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

REGIONAL BENCH – COURT NO.2

Excise Appeal No. 75147 of 2019

(Arising out of Order-in-Appeal No. 100/CE/RKL-GST/2018 dated 26.10.2018 passed by Commissioner (Appeals), GST, CX & Customs, Bhubaneswar)

M/s. Linde India Limited
(Oxygen House, P43 Taratala Road,
Kolkata-700088)

Appellant

VERSUS

Commissioner of CGST & CX, Rourkela Commissionerate
(KK 41, Civil Township, Rourkela-769012)

Respondent

APPEARANCE :
Mr. Saurabh Bagaria & Rishi Raju both Advocate for the Appellant
Mr. S. S. Chattopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

FINAL ORDER NO. 75358/2023

Date of Hearing : 8 May 2023
Date of Decision : 8 May 2023

PER R. MURALIDHAR

The Appellant is a manufacturer of various types of Gases falling under Chapter 28 of the CETA, 1985. The Company is in existence since 1935. In the year 2014, they have established further facilities as Rourkela Steel Plant. They have taken the Cenvat Credit on the 'inputs services' used by them for expansion activities. The Department took a stand that it amounts to setting of unit and taking ground that the words 'setting up' have been excluded in the definition of the inputs under Rule 2 (l) of Cenvat Credit Rules, 2004 issued Show Cause Notice demanding Rs.16,88,221/-. After due process, the Lower Authorities confirmed the demand along with interest and penalties. Being aggrieved by the same, the Appellant is before the Tribunal.

2. The Learned Advocate appearing for the Appellant submits that they have correctly availed the Cenvat Credit for the input services utilized by them, in the course of the expansion of their unit. The same cannot termed as 'setting up of the unit'. He relies on the case law of Mangalam Cement Limited Vs. Commissioner, Central Goods, Excise & Service Tax-Final Order

No.50454/2023 dated 10.04.2023. He submits that the Tribunal has considered the decision in respect of various other Tribunals and has held that the assesses are eligible to take Cenvat Credit for inputs services when the services were used and expansion and further construction in the existence unit. Therefore, he prays that the present Appeal may be allowed.

3. The Learned AR reiterates the submissions of the Lower Authorities and justifies and confirmed demands.

4. Heard both sides.

5. It is seen that in the case of Mangalam Cement Limited case cited supra, the issue was identical and the Tribunal has held as under:-

> *4. On examination of the monthly ER-1, <u>it was noticed that the appellant had availed the cenvat credit on input services which were actually used by them in the setting up</u> of their new unit MGU which is <u>not admissible</u> after amendment of the definition of input service w.e.f <u>01.04.2011.</u> On examining the details, it was observed that the appellant had included all the bills and payments made from October 2013 to 03.02.2014 in respect of various services specified though the commercial production started only from 24.02.2014, which means that they were used by them in setting up of the new unit, namely MGU. Accordingly, Show Cause Notice dated 3 26.08.2015 was issued for the period October 2013 to February 2014, as the department was of the view that the appellant had wrongly availed the cenvat credit amounting to Rs 1,36,25,467/- on the services used in setting up of the new plant, namely MGU.*
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> *8. The main issue in the present case is <u>whether the appellant rightly availed the cenvat credit on input services used by them in connection with setting up of their new unit which has been deleted from the inclusion part of section 2(l) post amendment of the definition of 'input service', w.e.f. 01.04.2011.</u>*
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> *<u>9. The above issue is no longer res integra as the same has been decided in favour of the assessee by various Benches of the Tribunal in several decisions,</u> Hindalco Industries Ltd., vs. Commissioner, Central GST, Central Excise & Customs, Jabalpur -2019 (5) TMI 1620 –CESTAT New Delhi, Commissioner of Central Excise, Kolkata-III vs. M/s Texmaco UGL Rail (P) Ltd., (Now known as Texmaco Hi-Tech Pvt. Ltd., (Vice-Versa) -2019 (7) TMI 1651 –CESTAT Kolkata, Kellogs India Pvt. Ltd., vs. Commissioner of Central Tax, Tirupathi GST -2020 (7) TMI 414*

–CESTAT Hyd., PepsiCo India Holdings (Pvt.) Ltd. vs. Commissioner of Central Tax, GST, Tirupati -2022 (56) GSTL 22 (Tri. Hyd.) and Hindustan Zinc Limited vs. Commissioner of CGST, Excise Customs, Udaipur -2021 (8) TMI 872 –CESTATNew Delhi after considering the provisions of section 2 (l) of the Finance Act, 2004 both pre and post amendment.

