CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL REGIONAL BENCH AT HYDERABAD

Division Bench

Court – I

Central Excise Appeal No. 1026 of 2012

(Arising out of Order-in-Original No.02/2012 (C.Ex.) dt.23.01.2012 passed by Commissioner of Customs, Central Excise & Service Tax, Tirupati)

Commissioner of Customs, Central Excise & Service Tax, Tirupati **......Appellant**
Amaravathi Nagar, MR Palli,
Chittor, Andhra Pradesh – 517 502

VERSUS

Dalmia Cement (Bharat) Ltd.
Chinnakomerla Village, Mylavaram Mandal,
Kadapa, Andhra Pradesh – 516 433 **......Respondent**

Appearance
Shri A.V.L.N. Chary, Authorized Representative for the Revenue.
None for the Respondent.

Coram:
HON'BLE MR. ANIL CHOUDHARY (JUDICIAL)
HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30090/2022

Date of Hearing: 07.09.2022
Date of Decision: 15.09.2022

[Order per: ANIL CHOUDHARY]

The issue involved in this appeal is whether the Cenvat credit has been rightly denied on MS Plates used in fabrication of Plant and Machinery/ capital goods during the period October, 2009 to March, 2010.

2. The brief facts are that the appellant is a manufacturer of cement which is dutiable. They are registered With LTU at New Delhi under Registration No. LTU/DEL/020 dated 14.11.2008. The appellant had procured MS Plates which were used in fabrication of Plant and Machinery and had taken Cenvat credit on the same. A show cause notice dated 02.11.2010 was issued, as it appeared to Revenue, in view of the ruling of the Larger Bench of this Tribunal in the case of Vandana Global Ltd and

others vs CCE [2010 (253) ELT 440 (Tri-LB)] that Cenvat credit is not applicable on cement and steel items which are used in fabrication of capital goods like Plant and Machinery, which is embedded to earth or used for laying foundation and building support structures. It further appeared to Revenue that in terms of Circular No. 98/01/2008-ST, input credit of service tax can be taken only if the output is a service liable to service tax or goods liable to excise duty. No Cenvat credit can be taken where services or goods attract neither service tax nor excise duty. It further appeared that MS Plates were used in fabrication of Plant and Machinery which are immovable property. Accordingly, the show cause notice proposed to disallow Cenvat credit of Rs.4,96,45,877/- along with proposal to impose penalty under Rule 15 of Cenvat Credit Rules, 1944. Further it was proposed to deny Cenvat credit on certain input services, as it appeared to be in contravention of Rules 2, 3 and 4 of Cenvat Credit Rules, 2004.

3. Show cause notice was adjudicated vide the impugned Order-in-Original dated 23.01.2012. Learned Commissioner held that Cenvat credit is available on MS Plates which were used in fabrication of Plant and Machinery as a manufacturer is entitled to Cenvat credit on all inputs used in the factory of production, which has been specifically provided in explanation (2) of Rule 2(k) of Cenvat Credit Rules, wherein it is provided that 'input' includes goods used in manufacture of capital goods, which are further used in the factory of the manufacturer. Relying on the ruling of this Tribunal in the case of CCE vs Madras Aluminium Co. [2010 (259) ELT 738 (Tri-Chennai)]. As regards the input services, learned Commissioner observed that it is incorrect to propose disallowance of Cenvat credit on the ground that the output is factory/ civil construction/ immovable property or capital goods which are exempted under Notification No. 67/95-CE, on which no duty is payable/ paid. The fact remains that final product manufactured by the appellant i.e., cement is dutiable. The impugned services deserved to be considered as having been used directly or indirectly, in or in relation to the manufacture of final product which is cement. Learned Commissioner found that many of the services received by the appellant have been specified in the definition of input services as these services are relating to modernization, renovation or repairs, advertisement or sales promotion, market research, storage up to the place of removal, procurement of inputs, activities relating to business such as accounting, auditing, etc. Although

some of these services do not have tangible output like factory building or finished product, yet Cenvat credit is allowed by virtue of the inclusion in the definition of input service. Thus, appellant is entitled to Cenvat credit on services received both for manufacture of cement as well as for setting up of the factory, as no dutiable products can be manufactured without setting up of the factory. Learned counsel further states that the appellant have, after issuance of show cause notice, suo moto reversed the Cenvat credit on services used for construction of residential colony, hospital and guest houses, an amount of Rs.2,03,537/-. Accordingly, learned Commissioner confirmed the demand of the said amount of Rs.2,03,537/- and also appropriated the same with the amount already reversed/ paid. Further, was pleased to drop the demand of Rs.4,94,42,340/-. Further, the amount of interest Rs.57,134/-, already paid by the appellant was appropriated. Further, penalty of Rs.10,000/- was imposed under Rule 15 of Cenvat Credit Rules.

