

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Zonal Bench, O-20, NMH Compound

Ahmedabad

Central Excise Appeal No.10099 of 2014-SM

Arising out of the order-in-appeal No.SUR-EXCUS-002-APP-186-13-14 dated 30.8.2013 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Surat II.

Kapstone Paper and Packaging Pvt. Ltd .. Appellants

Vs.

C.C.E. & S.Tax, Surat .. Respondent-Revenue

Appearance:

Present Shri Devashish K. Trivedi, Advocate for the appellants

Present Shri J. Nagori A.R. for the Respondent-Revenue

Coram: Honble Dr. D.M. Misra, Member (Judicial)

Date of hearing: 7.2.2017

Date of pronouncement: 21.2.2017

Final Order No.A/10405/2017

Per Dr. D.M. Misra:

This is an appeal filed against the Order-in-Appeal No. SUR-EXCUS-002-APP-186-13-14 dated 30.8.2013 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Surat II.

2. Briefly stated the facts of the case are that the appellants are engaged in the manufacture of excisable goods, namely paper and paperboard falling Chapter Heading 48 of the Central Excise Tariff Act, 1985. They have availed CENVAT credit of Rs.39,50,149/- on capital goods, procured on lease basis from one M/s B.G. India Energy Services Pvt. Ltd under agreement dated 28.2.2006. Alleging that the lessor had availed the benefit of depreciation under Section 32 of the Income Tax Act, 1961, and credit being not admissible to the Appellant, it was proposed to be recovered by issuance of show cause notice on 14.3.2012 with proposal for imposition of penalty. On adjudication, the demand was confirmed with interest and equal amount of penalty. Aggrieved by the said order, the appellant filed appeal before the Id. Commissioner (Appeals), who in turn, rejected their appeal. Hence, the present appeal.

3. The Id. Advocate for the appellants submitted that on a query by the department, on the issue of availability of credit on the capital goods procured on lease basis, the Appellant through their letter dated 30.6.2008 informed that the lessor M/s Gujarat Gas Co. Ltd have availed depreciation under Section 32 of the Income Tax Act, 1961 on the entire value of the capital goods including the amount of central excise duty paid thereof. Further, it was submitted that on a plain reading of the relevant provision, that is, sub-Rule (4) of Rule 4 of CENVAT Credit Rules, 2004, it appears that the depreciation was availed by the lessor of the capital goods and since the lessor is neither a service provider nor manufacturer, hence, there should be no restriction on availing CENVAT credit of duty paid on the capital goods in the hands of the Appellant. He submitted that in view of judgment of the Tribunal in the case of Surendra Industries (I) (P) Ltd. vs. C.C.E., Bangalore -2006 (198) ELT 397 (Tri-Bang.), later upheld by the Honble Karnataka High Court, the CENVAT credit would be admissible to the lessee-Appellant, even though the lessor had availed depreciation on the capital goods under Section 32 of the Income Tax Act, 1961. Further, he has submitted that since all the facts were within the knowledge of the department, being communicated by them through letter 30.06.2008, hence the demand issued on 14.03.2012 for recovery of the credit availed in 2008 is barred by limitation.

4. Per contra, the Id. A.R. for Revenue on the other hand submitted that the judgment cited by the Id. Advocate is not applicable to the facts of the present case inasmuch as in the said case, the CENVAT credit on the capital goods was disallowed for non-production of a certificate issued by the lessor to the lessee. It was not the case that the lessor has availed the depreciation and the lessee was allowed the Credit. It is his contention that in the present case, the lessor M/s Gujarat Gas Co. Ltd. has availed depreciation under Section 32 of the Income Tax Act, 1961, therefore, the appellant-lessee cannot claim the CENVAT credit on the same capital goods. He has submitted that relevant Rule 4(4) of CENVAT

