# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, BANGALORE

REGIONAL BENCH - COURT NO. 1

## Excise Appeal No. 20520 of 2017

[Arising out of Order-in-Original No. BEL/EXCUS/000/COM/BKK/044/16-17 (CX) dated 21.12.2016 passed by the Commissioner of Central Excise and Customs, Belgaum]

**Commissioner of Central Excise,**
**Customs & Service Tax, Belgaum**
No. 71, Club Road
Central Excise Building
Belgaum-590001 ……**Appellant**

***VERSUS***

**Ultratech Cement Ltd.**
Adityanagar, Malkhed Road
Tq. Sedam, Dist. Gulbarga
Malkhed–585292 **……Respondent**

**Appearance:**

Mr. H. Jayathirtha Authorised Representative for the Appellant.
Mr. Ravi Raghavan, Mr. Mohammed Ibrahim & Mr. Tushar Sharma, Advocates for the Respondent

**Coram:**
**Hon'ble Dr. D.M. Misra, Member (Judicial)**
**Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)**

## Final Order No. 21524/ 2023

Date of Hearing: 05.09.2023
Date of Decision: 05.09.2023

**Per: Pullela Nageswara Rao**

The Respondent is a manufacturer of Cement and Clinker falling under Chapter 25 of the Central Excise Tariff Act, 1985. The Respondent's cement plant is at Malkhed and has a Central Excise Registration No. AACL6442LEM017.

2. The brief facts are the respondent during April, 2011 to September, 2014, has expanded the cement plant's capacity from 47 Lacs MTs to 90 Lakh MTs. The Respondent purchased the machinery for the expansion of the plant and has undertaken expansion work in the existing factory premises, itself and for this expansion, the Respondent has used various services. These services include;

> 'Erection, Commissioning or Installation services' for erection and commissioning of the machinery to be installed in the plant.
>
> a. "Management or Business Consultant services" were availed to give advice on the optimum plant structure in order to boost the production capacity and also to give advice on various strategic issues and decisions made with respect to the expansion of the capacity.
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> b. "Consulting Engineer's services" have been availed to give advice on how to plan, construct and start the plant and also to give direction to complete the expansion.
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> c. Management, Maintenance or Repair services" were used for repairs and maintenance of the existing plant as well as the expanded plant.
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> d. Commercial or Industrial Construction services" were availed in order to construct the buildings.

3. The Respondent has not availed any Cenvat credit on construction services as the same have been specifically excluded from the definition of input services as amended w.e.f. 01.04.2011.

4. The amount-wise breakup of the input services on which the credit has been availed is as under:

| Sl. No. | Nature of service | Amount of credit availed (In Rs.) |
|---|---|---|
| 1 | Erection, Commissioning or installation services | 11,92,50,123 |
| 2 | Management or Business Consultant services | 3,30,117 |
| 3 | Consulting Engineer services | 2,15,48,616 |
| 4 | Management, Maintenance or repair services | 29,90,284 |
| | Total | 14,41,19,230 |

5. The respondent had completed the above expansion on 14.03.2014, thereafter theRespondent started producing the cement from the new capacity. The Respondent is payingexcise duty on the goods manufactured and cleared from the new capacity. For the expansion, no new registration has been taken, the purchase of rawmaterials, capital goods, work force, sale of the final product, clearance, accounting etc., is common.

6. An audit was conducted for the period April 2011 to December 2013. It wasobserved by the Department that the respondent has set up a new cement plant next to the already existing plant and have availed Cenvat credit of service tax paid on various input services used for the same.

7. Based on these correspondences and investigations, the department has issueda Show Cause Notice C. No. V/25/15/135/ 2014/Adjn dated 18.03.2015 proposing to demand and recover the Cenvat credit of Rs.14,41,19,230/- along with interest and penalty. The notice alleged that; the Respondent has not expanded its cementplant but has set up an entirely new one adjacent to the existing plant; the definition of 'input service' was amended with effect from 01.04.2011 and this amendment

deleted the words 'setting up' from the definition. Therefore, the Respondent is debarred from taking any Cenvat credit once the phrase "setting up of factory" is specifically removed from the definition of input services and as the availment of the Cenvat credit was detectedby the audit team, the Respondent has suppressed information and intended to avail inadmissible Cenvat credit and therefore, the extended period is invokable and for the same reasons penalty is also imposable on the Respondent.

