CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.71040 of 2018-EX [SM]

(Arising out of Order-in-Appeal No.NOIDA-EXCUS-001-APP-1878-17-18 dated 21/03/2018 passed by Commissioner (Appeals) Central Excise & CGST, NOIDA)

M/s Merino Industries Ltd., **.....Appellant**
(Village-Achheja, PO-Hapur-245101, Dist.Ghaziabad)

VERSUS

Commissioner of Central Excise &

CGST, Noida **....Respondent**

(Commissionerate, Noida)

APPEARANCE:

Shri S. Sunil, Advocate for the Appellant
Shri Manish Raj, Authorised Representative for the Respondent

CORAM: **HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

FINAL ORDER NO.70143/2024

DATE OF HEARING & DECISION : 07 March, 2024

SANJIV SRIVASTAVA:

This appeal is directed against order in appeal No.NOIDA-EXCUS-001-APP-1878-17-18 dated 21/03/2018 of Commissioner (Appeals) Central Excise & CGST, NOIDA. By the impugned order Commissioner (Appeal) has upheld the Order-in-Original No.164(227/2015)ADJ/DC/HPR/2016 dated 29.07.2016. By which following was held:

ORDER

(i) I allow the credit of Rs 4,11,646/- (Rupee Four Lacs Eleven Thousand Six Hundred and Forty Six Only) availed on Tubes and Pipes and I disallow the Cenvat Credit amounting to Rs 61,828/- (Rupees Sixty One Thousand Eight Hundred and Twenty Eight Only) wrongly availed and utilized on Plates, H R Coil & Channel Angels by M/s Merino Industries Ltd., Village-

Achheja, Delhi Road Hapur, Distt Hapur and order for recovery of the same for them under the provisions of Rule 14 of the CENVAT Credit Rules, 2004, read with Section 11 A (1) of the Central Excise Act, 1944.

(ii) I also confirm the demand of appropriate interest on the above said amount of wrongly availed Cenvat Credit and order for the recovery of the same from M/s Merino Industries Ltd., Village- Achheja, Delhi Road Hapur, Distt Hapur and order for recovery of the same for them under the provisions of Rule 14 of the CENVAT Credit Rules, 2004, read with Section 11 AA of the Central Excise Act, 1944.

(iii) I impose a penalty of Rs 61,828/- (Rupees Sixty One Thousand Eight Hundred and Twenty Eight Only) upon M/s Merino Industries Ltd., Village-Achheja, Delhi Road Hapur, Distt Hapur and order for recovery of the same for them under the provisions of Rule 15 of the CENVAT Credit Rules, 2004, read with Section 11 AC OF THE Central Excise Act, 1944.

2.1 The impugned order was challenged by this appeal.

2.2 This appeal has earlier been allowed as per Final Order No.70554 of 2019 dated 15.03.2019, albeit certain inadvertent errors crept in the order.

2.3 Applicant filed the application for rectification of mistake as per Section 35C (2) of the Central Excise Act, 1944.

2.4 The Rectification of Mistake Application was allowed vide Miscellaneous Order Nos.70006-70008 of 2023 dated 24.07.2023 and the matter was listed for hearing.

3.1 Heard both sides.

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

4.2 Following facts and findings were recorded in para 2 & 3, in the Final Order, No 70777/2019 dated 14.03.2019 of the Tribunal:

"2. The short issue involved is as to whether the Welding electrodes used for repair and maintenance in the assessee's factory are Cenvatable inputs or not. Though, the various decisions of the High Courts have held such use of welding electrodes as entitled to be covered by the definition of the inputs, the lower authorities have denied the benefit on the ground that repair and maintenance of the plant and machinery is not covered by the definition of manufacture and as such welding electrodes used for repair and maintenance could not be held to be Cenvatable.

3. Tribunal's decision in the case of M/s DSM Sugar Vs Commissioner of Central Excise, Meerut-II reported as 2017 (346) ELT 407 (Tri.-Del.) took note of various decisions of Hon'ble High Courts like M/s Ambuja Cements Eastern Ltd. Vs Commissioner reported as 2010 (256) ELT 690 (Chhattisgarh), Commissioner Vs Alfred Herbert (I) Ltd. reported as 2010 (257) ELT 29 (Kar) and Hindustan Zinc Ltd. Vs Union of India reported as 2008 (228) ELT 517 (Raj.) and held that such use of welding electrodes cannot be denied the benefit of Cenvat credit. Though the period involved in the present appeal is subsequent to 01.04.2011 when the definition of inputs underwent change but I note that even after the amendment, the goods used in the manufacture of the final products are Cenvatable. Admittedly, repair and maintenance of plant and machinery is one of the activities which are related to the manufacture of final product. Inasmuch as, without the said activity, the manufacturing process cannot be continued, it has to be held that the welding electrodes used for repair and maintenance of plant and machinery are Cenvatable."

4.3 Whereas the impugned order records the following:

"4.1 In this context, the only issue to be decided in the instant appeal is as to whether the adjudicating authority is justified in disallowing the Cenvat Credit taken on the items falling under Chapter 72 and 73 such as Channels,

Plates, H R Coils etc. of iron and steel used in repair and maintenance of capital goods within the factory.

4.2 Before deciding the case on merit, I would like to first examine the provisions of the CENVAT Credit Rules, 2004 during the period of dispute. I observe that Rule 2(a) of Cenvat Credit Rules, 2004 defines Capital Goods` as under:

"Capital goods" means:

(A) the following goods, namely

(i) all goods falling 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 [and]
(viii) 4.3

On perusal of the above, it is observed that the Cenvat credit can be taken on any items as "Capital Goods" which qualify the definition of "Capital Goods" as contained under Rule 2 (a) (A) of Cenvat Credit Rules, 2004, supra. From the facts of the case on record, I find that the appellant availed Cenvat credit on the items M.S. Pipe, HFS Pipes & tube, Steel Tubes & Pipes as capital goods. I find that "tubes and pipes and fiting thereof" are expressly covered at serial number (vi) of Cenvat Credit Rules, 2004, supra. Therefore, there is no doubt about admissibility of cenvat credit on "tubes and pipes and fitting" thereof as capital goods. The adjudicating authority has allowed the Cenvat credit of Rs.4,11,646/- in respect of "steel tubes and pipes" for the period April'2014 to December'2014.

Thus there is no dispute regarding the admissibility of Cenvat credit in respect of "steel tubes and pipes".

4.4 As regards to the cenvat credit taken and utilized by the appellant on the items falling under Chapter 72 and 73 such as Channels, Plates, H.R.Coils etc of iron and steel, I find that, as contended by the appellant, these items have been used in repair and maintenance of the capital goods within the factory. I observe that since these items were neither used as "input" nor as "capital goods"; therefore not eligible for Cenvat credit as "capital goods" in terms of Rule 2(a)(A) of the Cenvat Credit Rules, 2004, nor as "input" in terms of Rule 2(k) of the Cenvat Credit Rules, 2004. On perusal of the definition of "input" it is observed that the items Plates, Sheets, Channels, Screws etc. of iron and steel have been used by the appellant for repairing and maintenance of the capital goods in the factory, therefore these items cannot be considered as input used in or in relation to the manufacture of final products. Further there is no corroborative evidence that the said items have been "used in the manufacture capital goods which are further used in the factory of the manufacturer." Therefore these items cannot be covered under the definition of inputs in terms of the explanation of Rule 2(k) of the Cenvat Credit Rules, 2004. Further, these items are not expressly covered under the definition of capital goods in terms of Rule 2(a)(A) of the Cenvat Credit Rules, 2004. Since these items are construction / structural material, hence cannot be considered as parts, components or accessories of capital goods of Chapter 82, 84, 85 or 90 or Pollution Control equipments. There is no corroborative evidence that the said items have been used as claimed or have not been used in structural support in the factory. Neither there is any certificate from a Chartered Engineer evidencing that the impugned items have been used in the manufacture of capital goods which have further been used in the factory. I therefore hold that the adjudicating authority has rightly disallowed the cenvat credit on the *impugned items along with interest. The penalty has also rightly been imposed*

4.5 I further observe that with regard to Cenvat credit on "capital goods" the CBEC, vide Instruction issued under F.No.267/1 1/2010-CX-8 dated 08.07.2010, has issued the following clarification:

"Cenvat credit on capital goods is available only on items, which are excisable goods covered under the definition of capital goods under Cenvat Credit Rules, 2004 and used in the factory of the manufacturer. As regards inputs they have to be covered under the definition of input nder Cenvat Credit Rules, 2004 and used in or integrally connected with the process of actual manufacture of the final product for admissibility of Cenvat credit. The credit on inputs used in the manufacture of capital goods, which are further used in the factory of the manufacturer is also available except for items like cement, angles, channels, CTD, or TMT bars and other items used for construction of factory, shed, building or laying of foundation or making of structures for support of capital goods. Further, credit shall also not be admissible on inputs used for repair and maintenance of capital goods."

4.6 I further observe that the issue of admissibility of cenvat credit in respect of the items (welding electrodes) used for repair and maintenance of plant and machinery in the factory came up for consideration before Hon'ble High Court of Andhra Pradesh in the case of Shree Rayalaseema Hi-Strength Hypo Limited v CCE Tirupati 2012(278) E.L.T 167(A.P). The Hon`ble High Court held that that unless the goods are used in the manufacture of capital oods. which are thereafter used in the factory, they do not qualify as inputs. epair and maintenance being distinct from manufacture, CENVAT credit cannot be claimed under Rule 2(k) of the Rules of 2004 on the duty paid on welding electrodes used for repairs. The relevant extract of the decision is reproduced below:

"6. Dealing with the corresponding definition of 'input' in Rule 2(g) of the Rules of 2002, the Supreme Court in M/s. Maruti Suzuki Ltd. held that the crucial requirement is that the goods must be used in or in relation to the manufacture of the final product to qualify as an input and that this presupposes that the element of manufacture must be present. The second explanation to the definition in Rule 2(k) makes it clear that only goods used in manufacture of capital goods which are further used in the factory of the manufacturer would qualify as input. Though the assessee used the terms 'manufacture', 'repair' and 'maintenance' interchangeably in its reply, it is manifest that manufacture and repair/maintenance are not the same and cannot be equated. Goods used for repair or maintenance of the machinery are not constituents in its actual manufacture and therefore would not qualify under the second explanation to the definition.

7. The decision of the Bench of the Tribunal at Kolkata in SAIL proceeded on this premise and followed the decision of the Larger Bench of the Tribunal in Jaypee Rewa Plant v. Commissioner of Central Excise, Raipur [2003 (159) E.L.T. 553 (Tri. - LB)] wherein it was held that welding electrodes used for repair and maintenance of plant and machinery cannot be said to be used coextensively in the process of manufacture of the final product and hence, they are not integrally connected with the manufacture. Pertinent to note, the decision of the Kolkata Bench of the Tribunal was affirmed by the Supreme Court in SAIL v. Commissioner of Central Excise [2008 (229) E.L.T. A127].

8. In that view of the matter, we are not inclined to agree with the submission of the learned counsel for the assessee. The second explanation to the definition of 'input' under Rule 2(k) of the Rules of 2004 puts it beyond doubt that unless the goods are used in the manufacture of capital goods, which are thereafter used in the factory, they do not qualify as inputs. Repair and maintenance being distinct from manufacture, CENVAT credit cannot be *claimed under Rule 2(k) of the Rules of 2004 on the duty paid on welding electrodes used for repairs.*

9. The contention of the learned counsel for the assessee that the extended period of limitation of five years for recovery of the duty under the proviso to Section 11A(1) of the Central Excise Act, 1944 would not be available to the Revenue in this case, as the penalty proposed to be levied was dropped, does not hold water. The extended period of five years for recovery of duties either levied or short-levied arises under various situations such as fraud, collusion, wilful mis-statement, suppression of facts or contravention of the provisions of the Act or the Rules made thereunder with intention to evade payment of duty. It is no doubt true that the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty [Union of India v. Rajasthan Spinning and Weaving Mills - (2009) 13 SCC 448 = 2009 (238) E.L.T. 3 (S.C.)]. But merely because the ingredients for both are the same, it would not mean that in case penalty is not imposed, the duty also cannot be recovered. Once the assessee availed credit under Rule 2(k) of the Rules of 2004 without entitlement it amounts to contravention of the rule with the intention of evading payment and the extended period of limitation would be available to the Revenue, notwithstanding the decision not to purpose penalty upon the assessee."

4.7 The Principal Bench of Hon'ble CESTAT, Delhi , in the case of Vikram Cement y CCE Indore 2009 (242)E.L.T 545(Tri-Del) has held as under:

"If the product is not integrally connected with the process of the manufacture and which does not result in utilization of such product directly or indirectly in to the manufacture of the finished product, then such a product cannot be said to be the input utilized for or in relation to manufacture of the final product. The tribunal has further held that it is nobody's case that the repair and maintenance were forming part of the process of manufacture of the cement.

It is one thing to say that a particular thing is required to be kept intact or in a state which will enable the manufacture to operate the machine and it is another thing to say that the process of manufacture is necessary to bring out the final product. Obviously, to keep the machine in a state of operation, the maintenance or repairs would be absolutely necessary. But, the same cannot be said to be integrally related to the process of the manufacture of final product. The process of manufacture is different from the maintenance and repair of the machinery to keep it in a running condition".

4.8 Similar views have been taken by the Hon'ble High Court at the judicature of Allahabad (the jurisdictional High Court) in the following cases:

- *i. CCE Meerut-I v Triveni Engineering and Industries Ltd 2015 (323) E.L.T43(All)*
- *ii. CCE v D.S.M Sugar Mills Ltd 2016(338)E.L.T 581(All)*
- *iii. CCE v Kesar Enterprises Ltd 2016(344)E.L.T 809(All)*
- *iv. Kesar Enterprises Ltd v CCE 2017(350)E.L.T 223(All)*
- *v. CCE Lucknow v Nandganj Sihori Sugar Co.Ltd 2017 (357) E.L.T 13 (All)*

4.9 Considering the statutory provisions, overall facts of the case and applying the ratio of the judicial pronouncements, supra, I hold that the adjudicating authority has rightly disallowed the eenvat credit taken by the appellant in respect of Channels, Plates, H.R.Coils ete. ofiron and steel used in repair and maintenance of capital goods in the factory. As a natural corollary the appellant are also liable for interest and penalty. In view of these findings the appeal is liable to be rejected being devoid of merit."

4.4 From the issues as framed in the impugned order I, find that in the earlier order tribunal has decided the appeal by framing the incorrect issues, which were not there in the impugned order and not even raised in the appeal. Thus there is error apparent on record and the appeal was heard on merits again.

4.5 The issue involved in the matter is in respect of the admissibility of the CENVAT Credit in respect of Channels, Plates, H R Coils etc. of iron and steel used in repair and maintenance of capital goods within the factory, is no longer res-integra. In the case Kissan Sahakari Chinni Mills Ltd [2013 (292) ELT 394 (T)] held as follows:

> *"5. I have considered submissions from both the sides and perused the records. I find that the issue as to whether the goods used for repair and maintenance of plant and machinery are eligible for cenvat credit, stands decided in favour of the Appellant by Hon'ble Rajasthan High Court in the case of Hindustan Zinc Ltd. (supra) wherein Hon'ble High Court has held that MS/SS plates used in the workshop meant for repair and maintenance of the plant and machinery's would be liable for cenvat credit and also by the judgments of Hon'ble Chhattisgarh High Court in the case of Ambuja Cements Eastern Ltd. v. Commissioner of Central Excise (supra) and Hon'ble Karnataka High Court in the case of Commissioner of Central Excise v. Alfred Herbert (India) Ltd. (supra) wherein Hon'ble High Court have held that the inputs used for repair and maintenance of plant and machinery would be eligible for cenvat credit. The learned departmental representative has cited a contrary judgment of Hon'ble High Court of Andhra Pradesh, in the case of Sree Rayalaseema Hi-Strength Hypo Ltd. v. Commissioner of Customs & Central Excise, Tirupati reported in 2012 (278) E.L.T. 167. Since three High Courts as mentioned above, have held that the inputs used for repair and maintenance of plant and machinery are eligible for cenvat credit, I am of the view that it is these judgments which have to be followed.*

5.1 Moreover, during the period of dispute, the definition of 'inputs' covered all the goods except LDO, HSD and petrol used in or in relation to manufacture of final products, whether directly or indirectly and whether contained in the final product or not. The scope of the expression - "used in or in relation to manufacture of final products, whether directly or indirectly and whether contained in final products not", is much larger than the scope of the expression "used in the manufacture of" and would covere all the goods which have nexus with the manufacture of final products. The nexus of the use of a particular item with manufacture of final products has to be determined on the basis of the criteria as to whether the use of that item is determined by commercial expediency and whether without use of that item, the manufacture of final product though theoretically possible is commercially inexpedient. Hon'ble Cacutta High Court in the case of Singh Alloys & Steel Ltd., reported in 1993 (66) E.L.T. 594 (Cal.) has held that the definition of input is not dependent on what ought to be used, but what is actually used and what is commercially expedient to use, that expression "in relation to" has much wider connection and on this basis held that ramming mass and dolopatch mix used in the furnace as fettling material for reducing the erosion of the refractory lining of the furnace would be eligible for cenvat credit.

5.2 The Apex Court in the case of J.K. Cotton SPG & WVG Mills Co. Ltd. v. Sales Tax Office reported in 1997 (91) E.L.T. 534 (S.C.), interpreting the scope of the expression - "in the manufacture of goods" in Section 8(3)(C) of the Central Sales Tax Act, 1956 has in para 9 of the judgment held that this expression would cover the goods used in any process/activity which is so integrally connected to the ultimate manufacture of goods without that process or activity, even if theoretically possible, is commercially inexpedient. The scope of the expression used in the definition of 'input' in Rule 2(k) of the Cenvat Credit Rules, *2004 - "used in or in relation to manufacture of final products, whether directly or indirectly and whether contained the final products or not" is much wider than the scope of the expression "used in manufacture of" and therefore the expression- "used in or in relation to manufacture of final product', whether directly or indirectly" in the definition of input in Rule 2(2) would cover all the goods whose use is commercially expedient in manufacture of final products.*

5.3 Repair and maintenance of plant and machinery is an activity without which smooth manufacturing is not possible. Commercially, manufacturing activity is not possible with malfunctioning machines, and leaking tanks, pipes and tubes. Therefore the activity of repair and maintenance of plant and machinery is an activity which has direct nexus with manufacture of final products and the goods used in this activity would be eligible for Cenvat credit. For eligibility of an input for Cenvat credit what is relevant is whether the activity in which that input is used has nexus with the manufacture of final product and the nexus has to be determined on the basis of criteria as to whether that activity is commercially essential for manufacture of the final products."

4.6 In the case of Birla Corporation Ltd [2012 (276) ELT 376 (T-Del)] following was held:

"3.1 The first point of dispute in these appeals is as to whether M.S. Angles, Channels, Plates etc. used for repair and maintenance of plant and machinery are eligible for Cenvat credit or not. On this issue, we find that Hon'ble Rajasthan High Court in the case of Union of India v. Hindustan Zinc Ltd. (supra) has held that M.S./S.S. Plates used in the workshop for repair and maintenance of the machinery, which is used for the manufacture of final product are eligible for Cenvat credit. The Government's SLP against this judgment of Hon'ble Rajas-than High Court has been dismissed by Hon'ble Supreme Court vide judgment reported in 2007 (214) E.L.T. A115 (S.C.).

Besides this, we find that Hon'ble Chhattisgarh High Court in the case of Ambuja Cements Eastern Ltd. v. C.C.E., Raipur (supra) has held that welding electrodes used for repair and maintenance of the plant and machinery are entitled for Cenvat credit. In this judgment, Hon'ble High Court relied upon the judgment of Hon'ble Rajasthan High Court in the case of Union of India v. Hindustan Zinc Ltd. (supra) and in paras 21 and 22 of the judgment, Hon'ble High Court with regard to the Revenue's plea that the Tribunal in the case of Steel Authority of India Ltd. v. C.C.E. reported in 2008 (222) E.L.T. 233 (Tri.) had held that welding electrodes used for repair and maintenance of plant and machinery are not eligible for Cenvat credit and the SLP filed by M/s. SAIL against the Tribunal's order has been dismissed by Hon'ble Supreme Court in view of the facts of this case vide judgment reported in 2008 (229) E.L.T. A127 (S.C.), Hon'ble High Court observed that refusal of special leave to file appeal by a non-speaking or speaking order does not attract the doctrine of merger, whereas where an award, appeal or revision is provided against the order passed by the Court, Tribunal or any other authority before a superior forum and such superior forum modifies, reverses or affirms the decision put in issue, the decision by the subordinate forum merges in the decision by the superior forum and it is the later which subsists, remains operative and is capable of enforcement in the eyes of law, as held by Hon'ble Supreme Court in the case of Kunhayammed v. State of Kerala reported in 2001 (129) E.L.T. 11 (S.C.). In view of the judgment of Hon'ble Chhattisgarh High Court in the case of Ambuja Cements Eastern Ltd. v. C.C.E., Raipur and of Hon'ble Rajasthan High Court in the case of Union of India v. Hindustan Zinc Ltd. (supra), which is the Jurisdictional High Court for the present appeals, we are of the view that the items used for repair and maintenance of plant and machinery would be eligible for Cenvat credit and the

Commissioner (Appeals)'s order denying Cenvat credit in respect of the same is not sustainable."

4.7 In the appellants own case vide Final Order No 70886/2019 dated 11.03.2019 following has been held:

"The short issue involved in the present appeal is as to whether the various 'Iron & Steel' items used for repair and maintenance of the plant and machinery would be eligible for Cenvat Credit of duty paid on them. The Lower Authorities have denied the credit by relying upon the Hon'ble Andhra Pradesh High Court decision in the case of Shree Rayalaseema Hi-Strength Hypo Limited V/s CCE Tirupati reported as 2012 (278) E.L.T. 167 (A.P.).

2. The appellant in their Memo of appeal has referred to the Tribunal decision in the case of M/s Panipat Co-operative Sugar Mills Ltd. V/s Commissioner of Central Excise, Rohtak reported as 2013 (293) E.L.T. 66 (Tri.-Del.), wherein after considering the entire decisions of the various High Courts, it was observed as under:-

"3. Ms. Rashi Sureka, Advocate, ld. Counsel for the appellant pleaded that the items, in question, have been used for repair and maintenance of the plant and machinery of the plant and same are eligible for cenvat credit in view of the judgements of Hon'ble Chhattisgarh High Court in case of Ambuja Cements. Eastern Ltd. V/s CCE, Raipur reported in 2010 (256) E.L.T. 690 (Chhatt.) and judgement of Hon'ble Karnataka High Court in the case of Alfred Herbert (India) Ltd. reported in 2010 (257) E.L.T. 29 (Kar); and Hon'ble Rajasthan High Court in case of Hindustan Zinc Ltd. v Union of India reported in 2008 (228) E.L.T. 517 (Raj.). She, therefore, pleaded that the impugned order upholding the cenvat credit demand in respect of the items used for repair and maintenance of plant and machinery is not sustainable.

4. Ms. Shweta Bector, ld. DR defended the impugned order reiterating the finding of the Commissioner (Appeals) and citing the judgement of Hon'ble A.P. High Court in the case *of Sree Rayalaseema Hi-Strength Hypo Ltd. v. C.C. & C.E., Tirupati reported in 2012 (278) E.L.T. 167 (A.P.) pleaded that items, in question, are not eligible for cenvat credit an as such there is no infirmity in the impugned order.*

5. I have considered the submissions from both the sides and persued the records. The appellant in course of proceedings before the Deputy Commissioner as well as Commissioner (Appeals) pleaded that during the operation of sugar mill certain parts and components of the machinery get worn out and to replace the same, the new components have to be fabricated by using the steel items. On going through the impugned Order-in-Appeal, I find that the Commissioner (Appeals) has not disputed the usage of the M.S. Angles, Channels, Plates, H.R. Sheet, etc. The Commissioner (Appeals) has, however, simply relied upon the judgement of Larger Bench of the Tribunal in the case of Vandana Global v. CCE, Raipur reported in 2010 (253) E.L.T. 440 (Tri.-LB) and has upheld the Deputy Commissioner's order. In my view when the fact that the items, in question, have been used for repair and maintenance of the plant and machinery, that is, for fabrication of the parts of machinery which had got worn out and have to be replaced, in not disputed, in view of the judgements of three High Courts Hon'ble Chhattisgarh High Court, Hon'ble Rajasthan High Court and Hon'ble Karnataka High Court, as mentioned above, the inputs used for repair and maintenance of machinery would be eligible for Cenvat Credit. Though in a recent judgement in case of Sree Rayalaseema Hi-Strength Hypo Ltd. v. C.C. & C.E., Tirupati (supra) Hon'ble A.P. High Court has taken a different view holding that welding electrodes used for repair and maintenance are not eligible for cenvat credit as the activity of repair and maintenance is distinct from manufacture, in my view when three High Courts as mentioned above have held that the items used for repair and maintenance of plant and machinery are eligible for Cenvat credit it is this view which has to be adopted.

Moreover, for permitting cenvat credit what is relevant is as to whether the use of the item has nexus with manufacture and whether without that item manufactur is commercially possible. Since repair and maintenance is an activity which is essential for smooth manufacturing operations and without regular repair and maintenance, manufacturing activities is not commercially feasible, the inputs used for repair and maintenance of the plant would be eligible for cenvat credit. I, therefore, hold that the impugned order disallowing the cenvat credit is not sustainable. The same is set aside. The appeal is allowed."
3. Inasmuch as the issue stands discussed and held in favour of the appellant by following the said decision, I set aside the impugned order and allow the appeal with consequential relief to the appellants."

4.8 The decision of the Larger Bench of tribunal in case of Vandana Global [2010 (253) E.L.T. 440 (Tri.-LB)] holding to the contrary was set aside by Hon'ble Chattisgarh High Court as reported at [2018 (16) G.S.T.L. 462 (Chhattisgarh)] holding as follows:

"2. By the order dated 17-6-2008 the Principal Bench of the Tribunal referred the following issues for consideration to the Larger Bench :

"(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?"

3. Through the impugned order dated 4-5-2010 [2010 (253) E.L.T. 440 (Tri. - LB)], the Principal Bench of the

Tribunal presided by the President and the two Members answered the reference by holding 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."

4. In the light of the contents of the impugned order of the Tribunal and submissions of the assessee and the Revenue following substantial questions of law are formulated for consideration :

(A) Whether the terms 'capital goods' excludes the structures embedded to earth?

(B) Whether the goods like angles, joists, beams, bars, plates, which go into fabrication of such structures are not to be treated as 'input' used in relation to their final products as inputs for capital goods, or none of the above?

(C) Is the amendment brought in CENVAT Credit Rules, 2004 as per Rule 2 of the CENVAT (Amendment) Rules, 2009 retrospective in nature considering is it clarificatory to be applied to all matters which arise before 7-7-2009, the date of commencement of the CENVAT (Amendment)

Rules, 2009 : hereinafter referred to as 'Amendment Rules'.

5. The impugned order of the Tribunal had come up for consideration before different High Courts either cited as precedent or as relied upon by the Tribunal in different other matters. The Gujarat High Court in Mundra Ports & Special Economic Zone Ltd. - 2015 (39) S.T.R. 726 (Guj.) referred to the contents of the amendment, to the extent it is relevant for the purpose of this case and held as follows :

"We do not find that amendment made in the Cenvat Credit Rules, 2004 which come into force on 7-7-2009 was clarificatory amendment as there is nothing to suggest in the Amending Act that amendment made in Explanation 2 was clarificatory in nature. Wherever the Legislature wants to clarify the provision, it clearly mentions intention in the notification itself and seeks to clarify existing provision. Even, if the new provision is added then it will be new amendment and cannot be treated to be clarification on particular thing or goods and/or input and as such, the amendment could operate only prospectively."

6. That view has been quoted with approval by the Madras High Court in M/s. Thiruarooran Sugars v. Customs, Excise and Service Tax Appellate Tribunal (CMA 3814/2014 and connections) decided on 10-7-2017 [2017 (355) E.L.T. 373 (Mad.)] to conclude that the said amendment cannot be treated as clarificatory. M/s. Thiruarooran Sugars also considered the issue as to the effect and fundamental value of the evidentiary statement made by the Finance Minister dealing with an amendment in the budget speech.

7. Section 37 of the Central Excise Act, 1944; for short, 'the Act', is a rule making power. Section 37(2)(xvia) provide for the credit of duty paid or deemed to have been paid on the goods used in, or in relation to, the manufacture of excisable goods. Section 37(2A) of the Act

- The power to make rules conferred by clause (xvi) of sub-section (2) shall include the power to give retrospective effect to rebate of duties on inputs used in the export goods from a date not earlier than the changes in the rates of duty on such inputs. Though the power to make rules include the power to give retrospective effect, while doing so the provision under consideration is neither made retrospective nor could it be treated as one.

8. We are in complete agreement with the ratio of Mundra Ports (supra) and M/s. Thiruarooran Sugars (supra) on all fours.

9. Resultantly, we answer the questions formulated in these appeals in favour of the assessees and against the Revenue."

5.1 Appeal is allowed.

(Dictated and pronounced in open court)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp