IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
[COURT III : Division Bench B1]

Appeal No.: E/40462/2016

[Arising out of Order-in-Original No. TCP/EXCUS/037/2015 (C.Ex.) dated 28.12.2015 passed by the Commissioner of Central Excise & Service Tax, Tiruchirappalli]

M/s. The Ramco Cements Ltd., **: Appellant**
Govindhapuram Works,
Senthurai Road,
Ariyalur District – 621 713

Versus

The Commissioner of G.S.T. & Central Excise, **: Respondent**
Tiruchirappalli Commissionerate

Appearance:-
Shri. R. Parthasarathy, Consultant
for the Appellant

Shri. K. Veerabhadra Reddy, ADC (AR)
for the Respondent

CORAM:
Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing: 21.02.2019
Date of Pronouncement: 28.02.2019

Final Order No. 40400 / 2019

Per Bench :

Brief facts are that the appellants are engaged in the manufacture of Ordinary Portland Cement, PPC cement and Cement Clinker and are registered with the Department.

2.1 On verification of accounts by the Audit Officers, it was noted that they had constructed a new project viz., Line-II Project through contractors who undertook the work of "Erection, Commissioning and Installation" as a turn-key project using various items purchased during the period from November 2009 to April 2011. The Department noted that these items were assembled and embedded to earth making them immovable. On verification of accounts, it appeared that the appellants had taken CENVAT Credit in their Input Credit account on various items and components that are basically in the nature of capital goods falling under Chapter Heading Nos. 8431.3910, 8474.9000, 8474.3910, 8483.9000, 8428.9090, 8428.2011, 8501.5210, 8535.2121, 8544.6090 and 9031.8000 of the First Schedule to the Central Excise Tariff Act, 1985 to the extent of 100% in the same financial year contending that the impugned items are nothing but inputs for various items of machinery. The Department was of the view that the Credit availed on inputs is not eligible as the items do not qualify as inputs and do not qualify for Credit under the category of capital goods, as after assembly and erection, they are fixed to earth and become cement plant, which is immovable property and non-excisable.

2.2 The appellants had also availed Credit on various input services used for erection and commissioning of machinery. The Department was of the view that such services are not eligible for Credit.

2.3 Show Cause Notice was issued proposing to disallow the Credit and recover the same along with interest and also for imposing penalties. After due process of law, the Original Authority confirmed the demand of Rs. 25,55,70,351/- towards ineligible CENVAT Credit along with interest and imposed equal penalty. Hence, this appeal.

3.1.1 On behalf of the appellant, Ld. Consultant Shri. R. Parthasarathy appeared and argued the matter. He submitted that in order to enhance the production of clinker as well as cement, the appellant had constructed a new project called Line-II Project (cement plant) and such construction was undertaken between November 2009 and April 2011. Before commencement of the Line-II Project, the appellants had submitted a letter dated 04.11.2009 to the jurisdictional authorities wherein it was informed that they intend to take input CENVAT Credit on all the raw materials, machinery items, parts of machinery and equipment which are used for the installation of the cement plant. The erection of the cement plant (Line-II) necessitated the use of several components, machinery and machinery parts for the construction of raw mill, raw mill feed, blending silo, pre-heater, kiln, coal mill, coal mill feed, cooler discharge, clinker silo-I, clinker silo-II, raw material hopper buildings, primary crusher, secondary crusher, high grade LS stock yard, low grade LS stock yard, mixing hopper, Line-I LS stock yard, Line-2 LS stock yard, coal yard, clinker wagon loading, power plant, feed conveyor, cooler MCC Room cement mill and clinker gypsum hopper.

3.1.2 Various input services, in particular Erection, Commissioning and Installation Services, were also availed for installation and commissioning of the machines, equipment, etc. Thus, the appellant had availed input Credit of Rs. 18,90,75,202/- and input service tax Credit of Rs. 6,64,95,149/-. The Credit availed were duly disclosed in their ER-1 returns.

3.1.3 During 2009-10 and 2010-11, the Officers of the Anti-Evasion Wing visited the premises of the appellant and perused their records relating to CENVAT Credit and raised objection in respect of the input service Credit taken for various individual items of machinery used in several individual sub-assemblies which form part of the cement plant (Line-II). The jurisdictional Superintendent issued letters dated 28.09.2011 and 18.10.2011 on the basis of audit objections. The appellants replied vide their letter dated 26.11.2011. Thereafter, Show Cause Notice dated 27.11.2014 has been issued after a delay of more than two years proposing to disallow and recover the Credit of Rs. 25,56,54,811/-

3.1.4 He submitted that the Original Authority has held that the Credit is not admissible on the following grounds.

(a) Cement Plant (Line-II) had emerged in an immovable condition and the cement plant has not fulfilled the definition of "excisable goods";

(b) Cement Plant (Line-II) did not find place in any of the headings in First or Second Schedule in the Central Excise Tariff Act, 1985;

(c) Cement Plant *per se* has not been subjected to duty of excise;

(d) Credit for various input services was also denied on the ground that they were related to and restricted to the erection and installation of the plant and were not related to operational activities of the plant and as such, it has to be construed that these services were availed by the appellants for the manufacture of non-excisable goods.

3.1.5 Reliance placed by the Department on Board Circular No. 58/1/2002-CX dated 15.01.2002 is highly misplaced and erroneous. The said Circular is relevant only for the purpose of levy of duty on turn-key projects like steel plants and cement plants. It does not relate to availment of CENVAT Credit. The view of the Department that after assembling the machinery, they become attached to earth and thus, are in an immovable condition and would be non-excisable goods, for which reason Credit is not eligible, is incorrect and against the law.

3.1.6 The Department has relied upon the decision in the case of ***M/s. Vandana Global Ltd. Vs. Commissioner of C.Ex., Raipur - 2010 (253) E.L.T. 440 (Tri. – LB)*** to hold that after installation and assembly, the impugned items would be fixed to earth and become immovable property and therefore, not eligible for Credit. The said decision in *M/s. Vandana Global Ltd. (supra)* is no longer good law as observed by the Hon'ble High Court of Gujarat in the case of ***Mundra Ports & Special Economic Zone Ltd. Vs. C.C.E. & Cus. - 2015 (39) S.T.R. 726 (Guj.)***

3.1.7 He submitted that all these impugned items were used for capital goods of the cement plant (Line-II), which were used for the manufacture of cement. Thus, all the impugned items were used in or in relation to the manufacturing activity and therefore, would fall within the definition of input as it stood during the relevant period. The goods which are brought into the factory for 'any other purpose' would fall within the definition of input.

3.1.8 It is also argued by the Ld. Consultant that Explanation-2 of the definition of "input" restricts the use of MS Angles, Channels, etc., which fall under Chapter 73 from being eligible for Credit and that too used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods. In the present case, the items are used for making capital goods and therefore would be eligible for Credit. Further, the impugned items do not fall under Chapter 73 and therefore, restriction in Explanation-2 of the definition would not apply. To support his argument that the impugned items are eligible for Credit, he relied upon the decisions in the following cases :

- *Indira Gandhi Bharatiya Mahila Vikas SSK Ltd. Vs. C.C.E., Pune – 2016 (339) E.L.T. 430 (Tri. – Mum);*
- *C.C.E. & S.T. Vs India Cements Ltd. – 2014 (310) E.L.T. 636 (Mad.);*
- *India Cements Vs. CESTAT, Chennai – 2015 (321) E.L.T. 209 (Mad.);*
- *Monnet Ispat & Energy Ltd. Vs. C.C.E., Raipur – 2015 (330) E.L.T. 711 (Tri. – Del.);*
- *Madras Cements Ltd. Vs. C.C.E., Hyderabad – 2016 (336) E.L.T. 175 (Tri. – Hyd.);*
- *Thiru Arooran Sugars Vs. CESTAT, Chennai & Ors. – 2017-TIOL-1357-HC-MAD-CX.*

3.2.1 With regard to the Credit disallowed on input services, he submitted that the Show Cause Notice does not mention what are the input services which are not eligible for Credit. In fact, the major part of the service tax Credit availed by the appellant would fall under the category of Erection, Commissioning and Installation Services. These services have nexus with the manufacturing activity and would also fall within the definition of 'input service'.

3.2.2 Further, during the relevant period (prior to 01.04.2011), the Credit in respect of service tax paid for setting up of factory is eligible for Credit. Therefore, all the services which were used by the appellant for setting up of cement plant (Line-II) are eligible for Credit.

3.3 He put forward arguments on the ground of limitation also. It is submitted by him that though the audit as well as investigations were conducted in 2011, the Show Cause Notice has been issued much later only on 27.11.2014, invoking the extended period alleging suppression of facts with intention to evade payment of duty. The appellant had disclosed the entire Credit availed in their ER-1 returns. Further, prior to starting the construction of the project, the appellant had written letter dated 04.11.2009 to the jurisdictional authorities informing them of their intention to avail

Credit on various items under the category of 'inputs'. In spite of this, the Department has alleged suppression of facts, which is entirely wrong. Therefore, the Show Cause Notice issued invoking the extended period cannot be sustained.

4.1 Ld. AR Shri. K. Veerabhadra Reddy appearing on behalf of the respondent supported the findings in the impugned Order. He adverted to paragraph 2 of the Show Cause Notice and submitted that all the items on which the appellant as availed input Credit fall under Chapter Heading 84 and 85. These goods, therefore, are not in the nature of inputs and therefore, the Credit availed by the appellants are ineligible. If the appellants were eligible for Credit under the head of capital goods, they ought to have availed only 50% Credit in the first financial year and the balance 50% in the subsequent year.

