CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
SCO 147-148, SECTOR 17-C, CHANDIGARH-160017

DIVISION BENCH
Court-I
Appeal No.E/652/2012

(Arising out of OIO No.16/Commissioner/PKL/2011 dt.15.12.2011 CCE, Panchkula)

Date of hearing/Decision: 05.07.2018

Modern Dairies Ltd. **Appellant**
Vs.
CCE, Panchkula **Respondent**

Present for the Appellant: Ms. Krati Somani, Advocate
Present for the Respondent: Shri V.Gupta, AR

Coram: Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr.Devender Singh, Member (Technical)

FINAL ORDER NO. 62636/2018

PER: ASHOK JINDAL

The appellant is in appeal against the impugned order wherein the Cenvat credit to the tune of Rs.78,30,427/- has been denied along with interest and equivalent penalty is also imposed on them.

2. The brief facts of the case are that the appellant is engaged in the manufacture of diaries products such as Ghee, Whey, Proteins, Casein and Lactose. The appellant procured certain items like plates, coils, angles, etc. for fabrication of capital goods i.e. dairy machinery for production of final products. As the dairy machinery is classifiable under CETH 8434 which is exempted from payment of whole of excise duty vide Notification No.6/06-CE dt.1.3.2006 and Notification No.67/05-CE dt.16.3.1995, therefore, it was alleged

that the appellant is not entitled to avail Cenvat credit on the inputs used for manufacture of capital goods, consequently, they are required to reverse the said Cenvat credit on these inputs which have been used for manufacture of dairy machinery under Rule 6 of Cenvat Credit Rules, 2004. It was alleged that the appellant has availed Cenvat credit of Rs.17,67,816/- as capital goods on angles, channel, CR coil, plates, etc. which do not qualify as capital goods as per Rule 2(a) of Cenvat Credit Rules, 2004. Therefore, the appellant is required to reverse the said amount which the appellant has reversed before issuance of show cause notice. In these set of facts, a show cause notice was issued to the appellant to deny Cenvat credit of Rs.78,67,427/- and Rs.17,67,816/- along with interest and penalties were also proposed in the show cause notice. The matter was adjudicated and proposals made in the sow cause notice were confirmed. Aggrieved from the said order, the appellant has filed this appeal before this Tribunal.

3. Ld. Counsel for the appellant submits that the appellant was entitled to avail Cenvat credit on inputs used in the manufacture of capital goods within the factory in terms of Rule 2(k) of Cenvat Credit Rules, 2004. He further submits that the appellant has availed Cenvat credit on angles, channel, CR coil, plates, etc. as capital goods. In fact, these goods have been used for fabrication of capital goods, therefore, the same is to be treated as inputs. She further submits that although the capital goods fabricated by the appellant are exempted from payment of duty in terms of Notification No.6/06-CE dt.1.3.2006 and Notification No.67/05-CE

dt.16.3.1995 but the said capital goods so manufactured have been treated as final product by the Revenue. In fact, the said capital goods are not final products of the appellant but these capital goods were used for manufacture of final products which are cleared by the appellant on payment of duty. In that circumstance, the appellant is entitled to avail Cenvat credit on inputs used in the manufacture of capital goods which have been further used in the factory of production. The appellant is entitled to avail Cenvat credit in terms of Explanation 2 to Rule 2(k) of Cenvat Credit Rules, 2004. To support her contentions, he has relied on the decisions of this Tribunal in the case of Hindalco Industries Ltd. vs. CCE-2008 (230) ELT 649 (Tri.-Bang.), Hindustan Copper Limited vs. CCE-2006 (206) ELT 276 (Tri.-Del.) and Vaidyanath SSK Ltd. vs. CCE-2016-TIOL-2233-CESTAT-MUM.

4. On the other hand, Ld. AR submits that as these capital goods are exempted from payment of duty, therefore, the appellant is not entitled to avail Cenvat credit on the inputs used for fabrication of capital goods.

5. Heard the parties and considered the submissions.

6. On careful consideration of the submissions made by both sides, we find that short issue is to be decided by us as under:-

"Whether the appellant is entitled to avail Cenvat credit on inputs used in the fabrication of capital goods which are exempted from payment of duty in terms of Notification No.6/06-CE dt.1.3.2006 and Notification No.67/05-CE dt.16.3.1995 and further used in the manufacture of final products.

7. Rule 2(k) of Cenvat Credit Rules, 2004 defines inputs which are entitled to Cenvat credit.

8. For better appreciation, Rule 2 (k) is extracted below:-

Rule 2 (k) "input" means –

(i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known - - - - -

Explanation 2. Input includes goods used in the manufacture of capital goods which are further used in the factory of the manufacturer.

