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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.77206 of 2018

(Arising out of Order-in-AppealNo.02/CE/RKL-GST/2018 dated17.01.2018 passed by Commissioner (Appeals), GST, CX & Customs, Bhubaneswar.)

M/s.Shree Ganesh Metaliks Limited
(At-Chardihariharpur, P.O.-Kalosihiria, Kuarmunda, Dist: Sundargarh-770039.)

...Appellant

VERSUS

Commissioner of CGST & CX, Rourkela Commissionerate

.....Respondent

(KK-42, Civil Township, Rourkela, Odisha-769004.)

APPEARANCE

Shri Rajesh Sharma, Advocate for the Appellant (s)
Shri A.Roy, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO. 75523/2022

DATE OF HEARING : 6 June 2022
DATE OF DECISION : 13 September 2022

P.K.CHOUDHARY :

The Appellant is engaged in the manufacture of sponge iron falling under Chapter 72 of the Central Excise Tariff Act, 1985 having their factory at Kaloshihira, P.O.-Kuanmunda, Dist.Sundargarh, in the state of Odisha. For manufacture of sponge iron, coal is one of the major inputs. For the manufacture of the capital goods at coal washery unit, they purchased 47.195 MT of iron and steel materials such as MS Angles, Channels, MS Flats, Plates, CR Coils etc. all falling under Chapter 72.Coal washery is set up to wash raw coal for use in the manufacture of sponge iron. The Appellant manufactured specified capital goods such as Hopper, Conveyor, components, accessories of Crushing machine and EOT Cranes, which are specified capital goods in terms of various sub-clauses of Rule 2(a)(A) of the Cenvat Credit Rules,

2004. Upon procuring the said inputs the Appellant in terms of the amended Rule 2(k), read with Rule 2(a)(A), read with Rule 3 of Cenvat Credit Rules, 2004 claimed Cenvat credit of Rs.1,97,090/- during the period from September 2013 to March 2014. ER-1 returns were regularly filed. The details of utilization of the impugned goods vide their letter dated 12.09.2014 was submitted to the Department. The Appellant further states that in the instant case the capital goods manufactured out of iron and steel materials are manufactured separately and are attached to the foundations/structures subsequent to their emergence by way of bolting/welding for wobble free operations which were verified by the Departmental authorities in joint verification. As per the physical verification report dated 20.02.2015 of emergent goods manufactured out of the impugned goods are specified capital goods under Rule 2(a)(A) and the impugned goods are inputs in terms of the amended provision of Rule 2(k) of Cenvat Credit Rules, 2004. The Show Cause Notice dated 01.10.2014 was issued alleging availment of Cenvat credit in contravention of provisions of Rule 2 and Rule 3 of the Cenvat Credit Rules, 2004. The Adjudicating authority vide Order-in-Original dated 30.12.2015 allowed the Cenvat credit amounting to Rs.1,90,555/- and disallowed Cenvat Credit amounting to Rs.6,535/-. Against the above order, the Department filed Appeal before the Ld.Commissioner(Appeals) and the Commissioner(Appeals) vide the impugned order by relying upon the decision of the larger Bench of the Tribunal in the case of Vandana Global Ltd. Vs. CCE, Raipur [2010 (235) ELT 440 (LB)], allowed the Department's Appeal and disallowed Cenvat Credit amounting to Rs.1,97,090/-. Penalty of Rs.1,97,090/- under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944 has also been imposed. Hence the present appeal before the Tribunal.

2. The Ld.Advocate for the Appellant submits that the impugned iron and steel goods are utilized by them for manufacture of capital goods such as Hopper, Conveyor, components, accessories of Crushing machine and EOT Cranes. It is his submission that the impugned iron

and steel materials are not used for making support structure as held by the Department. It is the case of the Appellant that by a series of decisions it has been held that support structures are 'accessories' of various production machineries and therefore are capital goods and credit is admissible. In support of his submission he relies upon the judgement of Hon'ble Madras High Court in the case of Commissioner of Central Excise, Salem Vs. Madras Aluminium Co. Ltd. [2017 (349) ELT 133 (Mad.)]. He further submits that the decision of the Larger Bench of the Tribunal in the case of Vandana Global (supra) has been held to be not good law in the following cases:-

i) Mundra Ports & Special Economic Zone Ltd. Vs. CCE
(2015) 39 STR 725 (Guj.)]

ii) Surya Alloys Industries Ltd. Vs. UOI
[2014 (305) ELT 47 (Cal.)]

iii) Thiru Arooran Sugars And Ors. Vs. CCE
[2017 (355) ELT (373) (Mad.)]

3. The Ld.Authorized Representative for the Department justified the impugned order and submits that the Appeal may be dismissed being devoid of any merits.

4. Heard both sides and perused the Appeal records.

5. I have carefully examined the impugned order and the original adjudication order and have also gone through the appeal records. I find that the credit of Rs.1,97,090/- has been disallowed by the Ld.Commissioner(Appeals) merely on the basis of the decision of the Larger Bench of the Tribunal in the case of Vandana Global Vs. CCE, Raipur (supra). I have examined the observations made in Para 5.4 of the appeal order wherein the Ld.Commissioner(Appeals) has relied on the decision of the Larger Bench in the case of Vandana Global (supra) to disallow the credit. I find that the said decision of the Tribunal (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 had been set aside on 13.09.2017. I agree with the contentions of the Appellant that the very

basis followed by the Ld.Commissioner(Appeals) has now been settled in their favour. Relevant portion of the said decision is reproduced:-

> ***"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 inMundra 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 :*
>
> > *"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 the **Hon'ble Gujarat High Court in the case of Mundra Ports & Special Economic Zone Limited [2015 (39) STR 276 (Gujrat)]**and the **Hon'ble Madras High Court in the case of Thiru Arooran 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 (Appeals) 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 various High Courts.

6. Further, as pleaded by the Ld. Advocate for the assessee, the principle of "user test" also needs 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 coal washery plant as also certified by the Chartered Engineer and have been duly verified by the lower authorities at the adjudication stage. Therefore, applying the "user test" principle, as followed by various High Courts, the assessee is entitled to avail credit on the steel items.

In view of the above discussions, the impugned order cannot be sustained and is therefore set aside. The Appeal filed by the Appellant is allowed with consequential relief, as per law.

(Order pronounced in the open court on 13 September 2022.)

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

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