

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.1.2021

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MS.JUSTICE R.N.MANJULA

Civil Miscellaneous Appeal No.2735 of 2008

M/s.Dalmia Cements (Bharat)
Ltd., rep.by its General Manager
(Legal) Dr.Kishore Bharani

... Appellant/Respondents

Vs

1. The Customs, Excise & Service
Tax Appellate Tribunal, Shastri
Bhavan Annex, No.26,
Haddows Road, Chennai-6.

2. The Commissioner of Central Excise
(Appeals), No.1, Williams Road,
Cantonment, Trichy-1.

3. The Assistant Commissioner of
Central Excise, Central Excise 'I'
Division, Trichy.

... Respondents/Respondents

APPEAL under Section 35G of the Central Excise Act, 1944
against the order dated 29.5.2008 passed by the Customs, Excise
and Service Tax Appellate Tribunal, Chennai made in Final Order
No. 517/ 2008.

For Appellant : Mr.G.RM.Palaniappan for
Mr.S.Muthuvenkatraman

For Respondents 2 & 3 : Mr.V.Sundareswaran, SSC

JUDGMENT

Judgment was delivered by T.S.SIVAGNANAM, J

This appeal has been filed by the assessee under Section 35G of the Central Excise Tax Act, 1944 ('the Act' for brevity) challenging the order dated 29.5.2008 made in Final Order No.517/2008 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai ('the Tribunal' for brevity).

2. The appeal was admitted on 05.9.2008 on the following substantial questions of law:

"1. Whether the order of the Tribunal is vitiated inasmuch as it fails to take into account relevant aspects viz.

a. mode of annexation
b. object of annexation
c. beneficial enjoyment and thus stands vitiated ? and

2. Whether the first respondent ought to have allowed credit under the Capital Goods Scheme if not under the Inputs Scheme?"

3. We have heard Mr.G.RM.Palaniappan, learned counsel for the appellant and Mr.V.Sundareswaran, learned Senior Standing Counsel appearing for the Department.

4. We need not labour much to answer the substantial questions of law framed for consideration in the light of the recent decision of the Hon'ble Division Bench of this Court in the case of CCE Vs. India Cements Ltd. [CMA.No.1629 of 2016 dated 30.9.2020] wherein an identical question was considered and the only difference being that the case arose under the CENVAT Credit Rules, which subsequently stood substituted by the MODVAT Rules. This aspect was also taken note of and the substantial questions of law were answered against the Revenue by the said judgment.

5. The relevant portions in the said judgment read as hereunder:

"2. The following substantial questions of law were sought to be raised for consideration:

"(i) Whether the Tribunal misdirected itself and thereby fell into an error in holding that CENVAT credit is admissible on the capital goods which were not specified in the Rule 2(a)(A) of CENVAT Credit Rules, 2004? (being contrary to the ratio laid down

by the Apex Court in Vikram Cement Vs. CCE, Indore reported in 2005 (187) ELT 145 SC. [Appeal (Civil) No. 1197/2005 dated 24/8/2005]?

(ii) Whether the Tribunal was justified in holding that CENVAT credit is admissible on Construction materials (viz., Cement, MS Angles, MS Plates, MS Channels and HR Sheets etc), which are used for civil construction activity as "Capital Goods" eligible for CENVAT Credit in terms of Rule 2(a)(A) of sub clauses from (i) to (vii) of CENVAT Credit Rules, 2004 as it stood at the relevant time?

(iii) Whether the Tribunal committed an error of law in not appreciating the Legislative Intent in insertion of "but shall not include cement, angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated bar (TMT) and other used for construction of factory shed. buildings or laying foundation or making structures for support of capital goods? vide Not.No.16/2009-C.E (N.T) dated 7/7/2009 being clarificatory in view of already existing explanation 2 to Sec.2 (k) of CENVAT Credit Rules, 2004 and therefore, operates retrospectively?"

3. The Hon-ble Supreme Court with reference to availing of Cenvat Credit under the new Rule 2004 which substituted the earlier Modvat Rules, clearly held in para 25 of the Judgment which is quoted below that the Cenvat Rules which is in effect substitutes the Modvat Rules and the decision of the Hon-ble Supreme Court in Jaypee Rewa Cement case would continue to apply and the decision of the Supreme Court in the case of J.K.Udaipur Udyog Limited holding to the contrary was no longer a good law:-

"25. In our opinion the doubt expressed by the referring Bench about the correctness of the decision in CCE v. J.K.Udaipur Udyog Limited (supra) was well founded. Having regard to the fact that the Cenvat Rules in effect substitute the Modvat Rules, the decision in Jaypee Rewa Cement would

continue to apply. The decision in Commissioner of Central Excise v. J.K.Udaipur Udyog Limited (supra) holding to the contrary is, in our opinion, not good law. The reference is answered accordingly. All the appeals and special leave petitions will now be listed for being disposed of in the light of this judgment."

