IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. I

Appeal No. E/60132/2013-EX [DB]

[Arising out of order in original No. 26/Commr/CEx/BPL-II/2013 dated 24.07.2013, passed by the Commissioner of Central Excise, Bhopal]

For approval and signature:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. B. Ravichandran, Member (Technical)

Vardhman Fabrics ....Appellant

Vs.

CCE & ST, Bhopal ....Respondent

Appearance:

Shri Balbir, Advocate for the Appellant
Shri Yogesh Agarwal, DR for the Respondent

CORAM:
Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. B. Ravichandran, Member (Technical)

Date of Hearing: 26.12.2016

Date of Pronouncement: 30.12.2016

FINAL ORDER NO. 56201/2016-EX[DB]

Per B. Ravichandran

The appeal is against Order dated 23.07.2013 of Commissioner of Central Excise, Bhopal. The appellants are engaged in the manufacture of final products like woven fabrics of cotton, cotton yarn and PC yarn liable to Central Excise duty. The dispute in the present appeal relates to eligibility of the appellant for Cenvat credit of duty paid on various steel items during the period February 2007 to September 2008. The Original Authority concluded that the appellants are not eligible for Cenvat credit for Rs. 4,49,64,397/-. He imposed penalty of equivalent amount in terms of Rule 15 of Central Excise Rules, 2004 read with Section11AC of the Central Excise Act, 1944.

2. Ld. Counsel for the appellants submitted that;

(a) Cenvat credit of Rs. 4.09 Crore has been availed by them on various components of capital goods used in erection of Power Plant.

(b) Classification of various items received by the appellant was not in dispute. The credit has been denied only on the ground that these components and materials have been used in the factory and they become immovable property after their use. It was submitted that the credit is taken on the duty paid items received and used by them. As such the eligibility of credit can be determined at that stage only.

(c) The power plant of the appellant was consisting of various machinery which are clearly categorized as capital goods and while creating the plant for power generation, various components and accessories of machinery were fabricated and installed/integrated by the appellant by engaging contractor and the credit on the same cannot be denied.

(d) The emphasis made by the Original Authority on the immovability of the machinery is not relevant, the excisability of capital goods after its fabrication, is not subject of dispute. It is the credit eligibility of various components of accessories of such capital goods is subject matter of dispute. Reliance was placed on various decided cases in support of the above contention.

(e) Cenvat credit of structural items steel, HR Plates and HR Coils, Beams of Boiler, Vertical Bracing etc. were denied on the ground that such support structures were not eligible for credit in view of the decision of the Larger Bench of the Tribunal in ***Vandana Global Limited – 2010 (253) 440 ELT (LB-Tri.)***. The said decision is not applicable to the case of the appellant both on facts as well as on law. The various technological structures created by the appellants or wherein various capital goods used should not simply called as supports only. Further, the decision of the Tribunal in Vandana Global Ltd (supra) regarding retrospective application of Explanation-2 (a) of Cenvat Credit Rules has held to be not correct by later decisions of the High Courts. Reference was made to the Hon'ble Gujarat High Court in ***Mundra Ports and Special Economic Zone – 2015 (39) STR 276 (Guj.).***

(f) The demand for extended period is not legally sustainable. The appellants had shown the credit taken in their monthly statutory ER-1 returns. The eligibility of credit on various steel items was subject matter of interpretation and dispute. Accordingly, there can be no question of fraud, suppression etc. in the present case. The demand for extended period is not sustainable. For the same reason, imposition of penalty invoking fraud, suppression etc. is also not legally sustainable.

3. Ld. A.R. for the Revenue reiterated the findings of the Original Authority.

4. Heard both sides and perused the appeal records. The show cause notice contained the details of various items on which credit has been availed by the appellant. We notice that the invoice detail attached with the Show Cause Notice, in many cases, clearly indicate the description as parts of Boiler, accessories of Boiler. Machinery buck trolley, Cable Trays, Parts of conveyer, Hydro coils, components for Air Pollution control system etc. The credit of duty paid on these items was also denied without any detailed justification. We note that the duty paid items were brought in, which are clearly identified as components, parts or accessories of specific capital goods with specification which are covered by the definition of capital goods. In terms of explanation 2(a) of Cenvat Credit Rules, 2004, there can be no reason for denial of such credit. We mention this only to point out that denial of credit have been made on summarily discussion and conclusion based on purported immovability of capital goods fabricated by the appellants. We find that no restriction has been put in the definition of capital goods regarding movability of a particular structure. What is to be

considered is whether duty paid items brought in by the appellant has been used in components or accessories of identified capital goods. Such use justified the credit eligibility, as held by the Hon'ble Supreme Court in *Rajasthan Spinning & Weaving Mills – 2010 (255) ELT 481 (SC)*. The Hon'ble Supreme Court proposed "User Test" to find out the eligibility of MS Items for Cenvat credit eligibility. The same has been followed by various High Courts and Tribunals while deciding the eligibility of such items for credit. The Hon'ble Madras High Court in *India Cements Ltd vs. CESTAT, Chennai – 2015 (321) ELT 209 (Mad.)* held that MS Plates including channels used in the erection of various machinery such as crusher, kiln, hopers etc. can be considered as eligible for Cenvat credit as components of capital goods. Further, reference can be made to the decision of the Hon'ble Chhattisgarh High Court in ***UOI vs. Associated Cement Company Limited – 2011 (267) ELT 55 (Chhattisgarh)*** and decision of Hon'ble Karnataka High Court in ***CCE, Mysore vs. ICL Sugars Limited – 2011 (271) ELT 360 (Kar.).*** Further reference can also be made to the decision of Hon'ble Madras High Court in **Thiru Arooran Sugars - 2015-TIOL-1734-HC(MADRAS-CX)** and decision of Hon'ble Punjab & Haryana High Court in ***CCE, Jalandhar vs. Pioneer Agro Extracts Limited – 2008 (230) ELT 597 (P&H).***

5. We note that the Tribunal in various decisions held that Cenvat credit on MS items cannot be denied on the ground of their classification or the capital goods when fabricated getting

embedded to the earth for operational reasons. In ***Monnet Ispat & Energy Limited vs. CCE, Raipur – 2015 (330) ELT 711 (Tri. Del.),*** it was held that Cenvat credit was taken on the steel items when they are used for fabrication of components, accessories, support items, the credit cannot be denied on the ground that the final product are embedded to earth. We note that in the present case, various disputed items on which credit has been taken were either specifically classified as parts and components of capital goods or specifically included in such category complying with "User Test" laid down by the Hon'ble Supreme Court in ***CCE, Coimbatore vs. Jawahar Mills Limited – 2001 (132) ELT 3 (SC).***

6. As mentioned earlier, the issue of eligibility of credit of various items MS Channels, Beams, HR Plates etc. were subject matter of various decisions of the Tribunal. A reference can be made one of the recent decision in ***Singhal Enterprise Pvt. Limited vs. CCE, Raipur – 2016 (341) ELT 372 (Tri. Del.).*** The Tribunal observed as under:-

> **"13.** Now we turn to the question, whether credit is admissible on various structural steel items, such as, MS Angles, Sections, Channels, TMT Bar etc., which have been used by the appellants in the fabrication of support structures on which various capital goods are placed? The same stands denied by the lower authority. The learned DR has sought disallowance of the same by citing the decision of the Larger Bench in the case of Vandana Global Limited (supra) and other judgments. Further, he has brought to our notice and emphasized the amendment carried out in Explanation-II to Rule 2(a) which defines the term Inputw.e.f. 07.07.2009. It has further been pleaded that the Cenvat Credit claimed for the period

prior to this will be covered within the decision of the Larger Bench in the case of Vandana Global Ltd. (supra).

14. The Larger Bench decision in Vandana Global Ltd's case (supra) laid down that even if the iron and articles were used as supporting structurals, they would not be eligible for the credit. Considering the amendment made w.e.f. 07.07.2009 as a clarification amendment and hence to be considered retrospectively. However, we find that the said decision of the Larger Bench was considered by the Hon'ble Gujarat High Court in the case of Mundra Ports & Special Economic Zone Limited - 2015 (04) LCX0197, wherein it was observed that the amendment made on 07.07.2009 cannot be held to be clarificatory and as such would be applicable only prospectively.

15. We find that the controversy can be laid to rest by making a reference to the decision of the Apex Court in the case of CCE, Jaipur vs. Rajasthan Spinning & Weaving Mills Ltd., 2010 (255) ELT 481 (SC), wherein the Hon'ble Supreme Court has considered an identical issue of steel plates and MS channels used in the fabrication of chimney for diesel generating set. The credit stands allowed in the light of Rule 57Q of the erstwhile Central Excise Rules, 1944. In the said judgment, the Apex Court has referred to the "User Test" evolved by the Apex Court in the case of CCE, Coimbatore vs. Jawahar Mills Limited - 2001 (132) ELT 3 (SC), which is required to be satisfied to find out whether or not particular goods could be said to be capital goods. When we apply the "user test" to the case in hand, we find that the structural steel items have been used for the fabrication of support structures for capital goods. The appellants have argued that the various capital goods, such as, kiln, material handling conveyor system, furnace etc. cannot be suspended in mid air. They will need to be suitably supported to facilitate smooth functioning of such machines. It is obvious that the structural items have been suitably worked upon for this purpose. Accordingly, the goods fabricated, using such structurals, will have to be considered as parts of the relevant machines. The definition of 'Capital Goods' includes, components, spares and accessories of such capital goods. Accordingly, applying the "User Test" to the facts in hand, we have no hesitation in holding that the structural items used in the fabrication of support structures would fall within the ambit of 'Capital Goods' as contemplated under Rule 2(a) of the Cenvat Credit Rules, hence will be entitled to the Cenvat Credit."

7. We find that the Original Authority relied on an order dated 15.01.2002, issued by the Board under Section 37B of the Central Excise Act, 1944. This order clarifies the excisability of erection and fabrication of plant and machinery at site. In this connection, we are not dealing with excise duty liability when various capital goods and machinery fabricated or erected by the appellant while building up power plant or machinery in their unit. We are dealing with the provisions of Cenvat Credit Rules, 2004 to apply the same for credit eligibility of the appellant. As noted earlier in the order, that the Show Cause Notice contained complete list and details of items in invoice, classification and description of items of which credit have been availed by the appellant. We have noted that in large number of cases where the products have been clearly described as spare parts of boiler, parts of conveyer, spare parts of textile machinery under classification of Chapter 84, the credit has been denied. Apparently, no detailed examination of use of these items has been made by the Original Authority. Even the credit availed on Tubes, Pipes and ducts which were specifically mentioned as capital goods during the relevant period has been denied by the Original Authority without examination.

8. On careful consideration of the grounds of appeal and based on the discussion and findings as above, we find that the denial of credit to the appellant in the impugned order is not sustainable. Accordingly, we set-aside the impugned order and allow the appeal.

[Pronounced in the open Court on 30.12.2016]

Justice Dr. Satish Chandra
President

B. Ravichandran
Member (Technical)

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