CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. 1

Date of hearing/decision: 10.07.2017

Excise Appeal No. 979 of 2011

(Arising out of order-in original No. 03/Aayukt/2011 dt. 18.01.2011 passed by the Commissioner, Central Excise and Service Tax, LTU, New Delhi.)

M/s Dalmia Cements (Bharat) Limited Appellant

Vs.

CCE&C, LTU, New Delhi Respondent

Appearance:

Sh. P. K. Sahu, Advocate for the appellant
Sh. H. C. Saini, AR for the Revenue

Coram:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Final Order No. 55037 /2017

Per: **Justice (Dr.) Satish Chandra**:

The present appeal is filed against the order-in-original No. 03/Aayukt/2011 dt. 18.01.2011 passed by the Commissioner, Central Excise and Service Tax, LTU, New Delhi. The period of dispute is April 2008 to October, 2008.

2. Heard Shri P. K. Sahu, ld. Advocate for the appellant and Sh. S.C. Saini, AR for the Revenue.

3. After hearing both the sides and on perusal of the record it appears that -

(a) the first issue in the present appeal is pertaining to an amount of Rs. 2,51,34,068/- availed as credit on goods used for fabrication of plant and machinery is not available as the appellant was not the manufacturer of the capital goods . The contractor who executed the work is the manufacturer.

(b) an amount of Rs. 12,54,71,323/- availed as credit on capital goods was sought to be denied on the ground that the appellant could not have taken the credit on these capital goods as they have not commenced production at the relevant time;

(c) an amount of Rs. 5,86,62,803/- availed as credit on input services for construction of factory was sought to be denied on the ground that the construction is with reference to immovable property and accordingly the credit is not available.

4. After hearing both the sides and perusal of record, it appears that for the previous and subsequent period the identical issues have come up before the Tribunal in appellant's own case. (Ex. Appeal No. 543 of 2011 dated 13.02.2017 Dalmia Cements (Bharat Ltd. vs. CCE&ST (LTU) New Delhi). The Tribunal has decided the issue in favour of the appellant by observing that-

Issue No. 1 "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 v. Rajasthan Spinning & Weaving Mills Ltd., 2010 (255) E.L.T. 481 (S.C.)****, 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 v. Jawahar Mills Ltd., 2001 (132) E.L.T. 3 (S.C.)****, 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*".

In **Lafarge India Pvt. Ltd.** (supra) the Tribunal held as below :-

"6. We find that apart from the various other case laws relied upon by the appellant as above, the decisions of Hon'ble Madras High Court in ***India Cements Limited – 2012 (285) E.L.T. 341 (Mad.), 2014 (310) E.L.T. 636 (Mad.)*** *and* ***2014 (305) E.L.T. 558 (Mad.)*** *all on the same set of facts, though with reference to erstwhile Rule 57Q are also relevant. The Hon'ble Supreme Court in* ***Jayaswal Neco Limited – 2015 (319) E.L.T. 247 (SC)*** *allowed Cenvat credit on railway track materials used for handling raw material processed goods. The Tribunal in* ***Bellary Steel and Alloys Limited vs. CCE, Belgaum – 2005 (180) E.L.T. 92 (Tri. – Bang.)*** *held that Cenvat credit is available on HR sheet, angles, channels etc. used in fabrication and erection of technological structure and blast furnace and material handling system. Such supporting structure are also capital goods and the fact that they are embedded to earth is no reason for denying credit/ credit on input used. The Hon'ble Punjab & Haryana High Court in* ***CCE, Jullandhar vs. Pioneer Agro Extracts Ltd.– 2008 (230) E.L.T. 597 (P&H)*** *held that channels and angles, joint of iron steel used for installation of batch vessel or essential plant and machinery and are eligible for credit as capital goods. The Hon'ble Madras High Court in* ***Thiru Arooran Sugar - 2015-TIOL-1734-HC-Mad.CX*** *held that credit on M.S. Plates, angles, channels utilized in construction / erection of plant were eligible for credit. The High Court observed that the*

principle laid-down by the Hon'ble Supreme Court in ***Rajasthan Spinning and Weaving Mills Ltd.*** *(supra) is applicable to such situation.*

7. *We note that the Tribunal has been consistently following the ratio that the steel items when they are used in fabrication of capital goods and their accessories inside the manufacturer premises are eligible for credit by applying 'user test' as evolved by the Hon'ble Supreme Court in* ***Rajasthan Spinning and Weaving Mills Ltd.*** *(supra). A reference can be made to latest decision of the Tribunal in* ***Singhal Enterprises Pvt. Ltd. vs. CC&CE, Raipur*** *vide final order No. 53013/2016 dated 12/08/2016".*