4. Thus following the said judgment, the Madras High Court, in at least four cases of the Assessee has decided that Cenvat Credit in respect of capital goods like Structural Steel items like M.S.Plates, Angles, Channels and HR Sheets used for civil construction activity/erection of machineries shall be allowed under the Cenvat Rules, 2004.

5. In our considered opinion, the matter is no longer res integra and the learned Tribunal has rightly followed the decisions and held in favour of the Assessee. The relevant portion of the Tribunal-s order in this regard is quoted below for ready reference:~

"4 . After hearing the submissions of both sides, we find that the short issue in this case relates to availment of cenvat credit on OPC cement, MS plates, MS beam, MS Angle, MS channels, MS sheets, M.S.Flat, TMT Rod and TOR Rod which are used for the construction of their "Dry Process Cement Manufacturing Plant". On perusal of records, and the OIO, we find that credit was denied only on the ground that these items were used in the construction of the cement plant. Adjudicating authority has denied credit on the ground that the term "plant" is not defined as "capital goods" in the CCR. We find that on an identical issue of the same appellant, this Tribunal in two different appeals had already allowed the appeals and the Revenue preferred C.M.As. against the Tribunal-s order. The Hon-ble Madras High Court in both the orders in the case of CCE Trichy Vs India Cements Ltd. 2014 (305) ELT 558 (Mad.), and CCE & Service Tax Vs India Cements Ltd. 2014 (310) ELT 636

(Mad.) had dismissed the Revenue-s appeals. The relevant paragraphs of the High Court-s order reported in 2014 (305) ELT 558 (Mad.) are reproduced as under:

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

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 = 2012 (285) E.L.T. 341 (Mad.) (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 = 2012 (285) E.L.T. 341 (Mad.) (The Commissioner of Central Excise v. Ms. 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 or 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) ELT 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) ELT 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) ELT 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."

6. Further, we find, the Madras High Court by relying their own order reported in 2014 (310) ELT 636 (Mad.) again dismissed the C.M.A. filed by Revenue and upheld the Tribunal-s order. The Hon-ble High Court in a recent decision reported in 2015 (321) ELT 209 (Mad.) on an identical issue had allowed

the C.M.A. filed by the very same appellant. The relevant portion of this Hon-ble Madras High Court order is reproduced as under :

'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 = 2014 (310) E.L.T. 636 (Mad.) in respect of the very same assessee in C.M.A. No.1265 of 2014, following the abovesaid 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.'

7. Respectfully following the three Hon-ble High Court decisions in the appellant-s own case cited supra, and also maintaining this Tribunal-s order in the case of Dalmia Cements (Bharath) Ltd. Vs CCE Trichy (supra), holding that immovability is not a criteria for denial of Cenvat Credit, we hold that appellants are eligible for Cenvat Credit on the capital goods used in "Dry Process Cement Manufacturing Plant". Accordingly, the impugned order is set aside and the appeal is allowed."

6. After having heard the learned counsels for both sides and perused the order passed by the Tribunal, which is extracted above, we do not find any merit in the present Appeal and the same is liable to be dismissed. Accordingly, it is dismissed. The substantial questions of law

are answered in favour of the Assessee and against the Revenue."

6. Following the said decision, the above civil miscellaneous appeal is allowed and the order passed by the Tribunal is set aside. The substantial questions of law are answered in favour of the appellant/assessee. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1. The Customs, Excise & Service Tax Appellate Tribunal, Shastri Bhavan Annex, No.26, Haddows Road, Chennai-6.
2. The Commissioner of Central Excise (Appeals), No.1, Williams Road, Cantonment, Trichy-1.
3. The Assistant Commissioner of Central Excise, Central Excise 'I' Division, Trichy.

Copy to: The Section Officer,
V.R. Section,
High Court, Madras.

+1cc to S.Muthu Venkataraman, Advocate, SR.No.1280.

CMA.No.2735 of 2008

AP(CO)
CSR 12.03.2021

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