OD–1

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

CEXA/12/2023
IA NO: GA/1/2023, GA/2/2023
COMMISSIONER OF CENTRAL EXCISE KOLKATA III COMMISSIONERATE
VS
M/S TEXMACO UGL RAIL PVT LTD.

BEFORE :

THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE SUPRATIM BHATTACHARYA
Date : 22ND November, 2023

Appearance :
Mr. K.K.Maiti, Adv.
Mr. Tapan Bhanja, Adv.
…for appellant
Mr. Abhratosh Majumdar, Sr. Adv.
Mr. Kausheyo Roy, Adv.
…for respondent

The Court : - This appeal filed by the revenue challenges the correctness of the order passed by the Customs Excise and Service Tax Appellate Tribunal, East Zonal Bench, Kolkata (Tribunal) dated 25th July, 2019. There were two appeals before the learned Tribunal, one filed by the revenue challenging the order in original passed by the Assistant Commissioner of Central Excise, Kharda Division of Kolkata III, Commissionerate dated 29th February, 2016 challenging that portion of the order allowing the refund claim of the respondent/assessee to the tune of Rs.1,75,79,982/-. The assessee filed an appeal before the Tribunal as against the same order by which the refund claimed to the tune of Rs.5,51,72,812/- was rejected. The Tribunal by the impugned order dismissed the appeal filed by the revenue and allowed the appeal filed by the assessee.

Aggrieved by the same the revenue has preferred the appeal.

The appeal is time barred and there is a delay of 1212 days in filing the appeal. We have gone through the so-called reasons given in the condone delay petition by the revenue and we are not convinced that sufficient cause has been shown for not preferring the appeal within the period of limitation. Even by extending the benefit of the order passed by the Hon'ble Supreme Court whereby the purpose of limitation was extended still from March 2022 till the date of filing the appeal on 11.10.2023, there is no satisfactory explanation. The respondent/assessee also vehemently opposes the prayer for condonation of delay.

In the light of the above, we would be well justified in rejecting the application for condonation of delay and dismissing the application for condonation of delay and consequently, rejecting the appeal. However, we are not persuaded to do so since we are required to consider as to whether any substantial question of law arises for consideration in this appeal. Therefore, we exercise our discretion and condone the delay in filing the appeal.

Accordingly, the application for condonation of delay being GA/1/2023 stands closed.

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

"(i)Whether in terms of definition of "Input Services" under Rule 2(1) of the CENVAT Credit Rules, 2004 the credited input service can be availed by the respondent which is not covered under the definition of input service ?

(ii) Whether the Learned Tribunal has committed gross error by allowing Cenvat Credit during the period April, 2014 to June, 2014 when the word setting up has been omitted from the definition of Rule 2(1) of "Input Services" ?

(iii) Whether the Learned Tribunal is required under the law to verify the variation of amounts of credit availed and reflected in various returns which created confusion between the amounts of unutilized Cenvat Credit claimed as refund with the value of "Input Services" vis-à-vis "Input Services" credit which could not be co-related with the said returns?"

We have elaborately heard Mr. K.K. Maity, learned senior standing counsel, assisted by Mr. Tapan Bhanja, standing counsel appearing for the appellant and Mr. Abhratosh Majumdar, learned senior counsel, assisted by Mr. Avra Mazumder, learned advocate appearing for the respondent/assessee.

The Assistant Commissioner of Central Excise issued show cause notice dated 24th August, 2015. the allegation in the show cause notice is to the following effect :

"*The Credited input Service was in relation to set up the PROJECT in the premises of BELGHORIA WORKS, KOL-700 056, which is not covered under the Definition of INPUT SERVICE. It is worth to mention that the Definition of INPUT SERVICE earlier covered "SETTING UP" and these words have been omitted w.e.f. 01.04.2011, and therefore,* *the services relating to setting up of unit are not eligible for CENVAT CREDIT. For the instant Reference, the list of eligible INPUT SERVICES are annexed herewith.”*

As could be seen from the above allegation, the case against the respondent assessee was that the created input service was in relation to set up the project in the premises in question which is not covered under the definition of input service more particularly when the word ‘setting up’ was omitted in the definition of input service with effect from 1st April, 2011. To be noted that in the show cause notice the bouquet of services which the assessee had availed on which refund was claimed was not discussed and the only ground on which the show cause notice was issued is on the ground that the word ‘setting up’ was deleted with effect from 1st April, 2011 in the first definition of input service. The assessee submitted a detailed reply. Firstly, listing out of bouquet of services availed by them and specifically contended that though services were incidental and ancillary to the manufacturing and would squarely fall under the definition of input service. Further, it was pointed out that in the show cause notice the only reason proposed to deny refund was on the ground that the services availed by the company were used in relation to setting up of the plaint since the word ‘setting up’ was deleted from the definition of input service with effect from 1st April, 2011. Therefore, such services would not qualify as input services and will not be eligible for refund.

