IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-SM

COURT – IV

Excise Appeal No. E/52937/2018 [SM]

[Arising out of Order-in-Appeal No. 562 (CRM)/ST/JDR/2018 dated 13.06.2018 passed by the Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Jodhpur]

DCM Shriram Ltd. **...Appellant**

Vs.

C.C.E., Udaipur **...Respondent**

Present for the Appellant : Mr. Hemant Bajaj, Advocate
Present for the Respondent: Mr. P.R. Gupta, DR

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing/Decision: 27.11.2018

FINAL ORDER NO. 53348/2018

PER: RACHNA GUPTA

The appellant herein is engaged in manufacture of P.P. cement, PVC resins, caustic soda, etc. The Department has observed that the appellant has wrongly availed the cenvat credit to the tune of Rs. 3,82,512/- during the period w.e.f. January, 2011 to June, 2011 on the iron and steel items such as angles, channels, HR plates, MS rounds, joist, sections, wire rope, wire mesh, etc., trading them as input/capital goods. Show Cause Notice No. 8344 dated 04.10.2011 was served upon the appellant proposing the recovery of the aforesaid amount alleging that the aforesaid articles are neither the inputs nor the capital goods. The interest at the appropriate rate and the proportionate penalty was also proposed. The said proposal of demand was initially confirmed vide Order No. 40 dated 25.10.2012 as was passed by Assistant Commissioner to the extent of disallowing the cenvat credit amounting to Rs. 1,77,272/- on capital goods and cenvat credit amounting to Rs. 80,600/- on the inputs for the period in dispute alongwith the interest and penalty as proposed. Being aggrieved, Appeal was filed before Commissioner(Appeals) who vide the Order No. 562 dated 12.06.2018 rejected the Appeal as filed. Being aggrieved the appellant has approached this Tribunal with the impugned Appeal.

2. I have heard Mr. Hemant Bajaj, Ld. Advocate for the appellant and Mr. P.R. Gupta, Ld. DR for the Department.

3. It is submitted on behalf of the appellant that Commissioner(Appeals) while rejecting the Appeal has solely relied upon the decision of the case of **Vandana Global** reported as **2010 (253) E.L.T. 440**, a Larger Bench decision of this Tribunal. However the said decision stands already over ruled by the decision of High Court of Chhattisgarh in the case **Vandana Global Ltd. Vs. C.C.E. 2018 (5) TMI 305**. It is impressed upon that the said decision of Hon'ble High Court is sufficient for the said Order of Commissioner(Appeals) to be set aside. Otherwise also, there has been a catena of judgements including the one from the High Court of Rajasthan

which applied to the appellant herein in the case of **Union of India Vs. Hindustan Zinc Limited 2007(214) E.L.T. 510 (Rajasthan)**. The Ld. Counsel for the appellant has accordingly prayed for the impugned order to be set aside and Appeal to be allowed.

4. Per contra, Ld. DR has justified the Order by laying emphasis upon an instruction of the Department bearing No. 267 dated 08.07.2010 has also been made. Appeal is accordingly prayed to be dismissed.

5. After hearing both the parties, I observe that the only issue to be adjudicated in the present Appeal is as to whether the articles as that of angles, channels, HR plates, MS rounds, joist, sections, wire rope, wire mesh, etc. are the inputs/capital goods enabling the assesse/ appellant to avail the cenvat credit. The Adjudicating Authority below has rejected the claim relying upon the decision of Larger Bench but the said decisions stands over ruled by the decision of High Court of Chhattisgarh as is impressed upon on behalf of the appellant. Perusal of the decision reflects that the structures as mentioned above viz. angles, joist, beams, bars, plates as were denied to be the capital goods in the decision of Vandana Global(supra) are held to be the capital goods. The Hon'ble Supreme Court has earlier dealt with the issue in the case **C.C.E., Jaipur Vs. Rajasthan Spinning and Weaving Mills Ltd. 2010 (255) E.L.T. 481 (S.C.)** wherein the Hon'ble Apex

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 judgement, the Apex Court has referred to the "User Test Principle" as was evolved by the Apex Court in the case of **CCE, Coimbatore Vs. Jawahar Mills Ltd. 2001 (132) E.L.T. 3 (S.C.)** which was held to be required to find out whether or not particular goods could be said to be capital goods.

It was held: When we apply the "User Test Principle" 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 structural, 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.

6. This principle of "User Test Principle" as classified by the Hon'ble Apex Court has subsequently been used in several decisions, i.e. **C.C.E. Vs. India Cements Ltd. 2014 (310) E.L.T. 636**. Even in the case of Vandana Global's own case as the Commissioner (Appeals) has relied upon the above said decision while rejecting the appellant's case. **High Court of Madras in the case C.C.E. Vs. India Cements 2012 (285) E.L.T. 341** has also reiterated the principle of "User Test Principle"as detailed by Hon'ble Apex Court. Seeing from these decisions it stands clear that the articles on which the appellant herein has availed the cenvat credit clearly falls within the definition of capital goods as defined under Rule 2(k) of the Cenvat Credit Rules 2004. It is observed that the decisions as discussed above were very much available to be referred to by the Commissioner(Appeals) while passing the impugned decision on 12.06.2018. Still applying to a over ruled decision while rejecting the Appeal is held to be an act of committing a judicial indiscipline on the part of the Commissioner(Appeals).

7. This kind of lack of Judicial discipline will lead to mere litigation and chaos. Hon'ble High Court Karnataka Bengaluru in their decision dated 22.10.2018 in Writ Petition No. 37514/2017 has held that public servants committing such kind of act are actually threat to society.

Commissioner(Appeals) is required to be careful about getting acquainted with the latest laws especially the overruled decisions.

8. In view of the entire above discussion, the Order in hand is hereby set aside. Appeal stands allowed.

[Dictated and pronounced in the open Court]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

D.J.