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

REGIONAL BENCH - COURT NO.2

Excise Appeal Nos.218 of 2008

(Arising out of Order-in-Original No.CCE/BBSR-I/01/2008 dated 28.01.2008 passed by Commissioner of Customs, Central Excise & Service Tax, Bhubaneswar-I.)

M/s. NALCO Limited
(NALCO Bhawan, P/1, Nayapalli, Bhubaneswar-I.)

...Appellant

VERSUS

Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-I

.....Respondent

(Rajaswa Vihar, Bhubaneswar-751007 (Orissa).)

WITH

(i) Excise Appeal No.253 of 2008 (M/s. NALCO Limited); (ii) Excise Appeal No.290 of 2008 (M/s.NALCO Limited); (iii) Excise Appeal No.291 of 2008 (M/s.NALCO Limited); (iv) Excise Appeal No.292 of 2008 (M/s.NALCO Limited);

(i) (Arising out of Order-in-Original No.CCE/BBSR-I/02/2008 dated 26.02.2008 passed by Commissioner of Customs, Central Excise & Service Tax, Bhubaneswar-I.)

(ii) (Arising out of Order-in-Original No.CCE/BBSR-I/05/2008 dated 11.03.2008 passed by Commissioner of Customs, Central Excise & Service Tax, Bhubaneswar-I.)

(iii) (Arising out of Order-in-Original No.CCE/BBSR-I/06/2008 dated 14.03.2008 passed by Commissioner of Customs, Central Excise & Service Tax, Bhubaneswar-I.)

(iv) (Arising out of Order-in-Original No.CCE/BBSR-I/07/2008 dated 17.03.2008 passed by Commissioner of Customs, Central Excise & Service Tax, Bhubaneswar-I.)

APPEARANCE

Shri S.C. Mohanty, Advocate for the Appellant (s)

Shri S.S.Chattopadhyay, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO 77024-77028/2019

DATE OF HEARING : 8 August 2019
DATE OF DECISION : 23 December 2019 .

P.K.CHOUDHARY :

The issue involved in all these appeals is identical. Accordingly, the appeals are taken up for hearing together and this common order is being passed.

2. The dispute in the present case, relates to the period 2000-01 to 2003-04 and the issue involved is admissibility of balance 50% Cenvat credit on capital goods, in terms of Rule 57 AC (2) of the erstwhile Central Excise Rules, 1944 read with Rule 4 of the Cenvat Credit Rules, 2002. As per the said statutory provisions, credit upto 50% can be availed by the assessee, during the same financial year, when the capital goods were received in the factory and the balance credit can be availed during the subsequent financial year(s), provided the capital goods were in the possession and use by the assessee.

3. In the case in hand, the appellant had availed the first instalment of 50% of credit on the same financial year, in which the capital goods were received. The balance 50% credit was availed by the appellant in the subsequent financial years, which was disallowed by the learned adjudicating authority vide the impugned orders, on the ground that the said credit was availed before installation/use of the capital goods, as provided under Rule 57AC of the erstwhile 1944 rules read with Rule 4 (2) of the Cenvat Credit Rules, 2002.

4. Against the impugned orders passed by the learned adjudicating authority, the appellant had filed the appeals along with applications for stay of recovery of the adjudged dues before this Tribunal. The appeals were disallowed by the Tribunal for want of COD clearance, since the appellant is a central PSU. Subsequently, the appellant had

filed the COD clearances and thereafter, the matter came up for hearing before the Tribunal on 20.05.2009. On the basis of COD clearances, the appeals were restored by the Tribunal. After allowing the stay applications, the appeals were also allowed by the Tribunal on merits.

5. Challenging the aforesaid order dated 20.05.2009 of the Tribunal, Revenue had filed appeals before the Hon'ble Orissa High Court. The appeal of Revenue was disposed of by the Hon'ble High Court vide order dated 30.01.2019, in setting aside the order dated 20.05.2009 and remitting back the matter to the Tribunal, with the following observations:-

> *"5. Without entering into the technical objection by both the sides, we are of the opinion that the matter is required to be reheard by the Tribunal. Accordingly, we are not expressing any opinion on the merits of the case and only on the ground that the matter was not heard on that date, we are setting aside the impugned order and remitting the matter back to the Tribunal to hear the matter afresh and pass order following principles of natural justice. The impugned order dated 20.05.2009 is, therefore, quashed only for want of fixation of a date for hearing the matter on merits. It will be open for the Tribunal to reiterate its own view after examining the fact and law."*

6. Pursuant to the aforesaid order dated 30.01.2019 passed by the Hon'ble High Court, the appeals were posted for hearing on 07.08.2019 before the Tribunal for deciding the issues afresh.

