OD – 12

CEXA/4/2023
IA No.GA/1/2023

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction
ORIGINAL SIDE

COMMISSIONER OF CENTRAL EXCISE,
CUSTOMS AND SERVICE TAX,
DURGAPUR

-Versus-

M/S. JAI BALAJI INDUSTRIES LTD
(UNIT IV)

BEFORE :
THE HON'BLE ACTING CHIEF JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 24th April, 2023

Appearance :
Mr. Vipul Kundalia, Adv.
Mr. Tapan Bhanja, ADv.
...for the appellant

Mr. A.K. Prasad, Adv.
Ms. Swapna Das, Adv.
...for the respondent.

The Court : This appeal filed by the revenue under Section 35G of the Central Excise Act, 1944 (the 'Act' for brevity) questions the correctness of the final order dated 4th August, 2022 passed by the Customs, Excise and Service Tax Appellate Tribunal, Kolkata (the 'Tribunal') in Excise Appeal No.76215 of 2016.

The revenue has raised the following substantial questions of law for consideration:

(i) *Whether the Learned Tribunal has committed gross error of law by not fully appreciating the definition of 'input service' as defined under Rule 2(l) of Cenvat Credit Rules, 2004 and the applicability of the same in the facts and circumstances of the instant case?*

(ii) *Whether the Learned Tribunal is right and justified in allowing the Cenvat Credit on the Works Contract Services in so far as they are used for laying of foundation or making of structure for support of capital goods which are excluded from the definition of 'input service' as defined in Rule 2(l) of Cenvat Credit Rules?*

(iii) *Whether the order of the Learned Tribunal is perverse and contrary of law inasmuch as the Learned Tribunal has failed to appreciate that in terms of provision of Rule 2(l) of the Cenvat Credit Rules, 2004 services provided under 'Works Contract Service' have been straightwy excluded from the ambit of 'input service', hence, the availment of credit of service tax paid by the respondent on 'Works Contract Services' used for construction of structural support and laying of foundation for capital goods, is not at all admissible?*

(iv) *Whether the Learned Tribunal is right and justified in setting aside the adjudication*

> *order dated 10.03.2016 without appreciating the relevant provisions of the Cenvat Credit Rules, 2004 as well as the decisions relied upon by the adjudicating authority is support of the adjudication order?*

We have heard Mr. Vipul Kundalia, learned standing counsel assisted by Mr. Tapan Bhanja, learned Advocate for the appellant/revenue and Mr. A.K. Prasad, learned counsel assisted by Ms. Swapna Das, learned Advocate appearing for the respondent/assessee.

Though elaborate submissions have been made by the learned counsel for the revenue drawing our attention to various factual details, among the issues involved in the instant case, the first is to ascertain whether any substantial question of law arises for consideration. At this juncture, it would be worthwhile to refer to the decision of the Hon'ble Supreme Court in the case of *Commissioner of Customs-I vs. Aasu Exim Pvt. Ltd.* reported in 2018 (11) G.S.T.L. 226 (SC). The said case before the Hon'ble Supreme Court was an appeal under Section 130E(b) of the Customs Act, 1962 seeking to assail the correctness of the order of the Tribunal in relation to classification/rate of duty. In terms of the said provision, an appeal as against the order passed by the Tribunal where the issue relates to rate of duty or the classification of the products, lies to the Hon'ble Supreme Court and not to the High Courts. Nevertheless, the ratio laid down in the decision of the Hon'ble Supreme Court assumes importance in the case on hand. In paragraph 9 of the said judgement it has been held as follows:

> ***9.*** *In "Steel Authority of India Ltd. v. Designated Authority, Directorate General of Anti Dumping & Allied Duties & Others.", Civil Appeal No.241 of 2017 [2017 (349) E.L.T. 193 (SC)] decided by this Court on 17.4.2017, the scope of an appeal under Section 130E(b) of the Customs Act has been dealt with in detail. It has been held that the following conditions must be satisfied for exercise of jurisdiction under Section 130E(b) of the Customs Act.*
>
> > *(i) The question raised or arising must have a direct and/or proximate nexus to the question of determination of the applicable rate of duty or to the determination of the value of the goods for the purposes of assessment or duty. This is a sine qua non for the admission of the appeal before this Court under Section 130E(b) of the Act.*
> >
> > *(ii) This question raised must involve a* ***substantial question of law*** *which has not been answered or, on which there is a conflict of decisions necessitating a resolution.*
> >
> > *(iii) If the Tribunal, on consideration of the material and relevant facts, had arrived at a conclusion which is a possible conclusion,*

> *the same must be allowed to rest even if this Court is inclined to take another view of the matter.*
>
> *(iv) The Tribunal had acted in gross violation of the procedure or principles of natural justice occasioning a failure of justice.”*

Sub-paragraph (ii) and (iii) of paragraph 9 of the above decision, in the case of Steel Authority of India Ltd. will be applicable to the cases before the High Court. The appeal presently filed by the revenue under Section 35G is also identically worded and what is required to be seen by this Court is as to whether the question raised involves any substantial question of law which has not been answered or on which there is conflict of decisions necessitating a resolution.

The second aspect is that when the Tribunal, on consideration of the material and relevant facts had arrived at a conclusion which is a possible conclusion, the same must be allowed to rest even if this Court is inclined to take another view of the matter. Bearing the above legal principle in mind, we propose to examine the case on hand.

