IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 11.10.2017
CORAM
THE HONOURABLE MR. JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR. JUSTICE R. SURESH KUMAR

Civil Miscellaneous Appeal No.2629 of 2012
and
M.P.No.1 of 2012

The Ramco Cements Limited,
registered office at
"Ramamandiram",
Rajapalayam-626 117,
Tamil Nadu. … Appellant

Vs.

The Commissioner of Central Excise No.I,
Williams Road,
Cantonment,
Tiruchirapalli,
Tamil Nadu. … Contesting respondent

(Cause title amended vide order of this Court dated 06.10.2017 made in C.M.P.No.10957 of 2017 in C.M.A.No.2629 of 2012)
Prayer: Appeal filed under Section 35G of the Central Excise Act, 1944, against the Final Order No.534/2011 dated 20.04.2011 in Appeal No.E/665/2004 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.Rahul Balaji

For Respondent : Ms.R.Hemalatha
Senior Central Government
Standing Counsel

JUDGMENT

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

This appeal has been preferred by the assessee, aggrieved over the order of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (in short, CESTAT, Chennai) in Final Order No.534/2011 dated 20.04.2011, in Appeal No.E/665/2004.

2.The assessee is the manufacturer of cement and clinker, falling under Chapter 25 of the Central Excise Tariff Act, 1985. They were availing of Cenvat Credit in respect of certain capital goods and inputs.

3.The assessee was issued a show cause notice dated 07.11.2001, asking to show cause as to why the wrongly availed Cenvat Credit of Rs.20,31,183/- should not be disallowed and why penalty should not be imposed upon it.

4.In response, the assessee had sent a reply, to the show cause notice, dated 21.12.2001, inter alia stating that the goods against which, credit was availed, are essential in connection with the manufacturing/processing activities of the final products and it was also stated that, the said goods are parts, accessories and components of the machines.

5.However, not satisfied with the said reply given by the assessee, the original adjudicating authority, vide order dated 09.09.2003, disallowed the Cenvat Credit of Rs.19,94,383/- and also, imposed a penalty of Rs.1,000/-. Aggrieved over the said order in original passed by the adjudicating authority, the assessee preferred an appeal before the Commissioner (Appeals), who also in turn, has rejected the claim of the assessee, by his order dated 04.02.2004 stating that the items against which, credits were sought for, are not eligible for credit, as capital goods and also, not as inputs and accordingly, rejected the appeal filed by the assessee.

6.Having aggrieved over the said order, the assessee filed an appeal before the CESTAT, Chennai. The CESTAT, Chennai, in its order dated 20.04.2011, had also rejected the appeal by confirming the order of the adjudicating authority as well as the appellate authority, stating that the issued raised in that appeal before the CESTAT, Chennai, by the assessee, was covered by a Larger Bench decision of the Tribunal in Vandana Global Limited v. CCE, Raipur [2010 (253) ELT 440].

7.Aggrieved over the said order passed by the CESTAT, Chennai, though initially the assessee filed an appeal before the Honourable Supreme Court and subsequently, had withdrawn the same with liberty to approach this Court and accordingly, this present Civil Miscellaneous Appeal has been filed by invoking Section 35G of the Central Excise Act, 1944.

8.Heard Mr.Rahul Balaji, learned counsel appearing for the assessee and Ms.R.Hemalatha, learned Senior Central Government Standing Counsel appearing for the Revenue.

9.At the outset, the learned counsel appearing for the assessee would submit that, the issue raised in this appeal, is fully covered by a number of decisions of this Court by various Division Benches and the latest one being the case in C.M.A.Nos.3814 of 2011 and 2695 and 2696 of 2012 in the matter of M/s.ThiruArooran Sugars v. Customs, Excise and Service Tax Appellate Tribunal, Chennai, vide order dated 10.07.2017.

10.The instant appeal had been admitted on 17.09.2012 with the following substantial questions of law:

(a) "Whether the Tribunal erred in holding the appellant ineligible to Cenvat Credit under Rule 57AA of the Central Excise Rules, 1944, for goods used in the machineries installed in their factory for production, as 'capital goods'?

(b) Whether the Tribunal erred in holding the appellant ineligible to Cenvat Credit under Rule 57AA of the Central Excise Rules, 1944, for goods used in the machineries installed in their factory for production, as 'inputs'?

(c) Whether the Tribunal erred in relying upon the decision of the Tribunal's larger Bench in Vandana Global Limited v. CCE, Raipur (2010 (253) ELT 440)?

and

(d) Whether the impugned Judgment is contrary to the Judgments of the Hon'ble Supreme Court in CCE, Coimbatore and others v. Jawahar Mills Limited and others (2001 (6) SCC 274) and CCE, Jaipur v. Rajasthan Spinning and Weaving Mills Limited (2010 (12) SCC 186) on the definition and concept of capital goods?"

