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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

EXCISE APPEAL NO. 10263 OF 2017
(Arising out of OIO-BHR-EXCUS-000-COM-084-16-17 dated 31/10/2016 passed by Commissioner of Central Excise, Customs and Service Tax-Bharuch)

SHUBHLAKSHMI POLYSTERS LTD. ....**Appellant**
SURVEY NO. 126, 81-87, 90-102, 118-128,
VILLAGE- BHENSALI, DAHEJ PCPIR, TALUKA- VAGRA,
BHARUCH-GUJARAT

VERSUS

C.C.E., BHARUCH ....**Respondent**
R K CASTA SECOND FLOOR, CORPORATE HOUSE,
STATION ROAD, BHARUCH, GUJARAT-392001

APPEARANCE:
Shri. S.S. Gupta, Mehul Jiwani, Chartered Accountant for the Appellant
Shri. Vinod Lukose, (Superintendent) Authorized Representative for the Respondent

CORAM: **HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR**
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. A/ 11225 /2022

DATE OF HEARING: 20.06.2022
DATE OF DECISION:18.10.2022

RAMESH NAIR

M/s. Shubhalakshmi Polyesters Ltd. have filed present appeal being aggrieved with the Order-in-Original No. BHR-EXCUS-000-COM-084-16-17 dtd. 31.10.2016 under which the Commissioner has disallowed the cenvat credit availed by the Appellant on various input services.

1.1 The fact of the case is that appellant has installed the plant and availed the cenvat credit of various input services viz., Vastu consulting service, Construction Contractors Services, Land Survey Service, DG Set Hiring Services, Insurance services, Rent-a-Cab Services, Design & Engineering services, Courier services, Erection/Fabrication /Installation services etc. during the setting up. An enquiry against the appellant was initiated and it was revealed that appellant had availed the input services credit on various services prior to the commencement of the commercial production in their factory and credit availed by the appellant on various input services do not fall in the ambit of the definition of "input service". A show cause notice dated

21.04.2006 was issued to the appellant. In adjudication proceeding, Commissioner of Central Excise, Bharuch vide impugned order dtd. 31.10.2016 confirmed the cenvat demand of Rs. 1,13,88,436/- alongwith interest. He also imposed equal amount of penalty under Rule 15(2) of Cenvat Credit Rules,2004 read with Section 11 AC of the Central Excise Act, 1944. Hence, this appeal.

2. Shri S. S. Gupta with Mr. Mehul Jiwani, learned Chartered Accountant appearing on behalf of Appellant submits that the service relating to setting up of factory of Plant and Machinery has been covered under the 'main part' of the definition i.e used in relation to manufacture of the goods. Although setting up the factory is not manufacture in itself, it is an activity directly in relation to manufacture. Without setting up the factory, there cannot be any manufacture. Services used in setting up the factory are, therefore, unambiguously covered as 'input services' under main part of the definition of 'input service'. He placed reliance on the following Judgments.

(i) Pepsico India Holding (p) Ltd. [2021 (7) TMI-1094 CESTAT-HYDERABAD.

(ii) M/s Bharat Coking Coal Ltd. – 2021(10) TMI 383 – CESTAT KOLKATA

(iii) Shi Chabmundeshwari Sugars Ltd.- 2021(11) TMI -13-CESTAT BANGALORE

(iv) M/s Kellogs India Pvt. Ltd. – GST 2020(7) TMI 414 -CESTAT HYDFRABAD.

(v) Commissioner of C.Ex. Delhi Vs Bellsonica Auto Components India Pvt. Ltd. – 2015(40) S.T.R. 41 (P&H)

(vi) Sai Sahmita Storages (P) Ltd. – 2011 (23) STR 341 (AP)

(vii) ADF Foods Ltd.- 2013(1) TMI 607 – Gujrat High Court.

3. He also submits that the credit availed by the Appellant does not fall under the exclusion clauses of the definition of input services and thereby credit should not be denied. 'Construction Services or work contract services used for construction of building or civil structure is only excluded as can be evidenced from clause A of the said exclusion. The exclusion does not apply to the specified services when such services were used for other purposes.

4. He further submits that CESTAT has consistently held that exclusion clause provides for specified services which are used for the construction of a building or civil structures was not eligible and thereby services even though used for setting up of factory but not covered by exclusion clause than credit should not be denied. He placed reliance on following judgments.

(i) Piramal Glass Ltd. – 2019(10)TMI 1032
(ii) Shiruguppi Sugar Works Ltd. – 2019 (3) TMI 667
(iii) M/s BMM Ispat Ltd. – 2019(5) TMI 587
(iv) Mukund Ltd. – 2019(3) TMI 1422
(v) Thermax Ltd. – 2020 (35) GSTL 118
(vi) M/s Rastriya Ispat Nigam Ltd. – 2016(9) TMI 194
(vii) Red Hat India Pvt. Ltd. – 2016(6) TMI 619

5. He also submits that commissioner has made presumption that plant will only involve construction or execution of building/ civil structures which is legally not correct. It also involved the services relating to others also. Further Commissioner has denied the credit on presumption without verifying the nature and use of services.

6. He further argued that applying the user test laid down by the Hon'ble Supreme Court in the case of M/s Rajasthan Spinning & Weaving Mills Ltd. reported in 2010 (225) ELT 481 (SC) credit of service tax paid on input services shall be allowed to the Appellant.

7. He also submits that show cause notice is given in April 2016 whereas the credit for the periods 2011-12 and 2012-13 are proposed to be denied. Hence the entire demand is time barred as same is beyond the period of 2years.

8. On the other hand, Shri Vinod Lukose, learned Superintendent (Authorized Representative) appearing for the Revenue reiterated the findings recorded in the impugned order to strengthen the stand of Revenue that Cenvat credit availed by the appellant is not in conformity with the Cenvat statute and thus, denial of such credit by the department is proper and justified.

9. We have heard both sides and perused the records. We find that the adjudication authority in respect of disputed input services denied the credit without discussing the nature and use of the services in the Appellant's factory. In order to find out the eligibility of a particular service as 'input service' under such definition, the nature and the purpose of use of the service in the ultimate provision of the output service and use in factory is required to be examined inasmuch as the parameters of eligibility of such credit differs from case to case basis and standard practice cannot be adopted uniformly in judging such eligibility to the Cenvat benefit. On perusal of the case records, we find that the nature of use of the disputed services as explained by the appellant was not properly addressed by the adjudicating authority in the impugned order passed by him. Hence, we are of the considered view that the matter should be remanded to the original authority for a proper fact finding on issue of eligibility of Cenvat credit on the disputed services.

10. We therefore set aside the impugned order and allow the appeal by way of remand to the adjudicating authority to pass a *de novo* order after considering all the documents to be submitted by the appellant before him. Needless to say that the appellant should be given sufficient opportunity to make their submission and documents, if any required, and also granting the personal hearing before *de novo* adjudication.

11. The appeal is allowed by way of remand to the adjudicating authority.

(Pronounced in the open court on 18.10.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha