CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.1474 of 2012

(Arising out of Order-in-Original No.MP(Dem.-83/2010) 05 of 2012 dated 29.02.2012 passed by Commissioner Central Excise & Service Tax, Allahabad)

M/s Dalla Cement Factory .....Appellant
(Mr. V. K. Pandey C/o M/s. Dalla Cement Factory
Dalla, Sonebhadra)

VERSUS

Commissioner of Central Excise, Allahabad ....Respondent

(38, M.G. Marg, Civil Lines, Allahabad)

APPEARANCE:

Shri Atul Gupta, Advocate & Shri Prakhar Shukla, Advocate for the Appellant
Shri Manish Raj, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.-70048/2023

DATE OF HEARING : 23 August, 2023
DATE OF DECISION : 23 August, 2023

P.K. CHOUDHARY:

The present appeal has been filed by the Appellant against the impugned Order-in-Original passed by the Commissioner of Central Excise, Allahabad (Adjudicating Authority) confirming the proposal, made vide the present Show Cause Notice, for denial of credit availed on steel items used in the manufacture of support structures for capital goods and order for recovery thereof. Vide the impugned Order, the Ld. Adjudicating Authority has also ordered for recovery of interest and imposition of equivalent penalty.

2. The facts of the case in brief are that the Appellant, subsequent to the purchase of the present factory, had procured

several inputs of iron & steel such as angles, channels, plates, semi-rolled plates, chequered coils & joists, MS beams, MS Flats, HR sheets, MS bars, MS rods, etc. The procurement and utilization of the said goods within the factory of the Appellant is not in dispute and the said goods were duly accounted for in the books of the Appellant. The said items were utilized by the Appellant for installation and fabrication of various capital goods and structural support thereof. The total quantity procured was 37,718.782 MT and out of which only on 16,908.437 MT CENVAT Credit was availed and on remaining quantity of 20,810.245 MT credit was not taken as the same were used in civil structure. The detail of the credit taken on items was also furnished with the ER-1 returns filed regularly. These technological structures were intended to provide support to the various capital goods installed in the factory, to hold them firmly and were essential for functioning of these machineries, thus, becoming integral parts of the capital goods. The Appellant got the said capital goods and structures fabricated through contractors using the aforesaid steel items for fabrication of support structures like Lime Stone crusher, Pere-heater, Raw mill, clinker, etc. The Appellant was availing the benefit of credit on the said items obtained by it on grounds of their utilization in the manner provided hereinabove.

The show cause notice proposed denial of CENVAT Credit based on the Explanation 2 as amended vide Notification No.16/2009-CE (NT), dated 7-7-2009 by inserting the words "but shall not include cement, angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated bar (TMT) and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods" with effect from the date of publication of the Notification. The whole of the Credit taken pertains to the period prior to the above amendment as the Credit taken in March, 2010 was in respect of the inputs received in April, 2008.

3. The learned Adjudicating Authority vide the impugned Order-in-Original has allowed the credits attributable to

structures under pollution control equipment, structures under storage tanks & structure under component/accessories of capital goods. However, he has denied the credit to the Appellant on supporting structures for different capital goods and machineries. The said denial of credit against the inputs utilized in the fabrication of support structure is on the grounds that the credit on inputs utilized for construction of support structures for plant and machinery is not admissible in terms of exclusion clause in Explanation 2 to Rule 2(k) of Cenvat Credit Rules. The Ld. Adjudicating Authority justified the confirmation of demand on the basis of the decision of larger bench of this Tribunal in the case of Vandana Global reported at 2010 (253) ELT 440 (Tri-LB) in terms of the Explanation 2 to Rule 2(k) of Cenvat Credit Rules which, as per the Ld. Adjudicating Authority, will have retrospective operation owing to it being clarificatory in nature.

Being aggrieved, the Appellant has filed the present appeal before this Tribunal.

4. Learned Advocate appearing on behalf of the Appellant submitted that the Department in the present case has invoked the extended period of limitation while issuing the present show cause notice on the ground of suppression. He further submits that the issue involved in the present case relates to interpretation of various provisions and there were conflicting decision on the issue in various cases, necessitating reference to Larger Bench in the case of Vandana Global, hence the extended period of limitation is not invokable. He further submitted that in such legal complex situation the Appellant cannot be fastened with the allegation in account of mala fide intention. Learned Authorized Representative for the Department justified the impugned order and submitted that the appeal filed by the Appellant, being devoid of any merits, may be dismissed.

5. Heard both sides and perused the appeal records.

6. We find that the period involved in the present dispute pertains to 2005-06 to August 2008. At that relevant time, Explanation 2 to Rule 2(k) of the CENVAT Credit Rules, 2004 provided that inputs include goods used in the manufacture of

capital goods, which are further used in the factory of manufacturer. The aforesaid Rule 2(k) was amended vide the Notification No.16/2009-CE(NT) w.e.f. 07.07.2009. Explanation 2 to Rule 2(k) provides that inputs include goods used in the manufacture of capital goods which are further used in the factory of manufacturer, but shall not include cement, angles, channels, CTD bar or TMT bar and other items used for construction of company, shed, building or laying of foundation or making of structures for support of capital goods.

