IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Miscellaneous Application (COD)No. 76376/2017 &

Appeal No.E/75786/2017, CO-75963/2017

(Arising out of Order-in-Appeal No.144/CE/RKL/2017 dated 31.01.2017 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Bhubaneswar)

Commissioner of Central Excise, Customs & Service Tax, Rourkela
Applicant (s)

Vs.

M/s. OCL India Ltd. (Refractory) Unit,

Respondent (s)

Appearance:

Shri A.K.Biswas, Suptd.(AR) for the Applicant (s)
Shri T.R.Krishnamoorthy, DGM, Commercial for the Respondent (s)

CORAM:
Hon'ble Shri P.K.Choudhary, Member (Judicial)

Date of Hearing/Decision:- 21.02.2018

ORDER NO.FO/75789/2018

Per Shri P.K.Choudhary

1. The respondent has filed Misc. Application for condoning the delay in filing of the cross objection. Ld. Representative appeared on behalf of the respondent company M/s. OCL India Ltd. submits that the cross objection was dispatched by speed post on 14.09.2017 from Rajgangpur, Odisha and was received by this Tribunal only on 22.09.2017, whereas the last date of filing cross objection expired on 15.09.2017. Hence, there was delay of 7 (seven) days in filing of the cross objection. In view of the submissions of the Ld. Representative and the reasons as explained, the delay in submitting the cross objection is condoned.

2. The respondent company M/s. OCL India Ltd. (Refractory Works) are engaged in manufacturing of Refractory Bricks, Refractory Mortars & Pre-cast Bricks falling under Chapter 69,38 and 68 of the Central Excise Tariff Act (CETA), 1985. Show Cause Notice dated 30.03.2010 was issued alleging that they had availed cenvat credit on steel items such as M.S.Angle, M.S.Channel, M.S.Beam, M.S.Joist etc. during the period May, 2005 to December, 2005 by treating the same as inputs. The Adjudicating Authority confirmed the amount of Rs.10,96,224/- along with interest and imposed equal penalty. But Commissioner (Appeals) allowed the appeal and set aside the impugned order of the Adjudicating Authority. Hence, the Revenue is in appeal before this Tribunal.

3. Ld. AR for the Revenue submits that during the course of verification of records by the audit team it came to the notice that cenvat credit has been availed by the assessee on the input steel items. Accordingly, he reiterated the orders of the lower authorities.

4. The Deputy General Manager (Commercial) Shri T.R.Krishnamoorthy appeared on behalf of the respondent assessee submits that the impugned steel items had been used in the manufacture of support structures for various capital goods/machinery like Bell Kiln, Shaft Kiln, gas producers. This fact has been verified by the Jurisdictional Range Officer.

5. Heard both sides and perused the appeal records.

6. I find that the Revenue in their Grounds of Appeal stated that on perusal of the photographs and utilisation statement, it is clear that the impugned goods were manufactured for the support of BELL KILNS equipment/machinery for manufacture of Cement Shaft Kilns and Gas

Producer Plant, and therefore, the goods are only support structures to the machinery.

7. I find that on the identical situation, the Tribunal in the appellant's own case M/s. OCL India Limited Vs. Commissioner of Central Excise, Customs and Service Tax vide Order No. FO/78724-78725/ 2017 dated 30.11.2017 allowed the appeal of the assessee. The relevant portion of the said decision is reproduced below:

> *In respect of the credit availed on various steel structural materials such as M.S. Plates, Angles, Channels etc. which were used in the construction of capital goods such as Dry Heater, Calcyne, Storage Tanks, silos etc. The issue is covered by the earlier decision of the Tribunal in the case of Singhal Enterprises Pvt. Ltd. Vs. Commissioner of Customs & Central Excise, Raipur reported in 2016 (341) (ELT) 372 (Tri.-Delhi) where the Tribunal observed as :*
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> ***12.*** *We have gone through the judgment of the Hon'ble High Court of Allahabad cited by the Revenue. We find that the Hon'ble High Court has considered the claim of Welding Electrodes under the definition of 'Capital Goods' under Rule 2(a) of the Cenvat Credit Rules, 2004 and have come to the conclusion that the credit will not be allowable under this Rule. However, we find that the credit of duty paid on Welding Electrodes has been held allowable by several decisions of this Tribunal and hence the issue is no more res integra. We also find that several High Courts have also allowed such credit considering the same as allowable within the definition of "Input" under the Cenvat Credit Rules. One such reference can be made to the decision of the Hon'ble High Court of Chhattisgarh in the case of Ambuja Cements Eastern Ltd. v. Commissioner of Central Excise, Raipur, 2010 (256) E.L.T. 690 (Chhattisgarh), wherein welding electrodes used for repair and maintenance purpose were also held to be cenvatable. Similarly, in the case of Hindustan Zinc Limited v. Union of India, 2008 (228) E.L.T. 517 (Raj.), the Hon'ble High Court of Rajasthan allowed the Cenvat credit on the welding electrodes. By following said decision, we hold that the appellants are entitled to the credit on welding electrodes considering them as "Inputs".*