The assessee had specifically contended that they transferred number of services which has indirect connection to the manufacturing activities and the services include finance, administration, transportation, information technology, project management, project controlling, procurement of raw materials, quality control, infrastructural support, logistic and other operational assistance. After stating so, the assessee has elaborated on each and every service received by the company by carefully analysing the same and giving the requisite information. This explanation so offered by the assessee has been set out in its entirety in the order of adjudication dated 29^{th} February, 2016 in paragraphs 3.6 to 5.0. Thus, the assessee contended that the show cause notice has been issued without proper examination of facts and the provisions of law and clearly unsustainable and requested to drop the proceedings. The adjudicating authority while passing the order in original dated 29.2.2016 has made an attempt to examine the nature of services which were availed by the assessee. As pointed out earlier at the stage when the show cause notice was issued, the authority did not examine any of the bouquet of services which was availed by the assessee either individually or collectively and the allegation to deny refund was solely on the ground that in the definition of input service the word 'setting up' was omitted with effect from 1^{st} April, 2011. Therefore, we can safely hold that the order of adjudication dated 29^{th} February, 2016 has travelled far beyond the allegation in the show cause notice. Be that as it may, we if take note of the discussion and finding in the order in original, we find that the adjudicating authority has accepted that the bouquet of services have been used for setting up of various process required for the functioning of the unit which are essential for operation and running of the business and a pre-condition for manufacturing of final project. Having noted so, the adjudicating authority states that many of the invoices/debit notes it is stated as supply resourcing to set up the 'project' and, therefore, has come to the conclusion that the services were received well before start of the operation essential for running of the business which are the pre-conditions for manufacturer of final product and were certainly for set up of their factory and hence, not admissible. Unfortunately, the adjudicating authority not only travelled far beyond the allegation in the show cause notice but failed to take note of the specific case of the assessee that the services which were availed by them has direct connection to the manufacturing activities. The definition of input services prior to 31st March, 2011 as contained in Section 2(l) of CENVAT Credit Rules, 2004 after defining of the input service means has also inserted an exclusion clause wherein it has been stated that apart from the services mentioned in clauses (i) and (ii) of Section 2(l) of CENVAT Credit Rules, 2004. It is included several services in relation to setting up, modernisation, renovation or repairs of the factory etc. The definition of the input services was amended with effect from 1st April, 2011 and the significant change which would have relevant for the case on hand is that the word setting up was deleted and an exclusion clause was included under clause A whereby the definition of in the input services excluded service portion in execution of a works contract and construction services including services listed under clause (b) of Section 66E of the Finance Act. In so far as their use for a) construction or execution of the works contract of a building or a civil structure or a part thereof; or b) laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified services; or c) service provider by way of running of a motor vehicle etc.

Thus, it can be seen that the Rule 2(l) has three parts or limbs. The first limb covers services used by a provider of an output services or providing a output service; or services used by a manufacturer, whether directly or indirectly, in relation to the manufacture of final products and clearance of the final products upto the place of removal. The second limb of the definition under Rule 2L is the exclusive portion which includes services used in relation to modernisation, renovation or repairs of a factory premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion etc. and the third part of the definition contains the exclusion portion.

It was never the case of the department while issuing the show cause notice that in one or the entirety of the boogie of services on which refund was denied falls within the scope and ambit of the exclusion part of the definition under Rule 2L. On facts the assessee has been able to explain that all the services which were outsourced has indirect connection to the manufacturing activities. Thus, an attempt has been made by the adjudicating authority to cursorily examine the bunch of services which have been availed by the assessee, but has failed to discuss about the intricacies involved in each one of those services. Furthermore, the adjudicating authority while stating that the project was set up utilising the connected services enumerated in the invoice has further held that these have paved the way of those activities incidental or ancillary in Section 2F of the Central Excise Act, 1944. Thus, it can be steered clear that the bunch of input services received by the assessee on which refund was denied does not fall within the exclusion clause as it is not the allegation that it relates to a works contract or construction or execution of the works contract of a building or civil structure or laying of foundation or making of structures for support of capital goods etc. The learned Tribunal has rightly pointed out that the adjudicating authority has admitted in his order dated 29th February, 2016 that the input services on which service has been availed were essential for running of business and a precondition for manufacturing final product.

Therefore, we are of the view that the learned Tribunal rightly allowed the assessee's appeal and dismissed the appeal fled by the revenue.

Thus, we find no grounds to interfere with the order passed by the learned Tribunal and the substantial questions of law are answered against the revenue.

The stay application IA No: GA/2/2023 is also dismissed.

(T.S. SIVAGNANAM, C.J.)

(SUPRATIM BHATTACHARYA, J.)

GH/S.Das/SN.