

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
SPECIAL JURISDICTION (CENTRAL EXCISE)
ORIGINAL SIDE**

RESERVED ON: 03.12.2021
DELIVERED ON: 18.01.2022

CORAM:

**THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

**CEXA/20/2021
(IA NO: GA/1/2021, GA/2/2021)**

**COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX, HALDIA
VERSUS
M/S. EMAMI AGROTECH LIMITED.**

**Appearance:-
Mr. Vipul Kundalia
Mr. Tapan Bhanja
Ms. S. Majumder
Mr. A.Roy
....for the appellant.**

**Mr. Rahul Dhannuka
Mr. H. Choudhury
.....for the respondent.**

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. This appeal by the revenue is directed against the order dated 16.12.2020 passed by the Customs, Excise and Service Tax Appellate Tribunal, East Zonal Bench, Kolkata, (Tribunal) in Excise Appeal No. 76425/2016.
2. The revenue has raised the following questions of law for our consideration:-
 - (i) *Whether the respondent can avail Cenvat credit on the goods which are not in the nature of 'Capital Goods' in terms of Rule 2(k) of the Cenvat Credit Rules, 2004 and the same are not used for excisable final products?*
 - (ii) *Whether the Learned Tribunal is justified in relying upon the decision of the Hon'ble Karnataka High Court in the case of SLR Steels while coming to its conclusion that the credit on the disputed items is available as inputs having been used in the fabrication of storage tanks though in the facts and circumstances of the instant case, the aforesaid decision is not applicable?*
 - (iii) *Whether in terms of Explanation 2 of Rule 2(k) of the Cenvat Credit Rules, 2004 the respondent is eligible to avail Cenvat credit on the disputed items used in fabrication of storage tanks within the factory premises?*

- (iv) *Whether the Learned Tribunal before setting aside the order of the adjudicating authority on the basis of the certificate of Chartered Accountants' dated 23.08.2016 ought to have considered that the said certificate was never produced before the adjudicating authority and the contents of the certificate remained unverified by the Department and as such the order passed by the Learned Tribunal is bad in law?*
- (v) *Whether the Learned Tribunal committed gross error in not appreciating that the Chartered Accountant's certificate is, at best, only corroborative evidence and the same cannot be sole or conclusive evidence particularly when there is no specific provision in the Rules for the acceptance of such certificates?*
3. We have heard Mr. Vipul Kundalia, Mr. Tapan Bhanja, Ms S. Majumder and Mr. A.Roy for the Learned Counsel appearing for the appellant/revenue and Mr. Rahul Dhannuka and Mr. H. Choudhury, Learned Counsel appearing for the respondent/assessee.
4. The respondent/assessee is registered with the Central Excise Department engaged in the manufacture of Palm Oil and Soyabean oil. During the scrutiny of the documents for the period from 2010-2011 to 2012-2013 the department noticed that the assessee had taken credit of duty in respect of various structural material like "MS Channel, MS Angle, Joist, TMT, cements, Plates etc" which are covered under Chapter 72 and 73 of the Central Excise Tariff Act, 1985. The department further

noticed that during the aforesaid period the assessee had erected structural items like platforms, structures for carrying pipe lines, structure for resting capital goods and mainly for building foundation for capital goods, such materials have been used, erected and installed at the site within the factory premises. An audit objection was raised pursuant to which the assessee was called upon to furnish documents and offer their explanation.

5. The revenue was of the prima facie view that the credit availed by the assessee on the aforementioned capital goods was not admissible in terms of Rule 2 (k) read with Explanation 2 of the Cenvat Credit Rules, 2004, as in cases where inputs were used in the manufacture of capital goods which were further used in the factory for manufacture were to be treated as inputs and not as capital goods. Further, the revenue was of the view that the assessee had taken Cenvat Credit on the said inputs treating as capital goods resulting in wrong availment of Cenvat credit to the tune of Rs. 3,00,47,898/- during the aforementioned period. The revenue was also of the prima facie view that these amounted to wilful suppression of relevant facts and the inadmissible Cenvat Credit availed during the period as recoverable. With these allegations show cause notice dated 27.03.2015 was issued in which apart from aforementioned proposal there was a proposal to levy the interest at the appropriate rate and also to impose penalty. The assessee submitted their reply/objections on 04.06.2015.
6. The Commissioner Central Excise and Service Tax, Haldia Commissionerate, after considering the reply/objections filed to the show

