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

Appeal(s) Involved:

E/20356/2018-SM

[Arising out of Order-in-Appeal No. 575/2017-CT dated 27/12/2017 passed by Commissioner of Central Tax , BANGALORE-II(Appeal)]

M/s. Ultra Cement Ltd.
(Unit: Birla Super Bulk Terminal)
Near Railway Station,
Birla Super Bilk Terminal
Post Veerapura, Doddaballapur
BANGALORE - 561203
KARNATAKA

Appellant(s)

Versus

Commissioner Of Central Tax, Bangalore North
No.59, HMT Bhawan
Ground Floor, Bellary Road
BANGALORE - 560032
KARNATAKA

Respondent(s)

Appearance:

Mr. Syed M. Peeran, Advocate
LAKSHMI KUMARAN & SRIDHARAN
WORLD TRADE CENTRE NO.404-406, 4TH FLOOR, SOUTH WING BRIGADE GATEWAY CAMPUS NO.26/1, DR. RAJKUMAR ROAD,
BANGALORE - 560 055
KARNATAKA

For the Appellant

Mrs. Kavitha Podwal, Superintendent (AR)

For the Respondent

Date of Hearing: 20/12/2018
Date of Decision: 20/12/2018

CORAM:

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

Final Order No. 21930 / 2018

Per : S.S GARG

The present appeal is directed against the impugned order dated 27.12.2017 passed by the Commissioner (A) whereby the Commissioner (A) has rejected the appeal of the appellant.

2. Briefly the facts of the present case are that the appellants are engaged in the manufacture of cement falling under CSH 2523 2910 of the First Schedule of Central Excise Tariff Act, 1985. During the course of audit on the records of the appellant for the period July 2011 to April 2012 by the internal audit wing, it was observed that the appellant have irregularly availed service tax credit on construction service i.e., alteration and extension of railway track to the extent of RS.31,26,399/- and locomotive engine servicing charges amounting to Rs.4,740/- during the February 2012 and March 2012. The said services are not covered under the definition of input service and are specifically excluded. In this regard, statement of Shri Shrikant Kiniklar, Manager of the unit was recorded who *inter alia* stated that the entry in the ER-1 returns regarding availment of credit on input services reflects only the total credit availed not category wise. He further stated that the fact of availment of CENVAT

credit on AMC for loco and railway siding civil works was not intimated to the department. They also appeared to have availed inadmissible credit of Rs.4,740/- on AMC of locomotive engine. They appeared to have contravened the provisions of Rule 3 read with Rule 2(1) of the CCR, 2004 inasmuch as they have availed CENVAT credit on ineligible services. The availment of CENVAT credit on the ineligible services have not been brought to the notice of the department by the appellant either by way of intimation or through any document filed. The appellant have suppressed the fact of irregular availment of CENVAT credit with an intent to avail the unwarranted benefit of CENVAT credit. The irregular availment of CENVAT credit would have gone unnoticed had the audit party not taken the audit of records of the unit. On these allegations, a show-cause notice was issued to the appellant and after following due process, Additional Commissioner confirmed the demand of irregular CENVAT credit along with interest and penalty. Aggrieved by the said order, appellant filed appeal before the Commissioner (A), who rejected the appeal.

3. Heard both sides and perused the records.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law and the same has been passed without properly considering the facts and the law. He further submitted that the exclusion clause A(a) of Rule 2(l) excludes execution of work contract for building or civil structures and not all types of work contract. He further submitted that the appellant in the present case has availed the services of a contractor for alteration and extension of railway track which is neither a building nor a civil structure and therefore, the railway track and siding construction of railway siding civil work is not covered under the exclusion clause. He also submitted that the service provider has merely provided manpower for carrying out the required alteration and extension work i.e., dismantling the tracks, linking the tracks, packing the tracks, aligning the tracks, cutting to the profiles and dumping the cut spoils, etc. It is his further submission that the appellant is a bulk terminal cement plant wherein cement is received from other units of the appellant company in bulk and the same is packed into 50 kg bags as well as bulk in truck loaded tankers and cleared to depots for onward sale or directly sold to the buyers therefrom. The appellant being bulk terminal as huge volumes of cement are required to be handled and transported, the appellants have laid railway tracks

within the terminal premises which connect to the nearest railway station which enable the entire inward transportation and material handling system of the appellant. He also submitted that these railway track on which locomotive engine and wagons run are very essential for the entire receipt of inputs required for further packing and in turn transporting the cement for onward supplies and the maintenance of the railway track includes alteration, extension, and sidings and in the absence of adequate maintenance of the railway tracks, the entire material handling system would be damaged and thereby the effect the manufacturing activity i.e., packing of loose cement. Therefore, according to the learned counsel, the services used for alteration, extension and siding of railway track have nexus directly or indirectly in or in relation to the manufacture of final product by the appellant. For this submission, he relied upon the following decisions:

- *Jaswal Neco Ltd. vs. CCE: 2015 (319) ELT 247 (SC)*
- *Ultratech Cement Ltd. vs. CCE, Nagpur: 2018-TIOL-594-CESTAT-MUM.*
- *RSWM Ltd. vs. CCE, Jaipur: 2015 (37) STR 1074*