Credit Rules, 2004 is very clear in the sense that CENVAT credit in respect of capital goods shall not be allowed to the extent of the value of capital goods which represents the amount of duty on such capital goods on which depreciation under Section 32 of Income Tax Act was availed. On limitation, learned A.R. for the Revenue submitted that the letter dated 20.6.2008 claimed to be issued by the department, is typed copy of the illegible one, annexed at page 31 of the appeal paper book, and the reply-letter dated 30.6.2008, in response to the department's letter, claimed to be written by the appellant does not bear any acknowledgement of the Department, hence, cannot be relied upon. He has further submitted that in the letter dated 30.6.2008, the appellant had categorically informed to the Department that M/s Gujarat Gas Co. Ltd. had availed depreciation under Sec. 32 of Income Tax Act, 1961 hence, they cannot be asked to reverse the credit on capital goods under Rule 4(4) of CENVAT Credit Rules, 2004. In the statement of Shri Sudarsanan Nair, Authorised Signatory of the appellant recorded subsequently, that is on 19.1.2012, he has taken an altogether different stand that appellants were not sure about the depreciation claimed by the lessor. Therefore, the letter claimed to be addressed to the department on 30.06.2008 is not acceptable.

5. Heard both sides and perused the record. I find that the short issue needs to be answered is whether the appellants are eligible to CENVAT credit on the goods received from M/s B.G. India Energy Services Pvt. Ltd. (known as M/s Gujarat Gas Co. Ltd.) under lease arrangement. It is not in dispute that the said lessor had availed depreciation under Section 32 of Income Tax Act, 1961 on the entire value of the capital goods including the excise duty component on which the Appellant availed CENVAT Credit. Before proceeding to examine the rival contention, it is necessary to refer to the relevant Rule 4(4) of CENVAT Credit Rules, 2004 which reads as under:

“(4) The CENVAT credit in respect of capital goods shall not be allowed in respect of that part of the value of capital goods which represents the amount of duty on such capital goods, which the manufacturer or provider of output service claims as depreciation under section 32 of the Income-tax Act, 1961 (43 of 1961).”

6. On a plain reading of the aforesaid provision it is clear that the credit cannot be admissible on such capital goods on which depreciation has been claimed under Section 32 of the Income Tax Act, 1961. It is the capital goods which is eligible to depreciation and alternatively CENVAT Credit. The appellant had claimed that even if the lessor had availed depreciation, the CENVAT credit cannot be denied on such capital goods in the hands of lessee. The argument is fallacious inasmuch as the credit is allowed on the capital goods and not on qua manufacturer or lessor of the capital goods. The decision cited by the Id. Advocate in the case of Sundara Industries (I) (P) Ltd. (supra) is not applicable to the facts of the present case as in the said case even though the depreciation was not availed by the Financer KSFC, but mere non-supply of relevant certificate, resulted in denial of the credit to the lessee. In contrast, there is specific averment in the present case about availment of depreciation by the lessor M/s B.G. India Energy Services Pvt. Ltd., therefore, the CENVAT credit is not admissible to them.

7. On the issue of limitation , I find that the Appellant had claimed that all facts were communicated to the department way back in 2008 through their letter dt. 30.6.2008, hence recovery of the credit from the appellant is barred by limitation. I do not find any substance in the contention of the Id. Advocate inasmuch as the letter claimed to be written by the Superintendent at page 31 of the appeal paper book is not at all legible, therefore, it is difficult to accept the typed copy of the said letter annexed at page 30. Further, the reply claimed to have been filed by the appellant on 30.06.2008 also does not bear any acknowledgment of the Department. In a subsequent statement dated 19.1.2012 of Shri Sudarsanan Nair, he pleaded ignorance about the fact whether lessor had availed depreciation under Section 32 of Income Tax Act, 1961 or otherwise. The full text of the said statement is not placed before the Tribunal. Inference therefore is drawn that had the statement been produced, the contents thereof would have been adverse to the interest of the appellant. Thus, the appellant has failed to establish that all the facts were communicated to the Department in 2008 and not suppressed. Hence, extended period of limitation has correctly invoked and the demand is not barred by limitation as claimed by the Appellant.

In the result, the appeal fails on both the counts, that is, on merit as well as on limitation. The impugned order is accordingly upheld and their appeal is dismissed.

(Pronounced in the open Court on 21.2. 2017)

(Dr. D.M. Misra)

Member (Judicial)