(2014) 07 MAD CK 0281

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 1265 of 2014

Commissioner of C. Ex. and Service Tax — APPELLANT

Vs

India Cements Ltd. — RESPONDENT

Date of Decision : 10-07-2014

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11A(1), 35G

Citation : (2014) 310 ELT 636

Hon'ble Judges : R. Sudhakar, J;G.M. Akbar Ali, J

Bench : Division Bench

Judgement

G.M. Akbar Ali, J.—This Civil Miscellaneous Appeal has been filed under Section 35G of the Central Excise Act, 1944 challenging the order, dated 8-5-2013 made in Final Order No. 40179 of 2013 on the file of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), South Zonal Bench, Chennai [2013 (296) E.L.T. 513 (Tribunal)]. The substantial question of law raised before this Court is as follows:

"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?"

2. The first respondent herein/assessee is a manufacturer of cement falling under Chapter 25 of the Central Excise Tariff. The assessee availed Cenvat Credit on capital goods used in the erection of various capital goods, viz., new additional ESP for raw mill project, additional fly ash handling system, MMD Crusher etc and utilizing the credit for payment of duty on clearance of excisable goods from their unit. They also used M.S. Angles, M.S. Beams, M.S. Channels and TMT bars for the erection of new plant and machineries in their factory and treated the same as components.

3. A Show cause notice, dated 19-2-2009 was issued by the Department stating

that these are not capital goods and a demand was made on these goods. Reply was sent by the assessee objecting to the demand on 13-3-2009. Rejecting the contention of the assessee, the Assessing Officer confirmed the said demand of Rs. 53,23,756/-, which includes Cenvat of Rs. 51,86,528/- Edu. Cess - Rs. 1,03,724/- and S & HE Cess - Rs. 33,504/-, under proviso to Section 11A(1) of the Central Excise Act, 1944 and with Rule 14 of the Cenvat Credit Rules 2004 along with interest and penalty. Aggrieved by which the assessee preferred an appeal before the Appellate Tribunal.

4. The Tribunal considered the contention of the assessee as well as the Revenue and held that the assessee satisfied the user test. The Tribunal, while allowing the appeal, followed the earlier order of this Court and the law laid down in the case of Commissioner of Central Excise, Jaipur Vs. Rajasthan Spinning and Weaving Mills Ltd., and in paragraph Nos. 7 and 8, held as follows:

"7. In the present case, it is seen that the items in question were used in the erection of various machineries such as, new additional Electrostatic Precipitator for raw mill project, additional fly ash handling system, MMD crusher etc. for the Dry Process Cement Manufacturing Plant. It is evident that MS Angles, MS Beams, MS Channels etc. were used in the erection of machineries it become component of the same, which are integral part of Dry Process Cement Manufacturing Plant. It is noted that Fly Ash handlish system is a pollution control equipment and particularly mentioned in 2(a)(A)(ii) of Rules, 2004. The allegation in the above show cause notice that the Chapter Heading of these items were not covered under Rule 2(a) of the Rules, 2004, is not sustainable, in respect of pollution control equipments because the rule does not specify the tariff headings under which pollution control equipment should be falling. The appellant established that these items were used for erection of capital goods namely Dry Process Cement Manufacturing Plant, which falls under Chapter 84, as mentioned in Serial No. (i) of Rules 2(a)(A). Thus, the items in question are covered in serial No. (iii) of Rules 2(a)(A) of the Rules, C.B.E. & C. has clarified that all parts, components, accessories which are to be used with capital goods in serial (i) and (ii) of Rules 2(a)(A) and classifiable under any chapter heading are eligible for availment of Cenvat credit. A plain reading of serial (iii) cannot lead to a different conclusion either.

8. After considering the use of the goods in question, in our considered view, the present case is covered by the decision of the Hon''ble Madras High Court in appellant''s own case as referred above. We have also noticed that the Hon''ble Supreme Court in the case of Rajasthan Spinning and Weaving Mills Ltd. (supra) as relied upon the Hon''ble High Court in the appellant''s own case, allowed Modvat credit on MS channels, steel plants etc. as capital goods used for erection of chimney for diesel generating set. The findings of the Commissioner that these are structures fixed to earth with concrete foundations and are immovable appears to be beyond the scope of the show cause notice. So, the case of M/s. Triveni Engineering & Industries Ltd. (supra) as relied upon by the learned AR is

not applicable in the present case."

5. Aggrieved by the order of the Tribunal, the Revenue has preferred the present appeal.

6. Learned Standing Counsel appearing for the Revenue heavily relied upon the decision reported in Saraswati Sugar Mills Vs. Commissioner of Central Excise, Delhi-III, in Civil Appeal No. 5295 of 2003, dated 2-8-2011 : 2011 (270) E.L.T. 465 (S.C.). However, we find that this Court has earlier considered the case of the assessee in two similar cases of the previous assessment years in C.M.A. No. 3101 of 2005, dated 31-12-2012, where a reference was made to an order passed earlier in respect of the very same assessee. While dismissing the appeal filed by the Revenue the Division Bench of this Court held as follows:

"8. Even though learned standing counsel appearing for the Revenue submitted that the judgment in the assessee''s own case reported in The Commissioner of Central Excise Central Excise Vs. India Cements Limited and The Customs, Excise and Service Tax 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 The Commissioner of Central Excise Central Excise Vs. India Cements Limited and The Customs, Excise and Service Tax , pointing out to Rule 57Q and the interpretation placed by the Apex Court in the decision reported in Commissioner of Central Excise, Jaipur Vs. Rajasthan Spinning and 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 of 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) E.L.T. 465 (S.C.) (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 Commissioner of Central Excise, Jaipur Vs. Rajasthan Spinning and 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 Commissioner of Central Excise, Jaipur Vs. Rajasthan Spinning and 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."

7. From a perusal of the above said judgment, it is seen that there is no change in the circumstance and this Court had already considered the issue and held that the decision reported in Saraswati Sugar Mills Vs. Commissioner of Central Excise, Delhi-III, in Civil Appeal No. 5295 of 2003, dated 2-8-2011 is distinguishable on facts. This Court applied the principles laid down in the decision reported in Commissioner of Central Excise, Jaipur Vs. Rajasthan Spinning and Weaving Mills Ltd., and held that the Tribunal was justified in allowing the assessee''s contention in respect of the very same assessee. 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. The Tribunal has also found that the assessee has satisfied the user test in the present case. Hence, following the principles laid down in the decision reported in Commissioner of Central Excise, Jaipur Vs. Rajasthan Spinning and Weaving Mills Ltd., and the earlier decision of this Court in C.M.A. No. 3101 of 2005, dated 13-12-2012, we are inclined to reject the appeal, thereby confirm the order of the Tribunal. Accordingly, this Civil Miscellaneous Appeal stands dismissed. No costs.

