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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.75363 of 2014

(Arising out of Order-in-Appeal No.71/CE/BBSR-II/2013 dated 23.12.2013 passed by Commissioner(Appeals) of Central Excise, Customs & Service Tax, Bhubaneswar.)

Commissioner of Central Excise & Service Tax, Bhubaneswar-II
(C.R. Building, Rajaswa Vihar, Bhubaneswar, Odisha.)

...Appellant

VERSUS

M/s. Aryan Ispat & Power Private Limited

.....Respondent
(At-Bomaloi, P.O.-Lapanga (Rengali), Dist: Sambalpur-768212, Odisha.)

WITH

Excise Appeal No.75386 of 2014

(Arising out of Order-in-Appeal No.71/CE/BBSR-II/2013 dated 23.12.2013 passed by Commissioner(Appeals) of Central Excise, Customs & Service Tax, Bhubaneswar.)

M/s. Aryan Ispat & Power Private Limited
(At-Bomaloi, P.O.-Lapanga (Rengali), Dist: Sambalpur-768212, Odisha.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Bhubaneswar-II

.....Respondent
(C.R. Building, Rajaswa Vihar, Bhubaneswar, Odisha.)

APPEARANCE

Shri H.S.Abedin, Authorized Representative for the Revenue
Shri Kartik Kurmy, Advocate for the Assessee/Respondent

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

FINAL ORDER NO. 75264-75265/2022

DATE OF HEARING : 10 December 2021
DATE OF DECISION : 10 May 2022

P.K.CHOUDHARY :

Both the present Appeals have been filed against Order-in-Appeal dated 23.12.2013 passed by the Learned Commissioner (Appeals), Bhubaneswar. By the said Appeal Order, the CENVAT Credit of Rs.25,63,542/- availed on steel items has been disallowed against which the assessee is in appeal before us, whereas CENVAT Credit of Rs.79,20,750/- on various steel items, welding electrode, oxygens etc. have been allowed to the assessee against which the Revenue has preferred the appeal. Since, both the appeals arise out of a common order, both the appeals are taken up together for disposal. The periods in dispute in the present appeals are November 2005-August 2006, December 2006-March 2007, May 2007-March 2008, and January 2009-March 2009.

2. Briefly stated, the facts of the case are that the appellant - assessee namely M/s. Aryan Ispat and Power Pvt. Ltd. is engaged in the manufacture of iron and steel items on which applicable Central Excise Duty is being paid. The assessee had undertaken the work of erection and commissioning of 2X100 TPD and 350 TPD sponge iron kiln, 12 MW power plant and its auxiliary unit and coal crusher and coal washery at its plant for use in the manufacture of final products i.e. steel items. They have availed CENVAT Credit on various inputs and capital goods used in connection with the erection and commissioning of the said plant in terms of the provisions of CENVAT Credit Rule 2004.

2.1 7(seven) nos. of periodical Show Cause Notices were issued for disallowance of credit on various items availed by the assessee in respect of said plant on the ground that the goods were used for setting up of structures and foundation of plant and hence ineligible. The assessee furnished their reply in defence to the said notices along with the justification regarding the usage of said goods duly supported by Chartered Engineer’s certificate.

2.2 Ignoring the said submissions, the Learned Additional Commissioner, Central Excise, Bhubaneswar, confirmed Central Excise Duty demand of Rs. 1,04,84,292/- by disallowing credit as aforesaid as was proposed in the notices and also imposed equivalent penalty vide Order-in-Original dated 30.12.2011.

2.3 In the Appeal filed by assessee against the said Adjudication Order, the Learned Commissioner (Appeal) allowed credit of Rs. 79, 20,750/- by considering the utilization of steel and other items since supported by Chartered Engineer's certificate which was already on record at the time of adjudication.

2.4 However, the Learned Commissioner (Appeals) disallowed credit of Rs. 25,63,542/- on steel items by considering the same to be used for structural and mechanical support purpose by relying on the decision of the Tribunal's Larger Bench in the case of **Vandana Global Limited vs. CCE 2010 (253) ELT 440**, wherein it has been held that the amendment brought vide Notification No. 16/2009-CE dated 07.07.2009 in the definition of 'input' disallowing credit on structural items to be applicable with retrospective effect. The Learned Commissioner (Appeal), however, set aside the entire penal amount of Rs. 1, 04, 84,542/- with the observation that the issue involved interpretation of legal provision, there could not be any case of malafide intention on the part of the assessee.

