

In the High Court of Judicature at Madras

Dated: 06.03.2015

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The Honourable Mr.JUSTICE R.SUDHAKAR

and

The Honourable Mr.JUSTICE R.KARUPPIAH

Civil Miscellaneous Appeal No.347 of 2011
& M.P.No.1 of 2011

M/s.India Cements Ltd.,
Sankari West (PO)
Sankari - 637 303.

..... Appellant / Appellant

Vs.

1. The Custom, Excise and Service Tax
Appellate Tribunal, South Zonal Bench,
Chennai, Shastri Bhavan Annexe,
Haddows Road, Chennai - 600 034.
2. The Commissioner of Central Excise,
No.1, Foulks Compound Annai Medu,
Salem - 636 001. Respondents

APPEAL under Section 35-G of the Central Excise Act, 1944
against the order dated 25.10.2010 made in Final Order No.1126 of
2010 on the file of the Customs, Excise and Service Tax Appellate
Tribunal (CESTAT), South Zonal Bench, Chennai.

against the order of the Commissioner of customs and Central
Excise (Appeals) Salem dated 11.5.2010 and made order in Appeal
No.21/2010 /CE/SLM against the order of the Deputy Commissioner of
Central Excise Erode II. Division, Erode dated 30.10.2009 and made in
C.No.IV/16/135/2009-C Ex adj/ order Sl.No.10/2009 (DC/Erode-II)

For Appellant : Mr.C.Saravanan

For Respondents: Mr.V.Sundareswaran
Standing Counsel for R2

J U D G M E N T

(Judgment of the Court was delivered by R.SUDHAKAR,J.)

This Civil Miscellaneous Appeal filed under Section 35G of the Central Excise Act, 1944 challenging the order dated 25.10.2010 made in Final Order No.1126 of 2010 on the file of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), South Zonal Bench, Chennai was admitted by this Court on the following substantial questions of law:

"1. Whether in the facts and circumstances of the case, the Appellate Tribunal was justified in denying cenvat credit on MS Rod Sheets, M.S.Channel, M.S.Plates, Flats etc. used in the fabrication of fly ash hooper, fly ash bin, fly ash handling system & kiln brick laying work to bold refractories? and

2. Whether the decision of the Larger Bench in M/s.Vandana Global Ltd. and others vs. Commissioner of Central Excise, 2010 (253) ELT 440 (LB) can be said to have laid the correct principle of law and whether the Appellate Tribunal was justified in dismissing the appeal?"

2. The appellant/assessee is a manufacturer of cement falling under Chapter 25 of the Central Excise Tariff Act. The assessee has been availing cenvat credit on inputs, input services and on capital goods which were utilized for payment of duty on their finished goods, viz., 'cement'. On verification of the accounts, the Department noticed that the assessee availed cenvat credit in respect on MS Rod, Sheet, MS Channel, MS Plate, Flat etc., Alleging the said goods were used in the construction work only, show cause notice was issued to the assessee stating that these are not capital goods and a demand was made on these goods. Reply was sent by the assessee objecting to the demand stating that they have availed credit on MS Rod, Sheets, MS Channel, MS Plate and Flat etc. on the ground that they are components, parts and accessories of the machineries and equipments. Rejecting the contention of the assessee, the Adjudicating Authority confirmed the demand of Rs.1,09,909/- along with interest and penalty holding that the impugned goods would not fall under the definition of capital goods. Aggrieved by the said order of the Adjudicating Authority, the assessee preferred an appeal before the Commissioner (Appeals), who dismissed the appeal, thereby upheld the order of the Adjudicating Authority.

3. As against the said order of the Commissioner (Appeals), the assessee once again pursued the matter before the Tribunal.

4. The Tribunal after following the decision rendered by the Larger Bench of the Tribunal in the case of M/s.Vandana Global Ltd. &

Ors. Vs. Commissioner of Central Excise, Raipur vide Misc. Order No.296/2010-EX(LB) in Appeal No.E/1036/2008, dismissed the appeal filed by the assessee, thereby sustained the demand made by the Adjudicating Authority. However, the Tribunal deleted the penalty in view of the contrary orders on the same issue.

5. Aggrieved by the said order of the Tribunal, the assessee is before this Court.

6. Learned counsel appearing for the assessee placed before this Court the decision in the case of Commissioner of Central Excise, Jaipur V. Rajasthan Spinning & Weaving Mills Ltd., reported in 2010 (255) ELT 481 to contend that the impugned goods are used in the erection of the capital goods and hence, the assessee is eligible for availing cenvat credit.

7. Learned Standing Counsel appearing for the Revenue heavily relied upon the decision reported in 2011-TIOL-73-SC-CX (Saraswati Sugar Mills V. Commissioner of Central Excise, Delhi - III) in Civil Appeal No.5295 of 2003 dated 02.08.2011 to contend that since the impugned goods are not capital goods, the assessee is not eligible to avail credit as they did not fall under any of the chapters or headings of the tariff mentioned in the definition of capital goods in Rule 2(a)(A) of the Cenvat Credit Rules, 2004. He further submitted that the goods were used for construction of plant and the term "plant" is not defined as capital goods in the Cenvat Credit Rules, 2004.

8. Heard learned counsel appearing for the assessee and the learned Standing Counsel appearing for the Revenue and perused the materials placed before this Court.

9. It is not in dispute that the impugned goods were used for fabrication of structurals to support various machines like crusher, kiln, hoopers etc. and that without these structurals, the machinery could not be erected and would not function.

10. In the case of Commissioner of Central Excise, Jaipur V. Rajasthan Spinning & Weaving Mills Ltd., reported in 2010 (255) ELT 481, relied on by the learned counsel appearing for the assessee, the Apex Court, while dealing with the issue in question, in paragraph Nos.7 and 8, held as follows:

"7. In the present case, it is seen that the items in question were used in the erection of various machineries such as, - new additional Electrostatic Precipitator for raw mill project, additional fly ash handling system, MMD crusher etc. for the Dry Process Cement Manufacturing Plant. It is evident that MS Angles, MS Beams, MS Channels etc. were used in the erection of

machineries it become component of the same, which are integral part of Dry Process Cement Manufacturing Plant. It is noted that Fly Ash handlish system is a pollution control equipment and particularly mentioned in 2(a)(A)(ii) of Rules, 2004. The allegation in the above show-cause notice that the Chapter Heading of these items were not covered under Rule 2(a) of the Rules, 2004, is not sustainable, in respect of pollution control equipments because the rule does not specify the tariff headings under which pollution control equipment should be falling. The appellant established that these items were used for erection of capital goods namely Dry Process Cement Manufacturing Plant, which falls under Chapter 84, as mentioned in Serial No.(i) of Rules 2(a)(A). Thus, the items in question are covered in serial No.(iii) of Rules 2(a)(A) of the Rules, CBEC has clarified that all parts, components, accessories which are to be used with capital goods in serial (i) and (ii) of Rules 2(a)(A) and classifiable under any chapter heading are eligible for availment of CENVAT credit. A plain reading of serial (iii) cannot lead to a different conclusion either.

8. After considering the use of the goods in question, in our considered view, the present case is covered by the decision of the Hon'ble Madras High Court in appellant's own case as referred above. We have also noticed that the Hon'ble Supreme Court in the case of Rajasthan Spinning and Weaving Mills Ltd.(supra) as relied upon the Hon'ble High Court in the appellant's own case, allowed MODVAT credit on MS channels, steel plants etc. as capital goods used for erection of chimney for diesel generating set. The findings of the Commissioner that these are structures fixed to earth with concrete foundations and are immovable appears to be beyond the scope of the show-cause notice. So, the case of M/s.Triveni Engineering & Industries Ltd. (supra) as relied upon by the learned AR is not applicable in the present case."

11. Asfar as the reliance placed on the decision reported in 2011-TIOL-73-SC-CX (Saraswati Sugar Mills V. Commissioner of Central Excise, Delhi - III) in Civil Appeal No.5295 of 2003 dated 02.08.2011 by the learned Standing Counsel appearing for the Revenue is concerned, we find that this Court had earlier considered the case of the assessee in two similar cases of the previous assessment years in C.M.A.No.1301 of 2005 dated 31.12.2012, where a reference was made to an order passed earlier in respect of the very same assessee. While dismissing the appeal filed by the Revenue, the Division Bench of this Court held as follows:

"8. Even though learned standing counsel appearing for the Revenue submitted that the judgment in the assessee's own case reported in AIT-2011-358-HC (The Commissioner of Central Excise V. M/s.India Cements Limited) had been appealed against, as of today, there are no details; in any event, the fact herein is that the Revenue does not controvert the facts found by the Assistant Commissioner that the impugned goods were used for fabrication of structurals to support various machines like crusher, kiln, hoppers, pre-heaters conveyor system etc. and that without these structurals, the machinery could not be erected and would not function.

