CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

Regional Bench COURT-2

Excise Appeal No. 25161 of 2013

[Arising out of the Order-in-Appeal No.519/2012 dated 08.10.2012 passed by the Commissioner of Central Excise (Appeals), Mangalore.]

M/s. Gem Granites
Balakundi village,
Ilkal, Hungund,
Bagalkot District - 587125 **.......Appellant**

VERSUS

Commissioner of Central Excise,
71 Club Road, Central Excise Building,
Belagavi,
Karnataka – 590001 **..... Respondent**

Appearance:

Ms. Meghna Lal, Advocate for Appellant

Mr. Rajesh Shastry Authorized Representative for Respondent

Coram:

Hon'ble P.A. Augustian, Member (Judicial)

Hon'ble Pullela Nageswara Rao, Member (Technical)

FINAL ORDER No. 20697 of 2024

Date of Hearing:04.07.2024
Date of Decision:04.07.2024

Per: P.A. Augustian

The issue in the present appeal is whether the appellant is eligible to claim refund of unutilized CENVAT credit in relation to High-Speed Diesel (HSD) and credit of

Service Tax paid against Security Services. Appellant is a 100% export-oriented unit (EOU) engaged in manufacture and export of cut and polish granites in the form of dimensional blocks and slabs. For the purpose of said activities, appellant had imported and domestically procured mobile cranes, excavators, forks, lifts, compressors, generators and other material handling equipment without payment of duty. The said equipment was primarily used to carry out the manufacturing activity. For said machines, appellant used High Speed Diesel as fuel, which was procured from the DTA units. Since the fuel was procured on payment of tax from DTA units, appellant availed credit of the duty so paid on the HSD. Appellant also availed credit of Service Tax paid towards Security Services. Both the activities were reflected in the ER-2 Returns. However, the refund claim filed by the appellant were rejected by the Adjudication Authority and in appeal, Commissioner (Appeals) also rejected the same. Aggrieved by said order, present appeal is filed.

2. When the matter came up for hearing, Learned Counsel for the appellant submits that the issue is no more res-integra. The issue for the previous period was examined by this Tribunal in the appellant's own case in Appeal No. E/1541/2010, E/2091/2010 and E/481/2012, and allowed the claim on the credit of tax paid on HSD.

This Tribunal allowed the appeal reported in 2017 (347) ELT 652 (Tri. Bang) with the following observation:-

> *"6.1 We find that the appellants took the Cenvat credit of the duty paid on the HSD used as a fuel consequent to the C.B.E.C. Circular No. 799/32/2004-CX, dated 23-9-2004. This Circular also makes an EOU entitled to claim refund under Rule 5 of Cenvat Credit Rules, 2004, if Cenvat credit available with them could not be utilized*
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> *6.2 We find that for the appellants, who are an EOU, the definition of an input given in Rule 2(k) of Cenvat Credit Rules, 2004 cannot restrict the entitlement, when they are taking Cenvat credit in terms of Notification No. 22/2003, dated 31-3-2003. More so, when the decisions of the Tribunal viz., Hindustan Unilever Ltd. Vs. CCE, Bhavnagar (supra) and CCE Vs. Jagmini Micro Knit Pvt. Ltd. (supra) make it clear that appellants as an EOU can claim Cenvat credit for the duty paid on HSD oil used as fuel and when they are eligible to avail the benefit of the said Notification.*
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> *6.3 The Revenue's contention that in terms of definition of 'input' given in Rule 2(k) of Cenvat Credit Rules, 2004 the appellants are not entitled to claim Cenvat credit, cannot be accepted, when the Notification No. 22/2003, dated 31-3-2003 makes an EOU entitled to claim Cenvat credit on the procurement of HSD used as fuel. The case laws viz., Imperial Granites Pvt. Ltd. (supra) and Sangam Spinners Ltd. (supra) will not be applicable to the present appellants, who are an EOU and not a DTA industry.*

> *7. All the appeals are allowed in above terms by setting aside the impugned orders.*

3. Learned Counsel further submits that the removal of goods by EOU is governed by the provisions of Rule 17 of the Central Excise Rules, 2002. The facility of availing CENVAT Credit was extended to EOUs vide Notification No. 18/2004-CE (NT) dated 06.09.2004. The appellant also relied on the Notification No. 22/2003 dated 31.03.2003, the decisions of the Tribunal in following matters:-

i. Indian Oil Corporation Limited Vs. CCE (reported in 2008 (230) ELT 177 (Tri.- Chennai.)

ii. Commr. Of Central Excise Vs. Jagmini Micro Knit Pvt Ltd reported in 2009 (238) ELT 327 (Tri-Del.)

iii. Hindustan Unilever Limited Vs. CCE reported in 2010 (250) ELT 92 (Tri.- Ahmd.)

4. Regarding the denial of refund related to service tax paid against the security services, learned counsel for the appellant submits that service was utilised for the EOU only and when no dispute has been raised regarding validity of credit availed on security services at any juncture, eligibility of the same cannot be questioned at the time of seeking refund. If the respondent has reason to belief that the credit taken by the appellant was

ineligible credit, respondent ought to have initiated proceedings under Section 11A of Central Excise Rules, 2002 read with Rule 14 of Cenvat Credit Rules, 2004. Since the respondent failed to invoke the appropriate provisions, raising issues at the time of Adjudicating the refund application under Rule 5 of Cenvat Credit Rules, 2004 is unsustainable. The Learned Counsel to support the same, relied on the decision of the Hon'ble High Court of Telangana in the matter **of** Commr. of Customs & Central Excise, Hyderabad–IV Vs. Qualcomm India Pvt., Ltd., reported in 2021 –VIL-766-TEL- ST, where Hon'ble High Court held that denial of refund of credit under rule 5 Cenvat Credit Rules, 2004 without there being any proceedings initiated under Rules 14 of the Cenvat Credit Rules, 2004 for recovery of said credit is not valid and not justifiable. Learned Counsel also relied on the decision of the Tribunal in CCE & ST. BBSR Vs. M/s. Infosys Technologies Limited 2023 (9) TMI 566 – CESTAT Kolkata.

5. The Learned Authorised Representative (AR) for the Revenue reiterated the submissions and admits that the issue is covered by the decision of this Tribunal for the previous period as contended by the appellant.

6. Heard both sides and perused the records.

7. We find that the issue regarding eligibility of the appellant in claiming refund of Rs. 25,80,768 paid by appellant while procuring HSD for their EOU is covered in

favour of the appellant in their own case. As regarding the claim of rejection of refund of Rs. 1,18,298/- security services, as held in large number of cases including in the case of Qualcomm India Pvt., Ltd., (supra), once it is admitted as eligible credit and if the respondent has reason to believe that, it is wrongly availed, Respondent could have proceeded against the appellant under Rule 14 Cenvat Credit Rules, 2004 for the recovery of irregular CENVAT credit and not to adjudicate the same while processing the refund claim.

8. In view of the above discussion, Appeal is allowed with consequential relief, if any in accordance with law.

(Order pronounced in open court on 04.07.2024)

(P.A.Augustian)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

Sasidhar