11.In order to examine the said statement made by the learned counsel appearing for the assessee, the impact of the said Judgment in ThiruArooran's case cited supra, of a Division Bench of this Court, where, one of us (R.Suresh Kumar, J,) is a party, to be adverted to.

12.In the Judgment of ThiruArooran's case cited supra, three appeals were taken together by the Division Bench, where also similar questions of law were framed. The Division Bench has noted that one of the impugned order in the said batch of appeals in ThiruArooran's case, the CESTAT, SZ, Chennai, has dismissed the said appeal, fully relying upon the Larger Bench decision of the Tribunal in Vandana Global's case cited supra, and the relevant portion of the said Judgment noting this factor is as follows:

"11. This time around the Revenue was aggrieved and, therefore, an appeal was preferred with the Tribunal. The Tribunal, via a cryptic judgment reversed the order of the Commissioner (Appeals) by relying upon its own judgment, rendered by a Larger Bench, in Vandana Global Limited.

12.It is, in these circumstances that TAS has preferred an appeal with this Court."

13.The first issue taken up for decision of the Division Bench is as follows:

"14.1.The first issue that requires consideration is: Whether the structurals, cement, iron and steel, which are used in constructing foundations, would fall within the ambit and scope of Rule 2(a)(A)(iii), read with Rule 2(a)(A)(i) of the 2004 Rules. In other words, whether they could be treated as components, spares and/or accessories of the capital goods, referred to in Rule 2(a)(A)(i) of the 2004 Rules. In the alternative, it is submitted by both the Assessees, i.e., TAS and DCBL, that the said structurals, cement, and iron and steel, would fall within the definition of Rule 2 (k), read with Explanation 2 of the 2004 Rules; which, therefore, is the other issue, that is, required to be considered by us."

14.Before the Division Bench, the learned counsel appearing for the assessee, had relied upon the following Judgments, which have been noted at Para 16.5 of the Judgment, which is extracted hereunder:

"16.5. In support of his submissions, learned counsel relied upon the following judgments:

(i) CCE V. Rajasthan Spinning and Weaving Mills, 2010 (255) ELT 481 SC
(ii) CCE V. India Cements Ltd. 2012 (285) ELT 341 (Mad)
(iii) CCE V. India Cements Ltd. 2014 (310) ELT 636 (Mad)
(iv) CCE V. India Cements Ltd. 2014 (321) ELT 209 (Mad)
(v) Dalmia Cements (Bharat) Ltd. V. CCE 2016 (341) ELT 102 (Mad)
(vi) ThiruArooran Sugars V. CCE 2015 TIOL 1734 -HCMad.
(vii) Mundra Ports & Special Economic Zone Ltd. V. CCE & Cus 2015 (39) STR 726 (Guj.)"

15.After having taken note of the said factor referred by the appellant (assessee) side, the Division Bench has given elaborate discussions on the issue raised in the teeth of the decision of the earlier Division Bench. The relevant portion of the Division Bench in ThiruArooran's case, is once again extracted hereunder for better appreciation of the issue:

> "21. A perusal of the aforesaid extracts would show that the Revenue in the context of Rule 57Q was of the view that certain capital goods were made eligible for grant of Modvat Credit, based on classification, while components and spares of such capital goods were granted the same benefit based on description. For capital goods to be eligible for Modvat Credit, they had to fall within the ambit of the Chapters indicated in the Rule. This was so, as their eligibility to avail Modvat Credit was based on classification. In so far as components, spares and accessories were concerned, their eligibility for grant of Credit was pivoted on description, there being no reference to any Chapters. Therefore, components, spares and accessories of capital goods, which fell within the specified chapters were also entitled to Modvat Credit.
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> 22. Quite clearly, therefore, the argument of Ms.Hemalatha that because components, spares and accessories, fall in chapter 72, they cannot be treated as capital goods within the meaning of Rule 2(a)(A) of the 2004 Rules on a parity of reasoning, cannot be accepted. According to us, as long as the components, spares and accessories, pertain to capital goods falling in Rule 2(a)(A)(i), i.e., Chapter 82,84,85,90 and Heading No.68.05 and 68.04 of the first schedule to CETA, they would have to be treated as capital goods and would, hence, be eligible for Cenvat credit.
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> 23. Besides the aforesaid, let us advert to the view taken in various judgements on this very issue from time to time. A Division Bench of this Court, in the matter of: Commissioner of C.Ex., Tiruchirapalli V. India Cements Ltd., 2012 (285) E.L.T. 341 (Mad), was called upon to decide as to whether structural steel items, viz., Rebar Coils, CTD Bars, TOR Steel and, Cement used for civil construction activity, used as building material, could be treated as capital goods, eligible for credit, in terms of Rule 57Q.
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> 23.1. The Division Bench, in the aforementioned case, applying the test laid out by the Supreme Court in: Commissioner of Central Excise V. Jawahar Mills Ltd., 2001 (132) ELT 3 and in Commissioner of Central Excise, Jaipur V. Rajasthan Spinning & Weaving Mills 2010 (255) ELT 481, held that the aforesaid items will fall within the scope and ambit of the definition of 'capital goods', set out in Rule 57Q. The observations made by the court in

paragraph 7 and 8, being apposite, for the sake of convenience, are extracted hereafter:

