IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA
REGIONAL BENCH - COURT NO.2

Excise Appeal No.76669 of 2018
(Arising out of Order-in-Appeal No.20-21/CE/RKL-GST/2018 dated 15.02.2018 passed by Commissioner(Appeals), GST, CX & Customs, Bhubaneswar.)

M/s. Shyam Metalics & Energy Limited
(Vill.: Pandloi, P.O.: Lapanga (Rengali), Sambalpur-768212, Odisha.)
...Appellant

VERSUS

Commissioner of CGST & CX, Rourkela Commissionerate
.....Respondent
(KK-42, Civil Township, Rourkela-769012.)

WITH

Excise Appeal No.76670 of 2018
(Arising out of Order-in-Appeal No.20-21/CE/RKL-GST/2018 dated 15.02.2018 passed by Commissioner(Appeals), GST, CX & Customs, Bhubaneswar.)

M/s. Shyam Metalics & Energy Limited
(Vill.: Pandloi, P.O.: Lapanga (Rengali), Sambalpur-768212, Odisha.)
...Appellant

VERSUS

Commissioner of CGST & CX, Rourkela Commissionerate
.....Respondent
(KK-42, Civil Township, Rourkela-769012.)

APPEARANCE

Shri Ajay Sanwaria, Chartered Accountant for the Appellant (s)
Shri S.S.Chattopadhyay, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO. 75009-75010/2023

DATE OF HEARING : 13 January 2023
DATE OF DECISION : 18 January 2023

P.K.CHOUDHARY :

The Appellants are aggrieved by the Order-in-Appeal No. 20-21/CE/RKL-GST/2018 dated 15.02.2018 passed by the Ld.Commissioner(Appeals), GST, CX & Customs, Bhubaneswar.

2. The facts of the case in brief are that the Appellant is a manufacturer of sponge iron/ingot/billet/TMT bars falling under Chapter 72 of the Central Excise Tariff Act, 1985. The Appellant has a captive thermal plant installed within the factory for production of electricity. The electricity produced is used for manufacture of dutiable final products on which the Appellant had discharged appropriate excise duty. In the course of production of electricity, Fly Ash is generated. Since the Fly Ash is detrimental to the environment, the Appellant disposes of the same in accordance with the Environment (Protection) Act, 1986. For this purpose, the Appellant obtains services to transport such Fly Ash generated in its captive thermal plant to the Ash-pond locaed inside the plant and avails CENVAT Credit of the Service Tax paid thereon. The Appellant also clears Fly Ash from its factory on payment of appropriate excise duty and reflects the same in its ER-1 Returns. During the period in dispute, the Appellant was issued Show Cause Notices alleging irregular availement of CENVAT Credit on transport service of Fly Ash on the premise that it has no nexus directly or indirectly in or in relation to manufacture and clearance of the final products upto the place of removal.

3. The Appellant filed detailed replies and contended that availment of the services were in direct nexus with manufacture of the final product and that the said activity was mandatory for the purpose of environment protection. It was also submitted that the Appellant had duly discharged excise duty on the clearance of the Fly Ash from its factory. The Adjudicating authority dropped the demand on the ground that since the Fly Ash was generated in the process of production of electricity, which was further used in manufacture of the final product, the input service was used in or in relation to manufacture of final product. It was further held that the Fly Ash generated in the captive power plant of the Appellant was an excisable commodity and cleared on payment of Central Excise duty, thus qualifying as a final product of the Appellant. As such, the credit of the input service was duly admissible.

4. The Department filed appeals before the Ld.Commissioner(Appeals), *inter alia*, on the ground that Fly Ash is not a final product of the Appellant and that the service of shifting the Fly Ash was not used in or in relation to manufacturing activities or clearance of the final product. Therefore, the said activity did not qualify as an input service. The Appellants refuted the said contentions of the Revenue before the Ld.Commissioner(Appeals) and also submitted a written note dated 31.01.2018. However, without considering the submissions of the Appellant, the Ld.Commissioner(Appeals) allowed the Appeal filed by the Revenue. Hence the present Appeal before the Tribunal.

5. The Ld.Counsel appearing on behalf of the Appellant submitted that it is undisputed fact that the Appellant had been duly discharging appropriate excise duty on clearance of Fly Ash considering it as a finished product under the Central Excise Act, 1944. It is the case of the Appellant that when no dispute has been raised towards taxability of the final product, the Department cannot adopt a contrary view that the Fly Ash is not a final product and deny the CENVAT Credit on transportation thereof. The Ld.Counsel further submits that the removal of Fly Ash generated in the captive power plant of the Appellant is not only a statutory obligation, but it is also essential for continuance of the operation of the captive power plant, which feeds power to the manufacturing unit for manufacture of the finished goods. He vehemently argues that removal of Fly Ash on a regular basis is an integral part of the manufacturing activity of the Appellant. The denial of CENVAT Credit on transportation thereof from the captive power plant to the Ash-pond is not justified. In support of his submissions he relies upon the following decisions of the Tribunal:-

(a) Chemplast Sanmar Ltd. v. CCE Chennai
[2017 (52) STR 37 (Tri.-Chennai)]

(b) Lupin Ltd. v. CCE
[2013 (31) STR 744 (Tri.-Mumbai)]

(c) Vardhman Special Steels Ltd. v. CCE
[2017 (47) STR 245 (Tri.-Chan.)]