4.2 The appellants have availed the entire Credit under the category of inputs and the goods do not fit into the definition of 'inputs'. The impugned items after assembling and installation, become fixed to the earth to give them an immovable condition. As they become part of immovable property, they become non-excisable and therefore, Credit is not eligible. The appellant has not established the nexus of input service with manufacturing activity and therefore, the disallowance of input service Credit is also correct.

4.3 With regard to the arguments on limitation, he adverted to paragraph 48 of the impugned Order and submitted that mere intimation of intention to avail Credit will not absolve the appellants from the penalty for violating the provisions of law.

5. Heard both sides.

6.1 The issue is with regard to the disallowance of Credit under the category of 'inputs' as well as 'input services'. The details of the Credit availed as given in the Show Cause Notice, is reproduced as under :

Details	**Period**	**Amount of Credit taken (in Rs.)**
Input Credit	November 2009 to March 2011	18,90,75,202/-
Capital Goods Credit	November 2009 to March 2011	84,460/-
Input Service Credit	November 2009 to April 2011	6,64,95,149/-
Total		**Rs. 25,56,54,811/-**

6.2 Although it is alleged in the Show Cause Notice that the goods did not fall within the definition of 'inputs', the reason for which the Credit has been disallowed is that after assembly and installation of such items, they become immovable property and therefore, are not eligible for Credit. From the Show Cause Notice as well as the impugned Order, it is seen that various items were used for setting up of the cement plant. Many of these items are components or small parts which go into assembly, installation or commissioning of machines and equipment. As per Explanation-2 of the definition of inputs, as it stood during the relevant period, 'input' includes the goods used in the manufacture of capital goods which are further used in the factory of the manufacturer. Thus, all those items which are brought into the factory and used for the manufacture of capital goods, which are further used for the manufacturing activity, would be eligible for Credit.

6.3 The Department does not have a case that the items are not used as part of the cement plant. Instead, the Credit has been disallowed observing that these items take the nature of immovable property after being fixed to earth. The Department has placed reliance on the Larger Bench decision in the case of *M/s. Vandana Global Ltd. (supra)* to reach such conclusion, wherein it was held that after assembly/installation/erection, the machinery and components would result in the emergence of immovable property, which is non-excisable goods. This view was considered to be no longer good law in the decision of *Mundra Ports & Special Economic Zone Ltd.*

(supra) as well as the decision of the Hon'ble High Court of Chhattisgarh in the case of ***M/s. Vandana Global Ltd. Vs. Commissioner of C.Ex. & Cus., Raipur – 2018 (16) G.S.T.L. 462 (Chhattisgarh).*** The Hon'ble jurisdictional High Court in the case of *India Cements (supra)* and *Thiru Arooran Sugars (supra)* has analysed the eligibility of Credit on the basis of user test laid down by the Hon'ble Supreme Court in the case of ***Commr. of C.Ex., Jaipur Vs. Rajasthan Spinning & Weaving Mills Ltd. – 2010 (255) E.L.T. 481 (S.C.).*** These cases assist the arguments of the appellant.

6.4 Thus, following the decisions stated above as well as appreciating the facts presented by the records, we are of the considered opinion that the disallowance of Credit on the impugned items under the category of 'inputs' is unjustified and requires to be set aside, which we hereby do.

7.1 With regard to the Credit availed under the category of 'input services', we find that the assertion of the Ld. Consultant for the appellant that there is no specific mention in the Show Cause Notice as to what are the categories of services under dispute, is not without merit. In fact, there is nothing in the Show Cause Notice which gives details of the services which are not eligible for Credit.

7.2 The appellants have argued that the main service that has been availed by them is Erection, Commissioning and Installation Services as well as services in relation to setting up of the cement plant prior to 01.04.2011. The Credit in respect of setting up of factory is qualified as an 'input service' prior to 01.04.2011. Without availing the services of Erection, Commissioning and Installation, the machineries and equipment cannot be installed and put to commence manufacturing activity. We therefore find that the disallowance of Credit under the category of 'input service' to the tune of Rs. 6,64,95,149/- is without any legal reasons and requires to be set aside, which we hereby do.

8. The Ld. Consultant for the appellant has also argued on the ground of limitation. It is seen that for the period from November 2009 to March 2011, audit and later, investigation was also conducted. In spite of such investigations, the Show Cause Notice was issued only on 27.11.2014. The appellants have disclosed the entire Credit availed by them in their ER-1 returns as well as their statutory records. It is also seen that they have intimated the Department as early as 04.11.2009 with regard to their intention to avail the Credit. All this would show that the appellants cannot be saddled with the allegation of suppression of facts with intention to

evade payment of duty. We therefore find that there are no ingredients for invoking the extended period of limitation. The Show Cause Notice is time-barred and unsustainable on this ground also. The appellant succeeds both on merits as well as on limitation.

9. In view of the foregoing discussions, the impugned Order is set aside.

10. The appeal is allowed with consequential benefits, if any, as per law.

*(Pronounced in open court on **28.02.2019**)*

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

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