IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Excise Appeal No.76841 of 2018

(Arising out of Order-in-Appeal No.36/ST/BBSR-GST/2018 dated 23.02.2018 passed by Commissioner (Appeals) of CGST & Excise, Bhubaneswar)

M/s Mideast Integrated Steels Ltd.
Khurunti, Jajpur Road, Dist.-Jajpur, Pin-755026, Odisha

Appellant

VERSUS

Commissioner of CGST & Excise, Bhubaneswar
C.R.Building, Rajaswa Vihar, Bhubaneswar-751007

Respondent

APPERANCE :

Shri K.K.Acharya, Advocate for the Appellant
Shri A.Roy, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.75012/2023

DATE OF HEARING : 13.01.2023
DATE OF PRONOUNCEMENT : 19 JANUARY 2023

PER P.K.CHOUDHARY :

The Appellant is in appeal assailing the order of the Ld.Commissioner (Appeals).

2.1 The facts of the case in brief are that the Appellant was issued an Audit Memo to pay Rs.4,44,960/- being the service tax on Rs.36,00,000/- received during the Financial Year 2007-2008 for having provided "Renting of Immovable Property Service". The Appellant paid Rs.4,44,960/- by debit to Cenvat Account vide Entry Sl.No.329 dated 30th March 2009 along with interest of Rs.37,560/-.

2.2 In the light of the above, the Appellant on the same day paid Rs.9,85,086/- *suo motu* by debit to Cenvat Account vide Entry Sl.No.330 towards service tax on"Renting of Immovable Property Service"

rendered during Financial Year 2008-2009. These payments were intimated to the Range Officer vide letter dated 31st March, 2009.

2.3 During their subsequent Audit during Financial Year 2008-2009, the Auditors vide Audit Memo dated 19.01.2010, pointed out that the payment of service tax of Rs.9,85,086/- made on 30.03.2009 by debit to Cenvat Account was irregular and directed the Appellant to pay the said amount of Rs.9,85,086/- from current account with interest. The Appellant accordingly paid Rs.9,85,086/- from its Current Account on 08.03.2010. While informing the jurisdictional Range Officer about the payment of Rs.9,85,086/- from Current Account, the Appellant informed that they will reverse the utilization of input service credit in March, 2010, which was originally adjusted in March, 2009 ST-3 Return after payment being made. Accordingly, credit entry for Rs.9,85,086/- was made in Cenvat Account on 31st March, 2010.

2.4 In the course of subsequent Audit in March, 2011, the EA-2000 Auditors erroneously assumed that the reversal credit entry of Rs.9,85,086/- dated 31.03.2010 was an input service credit of service tax paid by the Appellant on "Renting of Immovable Property Service" received and directed for reversal thereof with interest on the ground that such service is not an input service for the Appellant.

2.5 Show-cause notice dated 21st March 2014 was issued for recovery of the said purported in admissible input service credit alleged on the aforesaid erroneous premises.

2.6 The Show-cause notice was adjudicated vide Order-in-Original dated 08.04.2015, wherein it was explained that the Show-cause notice sought to question the *suo motu* reversal entry dated 31.03.2010 inasmuch as the Appellant should have sought for refund thereof under Section 11B of the Act. It is case of the Appellant that the Order-in-Original has travelled all the way beyond the Show-cause notice.

2.7 The Appellant's Appeal there-against, was rejected by the impugned Order-in-Appeal. Hence, the present appeal before the Tribunal.

3. The Ld.Advocate appearing on behalf of the Appellant, relied upon the grounds of appeal and filed a written submission along with copies of relied upon decisions.

