CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 03

EXCISE Appeal No. 10965 of 2016

[Arising out of OIO-BHR-EXCUS-000-COM-057-15-16 dated 17/02/2016 passed by Commissioner of Central Excise, Customs and Service Tax-Bharuch]

HINDALCO INDUSTRIES LIMITED **.....Appellant**
Unit Birla Copper, Village-lakhigam,
Taluka-vagra,
Bharuch,
Gujarat

VERSUS

C.C.E.-BHARUCH **.....Respondent**
Vadodara-II, GST Bhavan,
Subhanpura,
Vadodara,
Gujarat-390023

APPEARANCE:
Shri Anand Nainawati, Advocate for the Appellant
Shri Tara Prakash, Deputy Commissioner (Authorized Representative) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

FINAL ORDER NO._10457_/2024

DATE OF HEARING: 07.11.2023
DATE OF DECISION: 22.02.2024

RAJU

This appeal has been filed by M/s. Hindalco Industries Limited against denial of Cenvat credit.

2. Ld. Counsel pointed out that this is a second round of litigation and the Appellants are before this Tribunal against the impugned de-novo order passed by the Ld. Commissioner of Central Excise, Bharuch pursuant to the remand by this Tribunal vide Final Order No. A/11658/2014 dated 09.09.2014.

3. In brief, the facts are that the Appellants, M/s Hindalco Industries Limited, Unit - Birla Copper, are inter alia engaged in the manufacture of Copper Cathodes falling under Chapter 74 of the First Schedule to the Central Excise Tariff Act, 1985. The Appellants have set up a green field project in Bharuch for manufacture of multiple products from Copper concentrate. During 2003 to 2005 the Appellants expanded the factory by

installing additional machinery such as smelter, coal handling plant, Sulphuric acid plant etc. Such expanded portion of the factory was referred to as Copper III plant. The Appellants placed work orders on contractors for setting up of the Copper III plant. The Appellants inter alia purchased duty paid H.R. M.S. and S.S. plates for use by the contractor. The H.R. M.S. and S.S. plates were mainly used by the contractor in the fabrication of the following items in the factory of the Appellants:

(i) Chimney

(ii) Ducts

(iii) Machinery

(iv) Pipes

(v) Support structures of capital goods

(vi) Storage tanks

Apart from the above, a small quantity of H.R. M.S. and S.S. plates was also used in fabrication of civil structures within the factory.

3.1 The Appellants during the period 2003 to 2005 consumed a total of 16270.59 MT of H.R. M.S. and S.S. plates for setting up of the Copper III plant. Out of the total quantity of H.R. M.S. and S.S. plates purchased, the Appellants availed Cenvat credit of duty paid on 5003.20 MT of H.R. M.S. and S.S. plates under the bonafide belief that the 5003.20 MT of H.R. M.S. and S.S. plates were used in fabrication of capital goods and thus were used in or in relation to the manufacture of finished goods. The Appellants availed Cenvat credit of Basic Excise Duty of Rs.2,63,25,623/- and Education Cess of Rs.1,20,973/- on the 5003.20 MT of H.R. M.S. and S.S. plates purchased during 2003 to 2005 in the month of March 2006 after the completion of the Copper III plant. During the scrutiny of the ER-1 return filed by the Appellants for the month of March 2006 it was observed by the Department that the Appellants have availed a total Cenvat credit of Rs.2,64,46,596/- on H.R. M.S. and S.S. plates in March 2006 whereas the dates of the duty paying documents described in the input credit account were of the period 2003 to 2005. Accordingly, investigation started and correspondences were exchanged between the department and the Appellants.

3.2 The Appellants were issued with a show cause notice dated 05.04.2007 proposing to deny and recover Cenvat credit availed in March

2006 on HR, MS and SS plates received and utilized during 2003 to 2005 for setting up of Copper III plant. The said notice culminated in to order dated 28.12.2007 by which the Ld. Commissioner confirmed the denial of cenvat credit and also imposed equal penalty on the Appellants. The said order was challenged before this Tribunal vide Appeal No.347/2008 which was disposed off by final order dated 9.9.2014 by observing as under:

> "4. Without dwelling deeper in the merits of the case, we find that various integrated plants was being erected by the appellant in their premises, for that purpose had procured HR/MS/SS plates and fabricated various machineries. We find few of the machineries were capital goods, as also storage tanks and pipes and pipe fittings. The certificate given by the Chartered Engineer indicates some connection/usage of the plate for fabrication of capital goods. In our considered view, the adjudicating authority has not appreciated the evidences and the Chartered Engineer's certificate in its correct perspective. To meet the ends of justice, we find that the matter needs reconsideration by the adjudicating authority, as also there are various case laws which are relied upon by the assessee in its favour, needs consideration by First Appellate Authority."

(Emphasis supplied)

Thus, the matter was remanded with a specific observation that adjudicating authority has not appreciated Chartered Engineers certificate in its correct perspective and therefore matters needs reconsideration.

3.3 Ld Counsel pointed out that In *de-novo* proceedings, Ld. Commissioner in the impugned order has confirmed the demand and imposed equal penalty on the ground that:

(i) Credit has not been availed within a reasonable period of time under Rule 4 of Cenvat Credit Rules, 2002/2004.

(ii) HR/MS Plates etc. have been used in the manufacturing of immovable structure and therefore they are not used for manufacturing 'goods' and same are not capital goods so as to qualify for credit as inputs. In this regard reliance has been placed on Order No. 58/1/2002-CX dated 15.01.2002 issued by the Board from F. No. 154/26/99-CX4.

(iii) That the storage tanks, though not embedded in the earth, are erected at site stage by stage and after completion they cannot be physically moved. On disposal, they have to be necessarily dismantled and sold as metal sheet/scrap. It is not possible to assemble the tank all over again. Such tanks are therefore not moveable and cannot be considered as excisable goods.

(iv) That the Appellants have an integrated complex plant having various facilities. The entire plant erected and commissioned resulted into the construction of an integrated immovable property which cannot be dismantled without substantial damage.

(v) That the then adjudicating authority has correctly not relied upon Chartered Engineer's certificate.

3.4 Ld. Counsel states that all the points are covered by various decision of tribunal. The appellant had relied upon the following decisions. It has been consistent view taken by the courts that credit on Iron & Steel Items used in manufacturing of plant & machineries and accessories thereof cannot be denied:

(i) HIL Limited Vs CCE - 2023 (4)TMI 428-CESTAT Ahmedabad
(ii) Bharat Petroleum Corporation Ltd Vs CCE -2023 (5) TMI 236-CESTAT Bangalore
(iii) Nayara Energy Ltd Vs CCE - 2021 (8) TMI 644-CESTAT Ahmedabad
(iv) Nayara Energy Ltd Vs CCE - 2020 (2) TMI 749-CESTAT Ahmedabad
(v) Nayara Energy Ltd Vs CCE - 2023 (8) TMI 703-CESTAT Ahmedabad
(vi) CCE & ST, Rajkot v. Sanghi Industries Ltd. - 2022 (5) TMI 475 (Tri. Ahm)
(vii) Sanghi Industries Ltd. v. CCE & ST, Kutch - 2017 (10) TMI 330 (Tri. Ahm)
(viii) CCE, Lucknow v. Mankapur Chini Mills - 2019 (367) ELT 889 (All.)
(ix) Mundra Ports & Special Economic Zone Ltd. v. Commissioner - 2015 (39) STR 726 (Guj.)
(x) India Cements Ltd. v. CESTAT Chennai - 2015 (321) ELT 209 (Mad.)
(xi) Manglam Cement Ltd. v. CCE, Jaipur-1 - 2018 (360) ELT 737 (Tri. LB)
(xii) CCE, Raipur v. Hira Ferro Alloys Ltd. - 2016 (342) ELT 434 (Tri. Del.)
(xiii) CCE, Raipur v. Topworth Steels (P) Ltd. - 2018 (15) GSTL 383 (Tri. Del.)
(xiv) Vodafone Mobile Services Ltd. v. CCE & ST, Delhi - 2019 (27) GSTL 481 (Del.)
(xv) Bharti Hexacom Ltd. v. CCE, Jaipur-1 - 2021 (52) GSTL 62 (Tri. Del.)
(xvi) Thiru Arooran Sugars v. CESTAT Chennai - 2017 (355) ELT

373 (Mad.)

(xvii) Birla Corporation Ltd. v. CCE - 2005 (186) ELT 266 (SC)

(xviii) Vandana Global Limited Vs Commissioner, Central Excise and Customs, Central Excise - 2018 (16) GSTL 462 (Chhat.)

(xix) Commissioner of CGST & Central Excise Lucknow Vs DSCL, Sugar, Rupapur District Harodi, U. - 2019 (367) ELT 836 (All.)

(xx) Tamilnadu Newsprint & Papers Ltd. Vs Commissioner of Central Excise - 2021 (3) TMI 179 (Mad.)

(xxi) The Commissioner of Central Excise Vs Madras Cements Ltd. 2019 (367) ELT 817 (Mad,)

(xxii) Dalmia Cements (Bharat) Ltd. Vs CESTAT, Chennai - 2016 (341) E.L.T. 102 (Mad.)

(xxiii) Commr. Of C.Ex., Visakhapatnam-II Vs Sai Sahmita Storages (P) Ltd. 2011 (270) E.L.T. 33 (A.P)

(xxiv) SLR Steel Ltd. Vs Commissioner of C.Ex., Banglore-II 2010 (249) E.L.T. 394 (Tri-Bang.)

(xxv) Commissioner of Central Excise, Banglore-II Vs SLR Steel Ltd. 2012 (280) E.L.T. 176 (Kar.)

(xxvi) HNG Float Glass Ltd. v. CCE, Vadodara 2022 (12) TMI 132 CESTAT Ahmedabad

(xxvii) SKF Technologies (1) Pvt. Ltd. v. CCE, Ahmedabad - 2018 (3) TMI 99- CESTAT Ahmedabad

(xxviii) Ultratech Cement Ltd Vs CCE - 2023 (8) TMI 184-CESTAT Ahmedabad

4. The Ld. Commissioner in the impugned order observes that the steel plates were used in the fabrication of immovable items which cannot be called "capital goods" and thus the same cannot be treated as "inputs" in terms of Explanation 2 to Rule 2(k) of the Cenvat Credit Rules, 2004. The Appellants submit that notwithstanding the aforesaid finding, the steel items under dispute are in any case, eligible for Cenvat credit as "inputs" under sub-clause (1) of Rule 2(k) of the Cenvat Credit Rules, 2004, as the same were used in or in relation to the manufacture of the finished products.

5. He further argued that the notice has been issued beyond the normal period of limitation.

6. Ld. AR relies on impugned order.

7. We have considered the rival submissions and deal with it issue wise in following paras.

7.1 Ld. Counsel has argued that despite there being a specific observation by the Tribunal in its order dated 09.09.2014 that the adjudicating authority has failed to consider Chartered Engineers certificate in its true perspective and therefore the same needs reconsideration. The Commissioner in the impugned order erred in defying the direction of this Tribunal without making any independent observations on the certificate. He pointed out that Ld. Commissioner in Para 13 of the impugned order holds that the then adjudicating authority has described in detail the Chartered Engineer's certificate in his order and that he agrees with the findings of the then adjudicating authority regarding the Chartered Engineer's certificate. He argued that such a finding in the impugned order vitiates the proceedings as it negates the very purpose of remanding the matter by Tribunal. We find that the certificate has been summarily rejected without any grounds. The grounds mentioned in the earliest OIO were already found inadequate by the tribunal in order dated 09.09.2014. Thus, we do not find any merit in such rejection of certificate.

7.2 Ld. Counsel has argued that as per Annexure to the show cause notice dated 05.04.2007, the use of H.R. M.S. & S.S. plates on which Cenvat credit of Rs.2,64,46,596/- is availed, can be broadly classified as follows:

Used for	**Sum of Basic Excise Duty**	**Sum of Cess**
Fabrication of chimney	Rs.3,85,034/-	NIL
Civil structures	Rs. 13,304/-	NIL
Fabrication of ducts	Rs.25,85,259/-	Rs.43,991/-
Fabrication of machinery	Rs.65,32,284/-	Rs.7,531/-
Fabrication of pipes	Rs.2,42,211/-	Rs.1,041/-
Fabrication of support structures for capital goods	Rs.97,03,041/-	Rs.55,976/-
Fabrication of tanks	Rs.68,64,489/-	Rs.12,434/-
Grand Total	**Rs.2,63,25,622/-**	**Rs.1,20,973/-**

This has not been disputed by revenue.

7.3 The definition of the term "inputs" as defined under Rule 2(k) of the Cenvat Credit Rules, 2004 during the relevant period is extracted below:

> *"(k) "input" means -*
>
> *(i) all goods except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to the manufacture of final products or for any other purpose, within the factory of production:*

(ii) all goods except light diesel oil, high speed diesel oil, motor spirit commonly known as petrol and motor vehicles, used for providing any output service;
Explanation 1-The light diesel oil, high speed diesel oil, motor spirit commonly known as petrol, shall not be treated as an input for any purpose whatsoever.
Explanation 2 - Input includes goods used in the manufacture of capital goods which are further used in the factory of the manufacturer:"

(Emphasis supplied)

Thus, the definition of inputs covers all the goods used in or in relation to the manufacture of the final product, whether directly or indirectly and also includes goods used in the manufacture of capital goods which are further used in the factory.

7.4 The term "Capital goods" have been defined under Rule 2(a) of the Cenvat Credit Rules, 2004 during the relevant period as follows:

"**Rule 2**. Definitions. In these rules, unless the context otherwise requires. -

(a) "capital goods" means:-

(A) The following goods, namely:-

(i) All goods under Chapter 82, Chapter 84. Chapter 85, Chapter 90, heading No. 68.02 and sub-heading No. 6801.10 of the First Schedule to the Excise Tariff Act;

(ii) Pollution control equipment;

(iii) Components, spares and accessories of the goods specified at (i) and (ii);

(iv) Moulds and dies, jigs and fixtures;

(v) Refractories and refractory materials;

(vi) Tubes and pipes and fittings thereof, and

(vii) Storage tank

Used-

(1) In the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or

(2) For providing output service;

(B) Motor vehicle registered in the name of provider of output service for

providing taxable service as specified in sub-clauses (f). (n). (0), (zr).

(zzp). (zzt) and (zzw) of clause (105) of section 65 of the Finance Act;"

(Emphasis supplied)

7.5 He further argued that in the present case the H.R. M.S. and S.S. plates have been used in the fabrication of items like storage tanks, chimneys etc. that are capital goods in terms of Rule 2(a) of the Cenvat Credit Rules, 2004. Thus, in view of Explanation 2 to Rule 2(k) of the Cenvat Credit Rules, 2004 the HR, MS and SS plates are inputs used in the manufacture of capital goods eligible for Cenvat credit.

7.6 We find that the reasoning of the Ld. Commissioner to deny credit on H.R. M.S. & S.S. plates is that the plant and machinery is immovable is perverse. Goods becoming immovable property is irrelevant for capital goods specifically covered under Rule 2(a) of the Cenvat Credit Rules, 2004. The Appellants had used HR, MS & SS plates used in the fabrication of plant and machinery like coal handling plant etc. The impugned order has disallowed such Cenvat credit on the ground that the plant and machinery so fabricated, are immovable and fixed to earth and cannot be called "capital goods". The Id. Commissioner observes that since the fabrication of such immovable plant and machinery cannot be called manufacture of capital goods, and therefore Cenvat credit availed on items used in such fabrication cannot be called "inputs". The Appellants submit that immovability is not a criteria relevant for determining whether Cenvat credit on goods used for manufacture of such plant and machinery is to be allowed or not.

7.7 We find that there is no restriction in Rule 2(k) of Cenvat Credit Rules, 2004, for the availment of the Cenvat credit of the duty paid on goods used for manufacture of capital goods. All that the said rule requires is whether such capital goods are used for manufacture of excisable goods in the factory. Once this requirement is satisfied, the fact that such capital goods came into existence as an immovable property is irrelevant or immaterial to avail Cenvat Credit.

7.8 We agree with the contention of Ld Counsel that Reliance placed by the Ld. Commissioner on the Board Circular dated 15.01.2022 is misplaced. The said circular merely identifies facets of manufacture of goods and duty liability under central excise act. The purpose of the said circular is only to clarify whether immovable structure is 'goods' for the purpose of levy of excise duty. There is nothing in the circular which even remotely suggest that reasoning therein has to be applied to decide the eligibility of credit on capital goods which is governed only by the provisions of Cenvat Credit

Rules. This view is also supported by the decision of the Tribunal in the case of Bharat Petroleum Corporation Ltd. Vs. CCE- 2023 (5) TMI 236 (T)

7.9 The appellant have argued that storage tanks are specified capital goods under sub-clause (vii) of clause (A) of the definition of "capital goods" under Rule 2(a) of the Cenvat Credit Rules, 2004. These storage tank are fabricated out of the HR, MS & SS plates. The Tribunal in the case of SLR Steels Ltd. v. CCE 2010 (249) E.L.T. 394 (Tri. - Bang.) rejected the contention of the department that credit can be rejected on cement and steel used for fabricating storage tank on the ground that storage tanks are immovable properties and are not capable of being bought and sold in the market. The said order was challenged by the department before the Hon'ble High Court of Karnataka by way of filing a Tax Appeal No. CEA 17/2010. Hon'ble High Court vide order dated 10.03.2011 reported at 2012 (280) ELT 176 (Kar.) dismissed the Tax Appeal filed by the department and held as under:

> "....Therefore, there is no ambiguity in any of these provisions. When once storage tank and pollution control equipment constitutes capital goods and any raw material purchased for construction of those goods, the duty paid could be utilized as a Cenvat credit by the assessee notwithstanding the fact that the storage tank is an immovable property. Therefore, the appellate authority committed a serious error firstly in holding that the storage tank is an immovable property and secondly on the ground that it cannot be bought and sold in the market, the criteria which is totally unwarranted under the circumstances...."

