

FAX : 0532-2460149

REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38, MG Marg Civil Lines, Old Red Building, Allahabad-211001
Regional Branch, Allahabad

Dated: 08/07/2016

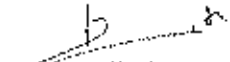
To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70311/2016-EX[DB] dated 06/06/2016

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.


Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	E/55941/2013	BAJAJ INDUSTRIES LTD UNIT-ITAI MAIDA, UTRAULA BALRAMPUR U.P.
		Name and Address of Respondent
2		C.C. & C.E. & S.T.-Allahabad 38...M G MARG...CIVIL LINES, ALLAHABAD, UTTAR PRADESH-211001

Copy To

3 Advocate(s) / Consultant(s):

PRADEEP K MITTAL AND
PRAVEEN K MITTAL
171-CHITRA VIHAR, DELHI-110092

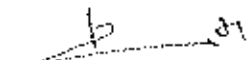
4 Bar Association, CESTAT, Allahabad

- 5 Director Publications, Customs, Excise, I.P. Estate, Delhi
6 M/s Cestax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3
7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17
8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohini Road, New Delhi-110005
9 Easy Service Tax Online Dist Com Pvt. Ltd., 407A, Icon Mall, Satellite Road, Ahmedabad-15
10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 58
13 The ICFAI society, 52, Nagarjuna Hills Punjagutta Hyderabad -500082
14 M/S Knowledge Processing Pvt. Ltd.(taxmanagementindia.com), FF-19, 1st Floor, Cross River Mall, UDD
Ground, Near Karkardouma Court, Delhi-110032

15 C.D.R.

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Asstt. Registrar

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
REGIONAL BENCH: ALLAHABAD**

DIVISION BENCH

Appeal No. E/55941/2013 (DB)

Dated of Hearing/decision: 06/6/2016

[Arising out of Order-in-Original No. MP(Dem. -12/2012) 37 of 2012 dated 19.11.2012 passed by Commissioner, Central Excise & Service Tax, Allahabad, (U.P.)]

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

M/s Bajaj Hindustan Ltd.

Appellant

Vs.

CCE & ST Allahabad (Now CCE Lucknow)

Respondent

Appearance:

Present for the Appellant: Shri Pradeep Kumar Mittal, Advocate
Present for the Respondent: Shri D.K. Deb (Assistant Commissioner) A.R.

**Coram: Hon'ble Shri Anil Choudhary, Member (Judicial)
Hon'ble Shri Anil G. Shakkarwar, Member (Technical)**

Final Order No. 70311/2016

Per: Anil Choudhary



1. The issue in this appeal are -

- Whether the appellant, a manufacturer of Sugar, is entitled to Cenvat credit on Steels goods such as Shape & Section,

angles, M.S. Plates/rounds, beams, rails etc. falling under Chapter Heading 72, 73 & 83 of CET Act, also welding electrodes used in fabrication/construction of capital goods including structural support, etc. for the period Feb/2007 to June/2009

- ii) Whether the exclusions provided in explanation-2 of Rule 2(k) of CCR, 2004, inserted w.e.f. 7.7.2009 have prospective effect only,
- iii) Whether the demand is barred by limitation and
- iv) Whether the appellant is liable for interest and penalty.

2. Heard the parties.

3. The brief facts are - upon scrutiny of records by preventive branch of Division for the period 2/07 to 3/10, it appeared that appellant have availed inadmissible Cenvat credit amounting to Rs.1,03,34,766 on steel items like Shape & Section, Angles, M.S. Plates/rounds, Beams, Rails etc. as inputs in construction/fabrication of structural supports embedded to earth, Frame works, working platforms, etc. Such goods as per Revenue are neither inputs nor capital goods as defined in Rule 2 of CCR, 2004. Accordingly show cause notice dated 01.3.2012 was issued for recovery of Cenvat taken Rs. 1.03,34,766/-, along with interest & penalty was also proposed.

