleared without payment of duty on the basis of the judgment of Hon'ble CESTAT passed in the case of Madura Coats Pvt. Ltd. 2005 (190) ELT 450 T. However, the above judgment was challenged by the department by filing a Tax Appeal before Hon'ble High Court of Gujarat and the same was pending.

2.1 A Show Cause Notices (SCN) bearing F. No.V.39/15-09/Dem/08 dated 3.10.2008 was therefore issued to the appellant proposing recovery of Central Excise duty of Rs. 14,23,546/- along with interest, under Section 11A and Section 11AB of the CEA, 1944. Imposition of penalty under Section 11AC on the appellant firm and personal penalty on Shri K.L.Sharma, Authorized Person under Rule 26 of the CER, 2002 was also proposed.

3. The SCN was adjudicated vide the impugned order wherein the Central Excise duty demand of Rs.12,12,339/- was confirmed alongwith interest. Penalty of Rs.12,12,339/- was imposed under Section 11AC. However, considering the death of Shri K.L.Sharma personal penalty on him was dropped.

4. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant have preferred the present appeal, on the grounds elaborated below:-

- The Adjudicating Authority has not considered the arguments advanced by the appellant that at the material time, there were myriads of decisions given by various Benches of the Hon' ble Tribunal including the decision of Madura Coats reported in 2005 (190) ELT 450T conclusively holding that capital goods when they are cleared after being used cannot be called as cleared "as such" and therefore, there was no requirement of payment of duty at the time of clearance

of used capital after using them. Thus, the Adjudicating Authority has completely ignored the fact that the law in this regard during the relevant period of time had been settled by the various Benches of Hon'ble Tribunal.

- Even when such decision was binding on the department the matter was apparently transferred to the call book, as is evident from the impugned order. It is pertinent to note that when the concept of call book has been struck down by the Hon'ble Gujarat High Court, the department was bound to decide the case in view of the decision which was holding the field, at the time when the case was adjudicated by the Adjudicating Authority. Hence, the impugned order being contrary to the judgment of Hon'ble High Court of Gujarat in case of M/s. Siddhi Vinayak Syntex Pvt. Ltd. is liable to be set aside in the interest of justice.

- The Adjudicating Authority has completely erred in confirming the demand of Rs.12,12,339/- while relying upon the decision of Modernova Plastics Pvt. Ltd. vs. CCE reported in 2008 (232) Ell 29. The Hon'ble Tribunal in the said case held that the scope and ambit of the expression "as such" 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. In comparison, the Rule 3(5) refers to the situation capital goods are cleared as such. That being the case, 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. The expression "as such" appearing in Rule 3(5) of cenvat credit rules as stood at the relevant time was clearly interpreted by the Hon' ble Tribunal in end number of cases like Madura Coats 2005 (70) RIT 730, Salona Cotspin Ltd. 2006 (201) ELT 592, Garden Plast Pvt. Limited 2009 (236) ELT 372, Cummins India Ltd. reported in 2007 (219) Eli 911 maintained by Hon'ble High Court of Bombay reported in 2009 (234) E.L.T. A 120 (Bom.), Commissioner v. Garden Plast Pvt. Ltd. 2009 (233) E.L.T. 468 (T), Commissioner v. L.G. Balakrishnan and Bros. 2009 (238) E.L.T. 659 (Tribunal). Thus, the Larger Bench of the Hon' ble Tribunal in case of Modernova Plastics Pvt. Ltd. vs. CCE reported in 2008 (232) ELT 29 has not decided the issue of interpretation of the words "as such" in Rule 3(5) of the Cenvat Credit Rules and the said case was pertaining to the interpretation of the words "as such" appearing in Rule 4(5) (a) of CCR which is not under consideration in the present case. Therefore, the impugned order passed by the Adjudicating Authority cannot be sustained and is liable to be set aside.

- The Adjudicating Authority has committed a grave error in relying upon the proviso of Rule 3(5) of the rules thereby quantifying the cenvat credit to be reversed by the appellant by taking into account 2.5% deduction each quarter. The said proviso was added by way of amendment vide Notification No. 39/2007-CE(NT) dated 13.11.2007 i.e. after the period when the capital goods were cleared by the appellant after using them. Thus, at the material time, there was no such proviso in Rule 3(5) of the Rules, 2004 and therefore, the quantification of cenvat

credit to be reversed by the appellant could not have been done by the Adjudicating Authority by applying such proviso. The Adjudicating Authority has relied upon the judgment of Betts India Pvt. Limited reported in 2022 (381) ELT 749 (SC) to hold that that the said amendment was applicable retrospectively. The said judgment rendered by the Hon'ble Supreme Court is not applicable in the facts of the present case because the Hon'ble Supreme Court has not dealt with the issue of interpretation of words "as such" as to whether it includes the capital goods cleared after being put to use.