(Emphasis Supplied)

The aforesaid decision of the Hon'ble Karnataka High Court, allowing Cenvat credit for items used in the fabrication of immovable storage tank was followed by the Hon'ble Tribunal in the case of **Metrochem Industries Ltd. v. CCE, Vadodara-1-2013 (292) ELT 578 (Tri. Ahmd.) and Grasim Industries Limited v. CCE, Jaipur - II-2015 (315) ELT 426 (Tri. Del).** The same is squarely applicable to the Appellant's case. Thus, credit on this ground cannot be denied.

7.10 The Appellants have used MS and SS plates used in the fabrication of chimneys. Chimneys are pollution control equipment and are thus specified capital goods under sub-clause (ii) of clause (A) of the definition of "capital goods" under Rule 2(a) of the Cenvat Credit Rules, 2004. The Hon'ble Supreme Court in **CCE, Jaipur v. Rajasthan Spinning & Weaving Mills Limited-2010 (255) ELT 481 (SC)** has examined the issue of eligibility of Cenvat credit availed on MS plates items used in the fabrication of chimneys. The Hon'ble Supreme Court has held that, once it is not under dispute that the impugned items are used in the fabrication of chimneys, Cenvat credit availed on the same cannot be denied. Thus, ground in impugned order is also rejected.

7.11 The Appellants have availed Cenvat credit on HR, MS and SS plates used in the fabrication of pipes. Pipes are specified capital goods under sub-clause (vi) of clause (A) of the definition of "capital goods" under Rule 2(a) of the Cenvat Credit Rules, 2004.Thus, the HR, MS and SS plates items used in the fabrication of specified capital goods, i.e. pipes are eligible for Cenvat credit as inputs in terms of Explanation 2 to Rule 2(k) of the Cenvat Credit Rules, 2004, i.e. goods used in the manufacture of capital goods which are further used in the factory of the manufacturer. The Appellants have used H.R. M.S. & S.S. in the fabrication of ducts. Cenvat credit is eligible on items used in the fabrication of ducts used in the plant and machinery installed in the factory. The Hon'ble High Court of Chattisgarh in Union of India v. Associated Cement Company Limited - 2011 (267) ELT 55 (Chattisgarh) held that the Cenvat credit of M.S. items used in the ducting of kilns in the factory is eligible in view of the decision of the Hon'ble Supreme Court in Rajasthan Spinning & Weaving Mills cited supra.

7.12 Cenvat credit has been denied on iron and steel items used in the fabrication of supporting structures for capital goods is eligible. The Appellants have availed Cenvat credit on H.R. M.S. & S.S. plates used in the fabrication of supporting structures of capital goods. There are cetena of decision wherein it has been held that the credit of steel used to support capital goods is eligible for credit.

7.13 The impugned order seeks to deny credit on account of an inordinate delay in availing Cenvat credit in violation of Rule 4(1) of the Cenvat Credit Rules, 2002 and/or 2004. There is no specific time limit prescribed for availment of Cenvat credit on inputs under Rule 4(1) of the Cenvat Credit Rules. The sub-rule which prescribes that "CENVAT credit in respect of inputs may be taken immediately" in Rule 4(1) makes it clear that the said provision is an enabling provision and enables the assessee to avail Cenvat credit immediately on receipt of the inputs. The following decisions do not support the impugned order. In the following decisions it has been consistently held that there is no time limit to avail credit :-

(a) CCE Vs Pierlita India Ltd - 2011 (273) ELT 535 (T)
(b) Central Bank of India Ltd Vs CST - 2023 (32) STR 525 (T)
(c) CCE Vs Raghuvar India Ltd - 2000 (118) ELT 311 (SC)
(d) Essel Propack Ltd Vs CCE - 2022 (379) ETL 123 (T)
(e) CCE Vs Lubi Electronics - 2009 (245) ELT 551 (T)
(f) Steel Authority of India Ltd - 2013 (287) ELT 321 (T)
(G) Vijay Kumar Srivastaw Vs. CCE - 2021 (4) TMI 804-CESTAT Ahmedabad

8. In view of above we do not find any merit in the impugned order. The same is set aside and the appeal is allowed.

(Pronounced in the open court on 22.02.2024)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

Dharmi