4. The appellant contested the show cause notice both on merits and limitation. However vide Order-in-Original dated 19.11.2012, Id. Commissioner adjudicated the show cause notice and confirmed the

proposed demand with interest. Further penalty of equal amount was imposed under Rule 15(2) of CCR read with Section 11AC of the Act. It was observed that items of Chapter Heading 72, 73 & 83 are not covered in the definition of Capital goods and inputs as defined in Rule 2(a) & (k) of CCR, 2004. So far the contention of appellant that they have fabricated (i) Boiler accessories, (ii) Accessories of Boiling house (centrifugal machine, crystalliser, Evaporator, Juice clarifier, Juice Sulphiter, Pan Rotary Screen, Sulphur Furnace, Water Tank (iii) Mill House accessories (Cane carrier, Cane gantry Cane unloader, Fibrizer etc. (iv) Drier House accessories (Centrifugal machine, Sugar grader) (v) Accessories of Cable tray, control panel, D.G. Set, Gantry, Transformer; it was held that the appellant have used the items in fabrication of gantries, support structure, metal frame relying on the ruling of Larger Bench of this Tribunal in **Vandana Global Ltd. Vs. CCE Raipur** reported in **2010 (253) E.L.T. 440 (Tri. LB)** it was held, in almost all cases appellant have constructed support structure and base frames as parts and accessories of capital goods which is not tenable.

4.1 So far credit of Rs.39,042 on welding electrodes is concerned, it was held - once it has been established that the goods in manufacture of which welding electrodes have been used are not goods, then welding electrodes cannot be considered as input eligible for credit. Further the explanation - 2 of Rule 2(k) of CCR, 2004 inserted w.e.f. of 07.7.2009 was held to have retrospective effect following Larger bench ruling of this Tribunal in **Vandana Global Ltd. Vs. CCE Raipur** (Supra). On the issue of applicability of extended



period of limitation, it was held that same is applicable as mere periodical audit by Revenue is not enough to infer revenue's knowledge about wrong avaiiment. Accordingly penalty was also confirmed.

5. The Ld. Counsel for the appellant states that the issue is not longer res-integra in view of several rulings of Hon'ble High Courts and this Tribunal He places reliance on final order of this Tribunal No. 57918/2013 dated 25.9.2013 in Appellants own case (another unit) - Excise Appeal No. 793/2011 (SM) wherein, it is held as follows -

"The appellant are a sugar mill engaged in manufacture of sugar and molasses chargeable to Central Excise duty. The dispute is in respect of Cenvat credit in respect of MS Angles, Channels, Plates etc. which according to the appellant were used for repair and maintenance of the as well as for fabrication of sugar machinery. The Cenvat credit of Rs. 71,090/- was taken in respect of welding electrodes and credit of Rs. 99,342/- was taken in respect of steel items during the period from January 2009 to August 2009. The department being of the view that these items are not covered by the definition of input or capital goods, initiated proceedings for recovery of the Cenvat credit alongwith interest and imposition of penalty which resulted in issue of order-in-original dated 31/3/10 by which the Assistant Commissioner confirmed the above-mentioned Cenvat credit demand alongwith interest and imposed penalty of equal amount on the appellant. This order of the Assistant Commissioner was upheld by CCE (Appeals) vide order-in-appeal dated 22/10/10 except for reduction of penalty to Rs. 20,000/-. In this order, the Commissioner (Appeals) held that the welding

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electrodes used for repair and maintenance are not eligible for Cenvat credit either as inputs or as capital goods and in respect of steel items, while observing that these items were used for fabrication of various mill house machinery such as Cane Carrier side plate and Leveller/Chopper Hoods, Bagasse Cilo Pipe, Bagasse Carrier, Sulphur Furnace, Juice Sulphiter, Pan Crystalizer, Juice Heater of Boiling House, Cable Tray and Motor Guard, ID Fans, Lime Slaker, Sugar Conveyor etc. and also for repair and maintenance of machines and erection of supporting structures for machinery, he denied the Cenvat credit on the ground that plant and machinery assembled at site cannot be treated as goods and hence these steel items would not be eligible for Cenvat credit, in view of judgment of Tribunal in the case of **Vandana Global Ltd. vs. CCE, Raipur reported in 2010 (253) E.L.T. 440 (Tri. LB)**. Against this order of the Commissioner (Appeals), this appeal has been filed.

2. Heard both the sides.

3. Shri G.K. Mahajan, Advocate, the learned Counsel for the appellant, pleaded that so far as welding electrodes are concerned, their use in repair and maintenance of the plant and machinery is not disputed at any stage. That there are judgments of three High Courts Judgment of Honble Rajasthan High Court in the case of **Hindustan Zinc Limited vs. Union of India reported in 2008 (228) E.L.T. 517 (Raj.)**, judgment of Honble Chhattisgarh High Court in the case of **Ambuja Cements Eastern Ltd. vs. CCE, Raipur reported in 2010 (256) E.L.T. 690 (Chhattisgarh)** and judgment of Honble Karnataka High Court in the case of **CCE, Bangalore I vs. Alfred Herbert (India) Ltd. reported in 2010 (257) E.L.T. 29 (Kar.)**, wherein