7. Shri S.C.Mohanty, learned Advocate for the appellants submitted that the dispute relates to the period 2000-01 to 2002-03 and that the subject capital goods have since been installed/used in the factory and to that effect installation certificates have been issued by the concerned technical persons. He has referred to Para 6.1 in the impugned order passed by the learned Commissioner to state that such installation certificate was submitted during the course of adjudication proceeding. The learned Counsel further submitted that

the capital goods having been installed and put to use for the intended purpose, the credit cannot be disallowed. To support such stand, the learned Advocate has relied upon the following judgements delivered by the judicial forums:-

(a) Commissioner of Central Excise v. Indian Oil Corporation Limited
[2014 (305) E.L.T. 507 (Guj.)]

(b) Commissioner of C.Ex., Raigad v. Ispat Industries Limited
[2012 (275) E.L.T. 79 (Bom.)]

(c) Bharat Petroleum Corpn. V. Commissioner of C.Ex., Mumbai-II
[2012 (277) E.L.T. 353(Tri.-LB)]

8. Arguing on behalf of the Revenue, Shri S.S.Chattopadhyay, learned Authorized Representative submitted that credit taken by the appellant before installation of the capital goods, is not admissible in view of the principles decided by the Hon'ble Patna High Court in the case of Indian Oil Corporation Ltd. V. Commissioner of Central Excise, Patna [2015 (316) E.L.T. 666 (Pat)].

9. We have perused the impugned orders passed by the learned Commissioner and also examined the submissions made by the learned Counsel appearing for the appellant.

10. The learned adjudicating authority in his findings has recorded that the installation certificates have been issued in different stages, after completion of the installation process. The credit availed by the appellant was disallowed, since the same was availed before the capital goods were put to actual use. The CBEC Circular No.267/26/2006-CX. dated 28.06.2006 was referred to in the adjudication order. The said circular clarifies that during the period from 01.04.2000 to 09.09.2004, the balance 50% Cenvat credit cannot be allowed in the subsequent year(s), unless the capital goods are put to use and mere possession is not enough.

11. We have perused the decisions cited and relied upon by the appellants, in support of its contention that credit of balance 50% is admissible. Even otherwise the credit stands admissible w.e.f.

10.09.2004, in terms of Rule 4(2)(b) of the Cenvat Credit Rules, 2004, under which the conditions of "use" appearing in the Cenvat Credit Rules, 2002 was omitted.

12. We have carefully gone through the decision of the Hon'ble Patna High Court in the case of Indian Oil Corporation Ltd. (supra) and the relevant paragraph is reproduced below for proper appreciation of the facts of the present case:-

> *"14. ………………………………….. Nothing in the aforesaid Rule 4(2)(b) of the Cenvat Credit Rules, 2002 suggests that the Cenvat Credit for the remaining 50% of the duty can be availed of in any subsequent financial year in anticipation of the capital goods being used on some future date in the same financial year."*

13. The above decision was rendered by the Hon'ble Patna High Court in the context of Rule 4(2)(b) of the Cenvat Credit Rules, 2002, which was effective till 09.09.2004 and the ratio of the said decision applies to the facts of the present case. Therefore, the balance 50% credit taken by the appellant before use of the capital goods, is not admissible.

14. We take note of the submissions made on behalf of the appellant that the capital goods were subsequently installed/put to use, the fact of which has also been acknowledged by the learned adjudicating authority in the impugned order. We also take note of the provisions of Rule 4(2)(b) of the Cenvat Credit Rules, 2004 (effective from 10.09.2004), in terms of which the condition of "use" was omitted. We find that no time limit is stipulated under the Cenvat Scheme, for taking credit on capital goods, since as per the scheme, the balance credit can be deferred by an assessee to be taken in any financial year or years, subsequent to the financial year in which the capital goods were received. In terms of above provisions, in our considered view, the appellant would be eligible for the credit on 10.09.2004. The appellant, however, would be liable to pay interest, in respect of the

period i.e. from the date of taking the credit till 09.09.2004, as per the provisions of law, as applicable.

15. The appeals are disposed of in above terms.

(Order pronounced in the open court on . ……23 December 2019.)

Sd/-
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(BIJAY KUMAR)
MEMBE(TECHNICAL)

sm