IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No.
APPEAL No. E/2003/10-Mum
(Arising out of Order-in-Appeal No. PKS/254/BEL/2010 dated 24.8.2010 passed by Commissioner of Central Excise (Appeals), Mumbai-III)
For approval and signature:
Honble Mr. S.S. Garg, Member (Judicial)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?

: No

2. Whether it should be released under Rule 27 of the : CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?

3. Whether Their Lordships wish to see the fair copy of the Order? : Seen

4. Whether Order is to be circulated to the Departmental authorities? : Yes

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R.R. Paints Pvt. Ltd. Appellant
Vs.
Commissioner of Central Excise, Mumbai-III Respondent
Appearance:
Mrs. Kranti Rathi, Advocate, with Shri Jagdish Gawde, Consultant, for appellant
Shri R.K. Maji, Assistant Commissioner (AR), for respondent
CORAM:
Honble Mr. S.S. Garg, Member (Judicial)
Date of Hearing: 6.1.2016
Date of Decision: 11.3.2016
ORDER NO

The present appeal is directed against the impugned order passed by the Commissioner (Appeals) whereby he has upheld the order-in-original.

2. Briefly the facts of the present case are that the appellant is engaged in the manufacture of various products falling under Chapters 32, 38, 25, 27 and 28 of the Central Excise Tariff Act, 1985 and is availing the facility of cenvat credit on inputs, capital goods and input services under Cenvat Credit Rules, 2004. The CERA audit was conducted at the premises of the appellant and they have observed that the appellant has availed and utilized service tax credit of Rs.2,80,538/- wrongly because the input services involved is pertaining to construction of shopping complex situated outside the factory premises during the period from June 2007 to December 2007. Thereafter a show cause notice was issued. The appellant filed reply refuting the allegations in the show cause notice and thereafter the Assistant Commissioner passed order dated 28.1.2010 confirming the demand and thereafter the appeal was filed by the appellant before the Commissioner (Appeals)

who upheld the adjudication order. Aggrieved by the said order, the appellant has filed the present appeal.

3. The learned counsel for the appellant submitted that in the impugned order, the learned Commissioner (Appeals) has held that the said construction was carried outside the factory premises. In fact the said construction was done within the central excise registered premises i.e. within the compound of the appellant↕s factory. He also submitted that all the expenses of construction and taxes including service tax were borne by the appellant. The relevant TR-6 challan for the service tax paid was received by the appellant from the service provider i.e. M/s. Swastik Construction, and the entries for having paid the service tax were made in the statutory records giving the details of service provider and documents of input service i.e. RG-23A (Part II) have also been submitted along with the appeal. He further submitted that all the relevant documents and records including the layout of the factory premises were submitted to the adjudicating authority, but the adjudicating authority failed to consider these facts while passing the order. He also submitted that the alleged demand has been confirmed on the ground that the credit availed was not in relation to the manufacture of the goods whereas it is not in dispute that the said premises was used by the appellant for the purpose of and in relation to their activities relating to business. In support of this submission, he relied upon the following decisions of the Tribunal:-

(i) Vako Seals Pvt. Ltd. vs. CCE, Mumbai-V reported in 2015 (40) STR 594;

(ii) CCE, Meerut vs. Bajaj Hindustan Ltd. reported in 2015 (40) STR 379.

3.1 The learned counsel further submitted that the credit involved in the show cause notice was for the period 2007 i.e. prior to amendment to Cenvat Credit Rules, which came into force on 1.4.2011. The definition of input services upto 31.3.2011 covered within its scope of the services used by an assessee in relation to his business activities. It was only after the amendment w.e.f. 1.4.2011 that the construction services were taken out of the definition of ◄input services↕.

3.2 He further submitted that the impugned order confirming the demand has traveled beyond the scope of the allegations made in the show cause notice and, therefore, deserves to be set aside. For this, he placed reliance on the following decisions of the Tribunal:-

(i) Gujarat Forging Ltd. vs. CCE, Rajkot reported in 2014 (36) STR 677;

(ii) DHL Logistics Pvt. Ltd. vs. CST, Mumbai-I reported in 2014 (36) STR 874.

3.3 He also submitted that the entire demand is time barred as the show cause notice was issued on 24.9.2009 for alleged inadmissible credit availed by the appellant in July 2007 by invoking extended period whereas the appellant in their entire statutory records has mentioned all the details regarding the availment of the credit and has filed all these documents before the department and for this, the appellant relied upon the following decisions of the Tribunal:-

(i) Chintamani Lamination vs. CST, Ahmedabad reported in 2014 (33) STR 327;

(ii) Cheviot Co. Ltd. vs. CCE, Kolkata-VII reported in 2010 (255) ELT 139.

4. On the other hand, the learned AR reiterated the findings of the Commissioner (Appeals).

5. I have heard the learned counsel for the parties and perused the records carefully.

6. The only question in this appeal is whether the appellant has rightly availed and utilized the credit or not. I find that prior to 1.4.2011, construction services was included in the definition of ◄input services↕ and in this case, the credit was availed for the year 2007, which is very much admissible at that time.

6.1 Further, I also find that the appellant has not suppressed any facts from the department. The appellant has mentioned in all the statutory records viz. RG23A (Part II), TR-6 challan and ER-1 returns regarding the factum of availment of the credit, but the department has not considered these factual aspects before passing the impugned order.

6.2 I also find that the impugned order has traveled beyond the show cause notice in the sense that in the show cause notice the allegation is that the appellant availed input service credit on construction of shopping complex outside the factory premises whereas in the impugned order, the demand has been confirmed on the ground that the service provided and credit availed was not either directly or indirectly in relation to the manufacture of the appellant↕s final product.

6.3 I also find that the entire demand in this case is time barred because the show cause notice was issued on 24.9.2009 for alleged inadmissible credit availed by the appellant during the period July 2007 by invoking the extended period whereas in fact there has not been any suppression or wilful declaration by the appellant and the entire records were with the department, wherein the appellant has reflected the availment of credit.

6.4 Further, I have gone through the various case laws cited at bar by the learned counsel for the appellant and they are applicable in the facts and circumstances of the case.

7. Therefore, considering the totality of the of the facts and circumstances, I am of the considered opinion that the impugned order is not sustainable in law and I set aside the impugned order by allowing the appeal of the appellant with consequential relief, if any.

(Pronounced in Court on 11.3.2016)
(S.S. Garg)
Member (Judicial)
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