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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.410 of 2011

(Arising out of Order-in-Original No.CCE/BBSR-I/37/2011 dated 09.03.2011 passed by Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-I.)

M/s. T.S. Alloys Limited
(Formerly Rawmet Ferrous Industries Limited)
(N3-24, IRC Village, Nayapalli, Bhubaneswar, Orissa, Pin-751015.)

...Appellant

VERSUS

Commissioner of Central Excise, Bhubaneswar-I

.....Respondent

(C.R.Building, Rajaswa Vihar, Bhubaneswar-751007, Orissa.)

APPEARANCE

NONE for the Appellant (s)
Shri A.Roy, Authorized Representative for the Revenue

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

FINAL ORDER NO. 75778/2023

DATE OF HEARING : 8 June 2023
DATE OF DECISION : 8 June 2023

Per : P.K. CHOUDHARY :

When the matter was called, none appeared on behalf of the Appellant. Since the matter lies in a narrow compass, therefore with the consent of the Ld.Authorized Representative for the Department, the Appeal itself is taken up for hearing.

2. The Appellant is engaged in the manufacture of High Carbon Ferro Chrome falling under Chapter 72 of Central Excise Tariff Act, 1985 in their factory at Anantpur, P.O. Dhurusia, Athagarh, Dist: Cuttack in the state of Orissa. The Appellant state that they had availed CENVAT Credit of Rs.1,10,18,261/- during the period from February 2005 to September 2006 on various steel items such as M.S. Angles,

Channels, M.S. Beams, Joists, Plates, H.R. Coils & H.R. Sheets all falling under Chapter 72 of the tariff initially claiming the same as capital goods and subsequently reversed the said credit in the capital goods credit account vide Debit Entry Serial No.66 dated 31.12.2007 and on the same date re-credited the same amount claiming the same as 'input' for capital goods as per Explanation 2 of Rule 2(k) of the CENVAT Credit Rules. It is their submission that in the monthly ER-1 Returns submitted by them, they mentioned the detail of taking credit and its utilization in the shape of abstract from the CENVAT Credit Input Stock Account and Input Credit Account during the relevant period. The details of iron and steel goods used in the fabrication/manufacture of different capital goods installed/used in the plant were submitted on 27.11.2006. It is also submitted that monthly details of credit account on capital goods, inputs and the services from the beginning of taking credit on various steel items along with drawings were filed with the Deptt.. A demand cum Show Cause Notice dated 07.01.2009 was served on them demanding recovery of CENVAT Credit under the proviso to Section 11A(1) of the Central Excise Act, 1944 read with Rule 14 of the CENVAT Credit Rules, 2004. The Show Cause Notice alleged that the Appellant had availed irregular credit on various steel items such as M.S. Angles, Channels, M.S. Beams, Joists, Plates, H.R. Coils & H.R. Sheets claiming the same as 'input' under Explanation 2 to Rule 2(k) of the CENVAT Credit Rules. The Show Cause Notice further alleged that the Appellant resorted to fraud, willful misstatement and suppression of material facts and contravened various provisions of the Act and the CENVAT Rules. The Adjudicating authority passed the following Order:-

> *5.0 In view of my findings as above, I order, as under-*
>
> *5.1 I allow CENVAT credit of Rs.1,77,552/- (Rupees One Lakh Seventy Seven thousand Five hundred fifty two only) on 'inputs' used in the manufacture of 'capital goods' under Explanation 2 to Rule 2(k) CCR' 04.*

5.2 I disallow Cenvat credit of Rs.1,08,40,709/- (Rupees One crore Eight lakhs Forty thousand Seven hundred nine only), under the impugned notice and order for its recovery along with interest under Rule 14 of the CCR'04 read with proviso to Section 11A and Section 11AB of the Act from RIL.

5.3 I confirm an amount of Rs.31,51,191/- (Rupees Thirty one lakhs Fifty one thousand One Hundred ninety only only) towards interest on the Cenvat credit taken amounting to Rs.1,10,18,261/- (Rupees One crore Ten lakhs Eighteen thousand Two hundred sixty one only) during the period from Feb'05 to 31.12.2007 and order for its recovery from RIL.

5.4 I also impose a penalty of Rs.1,08,40,709/- (Rupees One crore Eight lakhs Forty thousand Seven hundred nine only), under Rule 15 of the CCR'04 read with Section 11AC of the Act, for the reasons recorded above. However, in case the duty as confirmed above along with interest is paid within 30(thirty) days of the communication of this order, the amount of penalty liable to be paid shall be twenty five per cent of the duty so determined, provided that the reduced penalty is also deposited within 30(thirty) days of communication of this order.

While doing so, the Ld.Adjudicating authority relied on the decision of the Larger Bench of the Tribunal in the case of Vandana Global Ltd. [2010 (253) ELT 440 (Tri-LB)]. Hence the present Appeal before the Tribunal.

3. Heard the Ld.Authorized Representative for the Department and perused the Appeal records.

4. We find that the issue is no more res integra and has already been decided in favour of the assessee.

5. We find that the period involved in the present dispute pertains to February 2005 to September 2006. At that relevant time Explanation 2 to Rule 2(k) of the CENVAT Credit Rules, 2004 provided that inputs include goods used in the manufacture of capital goods, which are further used in the factory of manufacturer. The aforesaid Rule 2(k) was amended vide the Notification No.16/2009-CE(NT) w.e.f. 07.07.2009. Explanation 2 to Rule 2(k) provides that inputs include

goods used in the manufacture of capital goods which are further used in the factory of manufacturer, but shall not include cement, angles, channels, CTD bar or TMT bar and other items used for construction of company, shed, building or laying of foundation or making of structures for support of capital goods.

6. First of all we would like to refer to Rule 2(k) of CENVAT Credit Rules, 2004 which defines "input". This Rule as framed initially in 2004, read as under :

> "2(k) "input" means all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not, and includes lubricating oils, greases, cutting oils coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used for manufacture of final products or for any other purpose, within the factory of production.
>
> *Explanation 1.* - The high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.
>
> *Explanation 2. - Inputs include goods used in the manufacture of capital goods, which are further used in the factory of the manufacturer."*
>
> (emphasis supplied)

7. Definition of "input" under Rule 2(k) was amended vide notification dated 7-7-2009. Amended provision inserted following clause in *Explanation 2* by Cenvat Credit (Amendment) Rules, 2009 with effect from 7-7-2009:

> "but shall not include cement, angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated bar (TMT) and other items used for construction of factory shed, in building or laying of foundation or making of structures for support of capital goods"

8. Consequently, w.e.f. 7-7-2009, *Explanation 2* to Rule 2(k), as a whole, reads as under :

> "*Explanation 2.* - 'Input' include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer *but shall not include cement, angles, channels, Centrally Wasted Deform bar (CTD) or Thermo Mechanically Treated bar (TMT) and other items used for construction of factory, shed, building or laying of foundation or making of structures for support of capital goods."*

(emphasis supplied)

9. It may be noted that the Rule 2(k) was further substituted by Notification [No.] 3/2011-C.E. (N.T.), dated 1-3-2011 and a specific exclusion was provided for goods used for laying of foundation or making of structures for support of capital goods. Rule 2(k) as substituted w.e.f. 1-3-2011 reads as under :

"2(k) "input" means, -

> (a) all goods used in the factory by the manufacturer of the final product; or
>
> (b) any goods including accessories, cleared along with the final product, the value of which is included in the value of the final product and goods used for providing free warranty for final products; or
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> (c) all goods used for generation of electricity or steam (or pumping of water) for captive use; or
>
> (d) all goods used for providing any (output service); or

(e) all capital goods which have a value up to ten thousand rupees per piece, but excludes -

(A) light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol;

(B) any goods used for-

(a) construction or execution of works contract of a building or a civil structure or a part thereof; or

(b) laying of foundation or making of structures for support of capital goods, except for the provision of service portion in the execution of a works contract or construction service as listed under clause (b) of Section 66E of the Act;

(C) capital goods, except when,-

(i) used as parts or components in the manufacture of a final product; or

(ii) the value of such capital goods is up to ten thousand rupees per piece;

(D) motor vehicles;

(E) any goods, such as food items, goods used in a guesthouse, residential colony, club or a recreation facility and clinical establishment, when such goods are used primarily for personal use or consumption of any employee; and

(F) any goods which have no relationship whatsoever with the manufacture of a final product.

Explanation. - For the purpose of this clause, "free warranty" means a warranty provided by the manufacturer, the value of which is included in the piece of the final product and is not charged separately from the customer."

10. From the perusal of the circulars dated 2-4-2012 and 18-5-2012, it comes out that these circulars have been issued in the changed context of the definition of [Rule] 2(k) of Cenvat Credit Rules, 2004 and both circulars have no concern for the period in issue. Thus, we find that the reliance placed by the Revenue in this regard has no substance.

11. We find that a Larger Bench of the CESTAT in *Vandana Global Ltd.* v*. Commissioner of C.Ex. Raipur* [2010 (253) E.L.T. 440], has held that the amendment introduced vide the notification dated 7-7-2009 was a clarificatory amendment and was applicable retrospectively. It is the submission of the Appellant in the grounds of Appeal that it was the amended *Explanation 2* to Rule 2(k) as also the interpretation rendered by the Tribunal in *Vandana Global* (supra) that was applied by the Adjudicating authority to hold that the Appellant is not entitled to claim CENVAT credit on MS Plates, MS Channels, H.R. Coils, MS Angles, etc., as they are not inputs.

12. We find that the Gujarat High Court in *Mundra Ports & Special Economic Zone Ltd.* v*. C.C.E. & Customs* – [2015 (39) S.T.R. 726 (Guj.)], the Madras High Court in *India Cement Ltd.* v*. CESTAT, Chennai* – [2015 (321) E.L.T. 209 (Mad.)] and *Thiru Arooran Sugars* v*. CESTAT, Chennai* – [2017 (355) E.L.T. 373 (Mad.)] have held the judgment of *Vandana Global* (supra) not good in law. Therefore, the reasoning of the Adjudicating authority, which raised the demand along with interest and also imposed penalty on the Appellant, by relying upon the amendment in *Explanation 2* to Rule 2(k) and also *Vandana Global* (supra) is clearly unsustainable.

13. We also find that circular dated 2-4-2012 has been issued in the context of the amended definition of inputs under the Cenvat Credit Rules, 2004. Rule 2(k) was substituted by the Notification No. 3/2011-C.E. (N.T.), dated 1-3-2011 and a specific exclusion was provided for

goods used for laying of foundation or making of structures for support of capital goods. It was in the context of the amended definition (w.e.f. 1-3-2011) of inputs in Rule 2(k), the Circular dated 2-4-2012 was issued. It would be hazardous to rely upon the Circular dated 2-4-2012 to interpret the scope of inputs as it stood during the period 2005-06 to August, 2008, when the statutory framework was entirely different.

14. We further find that the judgements in the cases of *Commissioner of C.Ex., Jaipur* v*. Rajasthan Spinning & Weaving Mills Ltd.* – [2010 (255) E.L.T. 481 (S.C.)], *Commissioner of C.Ex. Tiruchirapalli* v*. India Cements Ltd*. – [2012 (285) E.L.T. 341 (Mad.)], *Mundra Ports & Special Economic Zone Ltd.* v*. C.C.E. & Cus*. – [2015 (39) S.T.R. 726 (Guj.)], and *Thiru Arooran Sugars* v*. CESTAT, Chennai* – [2017 (355) E.L.T. 373 (Mad.)] are squarely applicable to the facts of the present case.

15. The Madras High Court in *India Cement* (supra) noticed *Vandana Global* (supra) but relied upon the Apex Court judgment in *Rajasthan Spinning & Weaving Mills Ltd*. (supra), wherein the Apex Court has considered an issue of steel plates and MS channels used in the fabrication of chimney for diesel generating set and after considering it, the Apex Court allowed the Cenvet credit on MS Rod, sheets, MS Channel, MS Plate, etc., used for fabrication of structures to support various machines/capital goods.

16. In *Thiru Arooran Sugars (*supra), a Division Bench of the Madras High Court specifically considered as to whether MS structural, (which support plant and machinery), cement and steel (which are used in erecting foundations to hold plant and machinery) are integral part of capital goods eligible for Cenvat credit under the Cenvat Credit Rules, 2004 prior to the amendment of *Explanation 2* to Rule 2(k) by notification dated 7-7-2009. The Madras High Court has held that

irrespective of whether 'user test' is applied, or the test that they are an integral part of the capital goods is applied, all such items fell within the scope and ambit of both Rule 2(a)(A) and 2(k) and, therefore, Cenvat credit was to be allowed on such goods.

17. We find that the facts of the present case are squarely covered by the abovementioned judgements of the Hon'ble High Courts. In view of the above discussions, the impugned order cannot be sustained and is accordingly set aside. The Appeal filed by the Appellant is allowed with consequential benefits, as per law.

(Operative part of the order was pronounced in the open Court.)

Sd/

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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