cause notice by order dated 26.05.2016 confirmed the demand, levied interest and also imposed equal penalty to the amount of Cenvat credit availed by the assessee. Aggrieved by such order, the assessee filed appeal before the tribunal. The tribunal by the impugned order has allowed the appeal and set aside the order passed by the Commissioner.

7. The Learned Senior Standing Counsel for the revenue contended that the assessee had taken credit on capital goods under Tariff Heading no. 72 and 73 which was not admissible as per Rule 2 (k) read with Explanation 2 of the 2004 rules, since the capital goods were inputs of the assessee and these inputs used in the factory of the manufacture were to be treated as inputs and not as capital goods. Further it is submitted that the tribunal ought to have appreciated the fact that the capital goods on which the assessee availed Cenvat Credit do not fall within the definition of capital goods as they are neither goods falling under chapter 82, 85, 90 and Heading No. 68 of the First Schedule to the Central Excise Tariff Act, 1985, nor they are components, spares and accessories of such capital goods. Further it is submitted that the tribunal failed to clarify the utilisation of the items which was required to be done. Further the assessee had not maintained any record for use of the materials and their utilization. It is further submitted that the assessee is bound to show that the items under Chapter 84,85 and 90 had been used in relation to manufacture of goods in the factory for which they claimed Cenvat Credit. Further it is submitted that the tribunal placed reliance on the Chartered Accountant certificate which

does not specify that the books of accounts were verified before issuance of such certificate.

8. Relying upon decision in the case of *Commissioner of Central Excise, Aurangabad Versus Toyota Kirloskar Motors Private Limited [2010 (256) ELT (Karnataka)]* it is submitted that merely furnishing certificate of the Chartered Accountant/Chartered Engineer without any corroborative evidence cannot be the sole basis for accepting the case of the assessee. It is submitted that the said conclusion arrived at by the Court has been approved by the Hon'ble Supreme Court in *Toyota Kirloskar Motors Private Limited Vs. Commissioner of Central Excise, 2011 (274) E.L.T. 321 (SC)*. Further it is submitted that the assessee had constructed several structures which were fastened on the earth and cannot be considered to be the part of the machinery. On the above grounds, the revenue prayed for setting aside the order of the Tribunal and answering questions of law in favour of the revenue.
9. The Learned Counsel appearing for the respondent/assessee sought to sustain the order passed by the tribunal and submitted that the tribunal rightly noted that the adjudicating authority had glossed over the details furnished by the assessee which were item wise details of the credit availed. Further the tribunal had also perused the sample invoices and found that the goods were classified under Chapter 84, 85 and 90 of the Tariff Act. The tribunal rightly took note of the Chartered Accountant certificate dated 23.08.2016 certifying that the credit of Rs. 2,42,79,485/- pertains directly to the plant, machinery equipment and other goods squarely covered by the definition of capital goods. Further it

is submitted that the adjudicating authority did not under-take any independent enquiry but went by the audit objection. Thus the tribunal rightly held that the Chartered Engineer certificate should not have been disregarded and it was incumbent upon the adjudicating authority to either reject the certificate or accept the same but could not have ignored the certificate. Therefore, it is submitted that the tribunal had rightly allowed the appeal filed by the assessee. The Learned Counsel for the assessee submitted that the issue which is subject matter of this appeal is entirely factual and no questions of law arises for consideration in this appeal and in this regard reliance was placed upon the decision in the case of *CCE, Bilaspur Vs. Singhal Enterprises Private Limited reported in 2018 (359) E.L.T.313 (Chhattisgarh)* which decision was affirmed by the Hon'ble Supreme Court in the decision reported in *2018 (360) E.L.T. A125*.

10. We have heard the Learned Counsels for the parties and carefully perused the materials placed on record. On going through the order passed by the adjudicating authority dated 26.05.2016, we find that the observation made by the tribunal that the adjudicating authority glossed over the facts is incorrect. We say so because the adjudicating authority had taken into consideration the allegations in the show cause notice, the reply given by the assessee as well as the documents which they have relied on. The question which arose for consideration before the adjudicating authority was whether the assessee has correctly availed and utilised the amount of Cenvat Credit on the materials mentioned above treating them as capital goods during the period in question. If not

so, whether such credit availed by them is recoverable with interest and penalty to be imposed on the assessee. The argument of the assessee is that the items on which the credit was availed had been used for commissioning and fabrication of the storage tanks would get covered under sub clause (iii) of clause (a) of the definition of capital goods and these are necessarily required for the activities in the factory and for manufacture of the final products.

11. Rule 2 (a) of the Cenvat Credit Rules defines capital goods to mean all goods covered under chapter 82, 84, 85, 90 (Heading 6805 grinding wheels and the like, and parts thereof falling under Heading 6804) of the First Schedule to the Excise Tariff Act. Apart from that the other goods being pollution control equipment, components, spares and accessories, moulds and dice etc. jigs and fixtures, tubes and pipes and fittings thereof and storage tanks and these goods are to be used in the factory for manufacture of the final product but that does not include any equipment of appliance used in an office or for providing output services.
12. The adjudicating authority has observed that the structural items like platforms, structures for carrying pipelines, structure for resting capital goods and mainly building foundation for capital goods which have been erected installed on the site within the factory premises and the structures of base platforms have been fabricated out of such steel items apart from some tanks have been fabricated and there is no record or documents for identification of such tanks which have been maintained by the assessee. Further the adjudicating authority has observed that the structural systems so erected is permanent in nature,

embedded to earth are nothing but an immovable property and therefore cannot be treated as input for the manufactured items. Further, it held that the factory shed, building, laying of foundation and structures have not been specifically listed out in the definition of capital goods. The adjudicating authority relied on the decisions in the case of *M/s. – Saraswati Sugar Mills v/s CCE, Delhi-III reported at 2011 (270) ELT-465 (SC)*, *CCE, Meerut-II V/s Dhampur Sugar Mills Ltd. (2012) (280) ELT-70 (Tri-Delhi)*. The adjudicating authority also referred to the clarification given by the Central Board of Excise and Customs, dated 08.07.2010 clarifying that the inputs have to be covered under the definition of input under the “CENVAT Credit Rules 2004” and used in or integrally connected with the process of actual manufacture of the final product for admissibility of Cenvat credit. Therefore, the adjudicating authority concluded that the items on which the credit had been availed by assessee would not fall within the definition of capital goods. The adjudicating authority further noted that the assessee had not produced documents/evidence in support of their contentions and therefore confirmed the proposal in the show cause notice.

13. We have referred to the findings recorded by the adjudicating authority to support our conclusion that the tribunal committed an error in holding that the adjudicating authority had glossed over the submissions made by the assessee. The tribunal granted relief to the assessee, substantially based on the Chartered Accountant certificate. The question would be whether the Chartered Accountant certificate was issued upon

verification of all the details. Whether the assessee had produced supportive documents based on which the Chartered Accountant had certified in their favour. On going through the order passed by the tribunal as well as the other materials which were on record, we find that the Chartered Accountant certificate does not specifically state that it has been issued upon verification of all the details. It is argued by the Learned Counsel for the assessee that it may not be required for the Chartered Accountant to spell out the said details. However, it is the duty on the part of the assessee to produce documents to show that the certificate has been issued upon verification of all the details. This has not been done by the assessee as there is no record referred to or relied on by the tribunal which corroborates the certificate issued by the Chartered Accountant. Therefore, the tribunal proceeded on a mis-conception as if what has been stated in the Chartered Accountant certificate as “gospel truth” without calling upon the assessee to substantiate such stand. The Chartered Accountant certificate is dated 23.08.2016, the show cause notice cum demand is dated 27.03.2015, reply to the show cause notice is dated 04.06.2015 which has been noted by the adjudicating authority in paragraph 10.0 under heading “defence reply”. It is seen that opportunity of personal hearing was granted to the assessee on 21.03.2016 and 29.03.2016 and obviously the Chartered Accountant Certificate could not have been produced during the hearing as the certificate is dated 23.08.2016. Thus, it is clear that the Chartered Accountant certificate was referred to and relied upon for the first time before the tribunal. In such circumstances, the appropriate course that the tribunal could have been adopted was to remand the matter to the