3. Heard Shri Kartik Kurmy, Learned Advocate for the assessee and Shri H S Abedin, Learned Authorized Representative for the Respondent/Revenue for the Revenue and perused the appeal records. The Ld. Advocate for the assessee made extensive arguments to support his case and also submitted detailed written submissions. The Learned Authorized Representative for the Revenue supported the impugned order to the extent credit has been disallowed and also pleaded that the assessee was not eligible to credit at all. He also submitted that the credit which has been allowed by the Learned

Commissioner (Appeals), is not eligible and accordingly prayed for allowing the Revenue's Appeal.

4. We have carefully examined the impugned appeal order and the original adjudication order and have also gone through the appeal records. We find that the credit of Rs.25,63,542/- has been disallowed by the Ld. Commissioner (Appeal) merely on the basis of the decision of the Larger Bench in the case of Vandana Global (Supra). We have examined the observation made in **Para 5.4** of the Appeal Order wherein the Learned Commissioner (Appeals) has relied on the decision of Larger Bench in the case of Vandana Global (Supra) to disallow the credit. We find that the said decision of the Tribunal's Larger Bench was challenged by the assessee before the Hon'ble Chhattisgarh High Court as reported in **2018 (16) GSTL 462 (Chhattisgarh)** wherein the Tribunal's decision has been set aside on 13.09.2017, i.e. after the date of passing of the appeal order impugned herein. We agree with the contentions of the Ld. Advocate that the very basis followed by the Learned Commissioner (Appeals) has now been settled in their favour. The relevant portion of the said decision is reproduced below:-

> *"…5. The impugned order of the Tribunal had come up for consideration before different High Courts either cited as precedent or as relied upon by the Tribunal in different other matters. The Gujarat High Court in Mundra Ports & Special Economic Zone Ltd. - 2015 (39) S.T.R. 726 (Guj.) referred to the contents of the amendment, to the extent it is relevant for the purpose of this case and held as follows :*
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> > *"We do not find that amendment made in the Cenvat Credit Rules, 2004 which come into force on 7-7-2009 was clarificatory amendment as there is nothing to suggest in the Amending Act that amendment made in Explanation 2 was clarificatory*

> *in nature. Wherever the Legislature wants to clarify the provision, it clearly mentions intention in the notification itself and seeks to clarify existing provision. Even, if the new provision is added then it will be new amendment and cannot be treated to be clarification on particular thing or goods and/or input and as such, the amendment could operate only prospectively."*

6. That view has been quoted with approval by the Madras High Court in M/s. Thiruarooran Sugars v. Customs, Excise and Service Tax Appellate Tribunal (CMA 3814/2014 and connections) decided on 10-7-2017 [2017 (355) E.L.T. 373 (Mad.)] to conclude that the said amendment cannot be treated as clarificatory. M/s. Thiruarooran Sugars also considered the issue as to the effect and fundamental value of the evidentiary statement made by the Finance Minister dealing with an amendment in the budget speech.

7. Section 37 of the Central Excise Act, 1944; for short, 'the Act', is a rule making power. Section 37(2)(xvia) provide for the credit of duty paid or deemed to have been paid on the goods used in, or in relation to, the manufacture of excisable goods. Section 37(2A) of the Act - The power to make rules conferred by clause (xvi) of sub-section (2) shall include the power to give retrospective effect to rebate of duties on inputs used in the export goods from a date not earlier than the changes in the rates of duty on such inputs. Though the power to make rules include the power to give retrospective effect, while doing so the provision under consideration is neither made retrospective nor could it be treated as one.

8. We are in complete agreement with the ratio of Mundra Ports (supra) and M/s. Thiruarooran Sugars (supra) on all fours.

9. Resultantly, we answer the questions formulated in these appeals in favour of the assessees and against the Revenue.

10. In the result, the appeals of the assessees are allowed setting aside the Tribunal's decision impugned in each of those appeals. The

appeals filed by the Revenue are dismissed. However, no order as to costs."

In the above decision, the Hon'ble Chhattisgarh High Court has agreed with the decisions of **Gujarat High Court in the case ofMundra Ports &Special Economic Zone Limited [2015 (39) STR 276 (Gujrat)]**and **Madras High Court in the case of ThiruArooran Sugars vs. CESTAT [2017 (355) ELT 373(Tri. Del)]**. In the said decisions, it has been held that the amendment made in the Credit Rules on 07.07.2009 to restrict the credit on structural items cannot be considered to be retrospective in nature. Therefore, the reliance placed by the Ld. Commissioner (Appeal) on the decision of the Larger Bench in Vandana Global (Supra) to disallow a portion of the credit cannot be sustained in view of the legal positions laid down by the various High Courts as above.

5. We further consider, as pleaded by the Ld. Advocate for assessee, the principle of "user test" also need to be considered while deciding the entitlement of assessee to avail CENVAT Credit as laid down by the Hon'ble Supreme Court in the case of **CCE Vs. Rajasthan Spinning & Weaving Mills Limited [2010 (255) ELT 481 (SC)]**. Following the said decision, the Hon'ble Madras High Court in the case of Thiru Arooran Sugars (Supra) has held that iron and steel items and cement used for erection of foundation and support structures would also come within the ambit of the definition of "input" so long as it satisfies the "user test". The operative portion of the decision of the Hon'ble Madras High Court is reproduced below:-

"..43. As would be evident from the aforesaid extract, in Rajasthan Spinning & Weaving Mills Limited case, the Court relied upon the user test, enunciated, in its earlier judgment rendered in : Jawahar Mills Limited case. Clearly, the Court held that steel plates and MS Plates, i.e., structurals used in the fabrication of the chimney, which were an integral part of the diesel generating set would fall within the ambit and scope of definition of capital

goods. The Court, went on to further hold that such equipment had to be treated as an accessory. As a matter of fact, in Saraswathi Sugar Mills case, the Court, while noticing the view taken in Rajasthan Spinning and Weaving Mills Limited said that as long as it could be shown that the item in issue was an integral part of the machinery, i.e., capital goods, it would fall in the definition of 'component' and thus, by logical extension, come within the ambit of 'capital goods'.

43.1 To be noted, Hon'ble Mr. Justice D.K. Jain, (as he then was), was party to both the judgments rendered by the Supreme Court i.e., Rajasthan Spinning and Weaving Mills Limited as well as Saraswathi Sugar Mills Limited case.

43.2 Therefore, quite clearly, the two judgments referred to above cannot be read in the manner, as the Revenue is seeking to read them, that is, at cross purposes. In our opinion, the ratio of the two judgments, is that, as long as it is shown that the "component" and/or "accessory" is an integral part of the capital goods, (which, in turn, fall within the scope and ambit of the expression 'capital goods', referred to in Rule 2(a)(A)(i) of the 2004 Rules,) they would also qualify as capital goods.

44. In the facts of this case, we have to conclude that MS structurals, which support the plant and machinery, which are, in turn, used in the manufacture of sugar and molasses are an integral part of such plant and machinery. The assessee has clearly demonstrated that structurals as well as foundations, which are erected by using steel and cement are integral part of the capital goods (i.e., plant and machinery), as they hold in position the plant and machinery, which manufactures the final product. Therefore, in our opinion, whether the "user test" is applied, or the test that they are the integral part of the capital goods is applied, the assessees, in these cases, should get the benefit of Cenvat credit, as they fall within the scope and ambit of both Rule 2(a)(A) and 2(k) of the 2004 Rules.

45. For the foregoing reasons, we answer the questions, in all the three (3) appeals, which are set forth above, in favour of the assessees and against the Revenue.

46. Accordingly, the captioned appeals are allowed and the impugned judgments of the Tribunal, in each of these appeals, are set aside. However, there shall be no order as to costs."

In the facts of the present case, it is not in dispute that the various steel items have been used for the purpose of setting up of sponge iron kiln along with the power plant as also certified by the Chartered Engineer have been duly verified by the lower authorities in the adjudication stage. Therefore, applying the "user test" principle, as followed by the various High Courts, the assessee is entitled to avail credit on the steel items.

In view of the above discussions, the assessee is entitled to avail credit and therefore, the Appeal filed by the assessee is allowed with consequential relief. The Appeal filed by the Revenue is rejected. Both the Appeals are disposed as stated above.

(Order pronounced in the open court on 10 May 2022.)

Sd/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

Sd/

(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

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