IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO. 2

Ex. Appeal No. 77137 of 2018

(Arising out of Order-in-Appeal No. 51/CE/RKL-GST/2018 dated 22/03/2018 passed by the Commissioner (Appeals), CGST, Central Excise & Customs, Bhubaneswar)

M/s. Mahanadi Coalfields Ltd.,
Jagannath Area, P.O. Dera(Talcher)
Dist. Angul, Odisha – 759 103

….Appellant (s)

Vs.

Commissioner of Central Excise & S.Tax, Rourkela
Central Revenue Building, Rajaswa Vihar,
Bhubaneswar-7
Odisha

….Respondent (s)

Appearance:

Shri Rajeev Kr. Agarwal, C.A. for the Appellant (s)
Shri S. Mukhopadhyay, A.R. for the Respondent(s)

CORAM:

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

Date of Hearing :- 11.06.2019
Date of Pronouncement : 04.07.2019

FINAL ORDER NO. :FO/A/75772/2019

PER SHRI P.K.CHOUDHARY

The appellant assessee is in appeal against the Order-in-Appeal dated 22.03.2018 upholding the decision of the Original authority vide Order-in-Original dated 30.01.2017 wherein CENVAT credit of Rs. 27,31,354/- has been disallowed on capital goods. Vide the said Order-in-Original, equivalent penalty has also been imposed with applicable interest.

2. Briefly stated, the facts of the case are that the appellant, M/s. Mahanadi Coalfields Limited, is a subsidiary of Coal India Limited is engaged in the business of manufacturing and selling of coal. Levy of Central Excise duty was imposed for the first time w.e.f. 1st March, 2011, through the Finance Act, 2011 wherein the Tariff rate of goods falling under Chapter 27.01 (i.e. 'Coal') was made 5% against the 'NIL' rate. Prior to the said rate, Coal had always been subject to 'NIL' rate of Central Excise duty. A concessional rate of central excise duty of 1% was also provided from the aforesaid date, if the assessee did not avail the benefits of CENVAT credit. In the instant case, the appellant chose to pay duty at the normal tariff rate of 5% with simultaneous benefit of CENVAT credit facility in terms of CENVAT Credit Rules, 2004 ('CCR').

The appellant received an excavator machine on 17.02.2011 in a knocked down condition, which was assembled and was ready for use on 17.06.2011. DRR/ GRN was prepared on 17.06.2011 when goods were finally accepted as per the practice followed by the appellant, being a PSU unit. Accordingly, the said goods (excavator) were recorded in the books of account on 17.06.2011, based on which the said date of 17.06.2011 was shown in the CENVAT credit register. A Show Cause Notice dated 02.06.2016 was issued alleging that they have taken irregular credit of Rs.27,31,354/- since the capital goods were received on 17.02.2011 on which date coal was not subject to duty. The said SCN culminated into Order-in-Original dated 30.01.2017. Appeal filed before the Commissioner (Appeals) was rejected by upholding the adjudication order. Hence, the present appeal before the Tribunal.

3. Shri Rajeev Kr. Agarwal, CA, appeared on behalf of the appellant and Shri S. Mukhopadhyay, A.R. appeared on behalf of the respondent department.

4. The Ld. CA appearing for the appellant submitted that the "Excavator" was received by them on 17.02.2011 in a knocked down condition and was available for use only on 17.06.2011. Accordingly, GRN

receipt was prepared and the said goods was recorded in the books on 17.06.2011 when the CENVAT credit was availed. He submitted that as per Rule 4(2)(a) of CCR, CENVAT credit can be availed in respect of capital goods received in a factory at any point of time in a given financial year. He placed reliance on the ratio of the decision of Hon'ble Madras High Court in the case of Kaleesuwari Refinery Pvt. Ltd. v. CESTAT, Chennai [2016 (340) ELT 632 (Mad.)], wherein it has been observed that as per Rule 4(2)(a) of CCR, the assessee is liable to claim CENVAT Credit on capital goods at any time during the year subject to the condition that the goods to be manufactured out of them should not be exempted goods. Relevant para of the judgment is given below:

> *"..26. Coming to the core issue on hand, as we have pointed out earlier, the expression "financial year" appearing in Rule 4(2)(a) cannot be rendered redundant or nugatory. The capital goods were received admittedly during the financial year 2002-03. The main final product, namely refined edible oil was exempt from payment of duty only up to 28-2-2003 during the financial year 2002-03. The goods became dutiable with effect from 1-3-2003. Additionally, all the three by-products were not exempt from payment of duty during any part of the financial year 2002-03. Rule 4(2)(a) is not worded as follows :*
>
> *"Cenvat credit shall be availed with reference to the date of receipt of the capital goods."*
>
> *The Rule simply states that Cenvat credit shall be availed in respect of capital goods received in a factory at any point of time in a given financial year. In other words, if a factory is manufacturing goods which are dutiable, the date on which a person receiving capital goods is entitled to claim Cenvat credit, is left to his choice. He is entitled to take any date within the financial year subject only to the first condition imposed under Rule 6(4), namely that on the date on*

which he avails credit, the goods to be manufactured out of them should not be exempted goods. This is the proper manner of construction of Rules 4(2)(a) and 6(4).

27. The consequences of giving a different interpretation to the Rule is too obvious. Take for instance a case where the factory receives capital goods on a particular day, say for instance 1-10-2003. If the goods are dutiable goods on the date of receipt, namely 1-10-2003, the Department agrees that the factory will be entitled to Cenvat credit. Suppose an exemption notification is issued on the date following the date of receipt of capital goods, he will still be entitled to the benefit of Cenvat credit. Therefore, to interpret Rule 4(2)(a) in a manner that will benefit a person, who receives the capital goods on the date, on which, the goods to be manufactured were dutiable, despite the same goods becoming exempted goods on the next day, but to deprive the benefit to a person, who manufactures dutiable goods on the basis of the capital goods received in a particular financial year, would not be a proper interpretation to the Rules…."

On the basis of the above decision of the Hon'ble High Court, he submitted that CENVAT credit on capital goods can be claimed anytime during a given financial year and the same is not restricted on the date of receipt of the goods in the factory. He further submitted that the impugned order of Ld. Commissioner (Appeals) is based on the Larger Bench decision of Spenta International Ltd. v. Commissioner of Central Excise, Thane [2007 (216) ELT 133 (Tri-LB.)]. In the said decision, the Larger Bench affirmed the Tribunal's decision in the case of CCE v. Surya Roshni Ltd.2003 (155) ELT 481 (Tri-Del.) which matter is pending for consideration before the Hon'ble Madhya Pradesh High Court. The Hon'ble Madras High Court in Kaleesuwari Refinery's case (Supra), specifically noted in its decision in para 24 that the decision in the case of Surya Roshini was before the Madhya Pradesh High Court and should not have been relied by the Larger Bench and moreover, the Larger Bench did not consider the provisions of Rule 6 of the CCR. He also emphasized that the Madras High Court in para 26 specifically stated that the provisions of Rule 4(2)(a) of CCR is not worded as "Cenvat credit shall be availed with reference to the date of receipt of the capital goods.". Accordingly, he submitted that reliance placed by the Ld. Commissioner (Appeal) on the Larger Bench's decision is completely misplaced inasmuch as the case of appellant herein is covered by the ruling of Madras High Court which is binding.

The Ld. CA also placed reliance on the decision of the Apex Court in the case of H.S. Vankani & Ors. v. State of Gujarat & Ors. (2010) 4 SCC 301 to submit that it is a general rule of interpretation that a statute must not be construed in a way so as to lead absurdity, inconvenience or injustice. If the decision of Larger Bench in Spenta International is applied, which does not lay a correct legal position in view of the ratio laid down by Hon'ble Madras High Court, the appellant will be deprived from availing the benefit of CENVAT credit of duty paid on capital goods (excavators) used in the mines for production of coal on which central excise duty have been paid.

The Ld. CA further submitted that the duty demand is wholly barred by limitation. He submitted that appellant's accounts have always been audited by various Govt agencies and details of CENVAT Credit availed was duly disclosed vide ER-1 return for the month of May 2013 along with CENVAT Credit register. If there was any wrong availment of credit, it was always open to the Department to verify the credit availed as per the returns to determine the legal eligibility within normal period of limitation. He also submitted that PSUs do not have any intention to evade the payment of tax as has been held in CCE, Indore vs. Nepa Ltd 2013 (298) ELT 225 (Tri-Del), as also supported by the decision of Hon'ble Supreme Court in the case of Commissioner of Central Excise, Chennai-I Vs. Chennai Petroleum Corpn. Limited [2007 (211) ELT 193 (SC)]. He further submitted that it is a matter of settled position of law that where the issue involves interpretation of statutory provisions, no penalty is leviable. Lastly, he submitted that the duty of central excise was newly introduced on 'coal' w.e.f. March 2011. The concept of excise duty and CENVAT credit eligibility was completely a new subject for the appellant. Even if the credit is held to be not available, the availment of same cannot be attributable to reasons of fraud or suppression with the intent to evade payment of duty.

5. The Ld. Departmental Representative, on the other hand, submits that the appellant do not have any case inasmuch as legal position has been settled by the Larger Bench in Spenta International's case (Supra), wherein it has been held that date of receipt of capital goods would be the date when eligibility to avail CENVAT credit will be decided. Since the appellant received the goods on 17.02.2011 on which date the final product, coal, was not subject to central excise duty, they are legally not eligible for credit. He submitted that the aforesaid Larger Bench decision is consistently being followed. He further relied on the decision of coordinate Bench of this Tribunal in the case of Ankit Roofings Pvt Ltd vs. CCE Jaipur 2016 (341) ELT 351 (Tri-Del) wherein the LB decision of Spenta International has been followed. He also submitted that the appellant is not entitled to the benefit of time bar for the reason that that they intentionally stated the date of receipt of capital goods as 17.06.2011 instead of actual date being 17.02.2011 to avail wrongful credit.

6. Heard both sides at length and perused the appeal records.

7. The short issue that arise for consideration in the instant appeal is with respect to availment of CENVAT credit of excise duty paid on the capital goods received prior to the imposition of central excise levy on final product (i.e. Coal). On perusal of the entire case records, I am of the view that the case can be decided on the point of limitation. The levy of central excise was new in 2011 during which period the appellant has

availed the credit on capital goods which is in dispute. The appellant, right from the adjudication stage to the stage of first appeal, has all along submitted that the subject goods, excavators, have been received in knocked down condition on 17.02.2011 which got ready for use only on 17.06.2011 on which date the GRN was prepared and goods were recorded in the Books and credited. The relevant documents were placed before the original as well as first appellate authority as also appearing in page no 67 of the Appeal Paper Book. The said facts have nowhere been disputed in the original adjudication order. The Ld. Commissioner (Appeals) has also not given any finding on the same. In view of the decisions of this Tribunal in Nepa Ltd (supra) and the Apex Court decision in Chennai Petroleum Corporation (Supra), it is my considered view that the appellant being a PSU would not have reason to avail wrong credit with intention to evade payment of duty. Moreover, since the central excise levy was made applicable for the first time, the issue of availing credit on capital goods during the cut off date would arise as a one-time affair for which there may be inadvertent error not attributable to wilful suppression or deceit to avail irregular credit. Further, the issue of availment of credit like in the given case involves a legal interpretation and therefore, it cannot be said that there would have been deliberate attempt on the part of the appellant to avail irregular credit.

8. In view of the above findings, I set aside the demand of duty interest and penalty by allowing the appeal on the grounds of limitation itself.

(Pronounced in the open court on …04.07.2019..)

S/d.
(P.K.Choudhary)
Member(Judicial)

T. K.