- The calculation of the duty on depreciated value was wrongly calculated by the Adjudicating Authority. The depreciation in the present case ought to have been done on straight line method (SLM), but such standard method was not followed in the present case. Therefore, the calculation of duty is done on the basis of wrong computation by not following straight line method and the impugned order is therefore, unsustainable in law and deserves to be set aside in the interest of justice.

- The details and figures have been fully recorded in the appellant's Books of Accounts and such financial records maintained by the appellant in the normal course of business, and therefore there is no justification in holding that there was suppression of facts by the appellant. There was no suppression of facts for which extended period of limitation could have been invoked by the present case. Thus, it is a totally settled legal position that extended period of limitation by invoking proviso to Section 73 for demanding duty or tax beyond the normal period of limitation would be justified only when the assessee knew about the duty/tax liability.

- In the facts of the present case where no suggestion or allegation of any malafide intention to evade payment of duty is made out against the appellant, there is no justification in the imposition of penalty in law as well as in facts. The matter of penalty is governed by the principles as laid down by the Hon'ble Supreme Court in the land mark case of Messrs Hindustan Steel Limited reported in 1978 ELT (J159). The action of imposing a harsh and disproportionate penalty of Rs.12,12,339/-is therefore, totally illegal, unreasonable and arbitrary

- The action of ordering recovery of interest Section 11AA of the Act is also without any authority in law as there is no short levy or short payment or non-levy or non-payment of any excise duty.

5. Personal hearing in the matter was held on 28.07.2023. Shri Nitesh Jain, Chartered Accountant, appeared on behalf of the appellant. He reiterated the submissions made in the appeal memorandum. He submitted that the matter pertains to F.Y. 2005 for which the SCN was issued in October, 2008 and the same has been adjudicated vide impugned order dated 13.01.2023 i.e. after 15 years. He submitted that such gross delay has vitiated the order. In this regard, he relies upon the Supreme Court order in the case of ATA Freight Line Pvt. Ltd. dated 10.02.2023 and Styrolution ABS Pvt. Ltd of Gujarat High Court. In the present case, the department had kept the show cause notice in the call book on the grounds that the tribunal order in favour of the Appellant was challenged

by the department before Madras High Court. The departmental appeal has subsequently been withdrawn on monetary grounds. Therefore, the issue stood decided in favour of the appellant. However, the department has decided it against the appellant after delay of 15 years, without any justification, since the system of call book has no legal validity, as held by Gujarat High Court in the case of Styrolution ABS India Pvt. Ltd. Apart from this on merits also department has no case against the appliance since, the appellant had sold the second hand machinery after use, whereas the requirement of reversal of credit was applicable under the rules only to the cases, where the goods are sold or transferred as such without any use. In view of the above, he requested to set-aside the impugned orders and allow the appeal.

6. I have carefully gone through the facts of the case, the impugned order passed by the adjudicating authority, submissions made by the appellant in the appeal memorandum as well as those made during personal hearing. The issue to be decided in the present case is as to whether the central excise duty demand of Rs.12,12,339/- alongwith interest and penalties, confirmed in the impugned order passed by the adjudicating authority, in the facts and circumstances of the case, is legal and proper or otherwise.

7. From the facts of the case, it is observed that the appellant has cleared used capital goods like *"Second hand production line, second hand 125 KAVA D.G. Set with accessories, Second hand loom with accessories, second hand imported needle punch line with accessories"* without payment of duty in light of the judgment of Hon'ble CESTAT passed in the case of Madura Coats Pvt. Ltd.-2005 (190) ELT 450, wherein at para-5 of the judgment it was held that the word *'as such'* used in Rule 3(5) of CCR, 2004 will not cover the used capital goods. However, Revenue have claimed that in terms of Rule 3(5) of the CCR, 2002, the appellant are required to pay an amount equal to the duty credit availed in respect of such inputs or capital goods which are removed as such. It is also alleged that the goods cleared shall be removed under an invoice referred to Rule 9 but the same was not followed. Hence, a notice was served to the appellant. This SCN was transferred to call book in terms of Board's Circular No. 719/35/2003-CX as the judgment of Hon'ble CESTAT passed in the case of Madura Coats Pvt. Ltd was challenged by department by way of filing a tax appeal. However, the tax appeal was dismissed as withdrawn and therefore the notice was retrieved from call book and decided by the adjudicating authority. The adjudicating authority in terms of Rule 3(5) of the CCR, 2004, calculated the duty equal to the CENVAT credit taken on the said capital goods reduced by 2.5 percent for each quarter of a year or part thereof from the date of taking the Cenvat credit. The adjudicating authority relied on the decision passed in the case of Modernova Plastics Pvt. Ltd – 2008 (232) ELT 29 and held that second hand capital goods on which cenvat credit was availed when cleared after being used for one or two years, requires reversal of credit. The central excise duty was arrived at Rs.12,12,339/- which was ordered to be recovered alongwith interest and penalty.

