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

REGIONAL BENCH – COURT NO. 1

Excise Appeal No. 70686 of 2013

(Arising out of Order-in-Original No.CCE/SHILLONG NO.01/2013 dated 20.03.2013 passed by Commissioner, Central Excise, Shillong)

Commissioner of Central Excise & Service Tax, Shillong **: Appellant**
Morellow Compound, M.G.Road,
Shillong-793 00.

VERSUS

M/s. Rj Cements Industries Ltd. **: Respondent**
N.H. 36, Jabrakhowa, P.O.-Madartuli-783440
Dist.-Nogoan
Assam.

APPEARANCE:

Shri J.Chattopadhyay, Authorized Representative for the Appellant

Ms. Raginee Goyal, C.A. for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.76037/ 2024

DATE OF HEARING :20.05.2024

DATE OF DECISION:20.05.2024

Order : [Per Shri Ashok Jindal]

The Revenue is in appeal against the impugned order.

2. The facts of the case are that the Respondent is a manufacturer of Portland cement and clears the same on payment of duty and the manufacturing unit is located in the state of Assam.

3. The Respondent is eligible for refund of 75% of total duty paid in a month on cement cleared and manufactured from the own manufactured clinker and 36% of total duty paid in a month on clearance

of cement manufactured out of purchased clinker as per the provisions of Notification No-20/2007 as amended (Sr. No. 12 & 16 of the table annexed to the Notification).

4. The clause 2B of the said notification stipulates that, "in cases where all the goods produced by a manufacture are eligible for exemption under this notification, the exemption contained in this notification shall be subject to the condition that the manufacturer first utilizes whole of the CENVAT credit available to them on the last day of the month under consideration for payment of duty on goods cleared during such month and pays only the balance amount in cash.

4.1. On scrutiny of the ER-1 monthly returns submitted by the respondent, it was found that in the month of April 2012, the respondent took Cenvat on input service amounting to Rs. 45,333/- (Service Tax Rs. 44,013/- Edu. Cess Rs 880/- S&H Edu. Cess Rs. 440/-) and utilizes whole amount towards discharging duty liability in the same month. In May 2012, the respondent took input credit of Rs. 33,443/ (Service Tax - Rs. 32,470/- Edu. Cess Rs. 649/+S&H Edu. Cess Rs. 324/-1 and utilized the same in the month. Likewise, in June 2012 and July 2012, the respondent took input service credit of Rs. 38,580/- (Service Tax - Rs. 37,457/ Edu. Cess Rs. 749/- S&H Edu. Cess Rs. 374/-) and Rs. 27,225/- (Service Tax Rs 26432/ Edu. Cess Rs. 529/ + S&H Edu. Cess Rs. 264/-) respectively and utilized the same in the respective months. However, an amount of Rs 50,63.759/-(Service Tax Rs 49,15,660/- + Edu. Cess Rs. 98,682/- + S&H Edu Cess Rs 49,417/-) was also taken as credit by the respondent in the month of May 2012 which was incurred by them during the period from April 2007 to December 2011. Out of this amount, the respondent utilized Rs. 3,08,072/- (Service Tax- Rs. 2,99,100/ Edu. Cess Rs. 5,983/ S&H Edu. Cess Rs. 2,989/-), Rs. 394771/- (Service Tax Rs. 3,83,271/- + Edu. Cess- Rs. 7,666/- + S&H Edu. Cess Rs. 3,834/-) and Rs. 7,49,277/- (Service Tax - Rs. 7,27,455/- + Edu. CessRs. 14,548/- + S&H Edu. Cess-7,274/-) during the months of May 2012, June 2012 and July 2012 respectively towards payment of Central Excise duties.

4.2. The amount of input service tax paid by the respondent in a particular month is available to them for taking credit in that month and the same is required to be utilized during that particular month before paying any duty from the account current to fulfill the conditions laid down in the notification as mentioned above. The respondent has failed to comply with the requirement of the notification and instead, accumulated the input service credit intentionally for a long period of time ranging from 5 to 61 months and has taken credit of the whole amount in the month of May 2012 and thus, has contravened the true spirit of the Notification.

4.3. The Notification further specifies at Clause 2A that "provided that, where the duty payable on value addition exceeds the duty paid by the manufacturer on the said excisable goods, other than the amount paid by utilization of CENVAT credit during the month, the duty payable on value addition, shall be deemed to be equal to the duty so paid other than by CERVAT credit."

