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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-29-2010

Judge : The Honourable Mr. M. Veeraiyan, Member (Technical)

Appeal No. : Central Excise Appeal No.731 of 2008-SM

Appellant : Jaypee Ayodhya Grinding Operations

Respondent : C.C.E., Allahabad

Advocate for Pet/Ap. : Shri R.K. Hashija, Advocate for the appellant/applicant.
Shri I. Baig, Authorised Departmental Representative (SDR) for the Revenue.

Judgement :

Per M. Veeraiyan:

Heard both sides.

2. The impugned order upheld the order of the original authority disallowing the credit of Rs.3,59,420/- in respect of spares for cement mill and cement silo which were taken treating said spares as capital goods ordering recovery of equal amount as duty along with interest and imposing penalty of equal amount. The demand related to the period September 2004 to July 2005 and the demand was raised by show cause notice dated 7.8.06.

3. Learned Advocate for the appellants submits that these spares were used in the cement silo and cement mill and the credit is available. He also submits that there were decisions both in favour of the assessee and the Department during the relevant period and therefore, the appellant bona fide believed that they were entitled to cenvat credit as capital goods. They were filing periodical returns indicating the details of credit taken on inputs and capital goods. No information which was required to be furnished to the Department was suppressed. Therefore, the question of invoking the extended period of limitation does not arise. Within the normal period of limitation, the duty demand is only to the tune of Rs.88,400/- as could be seen from the Annexure 'D' to the show cause notice. In all other cases, the demand is time barred. He also submits that for the same reason, no penalty is imposable.

4. Learned SDR strongly supports the order of the Commissioner (Appeals). He also submits that the so-called spares have been used in cement mill and cement silo which are civil structures embedded to earth and therefore, they cannot be considered as capital goods as held by the Larger Bench of the Tribunal in the case of Vandana Global Ltd. reported in 2010 (253) ELT 440. He also submits that during the relevant period, there were differing decisions of the Tribunal and some in favour of the party and some in favour of the Department. It was incumbent upon the assessee to specifically submit that they were availing credit on so-called spares which were being used in civil structures. In the absence of such information, the Department was not in a position to know that they were availing such credit and therefore, the extended period of limitation has been rightly invoked. As regards the penalty, he agrees with the submission of the learned Advocate.

5.1 I have carefully considered the submissions of both sides. On merits of the case, I find that the issue is no more res integra.

5.2 The Larger Bench of the Tribunal in the case of Vandana Global Ltd. considered the following questions:-

(a) Whether the term 'capital goods' can include plant, structures embedded to earth?

(b) Whether the goods like angles, joists, beam, channels, bars, flats which go into fabrication of such structures can be treated as inputs in relation to their final products as inputs for capital goods, or none of the above?

(c) Whether the credit can be allowed in respect of goods like angles, joists, beam, channels, bars, flats which go into fabrication of such structures and plant?

Following are the salient features of the decision of the Larger Bench :-

a) It disapproved the decision of the Tribunal in the case of Bhushan Steel and Strips Ltd. vs. CCE, Raigad [2008 (223) ELT 517 (Tri-Mum)] which allowed credit on cement and steel used for providing foundation of machines, structures, tunnels, trenches, cellars and factory building essential for steel rolling mills and also allowed credit on roofing material;

b) It endorsed the decision of the Tribunal in the case of Vikram Cement vs. CCE, Indore [2009 (242) ELT 548] wherein it has been held that

“If the inputs were to include every product under the sun which is somehow related to the premises where the manufacturing process goes on, then there is no need to provide a definition of the term capital goods and, therefore, the acceptance of the contention on behalf of the appellants would render the definition of the term the capital goods to be redundant as well as the provisions relating to extending the benefit of Cenvat credit to the capital goods.”

c) It reiterated the need for the nexus between inputs and final products in or in relation to process of manufacture as a condition for eligibility to credit as held by the Hon ble Supreme Court in the case of Maruti Suzuki Ltd. vs. CCE [2009 (240) ELT 641 SC].

d) It held that amendment to Explanation 2 to Rule 2(k) of Cenvat Credit Rules, 2004 is a clarificatory amendment and that the same is applicable retrospectively.

e) It was also held that the foundation and supporting structures are neither inputs nor components, spares and accessories of machinery, nor have they been listed for such inclusion in the definition of capital goods.

With the above findings and observations, the question referred to the Larger Bench were answered as follows:

“49. In the light of the foregoing findings, we answer the questions referred to the Larger Bench as follows:-

(a) The terms capital goods has been defined in the Cenvat Credit Rules, which in turn have been framed under the rule making powers conferred under Section 37(2) of the Act. The said Section refers to credit of duty paid on goods used in, or in relation to the manufacture of excisable goods. Hence, capital goods defined in the Cenvat Credit Rules in the context of providing credit of duty paid, have to be excisable goods. Whether a particular plant or structure embedded to earth can be considered as excisable goods or not has to be determined in the light of the decisions of the Hon’ble Supreme Court on the issue, which is no longer res integra.

(b) Goods like cement and steel items used for laying foundation and for building supporting structures cannot be treated either as inputs for capital goods or as inputs in relation to the final products and therefore, no credit of duty paid on the same can be allowed under the Cenvat Credit Rules for the impugned period.”

6. In the present case, the materials in dispute have been used in the cement mill and cement silo. Undisputedly, the cement mill and cement silo are civil structures embedded to earth. To the facts of the present case, the decision of the Larger Bench of the Tribunal in the case of Vandana Global Ltd. cited supra is applicable and therefore, the appellants are not eligible for cenvat credit as held by the authorities below.

7. However, regarding invocation of extended period of limitation, both sides agree that there were decisions of the Tribunal, some in favour of the assessee and others in favour of the Department during the relevant period. Therefore, if the assessee entertained a belief that they were eligible for the benefit of cenvat credit for the impugned items as capital goods, the same can be considered as bona fide belief. Learned SDR was not able to show any provisions under which they were required to furnish certain information which they failed to furnish. Under these

circumstances, the ingredients for invoking the extended period of limitation are clearly absent. In view of the above, the submissions of the learned Advocate regarding time-bar of substantial part of the demand requires to be accepted. Both sides agree that the amount of Rs.88,400/- is within the normal period of limitation. Therefore, the demand to the extent of Rs.88,400/- along with interest as applicable requires to be upheld and the rest of the demand requires to be set aside.

8. Both sides are in agreement that in view of the differing decisions of the Tribunal and the High Courts on this issue prevailing in relevant time, the question of imposition of penalty does not arise.

9. In view of the above, the appeal is disposed of as follows:-

- a) On merit, the appellants are not eligible for the credit in respect of the impugned goods.
- b) The demand to the extent of Rs.88,400/- along with interest is upheld.
- c) The penalty is set aside.

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