Firstly, we take note of the submission of Mr. Kundalia, learned standing counsel for the appellant that the

Tribunal committed a serious error in holding that it has not been denied by the Department that the Coke Oven Plant of the appellant was towards modernisation and renovation of their existing plant/factory. This is the submission of the learned counsel that this finding is erroneous and in this regard has elaborately drawn our attention to the three show cause notices issued on the assessee, first of which is dated 4th March, 2014 for the period from 2011-12 to 2013-14 (upto October, 2013). The standing counsel has referred to the preamble of the show cause notice. As rightly pointed out by the learned counsel for the respondent/assessee, paragraph 2.3 of the show cause notice is relevant which is quoted below:

> *"**2.3** In terms of provision of Rule 2(l) services provided under 'Works Contract Service' have been straightaway excluded from the ambit of 'input service' and hence it appears that availment of such credit is not at all admissible. Further, the assessee appears to have violated the provisions of Rule 3 of Cenvat Credit Rules, 2004 also by availing such inadmissible Cenvat credit during the period from **2011-12 to 2012-13 (upto Oct.'13)** for an amount of Rs.1,84,94,031/- [B.E.D. – Rs.1,79,55,365/- + Education Cess - Rs.3,59,110/- + Secondary and Higher Education Cess - Rs.1,79,556/-] (Rupees One Crore Eighty Four Lakhs Ninety Four Thousand and Thirty One only) and utilizing the same towards of payment of C.E.Duty."*

To say the least, the Assessing Officer brushed aside the statutory provision, rather on a wrong understanding of the statutory provision has worded the show cause notice. The observations of the Assessing Officer stating that in terms of provisions of Rule 2(l), services provided under Works Contract Services have been straightaway excluded from the ambit of input service and hence it appears that availment of such credit is not at all admissible. This conclusion, at the very threshold by the Assessing Officer is on a wrong noting of the provision or in other words a wrong understanding of the statutory provision. Be that as it may, the assessee had submitted their reply and the case was adjudicated. Interestingly, when the case was adjudicated the scope of adjudication took a different turn and the Assessing Officer has gone into certain documents to arrived at a conclusion with regard to the scope of work. In fact, the said finding rendered by the adjudicating authority was squarely beyond the allegation in the show cause notice because there has been no annexures to the show cause notice except computation of the alleged excess availment of Cenvat Credit. Thus, the initial mistake committed by the Assessing Officer while issuing the show cause notice has perpetrated in the order of adjudication by carrying the mistake along with it. Thus, considering this fact, the Tribunal, in our view, rightly held that the revenue has not denied that the Cove Oven Plant of the appellant was towards modernisation and renovation of the existing plant/factory. If such is the case, the claim of the assessee would clearly fall within the definition of 'input service' as defined under Section 2(l) which was prevalent from the period from 1.4.2011 to 30.6.2017.

Learned counsel for the appellant took great pain to distinguish the decisions relied upon by the learned Tribunal. In our view, the manner in which the decision has to be read is as a whole to enable the Court to carry out as to what is the *ratio decidendi*. This is the cardinal and basic principle of culling out the legal principle in any decision. In the case of *M/s. Reliance Industries vs. CCE & ST, Rajkot*, which has been referred to by the Tribunal, it has been held as follows:

> *"4.10 Without prejudice to our above findings, we further find that the appellant's factory is admittedly huge existing petroleum industry and working for decades. The ECIS service was used for expansion, renovation and modernization of overall existing petroleum plant. As per inclusion clause of the definition the services relating to modernization, renovation is an admissible input service. In our view, even though service of construction of building or*

civil structure are falling under the exclusion clause but even if similar service is used for renovation and modernization of existing factory, the credit is admissible. The exclusion applies only in respect of such service as specified therein which are used for initial setting of the factory. It is pertinent to note that when the exclusion was brought in the rules, services relating to setting up of the factory was removed from the inclusion clause of the definition of input service in rule 2(l) of Cenvat Credit Rules, 2004 therefore, there is a direct nexus of the service mentioned in the exclusion clause and setting up of the factory. It is important to note that the legislature consciously continued the services of renovation, modernization, repairs appearing in the inclusion clause of definition of input service. This clearly shows that any service relating to modernization, renovation of the existing factory is admissible as input service which is the direct case of the appellant. This aspect has been considered in various judgements which are reproduced below:-

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9. Further, the said CHP has been set up with the view to 'modernise the coal loading process in the mines' also satisfies the definition of

> *input service. Moreover, since the credit has been allowed by the Department on certain invoices raised by the Contractor, the Department has in-principle found the service to be eligible for credit. We also agree with the submission made by the appellant that the mode of valuation adopted by the Contractor to discharge service tax on 40% of the contract value is in accordance with law contained in Service Tax Valuation rules and cannot be disputed while deciding credit eligibility at the appellant's end. When service tax has been levied only on 40% of the total value, it essentially means that service tax has been paid only on the service portion."*

On a reading of the above paragraph, it will clearly show that the decision can be clearly applied to the facts and circumstances of the case. In the said decision it has been held that even though services of construction of building or civil structure are falling under the exclusion clause but even if similar service is used for renovation and modernisation of existing factory, the credit is admissible. The exclusion applies only in respect of such service as specified therein which are used for initial setting of the factory. Thus, it is nobody's case much less revenue's case that project undertaken by the assessee was not one of modernisation and renovation.

This is precisely the reason why the show cause notice was worded so by the Assessing Officer though by wrongly interpreting the scope of Rule 2(l).

Thus, we find that the Tribunal, on re-appreciation of the factual position, has rendered a finding in favour of the assessee which, we find, does not suffer from any perversity or for us to interfere in this second appeal. For the above reason, we are of the view that no substantial question of law arises for consideration in this appeal.

The appeal (CEXA/4/2023) accordingly fails and is dismissed.

Consequently, the connected application for stay (IA No.GA/1/2023) also stands closed.

(T.S. SIVAGNANAM)
ACTING CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)

As/RS.