7.1 The appellant however are contesting that reliance on the decision of Modernova Plastics Pvt. Ltd. is mis-placed as there the Larger Bench was dealing with the expression "as such" used in Rule 4(5)(a). Rule 3(5) refers to the situation where capital goods are cleared as such. They placed reliance on various decisions like Salona Cotspin Ltd. 2006 (201) ELT 592, Garden Plast Pvt. Limited 2009 (236) ELT 372, Cummins India Ltd. -2007

(219) Eli 911, Garden Plast Pvt. Ltd.-2009 (233) E.L.T. 468 (T), L.G. Balakrishnan-2009 (238) E.L.T. 659 (Tribunal).

7.2 To understand the issue, the relevant provisions of Rule 3(5) of the CCR, 2004 is reproduced below:-

RULE 3. CENVAT credit

(5) 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 :

"Provided also that if the capital goods, on which CENVAT Credit has been taken, are removed after being used, the manufacturer or provider of output service shall pay an amount equal to the CENVAT Credit taken on the said capital goods reduced by 2.5 per cent for each quarter of a year or part thereof from the date of taking the Cenvat Credit;".

[the above proviso was introduced vide Notification No. 39/2007-CE(NT) dated 13.11.2007]

7.3 The adjudicating authority has relied on the decision of Hon'ble Larger Bench of the Tribunal in the case of *Modernova Plastyles Pvt. Ltd.* v. *CCE, Raigad* - 2008 (232) E.L.T. 29 (Tri.-LB), wherein the term 'as such' has been clarified by the wherein it was held that;

"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 "as 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) E.L.T. 217, the Tribunal has brought out how, in Rule 57S(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.e.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 "as such" is interpreted to mean new or unused capital goods, then the question of testing, repairing or reconditioning then 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) E.L.T. 365 (S.C.) and Rajesh Kumar Sharma v. UOI - 2007 (209) E.L.T. 3 (S.C.)."

I find that the above decision is not applicable to the present case as it deals with the provisions of Rule 4(5)(a) of the CCR,2004 and is not directly applicable to the interpretation of Rule 3(5).

7.4 I find that Hon'ble CESTAT, PRINCIPAL BENCH, NEW DELHI in the case of Shree Rajasthan Syntex Ltd - 2012 (282) E.L.T. 550 (Tri. - Del.) held that

"7. We have considered the rival submission and perused the record. The dispute in present appeal relates to the issue as to the appellant were required to pay duty at the assessable value of the capital goods sold by them in the market after a user of about ten years or they were required to reverse the Cenvat credit availed by them at the time of receipt of capital goods. The adjudicating authority have held that since the capital goods have been cleared by the appellant after a long user he has rightly paid excise duty on the assessable value of the capital goods at the time of sale. The Commissioner (Appeals) disagreed with the finding of the adjudicating authority and concluded that the appellant were required to pay the excise duty equivalent to the Cenvat credit availed in view of Rule 3(5) of Cenvat Credit Rules.

8. It is undisputed that the capital goods i.e. D.G. Sets, Water Heat Recovery Equipment were purchased by the appellant in the year 1996 and 1997 and those were sold in the market on assessable value after about nine years on payment of excise duty on transaction value. Ld. AR of Revenue has tried to justify the impugned order with the support of Rule 3(4)(c) and Rule 3(5) of Cenvat Credit Rules which are reproduced thus :-

(4) The CENVAT credit may be utilized for payment of -

(c) an amount equal to the CENVAT credit taken on capital goods if such capital goods are removed as such; or

(5) 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 :

Provided that such payment shall not be required to be made where any inputs are removed outside the premises of the provider of output service for providing the output service :

Provided further that such payment shall not be required to be made when any capital goods are removed outside the premises of the provider of output service for providing the output service and the capital goods are brought back to the premises within 180 days, or such extended period not exceeding 180 days as may be permitted by the jurisdictional Deputy Commissioner of Central Excise, or Assistant Commissioner of Central Excise, as the case may be, of their removal.

7. On bare reading of the aforesaid provision it would be seen that these provisions are applicable only when the capital goods on which Cenvat credit availed by the assessee are "removed as such". In our considered view the meaning of the expression "removed as such" would be that the capital goods after availing the Cenvat credit are removed from the premises of the assessee without putting them to use or putting them for use for a very small duration with a view to defeat the interest of revenue. In the instant case, admittedly, the capital goods i.e. D.G. Sets and Water Heat Recovery Equipment were disposed of in the market after putting them to use for a period of 9-10 years. Thus, it cannot be said that dispute of abovesaid capital goods on transaction value would be covered under the expression "removed as such" so as to attract the reversal of Cenvat credit availed under Rule 3(5)(a) or Rule 3(5) of Cenvat Credit Rules. Similar issue came up before the Punjab & Haryana High Court in the matter of Raghav Alloys Ltd. (supra) wherein Punjab & Haryana High Court after considering the judgment of Larger Bench in Modernova Plastyles Pvt. Ltd. (supra)

disagreeing with the view taken by the Larger Bench dismissed the appeal of the department with the following observations :-

"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 inserviceable 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 asssessee 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 (Tribunal.-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."

