CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
AHMEDABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.10547 of 2018

(Arising out of Order-in-Original No.KCH/EXCUS/000/COM/30 to 32/2017-18 dated 09/11/2017 passed by Commissioner of CGST, Ahmedabad)

M/s Philips Carbon Black Ltd., ...Appellant
(Vadala, Taluka Mundra, Kutch-370201)

VERSUS

Commissioner of Central Excise, Kutch ....Respondent

(Central Excise Bhavan,
Plot No.82, Dector-8,
Opposite Ramlila Maidan, Gandhidham, Gujarat)

APPEARANCE:

Shri J C Patel, Advocate for the Appellant
Shri Rajesh K Agarwal, Superintendent, Authorised Representative for the Respondent

CORAM:
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE Dr. AJAYA KRISHNA VISHVESHA, MEMBER (JUDICIAL)

FINAL ORDER NO. 10406/2026

DATE OF HEARING : 12 March, 2026
DATE OF DECISION : 12 March, 2026

SANJIV SRIVASTAVA:

This appeal is directed against order in original No: KCH/EXCUS/000/COM/30-32/2017-18 DATED 19.11.2017 OF THE Commissioner CGST, Audit Commissionerate Ahmedabad. By the impugned order following has been held:

"Order

(i) I disallow the cenvat credit, as detailed under, in terms of the provisions of Rule 14 of the Cenvat Credit Rules 2004 read with Section 11A(4) of the Central Excise Act, 1944 and order recovery of the same:

S. No.	*SCN number & date*	*Amount of confirmed duty*
1	*V.28/15-104/Adj/15-16 dated 20.6.2015*	*Rs. 2,75,39,946/-*
2	*IV/16-5/DSCN/PCBL/2015 dated 11.2.2016*	*Rs. 4,98,508/-*
3	*IV/16-26/PCBL/2015-16 dated 2.3.2016*	*Rs. 2,43,531/-*

(ii) Interest at the appropriate rate should be charged and reccvered on the above demand in terms of the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 1 1AB of the Central Excise Act. 1944

(iii) I impose penalty under Rule 15/(2 of the Cenvat Credit Rules read with Section 11AC(1) (c) of the Central as under in respect of the following show cause notice:

S. No.	*SCN number & date*	*Amount of Penalty*
1	*V.28/15-104/Adj/15-16 dated 20.6.2015*	*Rs. 2,75,39,946/-*
2	*IV/16-5/DSCN/PCBL/2015 dated 11.2.2016*	*Rs. 4,98,508/-*
3.	*IV/16-26/PCBL/2015-16 dated 2.3.2016*	*Rs. 2,43,531/-*

However, in terms of the provisions of Section 11AC of the Central Excise Act, 1944, the penalty shall be reduced to 25% of the penalty imposed if the confirmed demand along with interest and reduced penalty are paid within 30 days from the date of communication of the order

The SCNs as above are disposed in light of the above order."

2.1 Appellant is engaged in manufacture of excisable goods viz. Carbon Black. They are also availing CENVAT credit facility under the CENVAT Credit Rules, 2004. They are producing Carbon Black from Imported/ indigenous CBFS. Tail end gases are produced as by products which are further used in boiler to produce steam which ultimately used to produce electricity

2.2 Appellant was given permission by Gujarat Pollution Control Board, Gandhinagar to produce 80000MT of Carbon Black per annum and 16 MW of Electricity by installing captive power plant. Prior to that, permission dated 19.08.2008 was giver by

Ministry of Environment and forests Government of India, New Delhi in which it was clearly mentioned that total requirement of electricity for carbon black plant would be 6MW generated from off gases and 10 MW of Power will be supplied to Gujarat Electricity Board Grid. Further in October 2011. Subsequently, the said unit was granted additional permission for 140 TPD of Carbon Black and 6 MW of co-generation power

2.3 During the course of Audit, it was observed that the appellant had wrongly availed the CENVAT Credit totally amounting to Rs. 2,75,36,946/- for capital goods as well as CENVAT availed on Input services during the period June-10 to January- 2015 by contravention the provision of Rule 6(4) of Cenvat Credit Rules, 2004.

2.4 Shri Girish Singh, Vice President, of Appellant, under his submission dated 17.07.2012 submitted that

- their additional requirement of power has been as follows, after completing the second production line of 140 TPD of Carbon Black and its co-generation power plant:
  1. Carbon Black plant 1.0 MW
  2. Captive Power Plant 0.7 MW
- The total additional requirement on installation of second line of production for carbon black and captive power plant would be 1.7 MW and hence total power requirement of entire plant would be 7.7 MW (6MW -+ 1.7MW).
- to prevent the atmosphere from getting polluted, harmful gases were required to be used in captive power and by imposing such stipulation Gujarat Pollution Control Board comes into picture.

2.5 The facts as above make it amply clear that the said unit was required to produce electricity to prevent atmosphere from getting polluted and their total requirement of power was 7.7 MW for entire plant which includes second production line and its co-generation power plant also

2.6 As per Rule-3 of Electricity Rules, 2005, no power plant shall qualify as "Captive Generations Plant" under Section 9 read with clause (8) of Section 2 of the Act unless:

(a) In case of a power plant-

(i) Not less than twenty six percent of the ownership is held by the captive user(s) and

(ii) Not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis is consumed for the captive use

As per a (i) above, any power plant could be termed as captive power plant only if fifty one percent of power generated from it was used for captive use. Meaning of captive use' was utilization of electricity of manufacture of within the factory of production. Whereas, the noticee had sold electricity which was more than 50 percent of their production.

2.7 Electricity is chargeable to NIL rate of duty or exempted from payment of Central Excise duty and Provision of Rule 6(4) of Cenvat Credit Rules, 2004 were attracted in this situation as electricity was exempted goods and purpose of manufacturing was selling and fulfilling the obligation by supplying electricity-to others.

2.8 Thus, it was alleged that Appellant already having power plant for 16 MW and their requirement of power for the old plant was 6 MW, now with new production line, the total requirement of power put to gather would be 7.7 MW. This electricity supply could easily be taken from earlier installed 16 MW power plant. Thus, the electricity so generated from new plant had no nexus with the goods manufactured in the unit. Hence, the Cenvat credit availed by them on such captive power plant was not admissible to them in terms of Rule 6(4) of the Cenvat Credit Rules, 2004, as the same was used for manufacture of electricity which was and exempted product and the entire quantity being sold out no portion thereof was used captively for their manufacturing activities.

2.9 Show cause Notice dated 20.06.2015 was issued to the appellant asking them to show cause as to why:

(i) *The CENVAT Credit amounting to Rs 2,75,39,946/- (Rs. Two Crore Seventy Five Lacs Thirty Nine Thousand Nine Hundred and Forty Six only) i.e. Rs 2.06,28,911/- availed for Capital goods and Cenvat Credit amounting to Rs 69,14,035/- availed for input services during the month of June-10 to January 2015 should not be disallowed and recovered from them under Rule 14 of the CENVAT Credit Rules, 2004 read with proviso to Section 11A(1)/ 11A(4) of Central Excise Act, 1944.*

(ii) *Interest at appropriate rate should not be recovered form them on the aforesaid amount under Rule 14 of the CENVAT Credit Rules, 2004 read with proviso to Section 11AB/ 11AA of Central Excise Act, 1944.*

(iii) *Penalty should not be imposed upon them under Rule 15 (2) of the CENVAT Credit Rules, 2004 read with proviso to Section 11A(1)/ 11A(4) of Central Excise Act, 1944.*

2.10 Consequent to the above the statement of demands detailed in table below were issued to the appellant:

S. No.	SCN number & date	Amount of duty demanded
1	IV/16-5/DSCN/PCBL/2015 dated 11.2.2016	Rs. 4,98,506/-
2	IV/16-26/PCBU2015-16 dated 2.3.2016	Rs. 2,43,531/-

2.11 The show cause notices and the statement of demands have been adjudicated as per the impugned order referred in para 1 above.

2.12 Aggrieved appellant has filed this appeal.

3.1 We have heard Shri J C Patel Advocate for the appellant and Shri R K Agarwal, Authorized Representative for the revenue.

3.2 Arguing of for the appellant learned counsel submits:

- Electricity is not exempt within the meaning of Rule 6 read with Rule 2 (d) and therefore bar of Rule 6(1), (2) and (4) is not attracted. Reliance is placed on the following decisions:

- Gularia Chinni Mills [2014 (34) STR 175 (ALL)]
- Himadari Speciality Chemical P. Ltd. [2022 (7) TMI 1177 (Cal)]
- Rajasthan Renewable Energy [2023 (4) TMI 440]
- Nanglamal Sugar Complex [2022 (8) TMI 1151]
- Shree Renuka Sugars Ltd. [2022 (2) TMI 1543]
- Harinagar Sugar Mills [2020 (11) TMI 663]

➢ there was no violation of Rule 6(4) of the CCR, 2004 in as much as it was not the case of the department that 100% of the electricity generated by the second power plant was supplied outside the factory and no part of such electricity was used in the manufacture of Carbon Black. Thus, it could not be said that the capital goods were exclusively used in the manufacture of exempted goods. reliance placed on the following

- HEG Ltd. [2012 (275) ELT 316]
- JSW Steel Coated Products Ltd. [2016 (43) STR 280]
- Philips Carbon Black Ltd. [2016 (342) ELT 116]
- Finolex Industries Ltd. [2022 (6) TMI 3 CESTAT Mumbai]

➢ Power Plant qualified as 'Capital Goods' in terms of the provisions of Rule 2(a) of the Cenvat Credit Rules, 2004. That the capital goods had been received in their factory and all the conditions as per Cenvat Credit Rules had been satisfied and as such credit could not be denied.

➢ the second power plant was set up to meet the requirements of the Pollution Control Board regulations and as such the same was an integral part of the manufacturing activity. Thus, it could not be said that the power plant had no nexus to the manufacture of the final products.

- Indian Oil Corporation Ltd. [2013 (297) ELT 394].

- meeting the requirements of the Pollution Control regulations in the course of manufacture of final products is an integral part of the manufacturing activity:
    - Khedut Sahakari Khand Udyog Mandli Ltd. [2012 (279) ELT 40]
    - ABI Showtech India Ltd. [2016 (41) STR 912]
    - JBM Auto System P Ltd. [2012 (27) STR 170]
- definition of 'capital goods' also included Pollution Control Equipment and as such they were eligible for cenvat credit.
- Rule 6(4) had no application to input services and apart from the same no reasons had been given in the notice for denial of credit on input services.

3.3 Authorized Representative reiterated the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Impugned order records the findings as follows:

"14. The dual aspect that needs to be looked into is whether:

a) The credit on second power plant is admissible as capital goods or otherwise; and

b) The credit of input services used in relation to the power plant is admissible or otherwise.

I would first examine the issue regarding admissibility of cenvat credit on the second power plant.

15. It has been alleged in the show cause notice that the second power plant was exclusively used in the manufacture of exclusively exempted goods viz. electricity anc as such the credit would not be admissible in terms of the provisions of Rule 6(4) of the Cenvat Credit Rules, 2004. It is the contention of the assessee that the electricity generated out of the second power plant 'is partially used for their manufacturing activities. Thus, I find that the bone of contention is the usage of the second *power plant whether used exclusively in manufacture of exempted goods or otherwise.*

15.1 For the purpose of ascertaining the same, it would be appropriate to mention the genesis of the activities undertaken by the assessee. The assessee had commenced production activities by obtaining permission dated 19.8.2008 from the Ministry of Environment and forests Government of India, New Delhi for production of.80000MT Carbon Black per annum. The permission also stipulated that the off gases were to be treated and used for generation of 16 MW of Electricity by installing captive power plant of which 6MW would be used for manufacturing activities and the balance 10 MW of Power would be supplied to Gujarat Electricity Board Grid. Subsequently, in October 2011 the assessee was granted additional permission for manufacture of 140 TPD of Carbon Black wherein another power plant of 6 MW was required as per the norms of Pollution Control Board. The power required for production of such additional 140 TPD of Carbon Black was 1.7 MW as per the submission dated 17.7.12 of Shri Girish Singh Vice President of the assessee.

15.2 In view of the above, it is seen that the total power requirement for manufacturing Carbon Black by the assessee was 7.7 MW i.e. 6 MW for capacity of 80000MT and 1.7 MW for further 140 TPD. Against the said requirement of 7.7 MW, the assessee was already in possession of power plant wherein 16 MW of electricity was generated which was sufficient to take care of the entire manufacture of the Carbon Black by the assessee even after the enhanced capacity. Rather, even after using the said power of 7.7 MW, 8.3 MW of electricity generated out of the first power plant would remain surplus. It is very much on record that such surplus electricity is sold through brokers as submitted by Shri Girish Singh in his interview dated 17.7.2012 at point number 9. In view of the said *facts, it needs no rocket science to appreciate that the entire electricity generated by the second power plant is surplus and sold through brokers. Thus, the role of the second power plant is restricted to mere generation of electricity which would have to be sold.*

15.3 It is an undisputed fact that no duties of central excise are leviable on electricity and neither does the assessee dispute the said fact. The fact that electricity is excisable goods is forthcoming from Chapter Sub-Head No. 27160000 appearing in the first schedule to the Central Excise Tariff Act, 1985 wherein 'Electricity has been listed. Further, central excise duty is leviable on all manufactured excisable goods in terms of the provisions of Sec. 3 of the Central Excise Act, 1944 unless the same have been exempted or attract Nil/ No rate of duty in the Tariff. In the instant case central excise duty is not discharged on Electricity in as much as the same attracts No Rate in the first schedule to the Central Excise Tariff Act, 1985. In other words electricity is exempted goods and therefore no central excise duty is discharged on clearance of the same.

15.4 The term 'exempted goods' has been defined at Rule 2(d) of the Cenvat Credit Rules, 2004 which reads as under

"exempted goods means excisable goods which are exempt from the whole of the duty of excise leviable thereon, and includes goods which are chargeable to "Nil" rate of duty and goods in respect of which the benefit of an exemption under Notification No. 1/2011-C.E., dated the 1st March, 2011 or under entries at serial numbers 67 and 128 of Notification No. 12/2012-C.E., dated the 17th March 2012 is availed"

In the instant case electricity attracts no rate of duty i.e. Nil and as such the same is exempted. Further Explanation 1 to Rule 6(1) of the Cenvat Credit Rules, 2004 stipulates that exempted goods include non-excisable goods. Thus, *there is no room for doubt that electricity is exempted goods.*

15.5 Conjoint reading of the discussions at para 15.3 and 15.4 above lead to the inescapable conclusion that the second power plant has been used exclusively in the manufacture of exempted goods. Thus, the provisions of Rule 6(4) of the Cenvat Credi Rules, 2004 come into play which reads as under.

"No CENVAT credit shall be allowed on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duly of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearances made in a financial year."

16. The assessee have further contended that it is not the case of the department that that 100% of the electricity generated by the second power plant was supplied outside the factory and no part of such electricity was used in the manufacture of Carbon Black. The said submissions are totally mis-conceived and out of context because the very crux of the show cause notice is that the power generated out of the first power plant is sufficient to meet the requirements of the entire production of the plant and as such the power generated by the second power plant is entirely surplus and available for sale through brokers. The assessee have also placed reliance on the case laws of M/s HEG Ltd. reported at 2012 (275) ELT 316 and M/s JSW Steel Coated Products Ltd. reported at 2016 (43) STR 280. Perusal of both the said case laws indicates that the issue under contention in both the cases was partial use of the power generated by the Captive Power Plant for manufacturing activities and partial sale of power so generated. The facts of the case before me are on an entirely different footing since the entire electricity *generated by the second power plant is surplus and not required for manufacturing activities. As elaborately discussed above, the power generated by the second power plant is not partially used for manufacturing activity and partially sold. Thus, the facts of the case laws cited by the assessee are not similar and as such the ratio of the same cannot be made applicable to the facts before me.*

17. It has been further argued by the assessee that the Power Plant qualifies as 'capital goods' and all the conditions in the Cenvat Credit Rules, 2004 such as receipt of the same, use in their factory, etc. have been met with and as such credit would be admissible. They have place reliance on various case laws as listed at para 11.2 above in support of their claim. However, the dispute in the instant case is not whether the Power Plant qualifies as 'capital goods' or otherwise. Neither is the dispute concerning receipt of the goods and usage thereof. The contention of the department is to the short point that the said capital goods have been exclusively used in the manufacture of exempted goods and as such the credit is not admissible in view of the provisions of Rule 6(4) of the Cenvat Credit Rules, 2004. Thus, the said arguments and reliance on the case laws is totally out of context in light of the facts of the case under consideration.

18. The assessee has contended that the Power Plant was mandatory in terms of the regulations of the Pollution Board and as such would be an integral part of the manufacturing activity. They have placed reliance on the case law of M/s Indian Oil Corporation reported at 2013 (297) ELT 394 of which the relevant portion is reproduced under:

In the above case IOC are manufacturing HSD among other products, which in terms of ISl specifications could not contain sulphur above a limit specified in the ISI specifications. Since the Crude Oil used, sometimes, has *high sulphur content, this results in the sulphur content of the HSD manufactured out of such crude oil having sulphur beyond the permissible limit. For removal of sulphur so as to bring the sulphur content within the acceptable limit, the HSD is processed in the Diesel Hydrogen De-sulphurisation unit, which results in the production of hydrogen sulphide gas. Also a Standby Sulphur Recovery Unit (SRU) is installed to extract sulphur from hydrogen sulphide. The tribunal held that though sulphur emerging as an inevitable and unavoidable by-product being nil tariff rate item is an exempted final product, it cannot be said that the SRU and SSRU have been used for manufacture of sulphur, as looking to the use of the SRU and SSRU which have to be installed in terms of the directions of the Pollution Control Authorities, use is more in the nature of Pollution Control Equipment. In fact Diesel Hydrogen De-sulphurisation (DHDS) plant together with SRU and SSRU has to be treated as capital goods used for manufacture of marketable HSD and not the capital goods used for manufacture of Sulphur.*

The above indicates that the dispute was regarding generation of Sulphur which is a by-product and the matter of exemption was in relation to such by-product. However, in the case of hand electricity generated by the captive power plants is not a by-produce emerging out of the process of manufacturing Carbon Black by the assessee, In fact the generation of electricity is a separate process being undertaken in the Power Plant and as such the same can in by stretch of imagination be considered as by-product. Thus, the ratio of the said case law would not be applicable to the facts of the present case.

19. The assessee have further relied on their own case vide Order Nos. A/10915-10918/2016-WZB/AHD, dated 15-9-2016 of the Tribunal. However, the said case pertained to a period prior to 2011 when only one power *plant was installed in the factory of the assessee. In the said circumstances part of the power was used in manufacture of Carbon Black and part of the power was sold. However, post-2011 the scenario changed with the installation of the second power plant. Further in the instant case, as amply discussed hereinabove, the electricity generated by the second power plant installed after October, 2011 was not consumed in the manufacturing process by the assessee, at all. Therefore the factual matrix of Order Nos. A/10915-10918/2016 WZB/AHD is on a different footing and as such the analogy of the same cannot be made applicable to the present case.*

20. Now coming to the second issue regarding admissibility of credit on input services used in relation to the second power plant. The assessee have argued that Rule 6(4) of the Cenvat Credit Rules, 2004 has no application to input services and no other reason has been given in the notice for denial of such credit. In this regard I find that the show cause notice clearly spells out that the electricity generated in the second power plant has no nexus with the manufacture of final products viz. Carbon Black Having said so, it is obvious that the services used for installation of such power plant are not in or in relation to the manufacture of the finished product, In this backdrop, the proposal to deny the cenvat credit on such services has been clearly made in the show cause notice. In fact, the proposal for denial of Cenvat Credit on input service was invoked in the body & the operative position of the Show Cause Notice.

20.1 Such credit is not admissible since the goods manufactured out of the power plant were electricity which are exempted as discussed above. Thus, the credit is not admissible in terms of the provisions of Rule 6(1) of the Cenvat Credit Rules. 2004. In the instant case the power *exercised by the adjudicating authority is available under the provision of Rule 6(1) of the Cenvat Credit Rules, 2004 and mere wrong mention of the provisions would not vitiate the show cause notice. This has been expressly observed by the Supreme Court in the case of M/s Pradyumna Steel Ltd. reported at 1996 (82 ELT 441 (SC) and the relevant text of the same is reproduced under:*

"It is settled that mere mention of a wrong provision of law when the power exercised is available even though under a different provision, is by itself not sufficient to invalidate the exercise of that power."

20.2 The Supreme Court has made a similar observation in the case of M/s J K Steel Ltd. reported at 1978 (2) ELT J355 (SC) and the relevant text of the same is reproduced under:

"There is no dispute that the officer who made the demand was competent to make demands both under Rule 9(2) as well as under Rule 10. If the exercise of a power can be traced to a legitimate source, the fact that the same was purported to have been exercised under a different power does not vitiate the exercise of the power in question. This is a well-settled proposition of law. In this connection reference may usefully be made to the decisions of this Court in P. Balakotaiah v, The Union of India, 1958 SCR 1052 = (AIR 1958 SC 232) and Afzal Ulah v. State of U.P., 1964-4 SCR 991 = (AIR 1964 SC 264). Further a common form is prescribed for issuing notices both under Rule.9(2) and Rule 10. The incorrect statements in the written demand could not have prejudiced the assessee. From his reply to the demand, it is clear that he knew as to the nature of the demand. Therefore, I find no substance in the plea of limitation advanced on behalf of the assessee"

An identical view has also been taken in the case of Ms Elphinstone Spinning Weaving Mills Co, Ltd. reported at 1978 (2) ELT J399 (SC) wherein the Supreme Court has *observed that quoting of wrong rule does not make the show cause notice invalid.*

20.3 In the case of M/s Asian Alloys Ltd. reported at 2006 (203) ELT 252 (Tri.- Del.), it was observed-that wrong mention of the relevant provision for imposition of penalty is of no consequence, when the entire allegations are made clear in the show cause notice and the assessee also understood the same in that manner. For better understanding, I reproduce the relevant part of Para-15 of the said decision:

"It is obvious to us on reading the reply to the show cause notice as well as the impugned order that, the ingredients attracting confiscation and penalty were specifically alleged and clearly understood by the noticee and appropriately dealt with by the Commissioner. In this background mere wrong mention of the provision, namely, Rule 173Q instead of Rule 209 was of no consequence, since no prejudice whatsoever has been caused to the noticee by reference to Rule 173Q instead of Rule 209. It is the substance which is important and not the form; and when substance is examined it becomes obvious that there has been no prejudice whatsoever to the noticee by a mere erroneous reference to Rule 173Q in place of Rule 209."

It has also been held by Hon'ble Tribunal in the case of M/s. GeedeelonTexo-Twist (P) Ltd. Vs. Commissioner of CCE, Surat-II in 2009(238) ELT 455, quoting of wrong section or non-quoting of specific section of Customs Act does not vitiate the proceedings

20.4 In the instant case, the nature of the demand was very much known to the assessee in as much as the show cause notice clearly sought to disallow the cenvat credit on the purported input services. The reasons for not allowing such credit have also been amply attributed to the fact that the power plant itself was used for manufacture of exclusively exempted goods and as such the services used *for its installation obviously has no nexus to the final product viz. Carbon Black. Accordingly I find that the analogy of the above case laws is squarely applicable to the facts of the present case-and mere non-citing of Rule 6(1) of the Cenvat Credit Rules, 2004 will not vitiate the proceedings.*

It is a fact that the assessee have taken cenvat credit on the services involved in the installation of the second power plant. This is very much apparent from point 12 of the interview of Shri Girish Singh dated 17.7.2012. The term "input service' has been defined at Rule 2(l) of the Cenvat Credit Rules, 2004 which reads as under

"(l) "input service" means any service,-

(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 of final products and clearance of final products, upto the place of removal,

and includes services 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 of removal, procurement f inputs, activities relating to business, such as accounting, auditing, 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;"

In the instant case, it is clear that the Power Plant itself has been exclusively used in the manufacture of exempted goods Viz. electricity. Whereas, the final products manufactured by the assessee is Carbon Black and the electricity so generated out of the Power Plant has not *been used for manufacture of Carbon Black. Thus, it is very clear that the services used for installation of the Power Plant have not been used in or in relation to the manufacture of final products Viz. Carbon Black. Further, the said services are also not covered under the inclusive portion of the definition of the term "input service`. Thus, I find that the cenvat credit on the services used for installation of the second power plant is not admissible in as much as the same do not qualify as 'input services' as well as the fact that such services have been used exclusively for the manufacture of exempted goods viz. Electricity."*

4.3 From the facts of the case it is evident that appellant has to install the power generation unit as necessitated by the requirement of Gujarat Pollution Control Board. They are engaged in manufacture of carbon black and in the process of manufacture of the Carbon Black. The manufacture of carbon black leads to the production of harmful gases called tail end gases which are at very high tempearture. These gases could have been as exhaust of the manufacturing process can be flared in the atmosphere or could be used for generation of steam or electricity. Gujarat Pollution Control Board do not permit such flaring of the tail end gases at high temperature, but direct the use of the same in power generating unit to be set up by the appellant. The setting up of the power generation is a condition without which appellant could never set up a manufacturing facility for manufacture of carbon black. We observe that every time a permission to set up such a manufacturing facility is given, the condition to set up a power generation unit of specified capacity is imposed. Thus the manufacturing of carbon black is impossibility because of these conditions imposed by the Pollution Control Board without setting up an Power Generation Unit. Thus the process of generation of electricity in such a scenario by making use of tail end gases is incidental and ancillary to the completion of manufacture of the finished products.

4.4 To consider the issue in right perspective it is necessary to understand the term 'manufacture' as defined by Section 2 (f) of the Central Excise Act, 1944 and reproduced below:

> *(f) "manufacture" includes any process—*
>
> *(i) incidental or ancillary to the completion of a manufactured product;*
>
> *(ii) which is specified in relation to any goods in the Section or Chapter Notes of the Fourth Schedule as amounting to manufacture ;or,*
>
> *(iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer;*
>
> *and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;*

Manufacture has been defined by the Section 2 (f) in an inclusive manner. It includes all process ancillary or incidental to complete the process of manufacture of the finished goods. So the real test to determine whether a process undertaken is a process of manufacture of the finished goods, is to determine whether the process of manufacture of the finished goods could have been accomplished without the said process. In case of Eastend Paper Industries Ltd. [1989 (43) E.L.T.201 (S.C.)] laying down the test, Hon'ble Supreme Court observed as follows:

> *"4. This Court in the case of Empire Industries Ltd. and Ors. v. Union of India and Ors. - 1985 (20) E.L.T. 179 (SC) = 1985 3 SCC 314 has explained the concept of 'process' in Excise Law. In view of the principle laid down therein*

and other relevant decisions, processes incidental or ancillary to wrapping are to be included in the process of manufacture, manufacture in the sense of bringing the goods into existence as these are known in the market is not complete until these are wrapped in wrapping paper. In J.K. Cotton Spinning and Weaving Mills Co. Ltd. v. Sales Tax Officer [1965 (16) STC 563 (SC)], this Court while construing the expression 'in the manufacture or processing of goods for sale' in the context of Sales Tax Law, though the concept is different under the Excise Law, has held that manufacture of goods should normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. Where any particular process, this Court further emphasised, is so integrally connected with the ultimate production of goods that, but for that process, manufacture or processing of goods would be commercially inexpedient, articles required in that process, would fall within the expression `in the manufacture of goods'."

4.5 In case of Grasim Industries [2011 (273) E.L.T. 10 (S.C.)] Hon'ble Supreme Court has observed as follows:

> **"8.** …… The manufacture in terms of Section 2(f) includes any process incidental or ancillary to the completion of the manufactured product. This 'any process' can be a process in manufacture or process in relation to manufacture of the end product, which involves bringing some kind of change to the raw material at various stages by different operations. The process in manufacture must have the effect of bringing change or transformation in the raw material and this should also lead to creation of any new or distinct and excisable product. **The process in relation to manufacture means a process which is so integrally connected to the manufacturing of the end product without which, the manufacture of the end product would be impossible or commercially inexpedient…."**

4.6 In case of Indian Farmers and Fertilizer Coop. Ltd. [1996 (86) ELT 177 (SC), Hon'ble Supreme Court observed as follows:

> *"8. For our conclusion we draw support from the judgment of this Court in Collector of Central Excise, Calcutta-II v. Eastend Paper Industries Ltd. - 1989 (43) E.L.T. 201 = 1989 (4) SCC 244, where it was held, "Where any particular process......................is so integrally connected with the ultimate production of goods that, but for that process, manufacture or processing of goods would be commercially inexpedient, articles required in that process, would fall within the expression in the manufacture of goods". This was a reiteration of the view expressed in M/s. J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. Sales Tax Officer, Kanpur and Another - 1965 (1) SCR 900. It was there held, "The expression "in the manufacture" takes in within its compass, all processes which are directly related to the actual production". In Collector of Central Excise, New Delhi v. M/s. Ballarpur Industries Ltd. - (1984) 4 SCC 566, the respondent manufactured paper and paperboard, "in the processes relating to which "sodium sulphate" is used in the chemical recovery cycle of sodium sulphate which forms an essential constituent of sulphate cooking liquor used in the digestion operation". The Exemption Notification concerned provided exemption to goods which had used as raw material or component parts any goods (inputs) falling under Item 68 of the First Schedule to the Act from so much of the excise duty leviable thereon as was equivalent to the excise duty paid on the inputs. The Court quoted what had been said in Dy. CST v. Thomas Stephen & Co. Ltd., namely, "Consumption must be in the manufacture as raw material or of other components which go into the making of the end-product ...." and observed that, correctly apprehended, that statement did not lend itself to the understanding that for something to qualify itself as a raw material it had necessarily and in all cases to go into and*

be found in the end-product. The court also quoted with approval the case of Eastend Paper Industries Limited cited above.

9. That leaves us to consider whether the raw naphtha used to produce the ammonia which is used in the effluent treatment plant is eligible for the said exemption. It is too late in the day to take the view that the treatment of effluents from a plant is not an essential and integral part of the process of manufacture in the plant. The emphasis that has rightly been laid in recent years upon the environment and pollution control requires that all plants which emit effluents should be so equipped as to rid the effluents of dangerous properties. The apparatus used for such treatment of effluents in a plant manufacturing a particular end-product is part and parcel of the manufacturing process of that end-product. The ammonia used in the treatment of effluents from the urea plant of the appellants has, therefore, to be held to be used in the manufacture of urea and the raw naphtha used in the manufacture of such ammonia to be entitled to the said exemption."

4.7 In view of the conditions imposed by the Gujarat Pollution Control Board, the generation of power (electricity) in a power generation unit, using the tail end gases is process incidental or ancillary to the completion of manufacture of the carbon black by the appellant. Similar view has been expressed in the case of Indian Oil Corporation [2013 (297) ELT 394 (T)]

"4. *When the purpose of the Pollution Control Board and Environment Ministry is defeated, the order of adjudication should not sustain. There is nothing material found to held that the sulphur recovery plant is not integrally connected plant with the DHDS plant. When Revenue could not prove that there is no integral connection between DHDS plant and low sulphur recovery plant, the appellant succeeds. Consequently, appeal is allowed."*

4.8 In case of Shree Khedut Sahakari Khand Udyog Mandli Ltd. [2012 (279) ELT 402 (T-Ahmd)] following was observed:

> ***"7.*** *Disposal of Press Mud and Ash, as observed by ld. Commissioner (Appeals), is a statutory obligation and when there is a statutory obligation, it is required to be fulfilled and the respondents will not be allowed to continue to manufacture the goods as per Pollution Control Law. If Pollution Control Law is not fulfilled, there will not be any manufacture…"*

4.9 Rule 2 (a) of CENVAT Credit Rules, 2004 define the Capital Goods as follows:

(a) "capital goods" means:-

(A) the following goods, namely :-

(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, [heading 6805, grinding wheels and the like, and parts thereof falling under [heading 6804 and wagons of sub-heading 860692]] 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) ….;

(v) ….;

(vi) …..;

(vii) …., [and]

(viii) …….,

used –

(1) in the factory of the manufacturer of the final products,; or

(1A) outside the factory of the manufacturer of the final products for generation of electricity or for pumping of water for captive use within the factory; or

(2) *for providing output service;*

4.10 The power generation unit set up by the appellant as per the direction of the Gujarat Pollution Control Board, is more in the nature of pollution control equipment, which serves the purpose of preventing the release of harmful gases (tail end gases) at high temperature to atmosphere. For allowing the CENVAT Credit in respect of Pollution Control Equipments as Capital Goods, as per the above definition the only criteria is that the same should have been used in the factory of manufacture. We find that nothing has been brought on record to show that the criteria as specified by this Rule have not been fulfilled in the present case. In the case of Indian Oil Corporation referred earlier, Member (Technical) has by concurring order observed as follows:

> ***"10.*** *The appellant among other products, manufactured diesel which in terms of ISI specifications could not contain sulphur above a limit specified in the ISI specifications. Since the Crude Oil used, sometimes, has high sulphur content, this results in the sulphur content of the HSD manufactured out of such crude oil having sulphur beyond the permissible limit. For removal of sulphur so as to bring the sulphur content within the acceptable limit, the HSD is processed in the Diesel Hydrogen Desulphurisation unit, where the HSD is reacted with hydrogen in presence of a catalyst, as a result of which the sulphur present in the HSD reacts with hydrogen and hydrogen sulphide gas is found. Since hydrogen sulphide gas has very foul smell and is poisonous, the same cannot be released in the atmosphere and it is for this reason that the Pollution Control Authorities have directed the appellant to install not only Sulphur Recovery Unit, but also a Standby Sulphur Recovery Unit so that there is no release of Hydrogen Sulphide in the atmosphere. The function of SRU is to extract sulphur from hydrogen sulphide. Though sulphur emerging as an inevitable and unavoidable by-*

product being nil tariff rate item is an exempted final product, it cannot be said that the SRU and SSRU have been used for manufacture of sulphur, as looking to the use of the SRU and SSRU which have to be installed in terms of the directions of the Pollution Control Authorities, use is more in the nature of Pollution Control Equipment. In fact Diesel Hydrogen Desulphurisation (DHDS) plant together with SRU and SSRU has to be treated as capital goods used for manufacture of marketable HSD and not the capital goods used for manufacture of Sulphur. Therefore, the Commissioner's finding that SRU and SSRU are the capital goods used exclusively for manufacture of exempted final product - sulphur is incorrect and, as such, the impugned order is not sustainable. The SRU & SSRU have to be treated as the capital goods used in the manufacture of marketable HSD meeting the ISI specifications and which is a dutiable final product. The impugned order, therefore, is set aside. The appeal is allowed."

4.11 We also note that in the appellant own case as reported at 2016 (342) ELT 116 (T-Ahmd)] following was held:

"6. It is not in dispute that the major portion of the electricity generated was used in the manufacture of dutiable goods viz. carbon black. Thus, it is clear that the capital goods installed are not exclusively used in the manufacture of finished goods which are exempted from duty. The aforesaid issue is considered by Hon'ble Gujarat High Court in United Phosphorous Ltd. case, albeit in the erstwhile Rule 57Q of Central Excise Rules, 1944, however, the same is relevant in deciding the issue in the new set of rules also. In the said judgment, the Hon'ble Court, referring to the judgment of this Tribunal in the case of Kothari Sugars & Chemicals Ltd. v. Commissioner - 2006 (196) E.L.T. 35 (Tri.) and the decision of Hon'ble Supreme Court in the case of Solaris Chemtech Ltd. - 2007 (214)

> *E.L.T. 481 (S.C.), held that since the electricity generated by the appellant was not totally sold outside but partly consumed captively, therefore, the Cenvat credit availed on the capital goods cannot be denied. Following the aforesaid decision, I have no hesitation to hold that the appellants are eligible to Cenvat credit on capital goods installed in the factory for generation of electricity, which in turn, used in the manufacture of carbon black even though a part of it sold to M/s. Adani Exports Ltd. through Gujarat State Electricity Board."*

4.12 The definition of 'input services' have been reproduced in the impugned order referred earlier by us in para 4.2. From the definition of the 'input services', it is evident that all the services which are used directly or indirectly, in or in relation to the manufacture of finished products, are covered by the said definition. In view of the view taken by us that the power generation unit (captive power plant) is integrally connected with the process of manufacture of finished goods, and the process of manufacture of finished goods could not have been undertaken by the appellant in view of the requirements of Pollution Control Laws/ restrictions, the service received in relation to setting up and operation of this unit are covered by this definition. As these input services are integrally connected with the process of manufacture of finished goods (carbon black) cleared on payment of duty, Rule 6 (4) will have no application for denial of the CENVAT credit. Reliance is placed on the decision in Brindavan Beverages Pvt. Ltd. [2014 (310) ELT 398 (T)] holding as follows:

> *"7. In terms of the provisions of sub-Rule (4) of Rule 6 of the Cenvat Credit Rules, 2004 Cenvat credit shall not be admissible on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable*

thereon under any notification, where the exemption is granted based on the value or quantity or clearances made in a financial year. From a perusal of this sub-Rule, it is clear that capital goods Cenvat credit would be admissible when the capital goods are used either only for dutiable final product or for dutiable as well as exempted final product. The capital goods Cenvat credit is also admissible when a manufacturer is availing full duty exemption based on the value or quantity of the goods cleared in a financial year, in which case, while initially the manufacturer will be availing full duty exemption (for some months or for several financial years at a stretch) but subsequently at some point of time when he crosses the threshold limit for exemption, his final product becomes dutiable and in such a case, even during the period of full exemption, the manufacture can take capital goods Cenvat credit which he can utilize when this final product becomes dutiable. A question arises as to when capital goods are used for manufacture of dutiable as well as exempted final product, whether for availing capital goods credit, the dutiable as well as exempted final product have to be manufactured simultaneously. In our view this is not necessary, and Cenvat credit would be admissible even if the capital goods are used for manufacture of dutiable goods and exempted goods at different points of time. However, if at the time of receipt of the capital goods, the manufacturer was using the capital goods only for manufacture of fully exempted final product and had no plan or intention to use them for dutiable final products and later on, either the final product becomes dutiable or he changes his plans and starts using the capital goods for manufacture of dutiable final products, the judgment of the Tribunal in the case of CCE, Indore v. Surya Roshni Ltd. (supra) and Spenta International Ltd. v. CCE, Thane (supra) would become applicable. But, if at the time of receipt, the manufacturer had clear intention to use the capital goods for *manufacture of dutiable as well as exempted final products, in such a situation just because at the time of receipt, he uses the capital goods for manufacture of exempted final product and subsequently he switches over to the manufacture of dutiable final product, the capital goods Cenvat credit cannot be denied. When at the time of receipt of capital goods, capable of use in manufacture of dutiable as well as exempted final products, there is evidence to show that the manufacturer had intention to use them for manufacture of dutiable as well as exempted final product, the eligibility of the capital goods for Cenvat credit cannot depend upon the order in which the same are used - whether first for the manufacture of exempted final products or for the manufacture of dutiable final product. We are supported in this view by the judgment of Hon'ble Gujarat High Court in case of CCE, Vadodara II v. Gujarat Propack reported in 2009 (234) E.L.T. 409 (Guj.), wherein the Hon'ble High Court has held that when the capital goods installed in the year 2000 were used for manufacture of exempted goods on trial basis and subsequently were used for manufacture of dutiable goods when regular production was started, the Cenvat credit in respect of capital goods cannot be denied and the Tribunal's judgment in case of M/s. Surya Roshni Ltd. (supra) would not be applicable."*

4.13 In case of ABI Showtech India Ltd. [2016 (41) STR 912 (T-Chen)]

4. *Copy of the letter dated 1-9-2015 of the Tamil Nadu Pollution Control Board submitted by the appellant shows that it was directed to develop adequate green belt inside the premises for controlling pollution. The reasoning given in that order is that the emission/noise pollution shall be controlled through this process of green belt development. This ground calls for grant of Cenvat credit considering* *that the appellant is engaged in the manufacture of the goods mentioned in the Pollution Control Board order requiring emission/noise pollution control.*

4.14 In case of JBM Auto System P Ltd. [2012 (27) STR 170 (T-Chen)] following has been held:

"2. I have heard both sides. The Tamil Nadu Pollution Control Board has granted consent to the assessees to manufacture goods subject to condition of gardening in the plant premises — the industry is required to ensure that minimum three varieties of trees (Eucalyptus, Subabul and any other suitable variety) are planted at the destiny of not less than 1000 trees per acre of land. The requirement of permission of the Tamil Nadu Pollution Control Board is as per Section 41A of the Factories Act, 1948 as amended in 1987 and the consent order has been renewed from time to time. But for the consent order, the assessees cannot carry on manufacture. Therefore, the garden maintenance service has a nexus with the activity of the business of manufacture by the assessees. The decision of the Tribunal in Brakes India Ltd. v. CCE, Mysore [2010 (19) S.T.R. 524] holding that, in these circumstances, the manpower services used for garden maintenance is required as infrastructure for manufacture and clearance of final products and that credit is admissible, which decision has been followed in CCE, Hyderabad v. Voith Turbo Pvt. Ltd. [2011 (21) S.T.R. 52] is applicable on all fours to the facts of the present case and following the ratio thereof, I set aside the impugned order and allow the appeal."

4.15 We do not find any merits in the impugned order disallowing the credit availed by the appellant on the power generating unit (captive power plant) as Capital Goods and input services used in setting up the said unit. As we are setting aside the demand on merits itself we are not discussing the issues of limitation and penalty which are therein in the impugned order.

5.1 Appeal is allowed.

(Operative part of the order pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

(Dr. AJAYA KRISHNA VISHVESHA)
MEMBER (JUDICIAL)

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