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

Appeal No. E/75715/2018

(Arising out of Order-in-Appeal No. 26/CE/RKL-GST/2017 dated 23.11.2017 passed by the Commissioner (Appeals), GST,CX & Customs, BBSR.)

OCL Iron & Steel Limited.,

….Appellant (s)

Vs.

Commissioner of Excise & ST-Rourkela

….Respondent (s)

Appearance:
Shri S.B. Sharma, Adv. for the Appellant (s)
Shri D. Halder, AC (A.R.) for the Revenue

CORAM:
HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

Date of Hearing/Decision: - 07.09.2018
ORDER NO. FO/77339/2018

Briefly stated the facts of the case are that the appellant company is engaged in the manufacture of Sponge Iron and M.S. Billet classifiable under Chapter 72 of the Central Excise Tariff Act, 1985. The appellant for expansion of existing DRI Unit (Sponge Iron Unit) by setting up of Captive Power Plant of 14 MW and setting up of SMS Unit, purchased capital goods on payment of Central Excise Duty and claimed Cenvat Credit thereon. The Show Cause Notice dated 6.11.2006 was issued alleging irregular availment of credit. The Adjudicating Authority disallowed Cenvat Credit amounting to Rs. 7,26,888/- and ordered for recovery of the same from the appellants, M/s. OCL Iron & Steel Limited, along with interest and imposed equal amount of penalty under Rule 14 of the Cenvat Credit Rules, 2004. He, however, allowed the Cenvat Credit amounting to Rs. 23,67,643/-. The

Department filed an appeal before the lower Appellate Authority who set aside the Order-in-Original dated 29.02.2016 and allowed the appeal. The Assessee is in appeal before the Tribunal against the impugned order.

2. The Learned Advocate appearing on behalf of the appellant company reiterates the grounds of appeal. He further submits that by the Impugned Order, the Learned Commissioner (Appeals) has allowed the Department's appeal and thereby disallowed the Cenvat Credit of Rs. 23,67,643/- under Rule 14 of the Cenvat Credit Rules 2004 read with Section 11A/11AB of the Central Excise Act, 1944 which was claimed on 'inputs' such as Angles, Channels, Chequired Coils, CTD Bar, GC Sheet, HR Sheet/Plate, Joist, MS Beam, MS Flat, MS Rod, MS Rounds, Plate & TMT Bar etc. used in the manufacture of specified Capital goods mainly on the ground that emergent goods manufactured out of impugned Iron and Steel Materials are "supporting structures" and also held that the Adjudicating Authority has erred by placing reliance on utilization statement certified by the Chartered Engineer to hold the aforesaid goods as specified 'Capital Goods'. The Learned Advocate further submits that for the expansion of existing DRI Unit (Sponge Iron Unit), by setting up of Captive Power Plant of 14 MW and setting up of SMS Unit, they purchased capital goods on payment of Central Excise Duty and claimed Cenvat Credit thereon. It is his submission that for the sake of economy, faster implementation of the project and also owing to technical compulsions, some of the capital goods required for the said projects were manufactured in house captively. For the aforesaid purpose they

purchased 746.016 MT of Iron and Steel materials classifiable under Chapter 72 during the period October, 2005 to March, 2006 and claimed Cenvat Credit amounting to Rs. 25,29,181/- treating them as 'input' under Rule 2 read with Rule 3 of the Rules. It is further stated that they purchased 195.090 MT of Iron and Steel materials such as HR Plates, Sheets, Plates, MS Rod, MS Round and TMT Rod etc. all classifiable under chapter 72 which were used for making of Patching Formers (ordinarily known as Melt out Pharma) for Induction Furnace, Formers for Ladles, Slag Separator/ Steer Instrument (also known as Deslagging Spoon) in the process of manufacture of M.S. Angles on which they claimed Cenvat Credit of Rs. 5,63,350/- treating them as 'inputs' in terms of the Rule 2(k) of the Rules. He relied upon various decisions in support of his submission.

3. The Learned D.R. justified the impugned order.

4. Heard both sides and perused the appeal records.

5. I find from the impugned order, that the Ld. Commissioner (Appeals) has allowed the Department's appeal and thereby disallowed Cenvat Credit of Rs. 23,67,643/-.

I observe from the records that the appellant used the said inputs for manufacture of Capital Goods such as Coal Ground Hopper, Conveyor Chute, Screen Chute, Char and Coal Hopper, Ash Hopper AFBC, Chimney, Ducts from Boiler to ESP and from ESP to ID Fan, Canopies Boiler, Chamber Shell, EOT Crane, Steam Duct, Cooling Tower, Electrostatic Precipitator after AFBC Boiler (Pollution Control Equipment), Water Tank, Ash Hopper and Silo, Pug Mill-Ash Discharge Chute, gear Boxes, Furnace Feeding Ground Hopper, Sponge Feeding

Hopper to Furnace, Slag Box, Fume Extraction/Bag Filter with cage and Conveyors and its associated technological structures. The Appellant has also stated that the 'Patching Formers (Melt out Pharma)' is a hollow metal cylinder having both faces open and made up by welding HR Sheets/HR Coils etc. The 'Patching Formers' are placed inside the induction furnace crucibles and Ladles after refractory lining by ramming mass etc. to protect the Crucibles coils/ ladle brick lining from getting damaged due to contact with molten metal. Due to excessive heat the 'Former' also gets melted and form a lamination over exposed surface of the refractory lining which prevents the possibilities of molten metal getting into the Crucibles coils/outer shell of ladle and thus damaging it. The said materials are used in the process of manufacture of M.S. Billets. The Appellant further states that 'Slag Separator (Deslagging Spoon) manufactured out of M.S. Round/Rod, is used for deslagging of molten materials in the process of manufacture of M.S. Billets i.e. for breaking and removal of accumulated Slag Layer floating over the molten metal while being tapped out of the Induction Furnace. The breaking / removal of slag is required very often for releasing the gas accumulations under the surface of the molten material to avoid busting of red hot molten layer of slags causing accident. The process of breaking and removing red hot molten Slag is an integral part of the process of manufacture of M.S. Billet.

6. It is observed from the SCN that the steel materials have been used to make gigantic steel structures to participate in the manufacturing process of Sponge Iron and M.S. Billet carried out by

them and without them the manufacture process could not be completed. The issue to be decided in this appeal is regarding availability of Cenvat credit on various structural items such as Angles, Channels, Chequired Coils, CTD Bar, GC Sheet, HR Sheet/Plate, Joist, MS Beam, MS Flat, MS Rod, MS Rounds, Plate & TMT Bar etc. which have been used in making support structures of the Capital Goods.

7. I further observe that the Learned Commissioner (Appeals) has decided the appeal in favour of the Department by relying upon the decision of the Larger Bench of the Tribunal in the case of *Vandana Global Limited v. Commissioner of Central Excise as reported in 2010(253) E.L.T.440 (Tribunal-LB).* The aforesaid decision of the Larger Bench was considered by the Hon'ble Court of Gujrat in the case of *Mundra Ports & Special Economic Zone Ltd in 2015(39) S.T.R. 726 (Guj.)* wherein it was observed that the amendment made on 7.7.2009 cannot be held to be retrospective and as such applicable only prospectively.

8. *I 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 Limited <u>2010(255) E.L.T. 481(S.C.)</u>, 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, Coal Ground Hopper, Conveyor Chute, Screen Chute, Char, Chimney, Cooling Towers 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.

9. The above view also stands fortified by the judgment of

(i) Hon'ble High Court of Madras in the case of *Thiru Arooran Sugars Vs. CESTAT [2017 (355) ELT 373 (Mad)].*

(ii) Hon'ble High Court of Chhatisgarh in Vandana Global Ltd. 2018(16) GSPL 462 (Chattisgarh) decided in favour of the assessee. The relevant paras are reproduced.

4. *In the light of the contents of the impugned order of the Tribunal and submissions of the assessee and the Revenue following substantial questions of law are formulated for consideration :*

(A) Whether the terms 'capital goods' excludes the structures embedded to earth?

(B) Whether the goods like angles, joists, beams, bars, plates, which go into fabrication of such structures are not to be treated as 'input' used in relation to their final products as inputs for capital goods, or none of the above?

(C) Is the amendment brought in CENVAT Credit Rules, 2004 as per Rule 2 of the CENVAT (Amendment) Rules, 2009 retrospective in nature considering is it clarificatory to be applied to all matters which arise before 7-7-2009, the date of commencement of the CENVAT (Amendment) Rules, 2009 : hereinafter referred to as 'Amendment Rules'.

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) S.T.R. 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 :*

"We do not find that amendment made in the Cenvat Credit Rules, 2004 which come into force on 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 on particular thing or goods and/or input and as such, the amendment could operate only prospectively."

6. *That view has been quoted with approval by the Madras High Court in M/s. Thiruarooran Sugars v. Customs, Excise and Service Tax Appellate Tribunal (CMA 3814/2014 and connections) decided on 10-7-2017 [2017 (355) E.L.T. 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.*

7. *Section 37 of the Central Excise Act, 1944; for short, 'the Act', is a rule making power. Section 37(2)(xvia) provide for the credit of duty paid or 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.*

8. *We are in complete agreement with the ratio of Mundra Ports (supra) and M/s. Thiruarooran Sugars (supra) on all fours.*

9. *Resultantly, we answer the questions formulated in these appeals in favour of the assessees and against the Revenue.*

iii) The Tribunal in the case of Singhal Enterprises Pvt. Ltd., 2016 (341) E.L.T. 372 (Tri. - Del.) has allowed the assessee's appeal by relying upon the decision of the Hon'ble Gujrat High Court in the case of Mundra Ports & Special Economic Zone Ltd (Supra).

10. In view of the judgment of the Hon'ble High Courts and the Tribunal's decision as cited above, the impugned order is set aside and the appeal filed by the appellant is allowed.

(Dictated and pronounced in the open court.)

Sd/-
(P.K.Choudhary)
Member(Judicial)

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