7. Learned Advocate for the Appellant has submitted that a Larger Bench of the Tribunal in Vandana Global Ltd. v. Commissioner of Central Excise Raipur [2010 (253) E.L.T. 440], has held that the amendment introduced vide the notification dated 7-7-2009 was a clarificatory amendment and was applicable retrospectively. His submission is that it was the amended Explanation 2 to Rule 2(k) as also the interpretation rendered by the Tribunal in Vandana Global (supra) that was applied by the Adjudicating authority to hold that the Appellant is not entitled to claim CENVAT credit on MS Plates, MS Channels, H.R. Coils, MS Angles, etc., as they are not inputs.

8. It has been contended by the Ld.Advocate for the Appellant that Hon’ble Gujarat High Court in Mundra Ports & Special Economic Zone Ltd. v. C.C.E. & Customs – [2015 (39) S.T.R. 726 (Guj.)], and Hon’ble Madras High Court in India Cement Ltd. v. CESTAT, Chennai – [2015 (321) E.L.T. 209 (Mad.)] and Thiru Arooran Sugars v. CESTAT, Chennai – [2017 (355) E.L.T. 373 (Mad.)] have held the judgment of Vandana Global (supra) not a good law. Therefore, the reasoning of the Adjudicating authority, which imposed the demand along with interest and also penalty on the Appellant, by relying upon the amendment in

Explanation 2 to Rule 2(k) and also Vandana Global (supra) is clearly unsustainable.

9. Learned Advocate for the Appellant has further submitted that Circular dated 2-4-2012 has been issued in the context of the amended definition of inputs under the Cenvat Credit Rules,

2004. Rule 2(k) was substituted by the Notification No.3/2011-C.E. (N.T.), dated 1-3-2011 and a specific exclusion was provided for goods used for laying of foundation or making of structures for support of capital goods. It was in the context of the amended definition (w.e.f. 1-3-2011) of inputs in Rule 2(k), the Circular dated 2-4-2012 was issued. It would not be appropriate to rely upon the Circular dated 2-4-2012 to interpret the scope of inputs as it stood during the period 2005-06 to August, 2008, when the statutory framework was entirely different.

10. To strengthen his submission, learned Advocate for the Appellant has also relied upon Commissioner of C.Ex., Jaipur v. Rajasthan Spinning & Weaving Mills Ltd. – [2010 (255) E.L.T. 481 (S.C.)], Commissioner of C.Ex. Tiruchirapalli v. India Cements Ltd. – [2012 (285) E.L.T. 341 (Mad.)], Mundra Ports & Special Economic Zone Ltd. v. C.C.E. & Cus. –[2015 (39) S.T.R. 726 (Guj.)], and Thiru Arooran Sugars v. CESTAT, Chennai – [2017 (355) E.L.T. 373 (Mad.)].

11. In order to consider rival submissions, first of all we would like to refer Rule 2(k) of CENVAT Credit Rules, 2004 which defines "input". This Rule as framed initially in 2004, read as under:-

"2(k) "input" means all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not, and includes lubricating oils, greases, cutting oils coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used for manufacture of final products or for any other purpose, within the factory of production.

Explanation 1. - The high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

Explanation 2. - Inputs include goods used in the manufacture of capital goods, which are further used in the factory of the manufacturer."

(emphasis supplied)

12. Definition of "input" under Rule 2(k) was amended vide notification dated 7-7-2009. Amended provision inserted following clause in Explanation 2 by Cenvat Credit (Amendment) Rules, 2009 with effect from 7-7-2009:-

> "but shall not include cement, angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated bar (TMT) and other items used for construction of factory shed, in building or laying of foundation or making of structures for support of capital goods"

13. Consequently, w.e.f. 7-7-2009, Explanation 2 to Rule 2(k), as a whole, reads as under:-

> *"Explanation 2. - 'Input' include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer but shall not include cement, angles, channels, Centrally Wasted Deform bar (CTD) or Thermo Mechanically Treated bar (TMT) and other items used for construction of factory, shed, building or laying of foundation or making of structures for support of capital goods."*

(emphasis supplied)

14. It may be noted that the Rule 2(k) was further substituted by Notification No.3/2011-C.E. (N.T.), dated 1-3-2011 and a specific exclusion was provided for goods used for laying of foundation or making of structures for support of capital goods. Rule 2(k) as substituted w.e.f. 1-3-2011 reads as under:-

"2(k) "input" means, -

> *(a) all goods used in the factory by the manufacturer of the final product; or*
>
> *(b) any goods including accessories, cleared along with the final product, the value of which is included in the value of*

the final product and goods used for providing free warranty for final products; or

(c) all goods used for generation of electricity or steam (or pumping of water) for captive use; or

(d) all goods used for providing any (output service); or

(e) all capital goods which have a value up to ten thousand rupees per piece, but excludes -

(A) light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol;

(B) any goods used for-

(a) construction or execution of works contract of a building or a civil structure or a part thereof; or

(b) laying of foundation or making of structures for support of capital goods, except for the provision of service portion in the execution of a works contract or construction service as listed under clause (b) of Section 66E of the Act;

(C) capital goods, except when,-

(i) used as parts or components in the manufacture of a final product; or

(ii) the value of such capital goods is up to ten thousand rupees per piece;

(D) motor vehicles;

(E) any goods, such as food items, goods used in a guesthouse, residential colony, club or a recreation facility and clinical establishment, when such goods are used primarily for personal use or consumption of any employee; and

(F) any goods which have no relationship whatsoever with the manufacture of a final product.