9. Explanation 2 to Rule 2(k) of Cenvat Credit Rules, 2004 is relevant to decide the issue. As per Explanation 2 to Rule 2(k), the inputs used in the manufacture of capital goods which are further used in the factory of manufacturer are entitled to avail Cenvat credit. Admittedly, in the case in hand, the inputs have been used by the appellant for fabrication of capital goods which are ultimately used in their factory for manufacture of final goods. In that circumstance, it is clear that in terms of Explanation 2 to Rule 2 (k), the appellant is entitled to avail Cenvat credit. The same view was taken by this Tribunal in the case of Hindalco Industries Ltd.(supra) wherein this Tribunal has observed as under:-

> ***7.*** *I have examined the issue very carefully. If in terms of the M/s. Vikram Cement's case, the goods cannot be treated as capital goods, one should examine whether they can be considered as inputs. In the definition of input in Rule 2(k) of the Cenvat Credit Rules, explanation 2 is very relevant and the same is reproduced herein below :*

Explanation 2. - Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer;

In the light of the above explanation, the impugned goods can be treated as inputs because these goods are used in the manufacture of tanks falling under Chapter 84, which is specifically mentioned in the definition of capital goods. Therefore, even if the impugned goods cannot be treated as capital goods for cenvat purposes, they can be treated as 'input' and therefore, credit is not deniable. I find that in Para 6 of the show cause notice of the Assistant Commissioner, an observation has been made that the input credit is not admissible as the capital goods so produced are exempted under Notification No. 67/95. This observation of the Assistant Commissioner is wrong. Exemption Notification No. 67/95 is an exemption in respect of the capital goods fabricated using the steel plates and strips. In terms of the Explanation 2, the steel plates and strips should be considered as inputs. Therefore, the fact that the steel tank so manufactured are exempted under Notification No. 67/95 cannot be a reason for denying credit to the items, especially when they satisfy the definition of inputs in terms of Explanation 2. Therefore, there is no merit in the impugned order. I set aside the same and allow the appeal with consequential relief.

10. Further, the said decision has been affirmed by the Hon'ble Karnataka High Court reported 2012 (286) ELT 503 (Kar.).

11. Further in the case of Hindustan Copper Ltd. (supra), again this Tribunal had an occasion to examine the issue in hand. In the said case, the facts are as under:-

*"**1**.The issue raised in both these appeals is the same. The appellant manufactures several copper products in its factory from unrefined copper. Two such items are 'copper cooling elements' and 'copper launders'. These are (captively) used as capital goods by the appellant in its factory for the manufacture of other goods. Accordingly, it claimed exemption under Notification No. 67/95, dated 16-3-95 for these two items. That Notification, inter alia, exempted "capital goods as defined in Rule 57Q of the Central Excise Rules, 1944 manufactured in a factory and used within the factory of production".*

> ***2.*** *These items are produced from unrefined copper and rejected cathodes manufactured in the appellant's own factory. No duty was paid by the appellant on these items also on the ground that Notification No. 67/95 exempted the 'inputs' manufactured in a factory and used within the factory of production in or in relation to the manufacture of final products."*

This Tribunal has observed as under:-

> ***"4.*** *Since revenue's case is based on the exclusion contained in the proviso, we may read the relevant portions of Notification No. 67/95 :*
>
> ***GENERAL EXEMPTION NO. 6***
>
> ***Exemption to all capital goods and inputs if captively consumed within the factory of production:-***
>
> *(i) capital goods as defined in rule 57Q of the Central Excise Rules, 1944 manufactured in a factory and used within the factory of production;*
>
> *(ii) goods specified in column (2) of the Table hereto annexed (hereinafter referred to as ' inputs') manufactured in a factory and used within the factory of production in or in relation to manufacture of final products specified in column (3) of the said Table:*
>
> *from the **whole of the duty of** excise leviable thereon which is specified in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) :*
>
> *Provided that nothing contained in this notification shall apply to inputs used in or in relation to the manufacture of final products (other than those cleared either to a unit in a Free Trade Zone or to a 100% Export Oriented Undertaking or to a unit in an Electronic Hardware Technology Part or to a unit in a Software Technology park), which are exempt from the **whole of duty** of excise leviable thereon or are chargeable to 'Nil' rate of duty.*
>
> *Explanation. - For the purpose of this notification 'inputs' does not include :-*
>
> *(i) packaging materials in respect of which any exemption to the extent of the duty of excise payable on the value of packaging materials is being availed of for packaging any final products;*
>
> *(ii) packaging materials or containers, the cost of which is not included in the assessable value of the final products*

under Section 4 of the Central Excises and Salt Act, 1944 (1 of 1944)."

5. *The contention of the learned counsel for the appellant is that exemption is available to the assessee both in regard to copper cooling elements & copper launders [under Sl. (i)] and unrefined copper & rejected cathodes [under Sl. (ii)] in terms of exemption notification. Learned SDR would, however, contend that since use of unrefined and rejected cathodes are as inputs in the manufacture of final product (cooling elements and launders) which are exempt, the exemption is not available in view of the proviso to the notification.*

6. *It is clear from the above notification that capital goods produced in the factory of consumption is exempt. Similarly, inputs used in a factory is also exempt provided the final product is not exempt from the whole of duty of excise leviable thereon or are chargeable to nil rate of duty. The question that arises is whether the final product, which is capital goods covered under serial No.I of the Notification will also fall in the category of final product mentioned in the proviso. We are of the considered opinion that captively consumed capital goods cannot be treated in the excluded category of final product mentioned in the proviso. Such a view would negate exemption specifically given under SI. No. (i) to captively consumed capital goods and for this reason, such a construction of the notification should be avoided. There is also another very relevant factor. The exemption is to avoid multiple stages of taxation and taking of credit in regard to goods manufactured and utilised in the same factory. The view taken by the lower authorities would go against that scheme of the notification and would force the assessee to resort to payment of duty at every stage and take credit of duty paid, thus, availing the same benefit through the circuitous route of credit. Thus, the whole exercise would only cause more elaborate account keeping without any benefit to the revenue. The benefit that the exemption notification sought to give directly should not be made available only indirectly through Cenvat credit."*

12. Further, in the case of Vaidyanath SSK Ltd. (supra), again this issue came up for consideration before this Tribunal wherein this Tribunal has observed as under:-

5. In so far as the demand on the HR sheets used for manufacture of biogas storage tank is concerned it is seen that biogas tank is a part of biogas plant. Biogas plant is covered under list 5 attached to the Notification No.6/2006 dated 01/03/2006. Parts of biogas *plant also are covered under Sl.No.21 of the list 5. In view of the above, it is apparent that biogas storage tank is examined under Notification No.6/2006 dated 01/03/2006. The said tank is also exempted under Notification No.67/95. The term input is defined under Cenvat Credit Rules, under Rule 2 (k) explanation 2 to the said Rules 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 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.

*The appellants have claimed that in view of the explanation, the HR sheets used for the manufacture of biogas storage tank would be admissible. In the instant case the inputs, namely, HR sheets are used for manufacture of biogas storage tank which is exempted under Notification 6/2006 dated 01/03/2006. The appellants have relied on the decision of the Tribunal in the case of KCP Ltd.(supra).=****2008-TIOL-2531-CESTAT-BANG.*** *In the said case the inputs, namely, steel plants were used in the manufacture of clinker silos which are storage tanks for final products in the same factory. In the said case, the Tribunal observed as follows:*

One need not examine whether such silos are duty paid or not. That is not the point at issue. The silos may be dutiable or may not be dutiable under certain conditions. The Revenue has taken the point that they are immovable. Therefore they are not dutiable. Hence the credit can be denied. That is not the correct approach. In other words, the dutiability of the capital goods is irrelevant. So long as the inputs are used in capital goods which are used within the factory of production, input credit has to be given in terms of Explanation 2 to Rule 2(k). In other words, the said capital goods may be dutiable and if the duty is paid on such capital goods then the appellants would be entitled for Cenvat credit for the duty paid on capital goods. But when such capital goods or exempted or not dutiable, then the inputs would get the credit by virtue of Explanation 2 to Rule 2(k). For clarity, we are reproducing the Rule 2 (k) :

Rule 2. Definitions

(k) “input” means -

(i)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 in or in relation to manufacture of final products or for any other purpose, within the factory of production;

(ii) all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service;

Explanation 1 : The light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever,
Explanation 2: Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacture."

Therefore it is very clear that the said inputs such as steel plates, sheets, etc. used in the fabrication of silos are entitled for the credit. Hence the impugned order has no merit and it is not legal and proper. Hence we allow the appeal with consequential relief."

13. As the issue is squarely covered by the judicial pronouncements as discussed above, therefore, we hold that the appellant has correctly availed Cenvat credit on inputs i.e. steel items which have been used for manufacture of capital goods which are exempted from payment of duty and the said capital goods were further used in the manufacture of final products. In that circumstance, we do not find any merit in the impugned order and the same is set aside.

14. In the result, the appeal is allowed with consequential relief, if any.

(Operative part of the order pronounced in the court)

(DEVENDER SINGH)
MEMBER (TECHNICAL)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

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