CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

E/21423/2017-SM

[Arising out of Order-in-Appeal No. BEL-EXCUS-000-APP-SP-20-17-18 dated 24/05/2017 passed by the Commissioner of Central Excise, Mysore]

Vanya Steels Pvt. Ltd. Sy No. 58, Kasamkindi Road, Hirebagnal Village, Ginigera Koppal, Mysore – 583 231 Karnataka	**Appellant(s)**

Versus

Commissioner of Central Excise, **Customs and Service Tax, Mysore** S1-S2, Vinaya Marga, Siddhartha Nagar, Mysore – 570 011 Karnataka	**Respondent(s)**

Appearance:

Mr. Raghavendra B. Hanjer, Advocate	For the Appellant
Mrs. Kavitha Poduwal, Superintendent (AR)	For the Respondent

Date of Hearing: 01/03/2018
Date of Decision: 01/03/2018

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER

Final Order No. 20473 / 2018

Per : S.S GARG

The present appeal is directed against the impugned order dated 19.05.2017 passed by the Commissioner (Appeals) whereby the Commissioner (Appeals) has rejected the appeal of the appellant. Briefly the facts of the present case are that the appellants are holding Registration Certificate No. AACCV0767EXM001 and are engaged in the manufacture of sponge iron falling under Chapter 72 of CETA, 1985. The appellants are availing the benefit of cenvat credit of duty paid on input/input services and capital goods. It was noticed during the course of audit that the appellants have availed cenvat credit on MS Angles, MS Bars, Channels, etc. during the period from 03/2008 to 06/2009 and these items were used to build structural items for equipments like bunkers, conveyors, Kiln etc. treating them as capital goods. It appeared that the credit availed on the said items is irregular inasmuch as these items are neither inputs nor capital goods. Since the appellants did not reverse the irregular credit, show cause notice was issued proposing to deny the credit, besides proposal to demand interest and proposal to impose penalty. Based on the reply to the show-cause notice, the lower authority referring to the Hon'ble High Court of Allahabad decision in the case of M/s. U G Sugar & Industries Ltd., M/s. Bajaj Hindustan Limited, has held that the credit availed on the said items is irregular and ordered for recovery of same besides demanding interest and imposition of penalty on the appellant. Aggrieved by the Order-in-Original, the appellant filed the appeal before the Commissioner who rejected the appeal. Hence the present appeal.

2. Heard both the parties and perused the records.

3. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed contrary to the binding judicial precedent. He further submitted that the show-cause notice had proposed to deny the credit only on the allegation that MS Angles, MS Bars, Channels, Coils, Joists etc. used in fabrication of various equipments/components/parts/accessories of bunkers, storage tanks, conveyor system, kiln, pollution control equipment which are embedded to earth so as to form immovable property and hence the same cannot be considered as 'capital goods' as defined under Rule 2(a) of the Cenvat Credit Rules, 2004. He further submitted that the impugned order having accepted that the credit cannot be denied on the ground of immovability, has denied the credit on the ground that the appellant has failed to establish the user test in view of the decision of the Apex Court in the case of ***Jawahar Mills Ltd.*** **reported in** ***2001 (132) E.L.T. 3 (S.C)*** which was not the allegation raised in the show-cause notice. He further submitted that the impugned order as well as the adjudication order travelled beyond the allegation in the

show-cause notice and hence cannot be sustained in the eyes of law. For this submission, he relied upon the following decisions:

a. *Metrochem Industries Ltd. Vs. CCE, Vadodara-I – 2013 (292) E.L.T. 578 (Tri.-Ahmd.)*
b. *Global Energy Food Industries Vs. CCE, Ahmedabad – 2014 (300) E.L.T. 298 (Tri.-Ahmd.)*
c. *Unioson Metal Ltd. Vs. CCE, Ahmedabad – 2010 (253) E.L.T. 618 (Tri.-Ahmd.)*
d. *HPCL Vs. CCE, Mumbai – 2011 (269) E.L.T. 422 (Tri.-Mumbai)*
e. *India Cements Ltd. Vs. CCE, Trichy – 2013 (296) E.L.T. 513 (Tri.-Chennai)*
f. *Bharat Aluminium Co. Ltd. Vs. CCE, Rajpur – 2008 (228) E.L.T. 445 (Tri.-Del.)*
g. *Unitech Machines Ltd. Vs. CCE & ST., Meerut-I – 2015 (329) E.L.T. 860 (Tri.-Del.)*
h. *Commissioner Vs. Reliance Ports & Terminals Ltd. – 2016 (334) E.L.T. 630 (Guj.)*

3.1. He further submitted that the capital goods become immovable property is irrelevant as the eligibility of the credit has to be decided at the stage before becoming part of immovable property. For this submission, he relied upon the following decisions:

a. *Commissioner of Central Excise Vs. ICL Sugar Limited – 2011 (271) E.L.T. 360 (Kar.)*
b. *Commissioner of Central Excise, Bangalore – II Vs. M/s. SLR Steel Limited – 2012 (280) E.L.T. 176 (Kar.)*
c. *Mahindra & Mahindra Ltd. Vs. CCE – 2005 (190) E.L.T. 301 (LB)*

3.2. He also submitted that the issue of availment of credit on various iron and steel items used as components for capital goods or structural for support of capital goods is settled in favour of the appellant in the following decisions:

a. *Rangineni Steel Pvt. Ltd. Vs. CCE, C & ST, Mysore – Final Order No. 22599-22601/2017 dated 26.10.2017*
b. *Suguna Metals Pvt. Ltd. Vs. CC, CE & ST, Hyderabad-I – 2016 (339) E.L.T. 119 (Tri.-Hyd.)*
c. *Metrochem Industries Ltd. Vs. CCE, Vadodara-I – 2013 (292) E.L.T. 578 (Tri.-Ahmd.)*
d. *Monnet Ispat & Energy Ltd. Vs. CCE, Jaipur – 2015 (330) E.L.T 711 (Tri.-Del.)*
e. *India Cements Ltd. Vs. CESTAT – 2015 (321) E.L.T. 209 (Mad.)*
f. *Commissioner Vs. India Cements Ltd. – 2014 (305) E.L.T. 558 (Mad.)*

3.3. He also submitted that the demand for the period prior to 2009 is barred by limitation as the issue is relating to the interpretation of the definition of 'capital goods' and also in view of the subsequent decisions settling the issue in favour of the assessee.

4. On the other hand the learned AR reiterated the findings of the impugned order.

5. After considering the submissions of both the parties and perusal of the material on record and the various decisions relied upon by the appellant, I find that the impugned order has travelled beyond the show-cause notice because in the show-cause notice, the only allegation is that the MS Angles, MS Bars, Channels which have been used in the fabrication of various equipments are embedded to earth so as to form immovable property and hence cannot be considered as 'capital goods' as per the definition of 'capital goods' under Rule 2(a) of the Cenvat Credit Rules, 2004. Further I find that in the impugned order, the Commissioner has accepted that credit cannot be denied on the ground of immovability but still he has denied the credit by invoking the user test which was not an allegation in the show-cause notice. Further I find that the cenvat credit cannot be denied on the ground that the capital goods have become immovable property as held in the case of Mahindra & Mahindra Ltd. Vs. CCE

cited supra. Further I find that in an identical issue, the matter has been decided in favour of the assessee and by following the ratio of the above said decision, I allow the appeal of the assessee by setting aside the impugned order.

(Operative portion of the Order was pronounced
in Open Court on **01/03/2018**)

(S.S GARG)
JUDICIAL MEMBER

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