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

Dated: 28/02/2018

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70395-70396/2018-EX[DB] dated 26/02/2018

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/55620/2013 | **Bajaj Hindusthan Limited**<br>Unit Kundarki,kastua<br>GONDA<br>U.P |
| 2 | E/56167/2013 | **Bajaj Hindusthan Limited**<br>Athandama, Rudranagar,<br>Unit- Rudhauli<br>BASTI,<br>UTTAR PRADESH. |
| | | Name and Address of Respondent |
| 3 | | C.C. & C.E. & S.T.-Allahabad<br>38...M G MARG...CIVIL LINES,<br>ALLAHABAD,<br>UTTAR PRADESH-211001 |
| 4 | | C.C. & C.E. & S.T.-Allahabad<br>38...M G MARG...CIVIL LINES,<br>ALLAHABAD,<br>UTTAR PRADESH-211001 |

Other Appellants and Respondents as per Annexure

Copy To

5 Advocate(s) / Consultant(s):

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

6 Bar Association, CESTAT, Allahabad

7 Director Publications, Customs, Excise. I.P. Estate, Delhi

8 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp ICICI Bank of Defence Colony New Delhi-3

9 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

10 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

11 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

12 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

13 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

14 The ICFAI society, 52. Nagarjuna Hill,Punjagutta Hyderabad.-500082

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16 C.D.R. 17 Office Copy 18 Second Folder Copy 19 Guard File

Asstt. Registrar

# IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

## REGIONAL BENCH : ALLAHABAD

COURT No. I

APPEAL Nos.E/55620 & 56167/2013-EX[DB]

(Arising out of Order-in-Original No. MP(Dem.-06/2012) 35/2012 dated 30/10/2012 & Order-in-Original No. MP(Dem.-05/2012) 38/2012 dated 03/12/2012 both passed by Commissioner of Central Excise & Service Tax, Allahabad)

**M/s Bajaj Hindusthan Ltd.** — **Appellant**

Vs.

**Commissioner of Customs, C.E. & S.T., Allahabad** — **Respondent**

Appearance:

Shri Pradeep Kumar Mittal, Advocate — for Appellant
Shri Rajeev Ranjan, Joint Commissioner (AR), — for Respondent

**CORAM:**

**Hon'ble Mr. Anil Choudhary, Member (Judicial)**
**Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)**

| | | |
|---|---|---|
| Date of Hearing | : | 21/06/2017 |
| Date of Decision | : | 21/06/2017 |

FINAL ORDER NOs.70395-70396/2018

**Per: Anil Choudhary**

The present two appeals are filed by the appellants-assessee against Order-in-Original No. MP(Dem.-06/2012) 35/2012 dated 30/10/2012 & Order-in-Original No. MP(Dem.-05/2012) 38/2012 dated 03/12/2012 both passed by Commissioner of Central Excise & Service Tax, Allahabad.

2. The issue in these appeals filed by the appellant-assessee, a manufacturer of sugar and molasses etc. is

whether they are entitled to take Cenvat credit on iron and steel items namely Shapes and Sections, Angles, M.S. Plates, M.S. Round, M.S. Plates, Channels, Hot Strips, Chequered Plates, M.S. Plat, HR coils, Aluminium Sheets, R.S. Joist, etc., falling under Chapter 72, 73 and 76 of the Central Excise Tariff Act, 1985 including welding electrodes. As these items/inputs were used in manufacture of various capital goods like Syrup Treatment Plant, Control Unit, Filter Clarification System, etc. and whether the exclusions provided in Explanation-2 of Rule 2 (k) of Cenvat Credit Rules, 2004, inserted with effect from 07/07/2009 have prospective effect only, and whether the demand is barred by limitation.

3. The brief facts as per SCN in Appeal No.E/55620/2013 are: –

> "3.1 Whereas, on scrutiny of the records of the party for the period January' 07 to Dec' 10, submitted by the party vide ref. No. BHL-KDK/CIT/2011-12 dated 15.09.2011, it was found that during this period the party availed Cenvat Credit amounting to Rs. 1,92,30,572/- on the items such as Shape & Section, Angles, M.S. Plates, M S Round, Beams, Rails M. S. Flats, Channels, Hot Strips, H R Plates, M. S. Flat, M. S. Square, H R Coils, Aluminium Sheets, R. S. Joist etc. falling under chapters 72, 73 & 76 of the Central Excise Tariff Act, 1985 as inputs (details enclosed as "Annexure-A"). These inputs were used in the manufacture of goods i.e. Syrup Treatment Plant, Control Unit, Filter Clarification System and Structural Support for Machinery & Houses such as mill house, boiling house, power house etc.
>
> 3.2 Whereas the above goods i.e. Syrup Treatment Plant, Control Unit, Filter Clarification System and Structural Support for Machinery & Houses such as mill houses, boiling house, power house etc. do not qualify as Capital Goods as per definition of capital goods under Rule 2(a)(A) of Cenvat Credit Rules, 2004. Thus, the items i.e. Shape & Section, Angles, M.S. Plates, M S Coils, Aluminium Sheets, R.S. Joist etc. used for the manufacture of these goods do not qualify as inputs as per Explanation-2 of Rule 2 (k) of the Cenvat Credit Rules, 2004 and also these items are not covered under the definition of input under Rule 2(k) Cenvat Credit Rules, 2004 due to the reason that these items were not used in relation to the manufacture of final products i.e. V.P. Sugar and Molasses directly or indirectly."