4.4. It appears that by not availing and utilizing the credit of input service is the respective months when the said credit wee available to the respondent for taking credit, they have paid less from the credit account and more from the current account (in cash) and thus, received more refund under the notification No. 20/2007 dated 25/04/2007 as amended than they were actually entitled to and thus have contravened the provision of the above mentioned notification."

4.5. It was alleged that the total CENVAT Credit of Rs. 50,63,759/- accumulated over the period and availed & utilized for payment of Central Excise Duty cumulatively by the Respondent during the month of May, 2012 is inadmissible to them and is recoverable from them under Rule 14 of Cenvat Credit Rules, 2004 read with provision to Section 11A of the Central Excise Act, 1944.

4.6. On the basis of said allegation Show Cause Notice was issued which was adjudicated and proceedings against the Respondent was dropped.
4.7. Against the said order, Revenue is before us.

5. The Ld. Authorized Representative, for Appellant, submitted that it is a clear case where the condition of Notification No. 20/2007 CE dated 25/04/2007 was not fulfilled. Therefore, Ld. Adjudicating Authority has felled in error by dropping the proceedings against the Respondent.

6. On the other hand, the Ld. Authorized Representative appearing on behalf of the Respondent supported the impugned order.

7. Heard the parties and considered the submissions.

8. We find that the issue has been examined by the Ld. Adjudicating Authority in the impugned order wherein the Ld. Adjudicating Authority has observed as under:

"*6.2.1 in this regard, the noticee was requested to reverse the wrongly availed and utilized cenvat credit by the jurisdictional Range office but the said noticee did not reverse the wrongly availed and utilized Cenvat Credit, leaving no option but to initiate the proceeding as laid down under central excise Law and procedure and subsequent issuances the instant SCN.*

6.3 I find that that the noticee is utilizing cenvat credit (on input goods/capital goods) regularly as per the criteria of the Notification No. 20/2007 and there is no irregularity noticed so far as per their declaration in the monthly return. However it is found that they have not availed and utilized the Cervat Credit relating to input services (on GTA) all along but started utilizing the same from the month of May 12 as per their declaration in the Monthly Return

6.4 The noticee had referred a number of case laws/Board circulars in their support to claim the right to avail the cenvat credit. I find that the contention of the noticee not deniable since Cenvat Rules do not prescribe a time limit for carrying forward the cenvat credit. However, also find that the noticee is also a eligible for area based exemption availing the Notification No. 20/2007 dtd 25/4/2007(as amended) and the clause 2(A) of the said Notification states that the manufacturer first utilizes whole of the CENVAT credit available to them on the leas of the month under consideration for payment of duty on goods cleared during such month and pays only the balance amount in cash.

6.5 As discussed at above para that the noticee was availing cenvat credit on input goods/capital goods, therefore a query raises why the said credit under reference i.e., credit input services was not availed by the notiore and all of a sudden they started taking the said cenvat credit from the month of May 2012 as deciated by them their monthly returns. To this query, I find that the noticee stated in their reply that they were not aware about the fact that the credit on input service is admissible

6.6 The noticee has stated in their reply that due to non-availment of the said cenvat credit they had suffered loss and the allegation in the Show Cause Notice that they have got excess refund is not true. In this regard they have explained about the figures what would have been the position in case of availment of the said cenvat credit compared with the position where they have not availed the cenvat credit i.e., with the existing position

6.7 With relation to the above, I find that the allegation in the SCN is that since the noticee did not avail the cenvat credit in time as stipulated in the Notification No 20/2007 the noticee has paid central excise duty more from the PLA and subsequently got back more refund.

6.8 On deep study of the above with the noticee's contention that they have actually incurred loss by not availing cenvat credit and paying more from the PLA, I find that the Noticee is eligible for refund of 75% of total duty paid in a month on cement cleared and manufactured from own manufactured clinker and 36% of total duty paid in a month on clearance of cement manufactured out of purchased clinker as per the provisions of Notification No-20/2007 as amended.