(d) Ultratech Cement Ltd. v. CCE
[2014 (34) STR 426 (Tri.-Del.)]

(e) Jindal Steel & Power Ltd. v. Commissioner
[2018 (4) TMI 817-CESTAT New Delhi]
(f) India Pesticides Ltd. v. Commissioner
[2016 (8) TMI 724 – CESTAT Allahabad]
(g) CCE v. Shree Khedut Sakahari Udyog Mandli Ltd.
[2012 (279) ELT 402 (Tri.-Ahmd)]

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

7. Heard both sides and perused the Appeal records.

8. After hearing both the sides I find that the issue required to be decided in the present appeal is as to whether the services obtained by the appellant for removal of coal fly ash from the captive power plant which is used for generation of power, which in turn, is captively consumed for manufacture of excisable goods, can be held to be an eligible cenvatable input service. As is seen from the submission of the appellant the removal of coal fly ash from captive power plant is a necessity and without such removal, the captive power plant cannot work. As such, removal of coal fly ash is admittedly connected with the production of power, which in turn, has nexus with the manufacturing of the Appellant's final product. Revenue's objection is that since the coal fly ash is non-excisable item, removal of the same cannot be held to be an input service, cannot be appreciated, inasmuch as the admissibility of the input service credit is not dependent upon the product, in respect of which services are availed, to be excisable or non-excisable. Admittedly the Appellant's final product was excisable and was cleared on payment of duty. In fact, the Appellant had been duly discharging appropriate Excise Duty on clearance of the Ash considering it as a finished product under the Central Excise Act, 1944.

9. I note that the impugned order clearly records that the Appellant has undertaken various activities of removal/disposal of Fly Ash in terms of mandate of Ministry of Environment and Forest. He also recorded that while process is to fulfil action being environment friendly, however, he proceeded to record removal of Fly Ash to protect

environment is not on account of manufacture of finished goods. I note that removal and disposal of Fly Ash in a manner prescribed by the Government is a mandate requirement for continued production of electricity for activities used by the Appellant. In other words, without such due disposal of Fly Ash, generation of electricity cannot happen.

10. In view of these facts, it is not correct to say that the removal and disposal of Fly Ash is nothing to do with the manufacture of excisable goods. Admittedly, the electricity generated is captively consumed by the Appellant. Any input services or inputs used for such generation of electricity are necessarily to be considered as input service for final excisable goods. In view of these facts, I find that the impugned order cannot be sustained on merit, regarding denial of various input services or credit with reference to removal and disposal of Fly Ash is mandate of law.

11. The Tribunal in the case of *Sanghi Industries Ltd.* v. *C.C.E., Rajkot* - 2009 (236) E.L.T. 617 (Tri.-Ahmd.) = 2010 (20) S.T.R. 260 (T) has observed as under :

> *"……..As regards the service tax paid on overhauling of DG set, the Commissioner (Appeals) has taken a view that the final product is electricity which is exempt and therefore, credit is not admissible. Now the law is well settled that Cenvat credit used on inputs/capital goods used in power plant set up by the manufacturer is admissible if the final product is dutiable and therefore, in this case also the Cenvat credit of input services for overhauling of DC set is admissible. Accordingly, the appeal is allowed on the above terms."*

12. Further in the case of *Hindalco Industries Ltd.* v. *C.C.E., Allahabad* - 2008 (12) S.T.R. 337 (Tri.-Delhi), the Tribunal observed that the service tax credit paid on insurance premium of the captive power generation plant was held to be an admissible cenvatable service.

13. The Hon'ble Bombay High Court in the case of *Coca Cola India Pvt. Ltd.* v. *C.C.E., Pune-II* - 2009 (15) S.T.R. 657 (Bom.) = 2009

(242) E.L.T. 168 (Bom.) held that any such service used in relation to manufacturing activity and relating to business are required to be held as cenvatabie service. To the same effect is another decision of the Hon'ble Bombay High Court in the case of *C.C.E., Nagpur* v. *Ulratech Cement Limited and Another* - 2010-TIOL-745-HC-Mum-ST = 2010 (20) S.T.R. 577 (Bom.) = 2010 (260) E.L.T. 369 (Bom.) laying down that necessary requisite for production of final product or relatable to any business activity of the assessee has nexus with the assessee's final activities to be held as cenvatabie service.

14. By applying the ratio of the above decisions to the facts of the present case, I am of the view that removal of coal Fly Ash is one of the necessity for running of the captive power plant. Without such removal of the coal fly ash from the captive power plant, the same cannot operate and run, in which case, the power won't be generated and the appellant would not be in a position to manufacture their final product. As such, I am of the view that appellants are entitled to service tax paid on the services used by them for removal of coal fly ash from the captive power plant.

15. In view of the above discussions and analysis, denial of benefit of credit of input services used for removal and disposal of Fly Ash is not sustainable. Accordingly, the impugned order is set aside and Appeals filed by the Appellant are allowed to that extent with consequential relief, as per law.

(Order pronounced in the open court on 18 January 2023.)

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

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