4. The brief facts as per SCN in Appeal No.E/56167/2013 are: –

Whereas during the audit of records of the party for the period January' 2007 to November'2008, it was observed that they had availed Cenvat Credit. total amounting to Rs.2,80,76,595.00 on inadmissible goods such as Shapes & Sections, Angles, M.S. Plates, H.R. Coils, Aluminium Sheets, R.S. Joist, Welding Electrodes etc. all falling under chapter 72/76/83 of the Central Tariff Act, 1985, considering them as inputs. However, during further investigation in the matter by the Superintendent, Central Excise, Range Basti, the party took the plea that all these goods had been used as inputs in the manufacture of capital goods and thus these were eligible for Cenvat Credit in terms of Explanation -2 to Rule 2(k) of the Cenvat Credit Rules, 2004 and vide their letter Ref. No. BHSIL/CIT/2010, dated 01.10.2010 (enclosed as RUD-I), they submitted the brief details of the Capital goods alongwith their corresponding Chapter head, manufactured/fabricated by the items in dispute vis-à-vis their purchase invoice details and credit taken details. The further in-depth examination of the above end use, submitted by the party vis-à-vis the physical verification of the manufactured/fabricated Capital goods by the Officers of Central Excise. Range Basti revealed that the total amount involved, Rs. 2,80,76,595.00 has following break-up:-

a) Credit taken as Capital goods on G.I. Corrugated Sheets putting them under Ch. 84 – Rs. 78,996.00.

b) Credit taken as input on W. Electrodes of Ch. 83 – Rs.4,23,976.00 &

c) Credit taken as input on the items of Ch. 72/76 – Rs. 2,75,73,623.00.

Whereas the Galvanised Iron Corrugated Sheets, an item classifiable under Chapter- 72, has been claimed by the party of Chapter – 84 which deals with the goods like Nuclear Reactors, Boilers, Machinery & Mechanical appliances and parts thereof. It appears that the party have deliberately mis-stated this fact to take the benefit of Cenvat credit on this item as Capital goods. Thus the amount involved Rs. 78,996.00 in this regard appears inadmissible for the purpose of taking Cenvat credit.

Whereas the Cenvat Credit taken on W. Electrodes (Ch. 83) as input also do not appear proper as these items cannot be termed as "input" in light of the definition provided under Rule 2(k) of the Cenvat Credit Rules, 2004. Further the party's claim in their reply under Ref. No. BHSIL/CIT/2010, dated 01.10.2010 that these goods had been used as input in the manufacture of various Capital goods like Storage Tanks, Vacuum Pipes, Cane Unloader etc. and thus are covered under the Explanation – 2 to Rule 2(k), is not acceptable as they could not back their above claim with any verifiable documentary evidence. Thus the amount involved Rs. 4,23,976.00 in this regard also appears inadmissible for the purpose of taking Cenvat credit.

5. Accordingly on such facts for the 2 different units of the appellant company located at, Athadama, Rudranagar, Unit: Rudhauli Distt. Basti (UP) and another unit located at Kundarki, Distt. Gonda (U.P.), the disallowance of Cenvat

credit was proposed along with proposal to impose penalty. Vide separate Orders-in-Original the proposed disallowance was confirmed along with penalty as follows:-

| Sr. No | Appeal No. | Unit | SCN No. & Date | Period | Amount (Rs) | Penalty Amount (Rs) | Total (Rs) |
|---|---|---|---|---|---|---|---|
| 1. | E/56167/2013-EX[DB] | Rudranagar Dist: Basti(U.P.) | 02/Commr. Alld/2012 Dated 25/01/2012 | January 2007 to November 2008 | 1,23,70,513/- | 1,23,70,513/- | 2,47,41,026/- |
| 2. | E/55620/2013-EX[DB] | Kundarki Dist: Gonda (U.P.) | 03/Commr. Alld/2012 Dated 06/02/2012 | January 2007 to December 2010 | 1,92,30,572/- | 1,92,30,572/- | 3,84,61,144/- |

6. The learned Counsel for the appellant Mr Pradeep Kumar Mittal, Advocate states that the issue herein is no longer res-integra and the same have been decided in their favour in respect of their other similar units manufacturing sugar and molasses, particularly in the earlier Final Order No.A/70311/2016-EX[DB] order dated 06/06/2016 in Appeal No.E/55941/2013 (DB) and Final Order No.A/70217-70218/2017-EX[DB] dated 22.02.2017 in Appeal No.E/134/2012 & E/152/2012-EX[DB].