Explanation. - For the purpose of this clause, "free warranty" means a warranty provided by the manufacturer, the value of which is included in the piece of the final product and is not charged separately from the customer."

15. From the perusal of the circulars dated 2-4-2012 and 18-5-2012, it comes out that these circulars have been issued in the

changed context of the definition of [Rule] 2(k) of Cenvat Credit Rules, 2004 and both circulars have no concern for the period in issue. Thus, we find that the reliance placed by the Revenue in this regard has no substance.

16. The Madras High Court in India Cement (supra) noticed Vandana Global (supra) but relied upon the Apex Court judgment in Rajasthan Spinning & Weaving Mills Ltd. (supra), wherein the Apex Court has considered an issue of steel plates and MS channels used in the fabrication of chimney for diesel generating set and after considering it, the Apex Court allowed the Cenvat credit on MS Rod, sheets, MS Channel, MS Plate, etc., used for fabrication of structures to support various machines/capital goods.

17. In Thiru Arooran Sugars (supra), a Division Bench of the Madras High Court specifically considered as to whether MS structural, (which support plant and machinery), cement and steel (which are used in erecting foundations to hold plant and machinery) are integral part of capital goods eligible for Cenvat credit under the Cenvat Credit Rules, 2004 prior to the amendment of Explanation 2 to Rule 2(k) by notification dated 7-7-2009. The Madras High Court has held that irrespective of whether 'user test' is test applied, or the test that they are an integral part of the capital goods is applied, all such items fell within the scope and ambit of both Rule 2(a)(A) and 2(k) and, therefore, Cenvat credit was to be allowed on such goods.

18. Further, we find that the Hon'ble High Court of Allahabad also accepted the view that the decision in Vadana Global (supra) was not a good law. [CCE Lucknow vs. Mankapur Chini Mills 2019 (367) ELT. 889 (All.)]. The Jurisdictional High Court held as follows:-

> *"32 On going through the record, we find that the Revenue has relied upon the Larger Bench decision of the Tribunal in the case of Vandana Global (supra), wherein it was held that the Explanation added to the definition of capital goods w.e.f. 7-7-2009 has to be held as explanatory and thus retrospective in nature. The said decision of the*

Tribunal was considered by the Hon'ble Gujarat High Court in the case of Mundra Ports & Special Economic Zone Ltd. (supra), wherein the said decision was not approved by the Hon'ble High Court and observed that the amendment made on 7-7-2009 cannot be held to be clarificatory and as such would be applicable only prospectively.

*33**.** The Madras High Court in India Cement (supra) noticed Vandana Global (supra) but relied upon the Apex Court judgment in Rajasthan Spinning & Weaving Mills Ltd. (supra), wherein the Apex Court has considered an issue of steel plates and MS channels used in the fabrication of chimney for diesel generating set and after considering it, the Apex Court allowed the Cenvet credit on MS Rod, sheets, MS Channel, MS Plate, etc., used for fabrication of structures to support various machines/capital goods.*

*34**.** In Thiru Arooran Sugars (supra), a Division Bench of the Madras High Court specifically considered as to whether MS structural, (which support plant and machinery), cement and steel (which are used in erecting foundations to hold plant and machinery) are integral part of capital goods eligible for Cenvat credit under the Cenvat Credit Rules, 2004 prior to the amendment of Explanation 2 to Rule 2(k) by notification dated 7-7-2009. The Madras High Court has held that irrespective or whether 'user test' is test applied, or the test that they are in the integral part of the capital goods is applied, all such items fell within the scope and ambit of both Rule 2(a)(A) and 2(k) and, therefore, Cenvat credit was to be allowed on such goods.*

35. In view of above settled position of law, since items used by the respondent-assessee were used as structure to hold the capital goods, hence, it is wrong to say that respondents are not eligible to Cenvat credit. Therefore, in our considered opinion, the Tribunal has rightly allowed the appeal and the reasoning given by the Tribunal cannot *be said to be not cogent or correct appreciation of evidence on record."*

19. We find that the facts of the present case are squarely covered by the above mentioned judgements of the Hon'ble High Courts. In view of the above discussions, the impugned order cannot be sustained and is accordingly set aside. The appeal filed by the Appellant is allowed with consequential benefits, as per law.

(Dictated and pronounced in open court)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS