(2021) 08 CESTAT CK 0087

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Central Excise Appeal No. 40334, 40335, 40336, 40337, 40338, 40339, 40340 Of 2021

M/s. Australian Foods India Private Limited — APPELLANT

Vs

Commissioner Of G.S.T. And Central Excise — RESPONDENT

Date of Decision : 31-08-2021

Acts Referred:
Cenvat Credit Rules, 2004 — Rule 2(l), 14, 15
Central Excise Act, 1944 — Section 4(3)(c)(iii), 11A

Citation : (2021) 08 CESTAT CK 0087

Hon'ble Judges : P. Dinesha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. The common facts, as could be deciphered from the Orders-in-Original as well as the impugned Order-in-Appeal, inter alia, are that the appellant is a holder of Central Excise Registration and are manufacturers of cookies falling under CSH 19053100 of the Central Excise Tariff Act, 1985; that they also manufacture "dough" falling under Chapter Sub-heading 19012000; that the assessee was availing CENVAT Credit on inputs, capital goods and input services under the CENVAT Credit Rules, 2004, as amended.

2. The table prepared by the Commissioner (Appeals) at paragraph 1, page number 2 of his Order, is reproduced below for the sake of convenience:

Sl. No

A.No./ date

Order-in-Original No./date

Amount of credit demanded (in Rs.)

Amount of credit allowed (in Rs.)

Amount of penalty imposed (in Rs.)

SCN/SOD No./date

Period involved

(1)

(2)

(3)

(4)

(5)

(6)

(7)

(8)

1.

12/2021 (CTA-I)(CN) dated 25.01.2021

07/2020 (CE-JC) dated 23.11.2020

4,94,842/-

Nil

49,484/-

11/2012 dated 01/08.2012

July 2011 to June 2012

2.

13/2021 (CTA-I)(CN) dated 25.01.2021

08/2020 (CE-JC) dated 23.11.2020

17,45,623/-

Nil

1,74,562/-

46/2013 dated 02.08.2013

July 2012 to May 2013

3.

14/2021 (CTA-I)(CN) dated 25.01.2021

09/2020 (CE-JC) dated 23.11.2020

27,11,139/-

Nil

2,71,114/-

53/2014 dated 30.06.2014

June 2013 to May 2014

4.

15/2021 (CTA-I)(CN) dated 25.01.2021

10/2020 (CE-JC) dated 23.11.2020

20,45,527/-

Nil

2,04,553/-

39/2015 dated 11.06.2015

June 2014 to Feb 2015

5.

16/2021 (CTA-I)(CN) dated 25.01.2021

11/2020 (CE-JC) dated 23.11.2020

27,64,915/

Nil

2,76,492/-

29/2016 dated 24.03.2016

Mar 2015 to Feb 2016

6.

17/2021 (CTA-I)(CN) dated 25.01.2021

12/2020 (CE-JC) dated 23.11.2020

39,92,273/

Nil

3,99,227/-

09/2018 dated 16.03.2018

Mar 2016 to June 2017

7.

18/2021 (CTA-I)(CN) dated 25.01.2021

13/2020 (CE-JC) dated 23.11.2020

3,31,152/- (4/11-6/11)

7,78,980 /- (10/11- 3/11)