4. Being aggrieved, Revenue is in appeal. Relying on the ruling of the Larger Bench of this Tribunal in Vandana Global Ltd, states that Cenvat credit is not eligible on goods and services in dispute. It is further stated that various input services were utilized by the assessee in connection with civil construction activities and fabrication works in their factory premises as these have resulted in creation of immovable property like civil structures, CC roads, foundations/ structures of capital goods which are embedded to earth.

5. Having considered the grounds of Revenue and after going through the appeal records, we find that the whole case of Revenue starting from the show cause notice is based on the Larger Bench ruling of this Tribunal in the case of Vandana Global Ltd wherein this Tribunal had held that Cenvat credit is not available for inputs used in fabrication of support structures and foundation of capital goods, these being immovable structures which cannot be called goods.

6. We find that the Larger Bench ruling of this Tribunal has been set aside and reversed by the Hon'ble Chhattisgarh High Court in the appeal by Vandana Global Ltd. reported at 2018 (16) GSTL 462, wherein, it has been held that Cenvat credit of service tax on inputs like MS Angles/ beams/ bars/ plates, etc., which go into fabrication of structures embedded to earth

are to be treated as inputs used in relation to the final products, as inputs or capital goods. The Hon'ble Chhattisgarh High Court relied on the ruling of Hon'ble Gujarat High Court in the case of Mundra Ports & Special Economic Zone Ltd vs Commissioner [2015 (39) STR 726] and also on the ruling of the Hon'ble Madras High Court in the case of Thiruarooran Sugars vs CESTAT, Chennai [2017 (355) ELT 373]. For reference, we reproduce the findings of the Hon'ble Chhattisgarh High Court in Vandana Global Ltd., as follows:

> *"5. The impugned order of the Tribunal had come up for consideration before different High Courts either cited as precedent or as relied upon by the Tribunal in different other matters. The Gujarat High Court in Mundra Ports & Special Economic Zone Ltd [2015 (39) STR 726 (Guj.)] referred to the contents of the amendment, to the extent it is relevant for the purpose of this case and held as follows:*
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>> *"We do not find that amendment made in the Cenvat Credit Rules, 2004, which come into force 7-7-2009 was clarificatory amendment as there is nothing to suggest in the Amending Act that amendment made in Explanation 2 was clarificatory in nature. Wherever the Legislature wants to clarify the provision, it clearly mentions intention in the notification itself and seeks to clarify existing provision. Even, if the new provision is added then it will be new amendment and cannot be treated to be clarification o particular thing or goods and/or input as such, the amendment could operate only prospectively."*
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> *6. That view has been quoted with approval by the Madras High Court in M/s Thiruarooran Sugars vs CESTAT (CMA 3814/2014 and connections) decided on 10-7-2017 [2017 (355) ELT 373 (Mad.)] to conclude that the said amendment cannot be treated as clarificatory. M/s Thiruarooran Sugars also considered the issue as to the effect and fundamental value of the evidentiary statement made by the Finance Minister dealing with an amendment in the budget speech.*
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> *7. Section 37 of the Central Excise Act, 1944, for short, 'the Act', is a rule making power. Section 37(2)(xvia) provided for the credit of duty paid for deemed to have been paid on the goods used in, or in relation to, the manufacture of excisable goods. Section 37(2A) of the Act – The power to make rules conferred by clause (xvi) of sub-section (2) shall include the power to give retrospective effect to rebate of duties on inputs used in the export goods from a date not earlier than the changes in the rates of duty on such inputs. Though the power to make rules include the power to give retrospective effect, while doing so the provision under consideration is neither made retrospective nor could it be treated as one.*
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> *8. We are in complete agreement with the ratio of Mundra Ports (supra) and M/s Thiruarooran Sugars (supra) on all fours.*
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> *9. Resultantly, we answer the questions formulated in these appeals in favour of the assessees and against the Revenue.*
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> *10. In the result, the appeals of the assesses are allowed setting aside the Tribunal's decision impugned in each of those appeals. The appeals filed by the Revenue are dismissed. However, no order as to costs."*

7. In view of the aforementioned clarifications by the judgment of the Hon'ble Chhattisgarh High Court, we follow the same and hold that the appellant have rightly taken Cenvat credit on the inputs, capital goods and input services in question. Accordingly, we find no merits in the appeal filed by the Revenue and the same is dismissed.

8. Appeal is dismissed.

(Pronounced in the Open Court on 15.09.2022)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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