CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Excise Appeal No. 2565 of 2010

(Arising out of Order-in-Original No. 31/2010 dt. 27/09/2010
passed by Commissioner of Central Excise, Bangalore)

Welcast Steels Limited,
Plot No.15, Phase-I,
Peenya Industrial Area,
Bangalore 560058.

Appellant(s)

VERSUS

Commissioner of Central Excise
Bangalore III Commissionerate,
P.B. No.5400, C.R. Building,
Queens Road,
Bangalore 560 001.

Respondent(s)

AND

Excise Appeal No. 2566 of 2010

(Arising out of Order-in-Original No. 31/2010 dt. 27/09/2010
passed by Commissioner of Central Excise, Bangalore)

Shri P. Rajendra Kumar,
Sr. Manager(Finance)
M/s. Welcast Steels Limited, SY. Plot No.15, Phase-I,
Peenya Industrial Area,
Bangalore 560058..

Appellant(s)

VERSUS

Commissioner of Central Excise
Bangalore III Commissionerate,
P.B. No.5400, C.R. Building,
Queens Road,
Bangalore 560 001.

Respondent(s)

APPEARANCE:

Mr. M.S. Nagaraja, Advocate for the appellants.
Mr. H. Jayathirtha, Superintendent(AR) for the respondent.

CORAM:
HON'BLE Dr. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE Mrs. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20897-20898 / 2023

Date of Hearing: 21/06/2023
Date of Decision: 21/06/2023

Per : DR. D.M.MISRA

These two appeals are filed against the Order-in-Original No. 31/2010 dt. 27/09/2010 passed by Commissioner of Central Excise, Bangalore.

2. Briefly stated the facts of the case are that the appellants are engaged in the manufacture of High Chromium Grinding Media Balls falling under Chapter sub-head 73259100 of Central Excise Tariff Act, 1985. On the basis of information, it was alleged that the appellant had wrongly availed cenvat credit of service tax paid by M/s. Kirloskar Oil Engines Ltd. (KOEL, for short) who generated electricity inside the factory premises of the appellant by installing their DG sets consuming furnace oils and lubricants supplied free of cost by the appellant for generation of electricity. It is also alleged that the appellant had wrongly availed credit of service tax paid on outward freight services (transport services) up to the place of export. Further, it is alleged that on verification of stock during the visit of the officers to the factory,

shortage of 7.801 MTs of Ferro Chrome in input stock was noticed by the visiting Central Excise officers; accordingly credit availed on such quantity alleged to be irregular. On completion of the investigation, show-cause notice was issued on 07/04/2010 demanding wrongly availed cenvat credit of Rs.57,23,900/- with interest being cenvat credit availed on service tax paid by KOEL; credit of Rs.1,63,249/- demanded on outward freight charges and Rs.53,004/- demanded being the cenvat credit wrongly availed on shortage of inputs viz. Ferro Chrome, along with proposal for penalty on the company as well as on the Manager Shri P. Rajendra Kumar. On adjudication, the Commissioner confirmed demands with interest and imposed equivalent penalty on the appellant and personal penalty of Rs.1 lakh on the Manager. Hence, the present appeals.

3.1. At the outset, the learned advocate for the appellant has submitted that the appellant had supplied furnace oil and lubricants through pipeline to KOEL for generation of electricity by using the DG sets installed inside the factory premises of the appellant. The electricity was in turn used by the appellant for manufacture of excisable goods viz. High Chromium Grinding Media Balls. The allegation of the Department is that the activity of generation/ production of electricity by KOEL on job work basis falls outside the purview of 'Business Auxiliary Service' (BAS, for short) as defined under Section 65(19) of the Finance Act, 1994; also it is alleged that Notification No.8/2005-ST dt. 01/03/2005

exempts the said activity from payment of service tax since electricity is exclusively used by appellant in relation to manufacture of High Chromium Grinding Media Balls falling under Chapter 73259100 on which appropriate excise duty is paid. It is his contention that the learned Commissioner while confirming the demand in the impugned order observed that the payment of service tax by KOEL is irregular inasmuch as no service tax is payable for the said activity of generation of electricity which in turn used in the manufacture of High Chromium Grinding Media Balls; thus he confirmed the demand of cenvat credit availed by the appellant. It is his contention that the assessment of service tax by KOEL rests with the jurisdictional service tax authorities and the appellant has no role to examine the correctness of the service tax pad on the said activities but simply availed credit on the amount of service tax paid. Also his contention is that jurisdictional service tax authorities of KOEL has not raised about payment of service tax under the taxable category of BAS by KOEL; therefore reopening the assessment of the tax paid on the service provided at the end of the service receiver, while extending credit of the service paid, is contrary to the principles of law settled by the courts / Tribunal in various judgments. In support, he referred the following judgments.

