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

REGIONAL BENCH – COURT NO.2

Excise Appeal No. 76036 of 2019

(Arising out of Order-in-Appeal No. 56/CE/BBSR-GST/2018 dated 28.12.2018 passed by Commissioner (Appeals), GST, CX & Customs, Bhubaneswar.)

M/s. RSB Castings Ltd.
(NH-5, Plot No. 1008, 2010 Mania, Uchapada, Tangi
Choudwar, Cuttack-754022, Odisha)

Appellant

VERSUS

Commr. of CGST & CX, Bhubaneshwar
(C. R. Building, Rajaswa Vihar, Bhubaneswar-751007, Odisha)

Respondent

APPEARANCE :
Mr. Narendra Kumar Das, Advocate for the Appellant
Mr. P. Das, Authorized Representative for the Respondent

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

FINAL ORDER NO.75843/2024

Date of Hearing : 02 May 2024
Date of Decision: 02 May 2024

PER R. MURALIDHAR:

The Appellant is engaged in manufacturing of "Non Malleable Cast Iron Articles". They have taken the Cenvat Credit for various input services like civil consultancy, bank charges, security agency, advertisement service, manpower service, etc. during the period from 01/03/2012 to 31.03.2016. These services were utilized when the Appellant was setting up their plant for manufacturing of finished products which started with effect from September 2015. The Department issued Show Cause Notice on the ground that with effect from 01/04/2011 Rule 2 (l) of CCR, 2004 was amended and the word "setting up" was removed because of which Cenvat Credit cannot be taken for the services used towards setting up of the factories. After due process, the demand of Rs. 30,50,637/- was confirmed by the lower authorities. Being aggrieved, the Appellant is before the Tribunal.

2. The Learned Counsel appearing on behalf of the Appellant submits that these are essential services utilized by the Appellant when they were in the process of starting their manufacturing activities. Without usage of these services in their factory, the manufacturing activities would not have come into existence. There is no dispute that on the end product emerging in the factory, the Appellant is paying the Excise Duty. Therefore, he submits that they have correctly taken the Cenvat Credit on these input services. He further submits that the issue is no more *res integra*. He relies on the case law of **M/s. Texmaco UGL Rail (P) Ltd. Vs. CCE, Kol-III vide Final Order No. 76706-76707/2019 dated 25/07/2019.** This very issue was examined by the Bench and it was held that the Appellant would be eligible to take the Cenvat Credit. He also relies on the case law of **Pepsico India Holdings (Pvt.) Ltd. Vs. Commr. of Central Tax, GST Commissionerate, Tirupati.** In this case also, the Tribunal has held that just because of the word "setting up" has not been mentioned after 01/04/2011, the services related to setting up of the factory cannot be denied the Cenvat Credit. In view of these submissions, he submits that the Appeal may be allowed on merits.

3. He further submits that the Show Cause Notice issued on 17/05/2017 for the Cenvat Credit taken by them during the period 01/03/2012 to 31/03/2015 (though the Department has mentioned it as 31/03/2016) is hit by time bar. He submits that admittedly the Appellants were registered with Central Excise Department and they were filing their monthly ER-1 Returns showing the Cenvat Credit taken during March 2012 to March 2015. Therefore, the Appellant has in no way indulged in any suppression. The Department was aware that the Appellant were regularly taking the Cenvat Credit for various inputs though they were yet to commence the manufacturing activities as could be easily seen from the ER-1 Returns. Therefore, He submits that in the absence of suppression on their part, the Department was in error in invoking the extended period. Accordingly, he submits that the confirmed demand may be set aside on account of limitation also.

4. The Learned AR reiterates the finding of the lower authorities.

5. Heard both sides and perused the Appeal papers, documentary evidence placed before me and the cited case laws.

6. I find that there is no dispute that the Appellant is manufacturing goods which were exigible to Excise Duty payment when they are cleared from their factory. They have taken the Cenvat Credit on various input services which have been used before they commenced the manufacturing activities.

7. I find that the issue is no more res-integra. This Bench in the case of **Texmaco UGL Rail (P) Ltd, cited supra** has held as under:-

> *9. On conjoint reading of above definitions, it can be observed that the substantive part in respect of eligibility of credit in respect of input service has remained the same, being used by the manufacturer, whether directly or indirectly, in relation to the manufacture of final product. It is the inclusive part wherein amendment has been made effective from 1 stApril, 2011 vide Notification no. 3/2011-CE (NT) dated 01.03.2011 and accordingly several exclusions have been brought in the definition of Input services, which did not exist, in the prior period. Moreover, the term "services used in relation to setting up of the factory" has been removed from the definition, being replaced by specific exclusions. Thus, based on such amendments, the department has argued that credit in respect of input services which were used for setting up of the factory shall not be allowed. Such narrow interpretation, without even considering changes made in the definition of input services shall lead to wrong conclusion.*
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> *10. We observe that the amendments have been made in the definition of input services effective from 1 stApril, 2011 to specifically exclude input services in forms of works contract or construction services used in relation to building or civil structure or part thereof. It also excludes similar services used for laying of foundation or making of structure for support of capital goods. Thus, the intention of legislature was to restrict input tax credits on above services, which are used during factory set up and hence the term "setting up" was removed from the earlier definition having specific exclusion clause in the new definition.*
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> *[Emphasis supplied]*

8. Hyderabad Bench in the case of **Pepsico India Holdings (Pvt.) Ltd. cited** supra has held as under:-

> ***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]

9. As per the factual details given by the Appellant, the ratio of the cited cases is squarely applicable. Therefore, following the ratio of these case laws, I allow the Appeal on merits.

10. I also find substantial force in the Appellant's submission that when they were taking the Cenvat Credit and reflecting the same in the ER-1 Returns during the period 2012 to 2015, the Department was very much aware that they were taking the Cenvat Credit for various input services. The Department was aware that till September 2015, they were not manufacturing the goods, nor clearing the same. Therefore, the Appellant cannot be fastened with the liability of suppression. Accordingly, I hold that the confirmed demand for the extended period is also hit by time bar. Therefore, the Appeal stands allowed even on account of limitation.

11. The Appeal is allowed with consequential relief, if any, as per law.

(Dictated and pronounced in the open court.)

Sd/-
(R. Muralidhar)
Member (Judicial)

Pooja