6.9 I also find that the contention of the noticee is not deniable and actually they have suffered loss for non availment of the cenvat credit. The incidence of the above refund mechanism in case of cenvat availment compared *with the case of non availment of cenvat credit can be analyzed through the following two positions as in Part-A & in Part-B below:-(assuming total duty as Rs.100).*

PART-A *(without availment of input service)*

MONTH	*CENVAT (existing Cenvat)*	*PLA*	*Total Duty*	*Refund to the Max limit*
No. 1	*15*	*85*	*100*	*75*
No. 2	*10*	*90*	*100*	*75*
No. 3	*20*	*80*	*100*	*75*
No. 4	*05*	*95*	*100*	*75*
No. 5	*12*	*88*	*100*	*75*
	Total	*4 3 8*		*300*

In part A paid from PLA (cash) Rs. 438, refund allowed Rs. 300 therefore, Rs. 138 (Rs. 438-Rs. 300) is less received.

PART-B *(with availment of input service)*

MONTH	*CENVAT(existing cenvat+input service credit)*	*PLA*	*Total Duty*	*Refund to the Max Limit*
No 1	*18*	*82*	*100*	*75*
No. 2	*12*	*88*	*100*	*75*
No. 3	*21*	*79*	*100*	*75*
No. 4	*08*	*92*	*100*	*75*
No. 5	*16*	*84*	*100*	*75*

	Total	*425*		*300*

In part B paid from PLA (cash) Rs. 425 refund allowed Rs. 300 therefore Rs 125 (Rs.425-Rs.300) is less received.

6.10 The above shows it clearly that in Part A refund is less with relation to cash paid from the PLA than in Part-B. Therefore, I find that the contention of the noticee that they did not get excess refund is true and during the process of non availment of input service tax credit for their ignorance they suffered a loss of Rs. 20 85 lakh by depositing excess amount from the PLA and subsequent receiving of less refund.

6.11 The noticee stated in their reply that they themselves could not have intentionally attempted to cause to itself a loss of 20.85 lakhs as alleged by attempting to avail the credit in May 2012 instead of availing it in respective years when paid, except by way of omission due to ignorance and lack of trained staff. There is no apparent reason or logical ground which justifics why any manufacturer would intentionally do this to his detriment and then avail the credit voluntarily in May 2012 in lieu of earlier respective years. I find force in this logic that no business unit will attempt to cause itself loss.

6.12 I also find that the Notification No.20/2007 (as amended) allows tax holiday upto 10 years to a unit the date of it's commercial production. The commercial production of the noticee's unit started in the month of April 2007. The noticee in this regard stated in their reply that is and technically no reason which indicates why the noticee intentionally would not have utilized the said credit available to it earlier than May 2012 as alleged If intention of the noticee would have been to accumulate the credit for long period, the noticee would never have utilized the same during May 2012 and subsequent months, but rather wait until 2017 for the period of ten *years. This is neither the attempt nor the plea in the matter at hand-1 find there is logic in the reply of the noticee since they have voluntarily declared their cenvat credit and also justified their reason that no business unit would let itself suffered loss due to the ignorance of non-availment of cenvat credit.*

6.13 I also find that the noticee is a manufacturer in the North East Region availing area based exemption notification, the purpose of which is to boost the industrial growth. Exemptions from various taxes are extended by the Central Government as well as by the State Government for the development of the region through various incentives. In such a scenario an industry would suffer loss, for non availment of their own Cenvat Credit is not desirable when there is no revenue loss to the Govt- exchequer.

6.14 1, therefore find that the allegation in the SCN that the noticee has received more refund by not availing the cenvat credit and that the noticee has accumulated the input service credit intentionally and thus, has contravened the true spirit of the Notification no 20/20079 (as amended) is not justified.

6.15 Therefore, I find that the charges/demand in the SCN are not maintainable on merits as discussed in paras Supra."

9. We have gone through the observations made by the Ld. Adjudicating Authority in the impugned order and find that it is a case of the Revenue that the Respondent is not entitled to take the Cenvat Credit as the same was not utilized by the Respondent within the stipulated period but we find that in terms of Cenvat Credit Rules, 2004, there is no time limit fixed during the impugned period for availment of Cenvat Credit.

10. As no time limit was fixed, in that circumstances, Cenvat Credit availed by the Respondent for the period April, 2007 to December, 2011 in May, 2012 is not barred. Therefore, we do not find any infirmity in the impugned order, the same is upheld and the appeal filed by the revenue is dismissed.

(Operative part of the order was pronounced in open court)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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