> "7. As far as the Crane with accessories and Loader are concerned, there cannot be any difficulty in holding that they will come within the items of machinery or equipment used for production or processing of any goods for the manufacture of final products. As has been held by the Apex Court in Jawahar Mills Limited's case, the Rule makes it explicitly clear that the order of the Tribunal in dismissing the appeal preferred by the Revenue in respect of these two items and remitting the matter for fresh consideration in regard of the Bulldozer requires no consideration. As far as the other items, namely, Rebar Coils, CTD Bars, TOR Steel and Cement are concerned, as to whether they are capital goods or not, the Tribunal having regard to the law laid down by the Apex Court in Jawahar Mills's case, has liberally construed the above Rule and factually found that these are the items, which are used for the purpose of construction of the plant comprising of concrete foundations, concrete silos for storing raw materials, clinker and cement, heater tower structure, load centres etc. Having regard to the above factual findings, the Tribunal had found that these items are not used for civil construction, but for the construction, which are absolutely necessary for establishing a manufacturing unit for cement.
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> 8. The question as to how Rule 57Q should be interpreted came up recently before the Apex Court in the judgment reported in 2010 (255) E.L.T. 481 (Commissioner of Central Excise, Jaipur v. Rajasthan Spinning & Weaving Mills Ltd.). In paragraphs 12 and 13, while applying the "user test" and following the Jawahar Mills's case, the Apex court has held that even though steel plates and M.S.Channels used in the fabrication of chimney would fall within the ambit of "capital goods".

24. A similar question came up for consideration, once again, in another case, i.e., CCE, Tiruchirapalli V. India Cements Ltd. 2014 (305) ELT 558 (Mad.). In this matter, a Division Bench of this Court was called upon to answer the following question of law:

"Whether the Tribunal is correct in holding that, structural steel items viz., M.S.Plates, Angles, Channels and HR Sheets used for civil construction activity, are capital goods eligible for credit in terms of Rule 57Q as it stood at the relevant time? "

24.1. The Division Bench answered the question of law in favour of the Assessee. While doing so, the Division Bench distinguished the judgment of the Supreme Court in Saraswathi Sugar Mills V. Commissioner of Central Excise, Delhi 2011 (270) E.L.T. 465 (SC). and, instead, relied upon the judgment of the Supreme Court in CCE V. Rajasthan Spinning and Weaving Mills 2010 (255) ELT 481 SC and, while doing so, made the following observations:

"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."

16.The Division Bench in ThiruArooran's case has further held as follows:

"29. Therefore, besides anything else, what clearly comes to fore is that the various Division Bench of this Court have consistently ruled in favour of different Assessees in holding that structurals, which are used to keep in position plant and machinery and, cement, as also, iron and steel, which are used to erect foundations, which, in turn, hold the plant and machinery could, not only be treated as 'capital goods', but could also be treated as 'inputs'.

29.1. Having regard to this position, there is no good reason for us to take a different view, especially, as the Revenue has not laid a challenge to any of these judgments."

17.Further, it has been held in the said Judgment of the Division Bench in ThiruArooran's case, on the applicability of Vandana Global's case, which is extracted hereunder:

37. A similar conclusion was reached by the Gujarat High Court in the matter of: Mundra Ports & Special Economic Zone Ltd. V. CCE & Cus 2015 (39) STR 726 (Guj.). The Division Bench of the Gujarat High Court in Mundra's case, disagreed with the view taken by the Tribunal in the case of: Vandana Global Limited that the 2009 Notification would have retrospective effect. Pertinently, the Tribunal in Vandana Global Limited, has based its view on the speech made by the, then, Finance Minister. As a matter of fact, that part of the speech of the Finance Minister, which dealt with the amendment, was also relied upon by Ms.Hemalatha."

18.The Division Bench in ThiruArooran's case has also taken into account, the submissions made by the learned counsel appearing for the Revenue that, the issue raised in the said batch of cases cannot be decided on the basis of Rajasthan Spinning & Weaving Mills' case, but, only on the basis of Saraswathi Sugar Mills' case. This was also considered by the Division Bench in the following Paras of the said case, which are extracted hereunder:

> “40. Now coming to the submission put forth by Ms.Hemalatha that the applicable judgment in this case would be Saraswathi Sugar Mills and not Rajasthan Spinning & Weaving Mills, to our minds, the two (2) judgments, as concluded by five separate Division Benches of this Court, operate in two different state of facts.
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> ......
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> ......
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> 41.3. Therefore, to our minds, contrary to what Ms.Hemalatha has stated, the decision in the Saraswathi Sugar Mill's case would be distinguishable, as it dealt with an exemption notification.
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> 42. On the other hand, Rajasthan Spinning and Weaving Mill's case, in our view, is the more opposite case, which can be applied to the matters at hand. The Court, in the said case was called upon to rule as to whether the Assessee in that case could avail of Modvat Credit in respect of steel plates and MS channels, i.e., structurals used in the fabrication of chimney, which, in turn, was used, as it appears, in the operation of the diesel generating set.”

and ultimately, the Division Bench of this Court in Thiru Arooran's case has concluded as follows:

> 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.
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> 43.2. Therefore, quite clearly, the two judgements 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 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.
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> 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 2k 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."

19.Following the said Judgment in ThiruArooran's case, yet another appeal, of course, filed by the Revenue in C.M.A.No.2483 of 2016, on the same issue, came up for consideration before another Division Bench of this Court where one of us is a party (S.MANIKUMAR, J.,). (The Commissioner of Central Excise & Service Tax, Tiruchirapalli v. The Customs Excise and Service Tax Appellate Tribunal, South Zone Bench, Chennai, and another). In that case, the Revnue, being the appellant, had agreed upon the decision rendered by two separate Judgments of the Division Bench of this Court, one is C.M.A.Nos.3641 to 3643 of 2011, etc., batch, dated 10.07.2017 and another one is C.M.A.Nos.3814 of 2011 and 2695 and 2696 of 2012 {M/s.ThiruArooran Sugars Case etc., batch dated 10.07.2017}. Based on the said submission made by the learned counsel appearing for the Revenue as well as the learned counsel appearing for the assessee, the Division Bench, by order dated 25.07.2017, in C.M.A.No.2483 of 2016, has passed the following orders:

"3.On this day, Ms.Cynthia Crishnan, learned Counsel for the second respondent produced a copy of the common order, made in C.M.A.Nos.3641 to 3643 of 2011, etc., batch.

4.While adverting to the rival submissions, a Hon'ble Division Bench of this Court, has answered similar substantial questions of law, now raised in the instant Civil Miscellaneous Appeal, in favour of the assessee and against the revenue.

5.Similar substantial questions of law, were also considered in Civil Miscellaneous Appeal Nos.3814 of 2011, 2695 and 2696 of 2012.

6.Following the above said two decisions, the instant Civil Miscellaneous Appeal is dismissed, answering the substantial questions of law, against the revenue. No costs. Consequently, the connected Miscellaneous Petition is closed.”

20.Here also, in the impugned order, the CESTAT, SZ, Chennai, by only relying upon the Larger Bench decision of the CESTAT, in Vandana Global Limited v. CCE, Raipur [2010 (253) ELT 440], cited supra, has dismissed the appeal filed by the assessee, rejecting the contention that the Structurals and allied materials claimed to be parts of the capital goods/inputs capable of claiming Cenvat credit. Since the issue raised before the Tribunal (CESTAT) ought not to have been decided only on the basis of the decision of the Larger Bench of the CESTAT in Vandana Global's case, and in view of number of decisions of the Division Bench of this Court, which is the jurisdictional High Court, we are of the considered view that the impugned Judgment of the CESTAT, is liable to be interfered with, as the issue raised herein has already been covered in more than one decision of the Division Benches of this Court, as referred to above. Hence, the impugned order of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Appeal No. E/665/2004 in Final Order No.534/2011 dated 20.04.2011, is hereby set aside.

In the result, this Civil Miscellaneous Appeal is allowed and the substantial questions of law raised herein by the assessee, is answered in favour of the assessee and against the Revenue. However, there shall be no order as to costs.

Sd/-
Assistant Registrar(Audit)

//True Copy//

Sub Assistant Registrar

mps
To
1.The Customs, Excise and Service
Tax Appellate Tribunal,
South Zonal Bench,
Chennai.

2.The Commissioner of Central Excise No.I,
Williams Road,
Cantonment,
Tiruchirapalli,
Tamil Nadu.

+1 cc to M/s.R.Parthasarathy Advocate sr 73517
+1 cc to M/s.R.Hemalatha Advocate sr 73205

kj(co)
aa22/03/2018