9. In the decision reported in AIT-2011-358-HC (The Commissioner of Central Excise V. M/s.India Cements Limited), pointing out to Rule 57Q and the interpretation placed by the Apex Court in the decision reported in 2010 (255) E.L.T.481 (Commissioner of Central Excise Jaipur V. Rajasthan Spinning & Weaving Mills Ltd.) and in particular Paragraph Nos.12 and 13, wherein the Apex Court had applied the user test by following the Jawahar Mills's case, this Court held that steel plates and M.S.Channels used in the fabrication of chimney would fall within the ambit of "capital goods". In the face of this decision in the assessee's own case there being no new circumstance or decision in favour of the Revenue, we do not find any good ground to take a different view herein too.

10. As far as the reliance placed by the Revenue on the decision reported in 2011(270) E.L.T.465 (SC) (Saraswati Sugar Mills V. Commissioner of C.Ex., Delhi-III) is concerned, we do not think that the said decision would be of any assistance to the Revenue, considering the factual finding by the Tribunal therein in the decided case that the machineries purchased by the assessee were machineries themselves. Thus, after referring to the decision reported in 2010 (255) E.L.T.481 (Commissioner of Central Excise Jaipur V. Rajasthan Spinning & Weaving Mills Ltd.), the Apex Court held that in view of the findings rendered by the Tribunal that the machineries were complete and having regard to the meaning of the expression "components/parts", with reference to the particular industry in question, the Apex Court rejected the appeal filed by the assessee.

11. Thus going by the factual finding, which are distinguishable from the facts found by the Authorities below in the case on hand, we have no hesitation in rejecting the Revenue's appeal, thereby confirming the order of the Tribunal.

12. Learned standing counsel appearing for the Revenue pointed out that the Tribunal had merely passed a cryptic order by referring to the earlier decisions. We do not think that this would in any manner prejudice the case of the Revenue, given the fact that on the identical set of facts, the assessee's own case was considered by this Court and by following the decision reported in 2010 (255) E.L.T.481 (Commissioner of Central Excise Jaipur V. Rajasthan Spinning & Weaving Mills Ltd.) , the Revenue's appeal was also rejected. In the circumstances, this Civil Miscellaneous Appeal is dismissed. No costs. Consequently, C.M.P. No.16107 of 2005 is also dismissed."

12. From a perusal of the above said judgment, it is seen that there is no change in the circumstance and this Court had already considered the issue and held that the decision reported in 2011-TIOL-73-SC-CX (Saraswati Sugar Mills V. Commissioner of Central Excise, Delhi - III) in Civil Appeal No.5295 of 2003 dated 02.08.2011 is distinguishable on facts. This Court applied the principles laid down in the decision reported in 2010 (255) E.L.T.481 (Commissioner of Central Excise Jaipur V. Rajasthan Spinning & Weaving Mills Ltd.) and held that the Tribunal was justified in allowing the assessee's contention in respect of the very same assessee.

13. The present appeal is also in respect of the very same assessee and therefore we find no distinguishable fact or issue contrary to the earlier decision of this Court.

14. It is relevant to note that this Court in the decision reported in 2014-TIOL-1185-H-Mad-CX in respect of the very same assessee in C.M.A.No.1265 of 2014, following the above-said decision of this Court, dismissed the appeal filed by the Revenue.

15. Accordingly, following the principles laid down in the decision reported in 2010 (255) E.L.T.481 (Commissioner of Central Excise Jaipur V. Rajasthan Spinning & Weaving Mills Ltd.) and the earlier decisions of this Court in C.M.A.No.3101 of 2005 dated 13.12.2012 and C.M.A.No.1265 of 2014 dated 10.7.2014, we are inclined to allow the appeal, thereby set aside the order of the Tribunal. Accordingly, this Civil Miscellaneous Appeal stands allowed. No costs. Consequently, M.P.No.1 of 2011 is closed.

Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

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To

1. The Custom, Excise and Service Tax Appellate Tribunal,
Shastri Bhavan Annexe,
No.26, Haddows Road,
Chennai - 600 006.

2. The Commissioner of Customs
and central Excise (Appeals)
Salem

3. The Deputy Commissioner of Central Excise
Erode II Division
Erode

1 cc to Mr.C.S. Saravanan, Advocate, Sr. 13083

1 cc to Mr.V. Sundareswaran, Advocate, sr. 13084

C.M.A.No.347 of 2011
& M.P.No.1 of 2011

JSV (CO)
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