adjudicating authority to call upon the assessee to substantiate the Chartered Accountant certificate by producing relevant documents. However, the tribunal accepted the certificate in toto without noting the fact that there were no corroborative documents produced by the assessee to substantiate the contents of the certificate which admittedly did not certify that the Chartered Accountant had verified the details and there after issued the certificate.

14. Thus, in our view certificate which was produced before the tribunal, appears to have been produced for the first time before the tribunal. Identical was the fact in the case of *Delhi Motor Vehicles Private Limited* (supra) in which the Chartered Accountant certificate was produced by the assessee with cost analysis which was produced after the adjudication order was passed which was taken into consideration by the Tribunal as fresh evidence and for examining the correctness, the matter was remanded back to the adjudicating authority. The assessee carried the matter to the Hon'ble Supreme Court. It was held that the effect and implication of the contents of the certificates are required to be examined in the light of any other evidence that may be available on record or could be made available and the parties are required to be given an opportunity to adduce such other materials which may be produced by either of the parties in respect of the dispute between them so as to come to an appropriate finding on all the issues. In the said case, the Hon'ble Supreme Court remanded the matter to the tribunal in stead of the adjudicating authority.

15. In *Commissioner of Customs (Exports) Custom House Vs. BPL Limited 2010 SCC 3972* the substantial question of law framed for consideration was whether Chartered Accountant certificate alone can be accepted as evidence to rule out “unjust enrichment” without any corroborative evidence such as balance sheet, ledger accounts, sales invoices prior to after import etc. or not? It was held that certificate issued by the Chartered Accountant is merely a piece of evidence acknowledging certain facts, the authorities cannot merely act upon the certificate and if such an interpretation is given, then there is nothing for the authorities to decide the issue of refund. Thus, it was held that the tribunal had committed an error in merely relying upon the certificate produced by the assessee without taking into consideration of the fact that no evidence has been produced for considering the claim of refund. Thus, while answering the substantial question of law in favour of the revenue, the order passed by tribunal was set aside and the matter was remitted for a fresh consideration.

16. The facts of the above decision is *pari- materia* with the facts which are before us. There is nothing on record to indicate that the assessee had produced supportive documents to substantiate the Chartered Accountant certificate. Even assuming, the assessee was in possession of the documents, the endeavour of the tribunal should have been to either verify the documents, call for a remand report or remit the matter to the adjudicating authority to verify the correctness of the certificate issued by the Chartered Accountant. This exercise having not been done, we are of the clear view that a question of law arises for consideration in this appeal.

Hence, we do not agree with the contention of the Learned Counsel for the assessee that the matter is entirely factual and equally the decisions relied on by the Learned Counsel are clearly distinguishable on facts.

17. In the light of the above, we are constrained to interfere with the order passed by the tribunal. As mentioned above, the verification is required to be made as to the correctness of the contents of the Chartered Accountant certificate, as the certificate appears to have been produced for the first time before the tribunal and does not indicate that the same has been issued after due verifications of the details.

18. Thus, we are of the view that the matter has to be remanded to the adjudicating authority for fresh consideration.

19. In the result, the appeal is allowed. The order passed by the tribunal is set aside and the substantial questions of law are answered in favour of the appellant/revenue and the matter stands remanded to the adjudicating authority to consider the correctness of the contents of the Chartered Accountant certificate after affording an opportunity to the respondent assessee to produce sufficient documents and evidence in support of the conclusion certified by the Chartered Accountant. No costs.

(T.S. SIVAGNANAM, J)

I agree.

(HIRANMAY BHATTACHARYYA, J)

(P.A- SACHIN)