CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH

Excise Appeal No. 1621 of 2012

(Arising out of Order-in-Original No. Belapur/26/Tal/R-V/COMMR/KA/12-13 dated 29.08.2012 passed by the Commissioner of Central Excise & Customs, Belapur Commissionerate.)

M/s. VVF Ltd. ....Appellant
100% E.O.U., MIDC, Taloja,
Tal. – Panvel, Raigad,
Navi Mumbai – 410 208

VERSUS

Commissioner of Central Excise, Belapur ....Respondent
1st Floor, C.G.O. Complex,
CBD, Belapur,
Navi Mumbai – 400 614

APPERANCE:

Shri Vishal Agarwal, Advocate alongwith
Shri Ramnath Prabhu, Advocate for the Appellant

Shri Dhirendera Kumar, Jt. Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/86292 / 2022

Date of Hearing: 07.12.2022
Date of Decision: 07.12.2022

PER: DR. SUVENDU KUMAR PATI

Denial of CENVAT Credit of Rs.71,52,099/- on certain inputs to the Appellant on the ground that they are neither included in the definition of inputs as defined under Rule 2(k) of the CENVAT Credit Rules, 2004 (CCR in short) nor as capital goods as defined under Rule 2(a) of the CCR and its recovery alongwith interest and equivalent penalty that was directed through adjudication order passed by the Commissioner of Central Excise & Customs, Belapur Commissionerate on 29.08.2012 is assailed in this appeal.

2. Factual backdrop of this case is that Appellant is an EOU (Export Oriented Unit) engaged in manufacture of excisable goods like distilled fatty acids, glycerine, soap etc. During the period from 2005-06 to 2010-11 inputs used by it namely HR steel plates, CR coils, aluminium sheets, hangers, welding electrodes etc. claimed to have been used for fabrication of storage tanks and for providing support structure to such storage tanks as well as for maintenance of plant & machinery within the factory premises were held to be inadmissible by the Respondent-Department. Accordingly, show-cause notice dated 09.06.2011 was issued to it and upon reply received, matter was adjudicated by the Commissioner and the demand raised in the show-cause notice alongwith interest and penalty were confirmed. Appellant is before us challenging the legality of such confirmation order.

3. During the course of argument learned Counsel for Appellant Mr. Vishal Agarwal alongwith Mr. Ramnath Prabhu submitted that goods used for making of super structure to support capital goods were admittedly excluded from the definition of input w.e.f. 07.07.2009, for which denial would have been restricted to an amount of Rs.92,716/- since rest of amount relating to the inputs were utilised prior to the effective date of amendment i.e. 07.07.2009. Mr. Agarwal has drawn attention to the basis on which leaned Commissioner had passed his order namely that of the report

of the Inspector (Preventive) Central Excise, Belapur wherein he pointed out that while admitting that material were requisitioned by and issued to the general maintenance section and in some cases by the project Department and the contractor also gave his statement that tanks were fabricated by them at the Appellant premises, no internal document was available to conclusively prove that the steel sheets were specifically used for the purpose of fabrication of storage tank and therefore he concluded that it might have been possible that those are used in other civil/maintenance work or manufacture of civil structure/plant & machinery. He further pointed out that this observation in the order of the Commissioner (Appeals) was based on presumption and surmises which have no legal basis for the very reason that he had admitted the fact that "storage tank" is specifically included in the definition of capital goods under Rule 2(a) of the CENVAT Credit Rules, 2004 and its movability or immovability is immaterial for the purpose of Explanation 2 to Rule 2(k) of the CCR. In placing reliance on the various decisions passed in the case of *Vandana Global Ltd. Vs. Commissioner of Central Excise & Customs, Raipur* reported in *2018 (16) G.S.T.L. 462 (Chhattisgarh), Mundra Ports & Special Economic Zone Ltd. Vs. Commissioner of Central Excise & Customs* reported in *2015 (39) S.T.R. 726 (Guj.), Thiru Arooran Sugars Vs. CESTAT, Chennai* reported in *2017 (355) E.L.T. 373 (Mad.), CEAT Ltd. Vs. Commissioner of Central Excise, Mumbai Zone-II* reported in *2019 (367) E.L.T. 245 (Bom.), Ambuja Cements Eastern Ltd. Vs. Commissioner of Central Excise, Raipur* reported in *2010 (256) E.L.T. 690 (Chhattisgarh), Pr. Commissioner of Service Tax Vs. Shree Chanakya Education Society* reported in