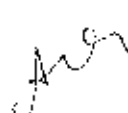
it has been held inputs used for repair and maintenance of the plant and machinery are eligible for Cenvat credit, that as regards the steel items namely MS Steel, MS Plates and MS Angles, the same have either been used for fabrication of various items of sugar mill machinery or for repair and maintenance of sugar mill machinery, as has been observed by the Assistant Commissioner in his order-in-original as well as in the show cause notice. That Commissioner (Appeals) has in his order wrongly mentioned that part of the steel items were used in erection of supporting structures for machinery, as there is no such allegation in the show cause notice nor any observation in the order-in-original passed by the Assistant Commissioner, that the steel items have been used either in repair and maintenance or for fabrication of the various items of sugar mill machinery, and therefore, the same would be eligible for Cenvat credit as input, that Honble Rajasthan High Court in the case of **Union of India vs. Hindustan Zinc Ltd.** reported in **2007 (217) E.L.T. 510 (Raj.)** has held MS/SS plates used in the workshop for repair and maintenance are eligible for Cenvat credit and this civil appeal filed against this judgment of Honble Rajasthan High Court has been dismissed by the Apex Court vide judgment reported in **2007 (214) E.L.T. A115 (S.C.)**, that the steel items used for fabrication of various items of sugar mill machinery like Cane Carrier side plate and Leveller/Chopper Hoods, Bagasse Cilo Pipe, Bagasse Carrier etc. being sugar mill machinery and, hence, covered by Chapter 84, would be eligible for Cenvat credit as input, as the definition of input also covers the goods used for manufacture of capital goods used in the factory of the manufacture. He, therefore, pleaded that the impugned order is not correct.



4. Shri R.K. Mishra, the learned Departmental Representative, defended the impugned order by reiterating the findings of the Commissioner (Appeals) and cited the judgment of Honble Andhra Pradesh High Court in the case of **Sree Rayalaseema Hi-Strength Hypo Ltd. vs. CCE, Tirupati** reported in **2012 (278) E.L.T. 167 (A.P.)**, wherein it was held that welding electrodes used for repair and maintenance of the plant and machinery are not eligible for Cenvat credit.

5. I have considered the submissions from both the sides and perused the records.

6. So far as eligibility for Cenvat credit of the welding electrodes used for repair and machinery of the plant and machinery is concerned, this issue stands decided by the judgment of three High Courts, as mentioned above - judgment of Honble Rajasthan High Court in the case of **Hindustan Zinc Limited vs. Union of India** (supra), judgment of Honble Chhattisgarh High Court in the case of **Ambuja Cements Eastern Ltd. vs. CCE, Raipur** (supra) and judgment of Honble Karnataka High Court in the case of **CCE, Bangalore - I vs. Alfred Herbert (India) Ltd.** (supra). When three High Courts have decided this issue in favour of the appellant, in my view notwithstanding the contrary judgment of Honble Andhra Pradesh High Court in the case of **Sree Rayalaseema Hi-Strength Hypo Ltd. vs. CCE, Tirupati** (supra), it is the judgment of the other three High Courts which would hold the field. Moreover, repair and maintenance is an activity without which manufacturing activity would not be commercially feasible even though theoretically it may be possible to carry out manufacturing activity without repair of plant and machinery. Apex Court in the case of **J.K. Cotton**



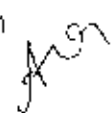
Spg. & Weaving Mills Co. Ltd. vs. Sales Tax Officer, Kanpur reported in **1997 (91) E.L.T. 34 (S.C.)**, while interpreting the scope of the expression "used in the manufacture of" in Section 8 (3) (b) of Central Sales Tax Act, 1956 has held that if a process or activity is so integrally related to the ultimate manufacture of goods so that without that process or activity, the manufacture may, even if theoretically possible, be commercially inexpedient, the goods intended in that process or activity would have to be treated as used in the manufacture. When the Apex Court has interpreted the expression used in the manufacture in the above manner, the scope of the expression used in or in relation to manufacture, whether directly or indirectly in the definition of input in Rule 2 (k) of the Cenvat Credit Rules, 2004 would be much wider. Moreover, Honble Calcutta High Court in the case of **Singh Alloys & Steel Ltd. vs. Assistant Collector of Central Excise** reported in **1993 (66) E.L.T. 594 (Cal.)** has held that the definition of input does not depend on what ought to be used but what is commercially expedient to use and expression in relation to used in Rule 57A has wide connotation. Therefore, for determining the eligibility of an item for Cenvat credit, what is relevant is as to whether the activity in which that item is required has nexus with manufacture or in other words without that item the manufacturing, though theoretically possible, is not commercially feasible. Repair and maintenance, in my view is an activity without which though manufacturing activity may be theoretically possible, the same would not be commercially feasible. The question as to whether repair and maintenance is an activity distinct and separate from manufacture has nothing to do with the question as to whether repair and maintenance has nexus with manufacture. Looked at from criteria prescribed by the Apex court in the case



of J.K. Cotton Spinning and Weaving Mills Co. Ltd. vs. Sales tax Officer, Kanpur (supra), the activity of repair and maintenance has to be treated as having nexus with manufacture and hence any item used for repair and maintenance would be eligible for Cenvat credit.

7. As regards the use of the steel items, which according to the department, were used for fabrication of various items of plant and machinery, I find the Assistant Commissioner on this point has given a clear finding mentioning the names of various items, of components of sugar mill machinery for which these steel items were used. There is neither any allegation in the show cause notice nor any finding in the Assistant Commissioners order that the steel items were used for structural supports and hence the observation in the Commissioner (Appeals)s order that part of the steel items were used for structural support is factually incorrect. Once it is accepted that steel items have been used for fabrication of various items of sugar mill machinery as mentioned in the order-in-original passed by the Assistant Commissioner or their repair and maintenance, these steel items would have to be treated as input used in the manufacture of capital goods and, hence, would be covered by the definition of input in Rule 2 (k) and would be eligible for Cenvat credit. Therefore, the impugned order upholding the denial of Cenvat credit in respect of these items is not sustainable."

6. The Hon'ble Gujrat High Court in **Mundra Port & Special Economic Zone Ltd. Vs. CCE [2015-TIOL-1288-HC-AMD-ST]** have held vide order dated 29.4.2015 overruling Larger Bench



decision of this Tribunal in **Vandana Global Ltd. Vs. CCE Raipur** reported in **2010 (253) E.L.T. 440 (Tri. LB)** that the Explanation -2 in Rule 2(k) of CCR, 2004, inserted w.e.f. 07.7.2009, have only prospective effect, observing that there is nothing in the Amending Act to suggest that the amendment made was clarificatory in nature. The Hon'ble Andhra Pradesh High Court in **CCE V/s Sai Samhita Storages (P) Ltd.** reported in **MANU/AP/0510/2011** have held that the assessee engaged in business of providing storage and warehousing services, is entitled to take Cenvat credit on inputs like Cement, Iron Bars, Pipes etc. used in construction of warehouse, without which the assessee could not have provided the taxable service of storage & warehousing. The Hon'ble Madras High Court In **India Cements Ltd. Vs. Cestat (2015)** have relied and quoted -

"8 As far as the reliance placed on the decision reported in MANU/SC/0895/2011: 2011-TIOL-73-SC-CX (Saraswati Sugar Mills Vs. Commissioner of Central Excise, Delhi - III) in Civil Appeal No. 5295 of 2003 dated 02.8.2011 by the learned Standing Counsel appearing for the Revenue is concerned, we find that this Court had earlier considered the case of the assessee in two similar cases of the previous assessment years in C.M.A. No. 1301 of 2005 dated 31.12.2012, where a reference was made to an order passed earlier in respect of the very same assessee. While dismissing the appeal filed by the Revenue, the Division Bench of this Court held as follows:

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"8. Even though learned standing counsel appearing for the Revenue submitted that the judgment in the assessee's own case reported in AIT-2011-358-HC (The Commissioner of Central Excise Vs. M/s India Cements Limited) had been appealed against, as of today, there are no details; in any event, the fact herein is that the Revenue does not controvert the facts found by the Assistant Commissioner that the impugned goods were used for fabrication of structurals to support various machines like crusher, kiln, hoppers, pre-heaters, conveyor system, etc. and that without these structural, the machinery could not be erected and would not function.

9. In the decision reported in AIT-2011-358-HC (The Commissioner of Central Excise Vs. M/s India Cements Limited), pointing out to Rule 57Q and the interpretation placed by the Apex Court in the decision in **Commissioner of Central Excise Jaipur Vs. Rajasthan Spinning & Weaving Mills Ltd.** (Supra) and in particular Paragraph Nos. 12 and 13, wherein the Apex Court had applied the user test by following the Jawahar Mills's case, this Court held that steel plates and M.S. Channels used in the fabrication of Chimney could fall within the ambit of "capital goods". In the face of this decision in the assessee's own case there being no new circumstance or decision in favour of the revenue, we do not find any good ground to take a different view.

10. As far as the reliance place by the Revenue on the decision reported in *Saraswati Sugar Mills Vs. Commissioner of Central Excise, Delhi-III* (Supra) is concerned, we do not think that the said decision would be of any assistance to the Revenue, considering the factual finding by the Tribunal therein in the decided case that the machineries purchased by the assessee

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were machineries themselves. Thus, after referring to the decision in **CCE Jaipur Vs. Rajasthan Spinning & Weaving Mills Ltd.**), the Apex Court held that in view of the findings rendered by the Tribunal that the machineries were complete and having regard to the meaning of the expression "components/parts", with reference to the particular industry in question, the Apex Court rejected the appeal filed by the assessee.

11. Thus going by the factual findings, which are distinguishable from the facts found by the Authorities below in the case on hand, we have no hesitation in rejecting the Revenue's appeal, thereby confirming the order of the Tribunal.

12. Learned standing counsel appearing for the revenue pointed out that the tribunal had merely passed a cryptic order by referring to the earlier decisions. We do not think that this would in any manner prejudice the case of the Revenue, given the fact that on the identical set of facts, the assessee's own case was considered by this Court and by following the decision reported in **(Commissioner of Central Excise Jaipur Vs. Rajasthan Spinning & Weaving Mills Ltd.)**, the Revenue's appeal was also rejected. In the circumstances, this Civil Miscellaneous Appeal is dismissed. No Costs. Consequently, C.M.P. No. 16107 of 2005 is also dismissed."

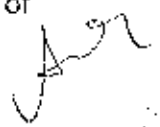
13. From a perusal of the above said judgment, it is seen that there is no change in the circumstances and this Court had already considered the issue and held that the decision reported in **2011-TIOL-73-SC-CX (Saraswati Sugar Mills Vs. Commissioner of Central Excise, Delhi-III)** dated 02.08.2011 is distinguishable on facts. This Court applied the principles laid down in the decision of Commissioner of Central Excise Jaipur Vs. Rajasthan Spinning & Weaving

Mills Ltd. (Supra) and held that the Tribunal was justified in allowing the assessee's contention in respect of the very same assessee.

15. Accordingly, following the principles laid down in **Commissioner of Central Excise Jaipur Vs. Rajasthan Spinning & Weaving Mills Ltd. (Supra)** and the earlier decisions of this Court in C.M.A. No. 3101 of 2005 dated 13.12.2012 and C.M.A. No. 1265 of 2014 dated 10.7.2014, we are inclined to allow the appeal, thereby set aside the order of the Tribunal. Accordingly, this Civil Miscellaneous Appeal stands allowed. No costs. Consequently, M.P. No. 1 of 2011 is closed."

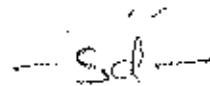
7. The Ld. A.R. for Revenue have placed reliance on the impugned order. He further relies on the ruling of Hon'ble Allahabad High Court in *Daya Sugar Vs. CCE* (2015) 316 ELT 394, wherein considering the allow-ability of Cenvat credit on chequered plates, packing plates, sheets, sections and staging materials for the period 3/2000 to 11/2000, under Rule 57Q of Central Excise Rules, 1944, wherein the appellant had taken credit based on suppliers invoices, and admittedly goods were used for constructing platforms for the use of running machinery, and for supporting equipments used in factory, it was held as the items are used merely for raising civil structures, hence credit was not available.

8. Having considered the rival contentions we hold that the appellant have constructed/fabricated machinery and its support structures, accordingly they are entitled to Cenvat credit on the goods in question including welding electrodes, relying on the findings of

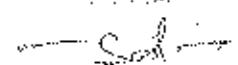


Hon'ble Madras High Court in India Cement (supra) and Gujarat High Court in Mundra Port (supra). We further hold that issue being wholly interpretational as their existed contrary judgements of this Tribunal, extended period of limitation is not invokable. Thus, the appeal succeeds both on merits and limitation. The impugned order is set aside. The Appellant will be entitled to consequential benefits, in accordance with law.

(Operative part of Order pronounced in the open Court at the conclusion of hearing).



(ANIL G. SHAKKARWAR)
MEMBER (TECHNICAL)



(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(K. Gupta)

निश्चित निका / Certified True Copy

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बिनायक गुप्ता / Asst. Registrar
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