# CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
# REGIONAL BENCH AT HYDERABAD
Single Member Bench - Court – I

## Excise APPEAL No. 31294 of 2018

(Arising out of **Order-in-Appeal** No. TTD-EXCUS-000-APP-040-18-19 dated 31.07.2018 passed by Commissioner of Central Tax (AUDIT), Guntur)

**India Cements Ltd.,** .. **APPELLANT**
Yemagunta P O,
Kadapa District,
Andhra Pradesh - 516309

*VERSUS*

**Commissioner of Central Tax,** .. **RESPONDENT**
**Tirupati - GST**
Tirupati Commissionerate,
West Church Compound,
MR Palli Road, Chitthoor,
Andhra Pradesh – 517 507.

**<u>Appearance</u>**

Shri Muthu Venkataraman, Advcate for the appellant.

Shri Bhanu Kiran, Assistant Commissioner for the Respondent.

**Coram: Hon'ble Mr. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)**

## FINAL ORDER No. A/30527/2019

Date of Hearing: 08.05.2019
Date of Decision: 08.05.2019

**[ORDER PER: MR. P. VENKATA SUBBA RAO]**

1. This appeal is filed against the Order-in-Appeal No. TTD-EXCUS-000-APP-040-18-19 dated 31.07.2018.

2. Brief facts of the case after filtering out the unnecessary details are the appellant were issued a show cause notice on 09.02.2015 seeking to deny cenvat credit of Rs. 3,05,185/- and recover the same under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11A(54) of Central Excise Act,

1944 along with interest. It is also proposed to impose penalty upon them under Rule 15(2) of CCR, 2004 read with Section 11AC. The period covered in the show cause notice is April 2012 to June 2012. The credit in dispute is the credit of service tax paid on supply of tangible goods and services (renting of poclainers and tippers). The lower authority, after following due process, confirmed the demand and imposed penalty as proposed. On appeal the first appellate authority upheld the order of the lower authority. Hence this appeal.

3. Learned Counsel for the appellant submits that Rule 2(ℓ) of CCR, 2004 upto 30.06.2012 read as follows:

"input service" means any service;

(i) Used by a provider of taxable service for providing an output service; or

(ii) Used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of the manufacture of final products and clearance of final products up to the place of removal.

And includes..................but excludes services;

(A) ..........................................................

(B) Specified in sub-clauses (o) and (zzzz) of clause (105) of section 65 of the Finance Act, in so far as they relate to a motor vehicle which is not a capital goods.

He submits that the case of the department is that since they have hired poclainers and tippers which are motor vehicles which are not capital goods the service tax paid on the higher charges of this is not eligible for cenvat credit specific exclusion as per clause (B) of the definition of input service as it stood during the relevant period. He argued that this demand is not sustainable for the following reasons:

i) Poclainers and tippers cannot be considered as motor vehicles in view of the judgment of Hon'ble Supreme Court in the case of Belani Ores Ltd., Vs State of Orissa [1975 AIR 17]. Since they cannot be considered as motor vehicles they are not excluded from availing cenvat credit as per clause (B) of Rule 2(ℓ) of Cenvat Credit Rules, 2004.

ii) Poclainers and tippers are capital goods as far as their activity is concerned and hence are not extended by caluse (B) of Rule 2(ℓ). He also argues that dumpers and tippers were specifically covered in the definition of capital goods under CCR, 2004 with effect from 01.07.2012. Although the period in question is prior to this date the benefit of the same should also be extended to them. In the judgment of the Hon'ble Apex Court in the case of W.P.I.L. Ltd., [2005 (181) ELT 359 (S.C.)] he would argue that where an exemption notification was withdrawn for some period and which was restored subsequently it also applies to the intervening period. The same logic should apply to the definition of capital goods as far as dumpers and tippers are concerned also.

iii) The show cause notice is time barred as the show cause notice was issued in 2015 for the period April 2012 to June 2012 and there is no whisper of allegation in the show cause notice that the appellant had committed any fraud or colluded or suppressed facts or wilfully mis-stated or contravened any provisions of the act or rules with an intent to evade payment of duty. Although in para 6 of the show cause notice there is an allegation that they had contravened statutory provisions there is no indication or allegation that this was done with an intent to evade payment of duty. Thus, there is not even a mention of the intent let alone any evidence for such intent. Therefore, their appeal may be allowed and impugned order may be set aside. He relies on the following cases:

  i) Mukand Ltd., [2019 (4) TMI 428 – CESTAT Bangalore]
  ii) Soumya Mining Ltd., [2017 (6) TMI 1071 – CESTAT New Delhi]

4. Learned DR reiterates the findings of the impugned order. As far as the first question as to whether the appellant is entitled to the benefit of cenvat credit on the service tax paid on hiring of poclainers and tippers is concerned he would urge that they are clearly motor vehicles and therefore were excluded from the definition as applicable during the relevant period and therefore no cenvat credit is eligible. Countering the arguments of the Learned Counsel, he would urge that the judgment of the Hon'ble Apex Court in the case of Belani Ores Ltd., (supra) was whether or not the dumpers and tippers used within the mine need to be registered under the Motor Vehicle Act and the Hon'ble Apex Court held that merely because

vehicles are also motorable they need not be registered because they operate within the mines. In contrast the dumpers and tippers which are used in the present case and in factories are all registered under Motor Vehicles Act and have registration numbers and therefore the two cannot be compared. After obtaining motor vehicles registration they cannot claim that they are not motor vehicles. Regarding the second argument that the dumpers and tippers are capital goods as per the definition of capital goods under CCR, 2004 he would submit that these were included in the definition of capital goods only with effect from 01.07.2012 and the same were not applicable during the relevant period. Regarding the contention of the Learned Counsel that the Hon'ble Supreme Court Judgment in the case of WPIL (supra) extended the benefit of the exemption notification even for the gap between two periods, he would urge that the present case is not of an exemption but a definition of the capital goods as was applicable during the relevant period. He would further urge that now the question of interpretation of fiscal statute as well as exemption notification has now been decided by the Constitutional Bench of the Supreme Court in the case of Dilip Kumar & Co., [CA 3327 of 2017] in which it is held that all fiscal statutes should be strictly interpreted the way they are written without any regard to the consequences thereof. Further, if there is an exemption notification, it should be construed strictly against the person claiming the benefit of exemption notification. This judgment of the Hon'ble Apex Court was passed in order to settle the differences between various judgments of various courts including those of Hon'ble Apex Court. Therefore the definition of capital goods with effect from 01.07.2012 cannot be extended to the period prior to the same. On the question of limitation also he would urge that the show cause notice clearly indicates that the appellant was followed statutory provisions although it does not specifically mention that this was done with an intention to evade the payment of duty.

5. I have considered the arguments on both sides an perused the records. I find that the show cause notice covered the period April 2012 to June 2012 but was issued on 09.02.2015 well beyond the normal period of limitation. There is nothing in the show cause notice to show that the appellant has committed any fraud or had colluded or had mis-stated any

facts or suppressed facts. There is an allegation that they have contravened the provisions of the act or rules but there is not even a mention that such contravention was done with an intent to evade payment of duty. I, therefore, find that the extended period of limitation cannot be indicated and the entire show cause notice is time barred and needs to be set aside on this ground alone. As far as the merits are concerned Rule 2(ℓ) as it stood during the relevant period specifically excluded motor vehicles which are not capital goods. Therefore, on merits the appellant could not have availed cenvat credit on the service tax paid on the hire charges for the vehicles in question. Usually, dumpers and tippers which are registered as motor vehicles and there is no contrary indication in the records. Once they are registered with the Motor Vehicles Department they cannot cease to be motor vehicles thereafter. The specific inclusion of dumpers and tippers as capital goods under Cenvat Credit Rules, 2004 excluded goods falling under Chapter 87 of the Central Excise Tax Act. I therefore, find that on merits the demand is sustainable, however since the show cause notice has issued after the period of limitation without either allegation or evidence of fraud, collusion etc., the demand is time barred. Accordingly, the impugned order is set aside with consequential relief.

(Dictated and pronounced in open court)

**(P. VENKATA SUBBA RAO)**
**MEMBER (TECHNICAL)**

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