2018 (362) E.L.T. 741 (Bom.), Larsen & Toubro Ltd. Vs. Commissioner of Central Excise, Pune-II reported in *2007 (211) E.L.T. 513 (S.C.),* he rests his argument in saying that the inputs availed on purchase of goods like HR still, plates, CR coils, aluminium sheets etc. for fabrication of storage tank or fabrication of structure are valid inputs and thrusting upon the judgment of *Mudra Ports & Special Economic Zone Ltd. Vs. Commissioner of Central Excise & Customs* reported in *2015 (39) STR 726 (Guj.)*, he pointed out that the Larger Bench decision in *Vandana Global Ltd. Vs. C. EX. & Cus., Raipur* reported in *2010 (253) ELT 440 (Tri.- LB)* that amendment brought on 07.07.2009 was clarificatory, was set aside by the Hon'ble Gujarat High Court for which Appellant is entitled to input credits taken up to the date of amendment.

4. In response to such submissions learned Authorised Representative for the Respondent-Department argued in support of reasoning and rationality of the order passed by the Commissioner (Appeals) and reiterated the fact that concrete proof concerning use of those materials in structures that can be treated as capital goods is unavailable, for which order passed by the Commissioner need not be interfered with.

5. We have perused the case record and gone through the written submissions as well as relied upon case laws. As could be observed from the order passed by the Commissioner (Appeals), it can be seen that he framed the issue as to if Articles of Iron & steel were apparently used in fabrication and whether capital goods can include

plants, structure etc. embedded to ask and finally if credits can be allowed in respect of HR steel plates, CR coils, aluminium sheets, hangers, welding electrodes etc. His ultimate finding is that there was no clear evidence available if materials were used for manufacture of tanks or used for support of super structure, though he accepted storage tank of both immovable and movable categories as capital goods. Ultimately placing reliance on the verification report submitted by the Investigating Officer (Supdt.) he concluded that there was probability of those goods being used not for manufacture of storage tanks.

6. If this is the sole basis of his finding, we have got no hesitation to set it aside since presumption has got no place in the rule of evidence except where no specific direction is available in the Evidence Act to accept presumption with variations like 'may' and 'shall'. Therefore, presumption howmuch strong can't take the place of proof. Moreover, going by the statement of the contractor recorded by the Investigating Officer, it is very much clear that fabrication with the help of steel sheet supplied by the Appellant were being carried out by the contractor, who had supplied the welding rods for fabrication purpose. The only claim of the Appellant is that such fabrication was done to prepare storage tanks which were included within the definition of capital goods that exist in the factory premises itself. This being the facts on record and having regard to the undisputed averment of the Appellant that prior to 07.07.2009 most of the inputs were utilised and credits were availed *vis.-a.-vis.* contradictory judgments being rendered on the issue of

admissibility of credits subsequent to the amendment w.e.f. 07.07.2009 to explanation to Rule 2(k) of the CENVAT Credit Rules, 2004 including findings of Larger Bench in Vandana Global Ltd. and its subsequent reversal by the Hon'ble Chhattisgarh High Court, we are inclined to set aside the demand and invocation of extended period. Hence the order.

ORDER

7. The appeal is partly allowed and the order passed by the Commissioner of Central Excise & Customs, Belapur Commissionerate vide Order-in-Original No. Belapur/26/Tal/R-V/COMMR/KA/12-13 dated 29.08.2012 is hereby modified to the extent that credit availed in respect of structure up to 07.07.2009 are admissible and credits taken thereafter to the tune of Rs.92,716/- taken for structure to support storage tank including balance 50% credit of Rs.46,358/- availed in the next year are inadmissible. Appropriation of the said amount computed from 07.07.2009 with interest up to date of his order is held to be proper and legal. Penalty for the extended period is hereby set aside with consequential relief.

(Operative portion of the order pronounced in open court)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

Prasad