8. The ratio of the aforesaid judgment squarely applies to the fact of the case, therefore, we find it difficult to sustain the impugned order passed by the Commissioner (Appeals). Accordingly, the appeal is accepted and impugned order of Commissioner (Appeals) is set aside."

8. Coming to the contention of the appellant that the proviso of Rule 3(5) was added by way of amendment vide Notification No. 39/2007-CE (NT) dated 13.11.2007 i.e. after the period when the capital goods were cleared by the appellant after using them. At the material time as there was no such proviso in Rule 3(5) of the Rules, 2004; therefore, the quantification of cenvat credit to be reversed by the appellant could not have been done by the Adjudicating Authority by applying such proviso. The Adjudicating Authority has relied upon the judgment of **Betts India Pvt. Limited** reported in 2022 (381) ELT 749 (SC) to hold that that the said amendment was applicable retrospectively. The said judgment rendered by the Hon'ble Supreme Court they claim is not applicable in the facts of the present case because the Hon'ble Supreme Court therein held that;

"7. In the CENVAT Credit Rules, 2002, the proviso to sub-rule (5) of Rule 3 provided thus:

"Provided also that if the capital goods, on which CENVAT Credit has been taken, are removed after being used, the manufacturer or provider of output service shall pay an

amount equal to the CENVAT Credit taken on the said capital goods reduced by 2.5. per cent for each quarter of a year or part thereof from the date of taking the Cenvat Credit."

8. However, when the CENVAT Credit Rules were modified in 2004, the said proviso was not there in the said Rules. Subsequently by an amendment carried in 2007, the said proviso has been added.

9. The said proviso to sub-rule (5) of Rule 3 of 2004 Rules, is in tune with Rule 57-S(2)(b) of the Central Excise Rules, 1944 (in short "1944 Rules"), which provide that

"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."

10. Admittedly, the appellant had used the goods in question in its factory at Goa from 1999 to 2004. As such, the appellant was entitled to the benefit of Rule 57-S(2)(b) of 1944 Rules.

11. It appears that though the said proviso to sub-rule (5) of Rule 3 existed in the 2002 Rules, by a legislature slip, it was not included in the 2004 Rules. As such, to clarify the position, an amendment was carried out in 2007 to bring it in tune with Rule 57-S(2)(b) of the 1944 Rules.

12. Having held that the amendment was clarificatory, in our view, the High Court erred in answering the question against the appellant.

13. Having held the 2007 amendment to be clarificatory, the effect would be that the said proviso existed in the statute book from 2004 itself. This being the position, the appellant was entitled to take benefit of the said proviso and make an adjustment as per the said proviso.

14. We accordingly allow this appeal and quash and set aside the impugned judgment and order of the High Court. The question of law as framed by the High Court is held in favour of the appellant. The demand issued by the revenue is quashed and set aside."

I find that in the above judgment, Hon'ble Apex Court has held that the High Court has erred in answering the question of law by holding that the amendment in Rule 3(5) was clarificatory in nature.

9. In light of above judgments, I find that the demand of CENVAT credit on the clearance of used capital goods on the basis of Rule 3(5) of the CCR,2004 and the calculation method adopted by the adjudicating authority by applying the proviso to said rule is not legally sustainable. Hence, the appellant is not required to reverse the CENVAT Credit taken on the said capital goods which were subsequently cleared after being put to used as clearance used capital goods cannot be considered as clearance as such. The above case laws are squarely applicable to the present appeal considering the fact that the clearance was neither as such nor the used capital goods were cleared prior to introduction of proviso to Rule 3(5).

10. In view of the above discussion and findings, I find that the demand of Rs.12,12,339/- is not sustainable on merits. When the demand is not sustainable there is no question of interest and penalty.

11. In view of the above discussion, I set-aside the impugned order confirming the demand of Rs.12,12,339/- alongwith interest and penalties.

अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed off in above terms.

(शिव प्रताप सिंह)
आयुक्त (अपील्स)

Date: .08.2023

Attested
(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad

By RPAD/SPEED POST

To,
M/s. Shakti Polyweave Pvt Ltd.,
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Ahmedabad-382225

- Appellant

The Assistant Commissioner,
CGST, Division-V,
Ahmedabad North
Ahmedabad

- Respondent

Copy to:

1. The Principal Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North. (For uploading the OIA)
4. Guard File.