i. Sarvesh Refractories (P) Ltd. Vs. CC [2007(218) ELT 488 (SC)]
ii. CCE Vs. MDS Switch Gear Ltd. [2008(229) ELT 485 (SC)]
iii. CCE, Goad Vs. Nestle India Ltd. [2012(275) ELT 49 (Bom.)]
iv. Olefine Organics (India) Pvt. Ltd. Vs. CCE, Thane 1 [2014 (299) ELT 91 (Tri. Mum.). Affirmed by Hon’ble High Court

of Bombay. Commissioner Vs. Oleofine Organics (India) Pvt. Ltd. [2015(319) ELT A192 (Bom.)]

v. India Oil Corporation Ltd. Vs. CCE, Guntur [2006(206) ELT 533 (Tri. Bang.)]

vi. CCE, Goa Vs. Courtaulds Packing (I) Ltd. [2007(217) ELT 399 (Tri. Mumbai)]

vii. Balakrishna Industries Ltd. Vs. CCE, Jaipur 1

3.2. Further assailing the impugned order for denying the cenvat credit of the service tax paid on outward freight services in transferring the finished goods to the place of export, the learned advocate submitted that this issue has also been settled in favour of the appellant by the principles laid down by the Hon'ble Supreme Court in the case of CCE &ST Vs. Ultra Tech Cement Ltd. [2018(9) GSTL 337 (SC)] and the judgment of Hon'ble Gujarat High Court in the case of CCE Vs. ADF Foods Ltd. [2021(45) GSTL 265 (Guj.)]. Also he has placed reliance on the CBEC Circular No.999/6/2015-CX dt. 28/02/2015 on the said issue. Regarding the shortage of inputs recorded by the Central Excise officers during their visit to their factory, he has submitted that the Manager though accepted the shortage in the Mahazar, however, later explained while furnishing the statement that certain quantity of inputs are spilled over in the process of shifting of the raw materials within the factory, resulting into the shortage. It is his contention that the shortages are never cleared without payment of duty clandestinely; hence confirmation of the demand of cenvat credit availed on such inputs also not sustainable in law.

4. Learned AR for the Revenue reiterated the findings in the impugned order.

5.1. Heard both sides and perused the records. The issues involved in the present appeals are:- (i) admissibility of cenvat credit of Rs.57,23,900/- of the service tax paid by KOEL under the category of BAS for consumption/use of furnace oil and lubricants for generation of electricity on job work basis, (ii) admissibility of credit of Rs.1,63,249/- on outward transportation of finished goods from the factory to the place of export and (iii) credit of Rs.53,004/- on shortage of 7.801 MTs of inputs viz. Ferro Chrome during stock verification.

5.2. The Revenue's contention is that the payment of service tax by M/s. KOEL under the taxable category of BAS is incorrect inasmuch as the service rendered by KOEL to the appellant does not come under the scope of the said taxable service and also since the electricity generated and used in the manufacture of High Chromium Grinding Media Balls in their factory is exempted from payment of service tax by virtue of Notification No.8/2005-ST dt. 01/03/2005. It is vehemently argued by the learned advocate for the appellant that no proceeding has been initiated by the jurisdictional authorities against KOEL for wrongly classifying the services under the category of BAS and discharge of service tax accordingly. We find force in the said contention. In such circumstances, as held in

series of judgments, the taxability of service tax paid by the input service provider cannot be questioned at the end of service receiver in availing the cenvat credit on the service tax paid on such input services. This issue has been settled by the Hon'ble Supreme Court in ***Sarvesh Refractories (P) Ltd***., ***MD Switch Gear Ltd.*** and by Hon'ble Bombay High Court in ***Nestle India Ltd.*** case (supra). Following the aforesaid precedents, we are of the view that the learned Commissioner's order confirming the demand on this count is unsustainable.

5.3. On the issue of admissibility of cenvat credit on outward transportation of goods from the place of manufacturing i.e. factory to ICD for export, this issue is also covered by the judgment of the Hon'ble Supreme Court in the case of ***Ultra Tech Cement Ltd.*** and ***CCE, Belgaum Vs. Vasvadatta Cements Ltd***. [2018 (11) GSTL 3 (SC)]. Hence the credit availed on this count is admissible.

5.4. Regarding the credit availed on the shortage of goods, we find that during the course of stock taking, the Manager was present all along and agreed to the shortage. Consequently, they reversed the credit involved on the said shortage being not used in the manufacture of finished goods. No doubt explaining the shortage in his statement, the Manager has disclosed that during the course of shifting of the raw materials, the spill over materials contributed to such shortage. However, it is also a fact that in any

case since the inputs which were found short were not used in or in relation to the manufacture of finished goods, therefore the cenvat credit attributable to such shortage cannot be admissible. However, in absence of removal of the said inputs clandestinely, the imposition of penalty on account of such shortage is unwarranted.

6. As we have observed that the major portion of the cenvat credit demanded and confirmed are admissible to the appellant; therefore imposition of personal penalty on the Manager also cannot be sustained.

7. In the result, the appeal filed by the Manager Shri Rajendra Prasad is allowed and the company appeal is allowed except to the extent of confirming demand of shortage of inputs of Rs.53,004/-. Appeals are disposed of accordingly.

(Order Pronounced in open court on conclusion of hearing)

(Dr. D.M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

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