11. For reference, we would like to take note of the observations made by the Tribunal in the earlier decisions on the eligibility of cenvat credit after the amendment of the definition of 'input service', excluding the setting up process of a factory from the inclusive part of the definition, w.e.f. 01.04.2011. In the case of Hindustan Zinc Ltd., (supra) it has been held:

> *15. The department wants to deny them the benefit of the CENVAT credit on the ground that „services related to setting up of a factory" which were specifically included prior to 1.4.2011 were no longer specifically included post 1.4.2011.*
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> *16. We find that the definition of „input service" prior to 1.4.2011 had two parts- a main part of the definition and an inclusive part of the definition. This inclusive part specifically included the services availed for setting up the factory. After 1.4.2011, it has three parts- a main part, an inclusive part and an exclusive part. The services used for setting up the factory are neither in the inclusive part of the definition nor the exclusive part of the definition. Therefore, such services were neither specifically included nor were specifically excluded.*
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> *17. It takes us to the main part of the definition which must be examined. If it is wide enough to cover the services in question, CENVAT credit will be available, otherwise it will not be available. The main part includes "services used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal." The term manufacture is not defined in the Rules.*
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> *Xxxxxxxxx*
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> *21. For a service to qualify as „input service" under CENVAT Credit Rules, 2004 post 2011, the service in question need not be covered even by the very wide definition of manufacture under section 2(f) of the Central Excise Act. Any service which is used not only in manufacture but also „in relation to" manufacture will*

> *also qualify as input service. The scope of input service is further enlarged with the expression whether directly or indirectly used in the definition of input service. Thus, there are: a) Actual manufacture; b) Processes incidental or ancillary to manufacture which are also manufacture; 8 c) Activities directly in relation to manufacture (i.e., in relation to „a" and „b" above); d) Activities indirectly in relation to manufacture (i.e., in relation to „a" and „b" above);*
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> *22. All four of the above qualify as input service as per Rule 2(l) (ii) as applicable post 1.4.2011. Although setting up the factory is not manufacture in itself, it is an activity directly in relation to manufacture. Without setting up the factory, there cannot be any manufacture. Services used in setting up the factory are, therefore, unambiguously covered as „input services" under Rule 2 (l) (ii) of the CENVAT Credit Rules, 2004 as they stood during the relevant period (post 1.4.2011). The mere fact that it is again not mentioned in the inclusive part of the definition makes no difference. Once it is covered in the main part of the definition of input service, unless it is specifically excluded under the exclusion part of the definition, the appellant is entitled to CENVAT credit on the input services used. This Bench has already taken this view in Kellogs. Similar views have been taken by the other Benches in the other cases mentioned above.*" (emphasis supplied)

12. The findings recorded above are squarely applicable to the facts of the present case and therefore we do not find any justification in denying the benefit of cenvat credit to the appellant. Here MGU was a part of the existing unit itself. The services so utilized for setting up of the factory which were availed prior to the commencement of production shall fall within the „means clause" of the definition of „input service", which has been held to be wide enough to allow cenvat credit of services used in or in relation to manufacture whether directly or indirectly. It is pertinent to appreciate that grinding unit was set up so 9 as to utilize the excess production of clinker in the main fatory and applying the principle laid down in the case of Kellogs (supra), there is a direct nexus between the manufacture of the final product & the services used for setting up the grinding unit, MGU.

17. We respectfully agree with the aforesaid decisions and therefore the demand made by the revenue to deny cenvat credit by the appellant and order its recovery is rejected. Consequently, the question of interest and penalty no longer survives.

6. Since the issue is fully covered by the above decisions, I allow the present Appeal with consequential relief, if any.

(Dictated and pronounced in the open court.)

Sd/-

(R. Muralidhar)
Member (Judicial)

Pooja