

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
SINGLE MEMBER APPEAL BRANCH

Appeal No. E/1909/2007 – SM[BR] WITH COD / 125 /2009 & E / CO / 125 / 2009 –SM[BR] Date 07/07/2010

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E. RAIPUR
CENTRAL EXCISE BUILDING, DHAMTARI ROAD,
TIKRAPARA, RAIPUR 492001.
C.C.E. RAIPUR

Appellant

Vs

Respondent

M/S ORION FERRO ALLOYS PVT. LTD.

I am directed to transmit herewith a certified copy of Final order No. 716 / 2010 –SM[BR] dated 30.6.2010
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944


Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent

M/S ORION FERRO ALLOYS PVT. LTD.

155, JINDAL INDL. PARK, VILLAGE PUNJIPATHRA, RAIGARH

2. Adv. / Consult

NONE;-----

3 S.D.R

~~4 J.C.D.R.~~

5 Bar association, CESTAT, New Delhi

6 Director Publications, Customs, Excise. I.P. Estate, New Delhi

7 M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3

8 Company Law Institute of India Pvt Ltd., No.2(Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17

9 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017

10 Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005

11 Easy Service Tax Online Dot Com Pvt Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

12 LAWCRUX Advisors Pvt Ltd, LAW House, 1-8, Sector - 10, Faridabad 121003 (Harvana)

13 TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road, Vasant Kunj, New Delhi - 110070

14 Office Copy

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Assistant Registrar
(SM Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-IV

SINGLE MEMBER BENCH

Date of hearing/decision: 30.6.2010

Central Excise Appeal No.1909 of 2007-SM with Condonation Application No.125 of 2009 and Cross-Objection No.125 of 2009

Arising out of the order in appeal No.87/RPR-I/2007 dated 30.3.2007 passed by the Commissioner (Appeals I), Customs , Central Excise, Raipur (C.G.).

For Approval and Signature:

Hon'ble Shri M. Veeraiyan, Technical Member

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

C.C.E., Raipur

....

Appellant

Vs.

M/s Orion Ferro Alloys Pvt. Ltd.

....

Respondent

Appearance:

Shri S.K. Bhaskar, Authorised Departmental Representative (JDR) for the Revenue and none for the respondents

Coram: Hon'ble Shri M. Veeraiyan, Technical Member

final Oral Order No. 716 / 2010 SM (Br)

Per M. Veeraiyan:

Appeal No.E/1909/2007 is by the Department against the order of the Commissioner (Appeals) No. 87/RPR-I/2007 dated 30.3.2007. Cross-Objection No.E/CO/125/2009 is related to this appeal. Since there is delay in

filing of cross-objection, the application No.E/COD/125/2009 has been filed seeking condonation of delay.

2. None appears for the respondents in spite of notice. On earlier occasions on 13.5.2010, 23.5.201 and 5.1.2010 also, none appeared on behalf of the respondents. Heard the learned DR.

3. Considering the grounds disclosed in the application for condonation of delay, the delay in filing of cross-objection is condoned.

4. The relevant facts of the case are that the respondents have procured duty paid M.S. Channal, parallel flange beam, parallel flange column, M.S. angle during May, 2004 and May, 2005 and used them for fabrication of supporting structures, platform, walkways and staircases and treating them as capital goods taken cenvat credit amounting to Rs.1,96,958/-. On the basis of show cause notice issued, the original authority confirmed the demand of Rs.1,96,958/- along with interest and imposed equal amount of penalty under Section 11AC. Since the amount was deposited prior to adjudication, the said amount was appropriated. On appeal by the party, the Commissioner (Appeals) set aside the order of the original authority. Hence the Department is in appeal.

5. Learned DR submits that the impugned materials have been utilised in fabricating the supporting structures as held by the original authority. The said items cannot be treated as capital goods as settled by the Larger Bench of the Tribunal in the case of Vandana Global Ltd. reported in 2010 (253) ELT 440. Learned DR also submits that the respondents have claimed these items as capital goods when they are not capital goods and therefore,, the original authority has rightly invoked the extended period of limitation. As regards the penalty, he fairly concedes that in view of divergent decisions prevailing on the issue during the relevant time, the penalty may not be warranted.

6.1 I have carefully considered the submissions of the learned DR and perused the records including the grounds urged in the cross-objection. I find that the issue is no more res integra as the same has been decided by the Larger Bench of the Tribunal in the case of Vandana Global Ltd. cited supra.

6.2 The Larger Bench of the Tribunal in the case of Vandana Global Ltd. considered the following questions:-

- (a) Whether the term "capital goods" can include plant, structures embedded to earth?**
- (b) Whether the goods like angles, joists, beam, channels, bars, flats which go into fabrication of such structures can be treated as 'inputs' in relation to their final products as inputs for capital goods, or none of the above?**
- (c) Whether the credit can be allowed in respect of goods like angles, joists, beam, channels, bars, flats which go into fabrication of such structures and plant?**

Following are the salient features of the decision of the Larger Bench :-

- a) It disapproved the decision of the Tribunal in the case of Bhushan Steel and Strips Ltd. vs. CCE, Raigad [2008 (223) ELT 517 (Tri-Mum)] which allowed credit on cement and steel used for providing foundation of machines, structures, tunnels, trenches, cellars and factory building essential for steel rolling mills and also allowed credit on roofing material;**
- b) It endorsed the decision of the Tribunal in the case of Vikram Cement vs. CCE, Indore [2009 (242) ELT 548] wherein it has been held that**

"If the inputs were to include every product under the sun which is somehow related to the premises where the manufacturing process goes on, then there is no need to provide a definition of the term capital goods and, therefore, the acceptance of the contention on behalf of the appellants would render the definition of the term the capital goods to be redundant as well as the provisions relating to extending the benefit of Cenvat credit to the capital goods."
- c) It reiterated the need for the nexus between inputs and final products in or in relation to process of manufacture as a condition for eligibility to credit as held by the Hon'ble Supreme Court in the case of Maruti Suzuki Ltd. vs. CCE [2009 (240) ELT 641 SC].**
- d) It held that amendment to Explanation 2 to Rule 2(k) of Cenvat Credit Rules, 2004 is a clarificatory amendment and that the same is applicable retrospectively.**
- e) It was also held that the foundation and supporting structures are neither inputs nor components, spares and accessories of machinery, nor have they been listed for such inclusion in the definition of capital goods.**

With the above findings and observations, the question referred to the Larger Bench were answered as follows:

"49. In the light of the foregoing findings, we answer the questions referred to the Larger Bench as follows:-

(a) The terms "capital goods" has been defined in the Cenvat Credit Rules, which in turn have been framed under the rule making powers conferred under Section 37(2) of the Act. The said Section refers to credit of duty paid on goods used in, or in relation to the manufacture of excisable goods. Hence, 'capital goods' defined in the Cenvat Credit Rules in the context of providing credit of duty paid, have to be excisable goods. Whether a particular plant or structure embedded to earth can be considered as excisable goods or not has to be determined in the light of the decisions of the Hon'ble Supreme Court on the issue, which is no longer res integra.

(b) Goods like cement and steel items used for laying 'foundation' and for building 'supporting structures' cannot be treated either as inputs for capital goods or as inputs in relation to the final products and therefore, no credit of duty paid on the same can be allowed under the Cenvat Credit Rules for the impugned period."

7. In the present case, it is clear that the materials like M.S. Channals, parallel flange beam, parallel flange column and M.S. angle have been used only for fabricating supporting structures. Therefore, the respondents are not eligible for credit as held by the original authority. In view of the above, the order of the Commissioner (Appeals) allowing the credit is not proper.

8. However, the finding of the original authority that extended period of limitation can be invoked as the respondents have wrongly claimed the disputed items as capital goods when they are not capital goods cannot be upheld. The view taken by the respondents that these items are capital goods, undisputedly was also being taken by the Tribunal in some of the decisions, therefore, their belief that the impugned items were capital goods was bona fide belief. From the show cause notice and from the order of the original authority, no material is available to show that the respondents

failed to furnish any relevant information which was required under the law. Therefore, the question of suppression or misstatement justifying invocation of extended period does not arise. On the same ground, the question of imposition of penalty does not arise.

9. The order of the Commissioner (Appeals) is set aside and the order of the original authority is restored with the following modifications:-

a) The respondents are not eligible for cenvat credit on the impugned items.

b) However, the duty demand and interest shall have to be worked out within normal period of limitation and for this purpose, the matter is remitted to the original authority.

c) In view of the facts and circumstances of the case, the penalty is *not* warranted and therefore, the order of the Commissioner (Appeals) in so far as setting aside the penalty is concerned, the same is sustained.

d) Cross-Objection which is merely in support of the order of the Commissioner (Appeals) is also disposed of.

10. The appeal as well as cross-objection are disposed of in the above terms.

(M. Veeraiyan)
Technical Member

scd/