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 Ltd. (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 "Input" w.e.f. 7-7-2009. 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 structures, they would not be eligible for the credit. Considering the amendment made w.e.f. 7-7-2009 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 Ltd., 2015 (04) LCX0197 = 2015 (39) S.T.R. 726 (Guj.), wherein it was observed that the amendment made on 7-7-2009 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 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.*

The same view was also held by the Tribunal in the case of M/s. Lafarge India Ltd. Reported in 2016 TIOL 2875 (CESTAT-Delhi). By following the decisions(supra) we are of the view that CENVAT Credit is allowable on such Iron and steel structures . The cement used alongwith the structural items for construction of capital goods as well as supporting structures will also be considered as inputs for which credit will be available as held by the Hon'ble Madras High Court in the case of Commissioner Vs. India Cements Ltd. [2012 (285) ELT 341 (Madras)]. Consequently, reversal of such CENVAT Credit is not justified and is set aside.

5. In respect of the Appeal No. E 15/12 as observed above, the CENVAT Credit on Iron & Steel structures are allowed. However, with reference to the CENVAT Credit availed but subsequently, reversed in respect of the cement used in the Civil foundation, it has been argued on behalf of the appellant that CENVAT Credit availed was never utilised before the same was reversed and consequently there is no justification for payment of interest in such case. In this connection, they relied on the decision of the Hon'ble High Court of Karnataka in the case of Commr. of Central Excise & Service Tax, LTU, Bangalore Vs. Bill Forge Pvt. Ltd. [2012 (279) ELT 209(Karnataka) as well as decision of the Tribunal in the case of Additional G.M. (Finance), BHEL Vs. Commissioner of C.E. & Service Tax, Bhopal reported in 2017 (TIOL) 3598 (CESTAT-Delhi). In the later case, the tribunal observed that :

> *"5. We find that in the appellant's own case for the earlier period, vide Final Order No. A/54535/2014 dated*

27/11/2014; this Tribunal has decided that interest is not payable by the appellant relying on the decision of Hon'ble Apex Court in the case of Bombay Dyeing & Mfg. Co. Ltd. [2007 (215) ELT 3 (SC)]= 2007-ITOL-141-SC-CX. Further, we find that the issue has come up before the Hon'ble High Court of Karnataka in the case of Bill Forge Pvt. Ltd. [2012 (26) STR 204 (Kar.)] =2011-TIOL-799-HC-KAR-CX wherein the Hon'ble High Court have considered the decision of Apex Court in the case of Ind-Swift Laboratories Ltd. [2011 (265) ELT 3 (SC)]=2011-TIOL-21-SC-CX and held that if the Cenvat Credit availed by the assessee wrongly but same has been reversed before utilization of the same , no interest is payable by the assessee. Therefore, relying on the above cited decision, we hold that appellant is not liable to pay interest since Cenvat Credit availed by them wrongly has been reversed before utilization of the same."

By following the above decision, we hold that appellant is not liable to pay interest since the CENVAT Credit availed by them, wrongly reversed before utilisation of the same.

6. In view of the above discussion, we allow both the appeals by setting aside the impugned orders."

8. In view of the above decision, I do not find any reason to interfere in the Order of the Commissioner (Appeals). Accordingly, the appeal filed by the Revenue is dismissed. Cross Objection disposed of.

(Dictated and pronounced in the open court.)

S/d.
(P.K.Choudhary)
MEMBER (JUDICIAL)

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