33,115/-

51/2011 dated 15.11.2011

Nov 2010 to June 2011

3.1 Shri P.C. Anand, Learned Consultant appearing for the assessee-appellant, would inter alia submit that on scrutiny of ER-1 monthly returns filed by the appellant, it was noticed that the appellant had availed CENVAT Credit of Service Tax paid towards rent/licence fees/maintenance charges/amenity fees for occupying retail outlets situated elsewhere than the factory of manufacture i.e., Delhi, Kolkata, etc.; that alleging such services do not qualify as 'input services' defined in Rule 2(l) of the CENVAT Credit Rules, 2004 ('CCR' for short) since the charges were incurred towards their sale/retail outlets other than the registered unit at Ambattur, Chennai, Show Cause Notices listed in Column 7 of the above table were issued to the appellant covering the period mentioned in Column 8 therein, proposing to demand and recover ineligible CENVAT Credit for the amounts mentioned in Column 4 of the table under Rule 14 of the CCR read with Section 11A of the Central Excise Act, 1944 along with appropriate interest; that after due process of law, for the period from April 2011 to June 2017 covered in the Notices/SODs, the demand of recovery of ineligible credits were confirmed with appropriate interest on the finding that the definition of input services was amended with effect from 01.04.2011 to exclude the phrase "activities relating to business" and that the impugned services were not related to the manufacturing activity of the appellant's Ambattur unit; that penalty under Rule 15 of the CCR was imposed on the appellant as mentioned in Column 6 of the table. The appellant having not met with success in its first appeal before the First Appellate Authority, has filed these appeals before this forum.

3.2 Learned Consultant for the appellant would further contend that the issue is no more res integra and the same is set at rest by the co-ordinate Delhi Bench of the CESTAT vide its order in the case of M/s. Barmalt (India) Pvt. Ltd. v. Commissioner of C.Ex., Delhi-III reported in 2015 (38) S.T.R. 882 (Tri. - Del.).

4. Per contra, Shri Arul C. Durairaj, Learned Departmental Representative appearing for the Revenue, supported the findings of the lower authorities.

5. Heard both sides, gone through the documents placed on record and have also gone through the decisions/orders relied upon during the course of arguments. After hearing both sides, I find that the only issue to be decided by me is whether CENVAT Credit would be allowable with reference to certain services at a depot outside the factory, from where the manufactured finished goods were

cleared/sold?

6. The co-ordinate Delhi Bench of the CESTAT in the case of M/s. Barmalt (India) Pvt. Ltd. (supra) has dealt with an identical situation and the relevant observations and finding reads thus:

"4. The appellants contend that

(i) out of the impugned demand, Rs. 57,32,077/-pertains to credit taken in respect of service tax paid on commercial or industrial construction service which was used for setting up their factory and that prior 01.04.2011 such service for setting up the factory was clearly eligible to be called input service.

(ii) Of the remaining amount, Rs. 13,68,611/-pertains to service tax paid on rent prior to 01.04.2011 and Rs. 9,12,408/- pertains to such service tax paid after 01.04.2011 and the definition of input service clearly allows services used in relation to storage up to the place of removal to be called input service.

5. We have considered the matter. As regards the credit taken in respect of Commercial or industrial construction service, it is not disputed that the said service was utilized for setting up the factory and therefore it was covered under the definition input services prior 01.04.2011 as is evident from the definition of input service contained in Rule 2(l) of Cenvat credit Rules 2004 reproduced below:

(i) used by a provider of taxable service for providing an output service, or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture or final products and clearance of final products from the place of removal.

And includes service used in relation to setting up, modernization, 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, market research, storage upto the place or removal, procurement of inputs, activities relating to business, such as accounting, audition, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal.

Thus the entire credit relating to commercial or industrial construction service is clearly admissible.

6. As regards Cenvat credit of service tax paid for rental service the appellants have stated that they owned, and were responsible for, the goods upto the warehouse from where the finished goods were cleared/sold and therefore in terms of Section 4(3)(c)(iii) of Central Excise Act, 1944 such a warehouse was the place of removal. As per the above definition, input services used for storage up to the place of removal continued to be covered under the definition of input service. Therefore, the service tax paid on rent is also available as credit.

7. In view of the foregoing discussion, we waive the pre-deposit and allow the appeal."

The above ruling takes care of Section 4(3)(c)(iii) of the Central Excise Act, 1944 as well and hence, the impugned order cannot be sustained.

7. Following the above ratio decidendi, the impugned order is set aside and the appeals are allowed with consequential benefits, if any, as per law.

(Order pronounced in the open court on 31.08.2021)