4. Heard both sides and perused the appeal records.

5. I find that the Appellant had discharged the duty burden from their PLA Account and as such, there is no dispute about the same. With such payment of duty out of PLA, they have reversed the debit entry made by them in their Credit Account which was used for payment of duty earlier. Though there was no proposal in the Show-cause notice to deny such re-credit, the original Adjudicating Authority went ahead and even after accepting that the duty was paid subsequently in cash, disallowed the re-credit and confirmed the duty to that extent. It is my considered view that once the duty has been paid in cash, earlier payments made through Cenvat Account are liable to be re-credited in the said Account and no objection that such re-credit was not on the basis of any eligible document can be adopted by the Revenue. Admittedly, it is not a case of availment of credit in the ordinary course, but such re-credit was to neutralize the subsequent payment of duty in cash. My view gets fortified by the judgement of the Hon'ble High Court of Madras in the case of ICMC Corporation Limited vs. CESTAT, Chennai reported in 2014 (302) ELT 45 (Mad.), whereby the Hon'ble High Court held that the *suo motu* credit of Cenvat reversed earlier involved only an account entry reversal and in the process, no outflow of funds from the assesse and accordingly, filing of refund claim under Section 11B of the Central Excise Act, 1944, is not required. The relevant paragraphs of the said judgement are reproduced below for ready reference :

> ***"13.*** *We do not subscribe to the view expressed by the Revenue. Admittedly, the assessee originally availed the Cenvat credit on Service Tax for discharging its liability. However, for sound reasons, it reversed the credit. Strictly speaking, in this process, there is only an account entry reversal and factually there is no outflow of funds from the assessee to result in filing application under Section 11B of the Central Excise Act, 1944 claiming refund of duty. The contention of the Revenue that even in reversal of the entry there is bound to be an unjust enrichment has no substance or based on any legal principle, since, what is availed*

off by the assessee is only a credit on the duty paid on the services rendered. Further, the assessee is entitled to take note of as per Rule 6(5) of the Cenvat Credit Rules, 2004. as there is no dispute of the fact that a sum of Rs. 3,21,308/- available as Cenvat credit was in respect of input services, which are given under Rule 6(5) of the Cenvat Credit Rules, 2004. When that being the case, in respect of those services specifically mentioned under Rule 6(5) of the Cenvat Credit Rules, 2004 as it existed during the relevant period viz., 2004-2006 getting the reversal of the entry is in tune with its stand taken, which was accepted by the Tribunal in the earlier round of litigation.

14. *We do not find any good ground to hold that it was a case of refund of duly falling under Section 11B of the Central Excise Act, 1944 and that the assessee was to comply with the provisions of Section 11B of the Act. The view of the Tribunal that the assessee should seek reversal in the appropriate judicial forum, if the assessee was aggrieved by the earlier order herein does not arise at all.*

15. *Even a cursory reading of the order of the Tribunal in the earlier round of litigation would show that it accepted the assessee's case of suo motu reversal of the entry. That being the case, the subsequent conduct of the assessee for a follow up action on an amount of Rs. 3,21,308/-, which is only an account entry adjustment, technically speaking cannot be taken exception to either by Tribunal or for that matter by the Revenue. For this, we do not find any need for a finding to be given in the order of the Tribunal in the earlier round of litigation.*

16. *We do not for a moment deny the fact that a sum of Rs. 3,21,308/- for which suo motu credit was taken by the assessee was forming part of Rs. 5,38,796/-, which was earlier reversed by the assessee. On the admitted fact, Rs. 3,21,308/- represented the enumerated input services as given under Rule 6(5) of the Cenvat Credit Rules, 2004, we have no hesitation in accepting the*

plea of the assessee that on a technical adjustment made, the question of unjust enrichment as a concept does not arise at all for the assessee to go by Section 11B of the Central Excise Act, 1944."

6. At this stage, the Ld.Authorised Representative for the Revenue has strongly relied upon Larger Bench's decision of the Tribunal in the case of BDH Industries Ltd. Vs. Commissioner of Central Excise (Appeals), Mumbai I reported in 2008 (229) ELT 364 (Tri.-LB). I find that the decision of the Larger Bench of the Tribunal is dated 09.07.2008, whereas the decision of the Hon'ble High Court of Madras was delivered on 03.01.2014 i.e. much after the decision of the Larger Bench of the Tribunal.

7. I find that the facts of the present case are squarely covered by the aforesaid decision of the Hon'ble High Court of Madras. Accordingly, by following the judicial discipline and by respectfully following the ratio of the judgement of the Hon'ble High Court of Madras, I hold that the impugned orders cannot be sustained and the same are set aside.

8. As a result, the appeal filed by the Appellant is allowed with consequential relief, as per law.

(Pronounced in the open court on **19.01.2023**)

Sd/
(P. K. Choudhary)
Member (Judicial)

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