It is further pointed out that in both the appeals the learned Commissioner disallowed the Cenvat credit mainly following the ruling of Larger Bench of this Tribunal in the case of Vandana Global Ltd. Vs CCE, Raipur reported at 2010 (253) ELT 440 (CESTAT-LB) which is no longer good law and have been overruled by the Hon'ble Gujarat High Court and by Hon'ble Madras High Court in India Cements Ltd. and also in other judgments.

7. The learned Counsel points out that the Chartered Engineer vide his certificate dated 10.05.2012, in Appeal No.E/56167/2013-EX[DB] (on page No.251 to 302) has also certified the use of steel items for fabrication of plant & machinery, necessary support for plant & machinery, the details of such plant & machinery is also given. Similarly, the chartered Engineer vide his certificate dated 09/05/2012 in Appeal No.E/55620/2013-EX[DB] (at page no.152 to 184), have certified that various steel items have been used for fabrication of plant & machinery and also for necessary support for such plant & machinery.

8. The learned A.R. for revenue have relied on the impugned order.

9. Having considered the rival contentions we find as follows: -

9.1. So far as eligibility for Cenvat credit of the welding electrodes used for repair of the plant and machinery is concerned, this issue stands decided by the judgment of three High Courts, - judgment of Hon'ble Rajasthan High Court in the case of Hindustan Zinc Limited vs. Union of India, judgment of Hon'ble Chhattisgarh High Court in the case of Ambuja Cements Eastern Ltd. vs. CCE, Raipur and judgment of Hon'ble Karnataka High Court in the case of CCE, Bangalore Vs. Alfred Herbert (India) Ltd. When three High Courts have decided this issue in favour of the appellant, in our view notwithstanding the contrary judgment of Hon'ble

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. The 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 our 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. Looking 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. Further, usage of Iron & Steel items required for construction of structural supports for plant & machinery is concerned, the said issue is covered in favour of the manufacturer-assessee in the case of India Cements Ltd of Hon'ble Madras High Court, reported at AIT–2011–358–HC and also in the case of Hindustan Zinc Ltd Vs Union of India reported at 2007 (217)

ELT 510 (Raj) by Hon'ble Rajasthan High Court. The Hon'ble Supreme Court had affirmed the judgment of Hon'ble Rajasthan High Court reported at 2007 (214) ELT A 115 (SC), wherein it was held that although repair and maintenance is an activity without which manufacturing activity would not be commercially feasible, even though critically, it may be possible to carry out manufacture without repair of plant and machinery. So far the utilization of items like M.S. Plates, are concerned, it is admitted fact that such items have either been used in repair and maintenance or for fabrication of various capital items or machinery of the sugar mill and, therefore, the same would be eligible for Cenvat credit, it is held by Hon'ble Rajasthan High Court in the case of Union of India Vs Hindustan Zinc Ltd. (supra), wherein it is held that M.S./S.S. Plates used in the workshop for repair and maintenance are eligible for Cenvat credit. That the steel items used for fabrication of various items of Sugar Mill Machinery like cane, Bagasse carrier, Bagasse Cilo, pipe, etc., being sugar mill machinery and hence are covered by chapter 84, would be eligible for Cenvat credit as inputs and the definition of input also cover the goods used for manufacturing of capital goods used in the factory of manufacturer of dutiable goods.

10. We, further hold that as the steel items have admittedly been used for fabrication of various items of plant and machinery, being components of sugar mill machinery, or

used in the repair of such machinery, the steel items would have to be treated as input 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 credit. We also note that Hon'ble Gujarat High Court in the case of Mundra Port and Special Economic Zone Ltd. Vs CCE reported at 2015-TIOL-1288-HC-AMD-ST have held, overruling the Larger Bench of this Tribunal in the case of M/s Vandana Global Limited reported at 2010 (253) ELT 440 (Tri.-L.B.) that explanation 2 in Rule 2(k) of CCR, 2004, inserted with effect from 7th July, 2009 have only prospective effect, observing that there is nothing in the amending Act to suggest that amendment was clarificatory in nature. We further notice that Hon'ble Andhra Pradesh High Court in the case of CCE Vs Sai Samhita Storage Private Ltd. reported at 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 warehouses without which the assessee could not provide the taxable service. Accordingly, we hold that the appellant-assessee is entitled to Cenvat credit in respect of all the items of inputs disputed in the show cause notice. We also notice that the appellant had taken a categorical stand when objection was raised by audit that they have rightly taken Cenvat credit of the items in dispute and from such date, show cause notices have been issued after more than 12 months. Accordingly, we hold that the show cause notices are also bad on the ground of limitation and there is no ground for invoking the extended period of limitation.

11. Accordingly, we allow these appeals both on merits as well as on limitation. The appellant-assessee shall be entitled for consequential benefits, in accordance with law.

(Dictated in Court)

-Sd/-
(ANIL G. SHAKKARWAR)
Member (TECHNICAL)

-Sd/-
(ANIL CHOUDHARY)
Member(JUDICIAL)

Akp

प्रमाणित प्रति/Certified True Copy
13/03/18
सहायक पंजीकार/Asstt. Registrar
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