4.1 He also submitted that this issue is no more *res integra* and has been decided by various decisions of the Tribunal wherein the Tribunal has allowed the credit on railway siding

work. For this submission, he has relied upon the following decisions:

- *Orient Cement Ltd. vs. CCE: 2017 (51) STR 459 (Tri.-Hyd.)*
- *The India Cement Ltd. vs. CCE, Chennai: 2018-VIL-426-CESTAT-CHE-CE*
- *CCE, Raipur vs. Vimla Infrastructure India P. Ltd.: 2018 (13) G.S.T.L. 57 (Chhattisgarh)*
- *Jaypee Rewa Plant vs. CCE, Jabalpur: 2018 (9) TMI 633-CESTAT-NEW DELHI*

4.2 He also submitted that the entire demand is barred by limitation as the show-cause notice was issued to the appellants on 20.8.2013 to demand CENVAT credit availed during the period July 2011 to April 2012. He also submitted that the appellants have not suppressed any facts from the department with intent to evade payment of duty, hence longer period of limitation in terms of Section 11A cannot be invoked in the present case because the demand was raised on audit objections and statutory records and the fact of availment of CENVAT credit has been reflected in the ER-1 returns and the appellants were having *bona fide* belief that the service of alteration and extension of railway track and AMC of locomotive engine are covered under definition of input service. Moreover, the issue involves interpretation of the provisions of CENVAT Credit Rules. For this submission, he relied upon the following decisions:

- *Musaddilal Projects Ltd. vs. CCE: 2017 (4) G.S.T.L. 401 (Tri.-Hyd.)*
- *Gac Shipping (India) Pvt. Ltd. vs. CCE, Cochin: 2017 (49) STR 242 (Tri.-Bang.)*
- *Maruti Suzuki India Ltd. vs. CCE, Delhi-III: 2017 (47) S.T.R. 273 (Tri.-Chan.)*

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

6. After considering the submissions of both the parties and perusal of the material on record, I find that the issue involved in the present case is covered by the Division Bench decision of this Tribunal in the case of ***Jaypee Rewa Plant*** cited supra wherein the Tribunal has considered various decisions and has held as under:

> "The definition of 'capital goods' as well as 'inputs' mandate the usage of goods within the factory. It has been held in a catena of judgment that where pipelines, rope-ways and other material handling equipment and their parts are partially located within factory and partially outside, then the portion which is outside the factory has been treated as an extension of the portion which is inside the factory. Accordingly, the condition of 'used in factory' gets satisfied and the CENVAT credit is admissible.
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> Thus, the railway track laid by the appellant (which connects the railway siding outside the factory with the

siding inside the factory) shall have to be treated to have satisfied the condition of 'used in the factory'. In this regard, reliance is placed on the judgment in the case of Birla Corporation Ltd. vs. CCE [2005 (186) ELT 266 (SC)] wherein it is held that the railway track qualifies as capital goods inasmuch as it is a part and parcel of the plant and machinery installed in the factory, more specifically the material handling equipment, since it helps in movement of inputs as well as finished goods to and from the appellant's factory.

5. Also the issue about railway tracks is no more *res integra* in view of the judgment in the case of ***Ultratech Cement Ltd. vs. CCE, Nagpur: 2018-TIOL-594-CESTAT-MUM.*** Similarly, the issue about works contract services availed for laying down the railway line is also no more *res integra* in view of the judgment in the case of ***The India Cement Ltd. vs. CCE, Chennai-I: 2018-VIL-426-CESTAT-CHE-CE***, wherein it was held that:

> *"Sub-clause (A) of the definition of input does not envisage blanket exclusion to all works contract services from the definition of input services. Only the works contract services for:*
>
> *(i) Construction of a building or a civil structure or part thereof, and*
> *(ii) Laying of foundation or making structures for support of capital goods.*
>
> *have been excluded under the sub-clause (A).*

Inasmuch as the services of laying of railway line is neither in relation to construction of building or a civil structure nor in relation to laying of foundation or making structures for support of capital goods. On the contrary, the present services are for laying of railway tracks, which per se are capital goods, thus, the present services are in relation to the installation of capital goods only. Thus, the exclusion under sub-clause (A) of the Rule 2(l) does not apply to the instant case.

Thus, the appellant has correctly availed the CENVAT Credit on the works contract services for laying the railway lines.

6. Accordingly, we allow the appeal."

6.1 Further, in the case of Orient Cement Ltd. cited supra, the Division Bench of the Tribunal has held in para 7 as under:

"7. From the discussions and observations made in the above judgments as well as the facts presented before us, we are of the view that the credit availed on service tax on maintenance service of railway sidings is eligible. It has also to be pointed out that without the railway siding laid outside the factory so as to connect factory with a railway station, no purpose would be served. Following the decisions, we hold that the credit is admissible."

Therefore, by following the ratio of the above said decision, I am of the view that the impugned order denying the CENVAT credit on the railway sidings or alterations of sidings and extension of siding is not sustainable and therefore, I set aside the impugned order by allowing the appeal of the appellant.

(Operative portion of the Order was pronounced in Open Court on **20/12/2018**)

S.S GARG
JUDICIAL MEMBER

rv...