6. **Issue No. 2**: The Tribunal observed that-

On the second issue regarding denial of credit on capital goods on the ground that no credit is available prior to the commencement of production, we note that the Original Authority relied on the Board Circular dated 26/12/1994. It was clearly recorded in the impugned order that the nature of goods being capital goods as defined under Rule 2 of Cenvat Credit Rules, 2004 is not disputed. The only issue is whether the appellant can take credit before the commencement of production. The Original Authority held that upon completion of installation these capital goods become immovable and are non-excisable. Further, credit is admissible only on capital goods when the appellant commences production. First of all, we note circular dated 26/12/1994 relied upon by the Original Authority has no relevance to the dispute at hand. The said circular dealt with the provisions of erstwhile Rule 57Q and the declaration to be filed for availing credit under the said rule. The procedure is prescribed under Rule 57T of the erstwhile Central Excise Rules, 1944. We find the credit availed by the appellant are in terms of Cenvat Credit Rules, 2004 which does not provide for any declaration etc. for availing credit. Further, as submitted by the appellant the various duty paid capital goods were received in the premises of the appellant in connection with setting up of the plant. Apparently after setting up of such plant only, production of final product can commence. The appellant necessarily has to keep account of all the duty paid capital goods alongwith quantum of eligible credit on such capital goods. It is not the case of the Revenue that the appellants have utilized any of the credit availed on this capital goods before the commencement of production. It is clear that such utilization is possible only when dutiable final products are manufactured and cleared by the appellant. Hence, keeping a record of all the credits available will necessarily help both the Revenue and the appellant for proper accounting and verification of such credit. Regarding the observation recorded by the Original Authority on the immovability of the capital goods, we find that duty paid capital goods have been received in the premises of the appellant. The capital goods are to be installed in a manner for effective use in the production process. The capital goods as they were received by the appellant were duty paid and the credit on the same cannot be denied on the ground that they were embedded to earth after installation. The excisability of capital goods is not a point for decision. There is no irregular utilization of credit by the appellant and no such allegation has been made in the show cause notice. Even if the appellant has entered the credit in their books of accounts no utilization is possible without commencement of production. In effect, the credits available on the capital goods will come to be entered as availed and utilized only on production of dutiable final product. We find no justification to deny Cenvat credit on capital goods which, are otherwise legitimately available to the appellant. The reasoning adopted by the Original Authority placing reliance on the circular dated 26/12/1994 is misplaced and legally unsustainable. Accordingly, we find the appellant’s eligibility for credit cannot be denied.

7. **Issue No. 3** :

On the third issue regarding denial of credit on input services for construction of factory by the appellant, we note that the appellants availed credit of service tax paid on various input services like works contract service, GTA, telephone, security service, consulting engineering service, rent a cab operator service etc. These credits were denied by the Original Authority on the ground that credit on input services can be allowed only if used for provision of a service liable to service tax or manufacture of goods liable to excise duty. Reliance was placed on Board circular dated 04/01/2008. We note that the reliance placed by the Original Authority on the said circular is misplaced and not appropriate. The said circular dealt with specifically 'commercial or industrial construction service' and 'renting of immovable property service'. Presently, we are dealing with various input services availed by the appellant to set up their production factory. "Input service" in terms of Rule 2 (l) of Cenvat Credit Rules, 2004 means any service used by the manufacturer whether directly or indirectly, in or in relation to the manufacture of final products and includes services used in relation to setting up, modernization, renovation or repairs of a factory. The credits availed by the appellant are with reference to construction of factory. The said activity is covered by the definition of input service during the relevant time. It is also to be noted that the definition of "input service" is very broad and includes those services which are used by the manufacturer whether directly or indirectly, in or in relation to the manufacture of final products. It is clear that the said service even if used indirectly by the manufacturer in relation to manufacture of final product, the same should be eligible for credit. Apart from this, there is a specific inclusion of services used in relation to setting up of factory. The services availed by the appellants are covered by the definition of input service.

The findings recorded by the Original Authority is without any legal support and application of an interpretation which is not relevant to the facts of the present case. Further, the reliance again placed on the decision of Tribunal in **Vandana Global Ltd.** (supra) is not appropriate. We note that the decision of Larger Bench of the Tribunal in **ABB Ltd. vs. CCE & ST, Bangalore** reported in **2009 (15) S.T.R. 23 (Tri. – LB)** which is in favour of the appellant, was referred to by the Original Authority. He did not rely on the same on the ground that the same has not been accepted by the Department and appeal has been filed. We find that such reasoning is not tenable. We also refer to the decisions of the Tribunal in **CCE, Delhi – III vs. Exide Industries Ltd.** reported in **2016 (43) S.T.R. 463 (Tri. – Del.)** and **Steril Gene Life Sciences Pvt. Ltd. vs. CCE, Puducherry** reported in **2016 (42) S.T.R. 355 (Tri. – Chennai)**. Considering the scope of the definition of input service during the relevant time, we find that the reasoning and finding recorded in the impugned order is not legally sustainable.

8. By following our earlier order (supra) we set-aside the impugned order and allow the appeal.

9. In the result, appeal filed by the appellant is allowed.

(Dictated and pronounced in the open Court).

(V. Padmanabhan)
Member (Technical)

Justice (Dr.) Satish Chandra)
President

Pant