8. The Respondent filed a detailed reply contending that; an amount of Rs.43,74,021/- availed as credit was reversed in the same month therefore, the said amount is to be omitted out of the total Cenvat Credit demand of Rs.14,41,19,230/-.; they have taken credit on input services which have been used to install / erect a new plant, which is used in the manufacture of cement i.e. the final product; The main clause of Rule 2(l) as applicable to a manufacturer means services '*used in or in relation to manufacture of final products and clearance of final products upto the place of removal';* Rule 2(l), prior to 01.04.2011, read as '*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…'*. From 01.04.2011, except 'setting up', services in relation to 'modernization, renovation or repairs of a factory, premises etc., continues to be in the inclusive clause; the definition read as '*setting up, modernization, renovation or repairs'* relate to factory, premises of provider of output service or an office relating to such factory or premises; therefore, if the approach in the notice is to be adopted, what has been deleted from the definition is only services in relation to setting up of a 'factory'. In the present case, admittedly a factory was not set up but only an additional plant was installed within the existing factory.

9. The Learned Commissioner vide impugned order dated 21.12.2017 accepted the plea of the Respondent that; an amount

of Rs.43,75,021/- availed as credit and reversed the same month was included in the present proceedings, therefore, an amount for Rs.43,74,021 was omitted out of the total cenvat credit demand of Rs.14,41,19,230/- and examined the admissibility of balance cenvat credit of Rs.13,97,44,209/-; the Learned Commissioner after noting and discussing the definition of input services under Rule 2(l) of the Cenvat Credit Rules with effect from 01.04.2011 held that it would not be construed that all the services used for setting up of plant are excluded from the purview of the definition of input service and that the Respondent is still eligible so long as they are covered by the main part of the definition of the input service; the disputed services are used in or in relation to the manufacture of excisable goods and not covered under exclusion part of the definition and allowed the credit of Rs.13,91,22,878/- out of total credit of Rs.13,97,44,209/- and disallowed the credit of Rs.6,24,922/- pertaining to certain invoices holding that services received in respect of the said invoices are no way related to manufacture of goods either directly or indirectly and hence, credit to the extent of Rs.13,91,22,878/- is in order. Being aggrieved with that portion of the impugned order, wherein the Learned Commissioner has allowed the credit of Rs.13,91,22,878/-, the present appeal has been filed by the Department.

10. The Respondent in the appeal contends that; the case of the department is that the definition of 'input service' was amended with effect from 01.04.2011 and this amendment deleted the words 'setting up' from the definition. Therefore, the Respondent is debarred from taking any Cenvat credit once the phrase "setting up of factory" is specifically removed from the definition of input services; the issue involved in the present matter is no longer *res integra* and the same has been decided by the Hon'ble Tribunal in the case of ***Pepsico India Holdings (Pvt.) Ltd. vs. CCT, GST Commissionerate, Tirupati*** reported in ***2022 (56) G.S.T.L. 22 (Tri. - Hyd.)***

11. The respondent places reliance on the following decisions wherein the Hon'ble Tribunal has held thatdeletion of words "setting up" from definition of input services does not make any difference in respect of services for setting up of the factory, so long as the said services were covered by expression "used in or in relation to manufacture of final products".

i) ***Aditya Aluminium v. CCE, Customs and ST, Bhubaneshwar - 2023-VIL-777-CESTAT-KOL-CE***
ii) ***Tata Steel Ltd. Vs. CCGST & CX, Bhubaneshwar - Final Order No. 76490/2023 dated 23.08.2023 passed by CESTAT Kolkata***
iii) ***Jindal Steel & Poer Ltd. Vs. CCT, Rourkela - Final Order NO. 75613/2013 dated 05.06.2023 passed by CESTAT Kolkata***
iv) ***Shell India Pvt. Ltd. Vs. CCE, Bangalore North - 2021-VIL-820-CESTAT-BLR-ST - Affirmed by Hon'ble High Court of Karnataka 2023-VIL-01-KAR-ST***
v) ***CCE, Kolkata v. Texmaco UGL Rail Ltd. - 2019 (7) TMI 1651-CESTAT, Kolkata***
vi) ***Hindalco Industries Limited v. CGST, CE & Customs, Jabalpur -2019 (5) TMI 1620-CESTAT New Delhi***

12. Further the respondent submitted that an analysis of the definition of input services makes it clear that the definitionof input services is exhaustive in nature and if a particular service has been used directly or indirectly in the manufacture of final products, the said service will be considered to be an input service, irrespective of whether the particular service has been mentioned in the inclusive limb of the definition of input services or not. The Respondent made the following submissions with respect to each service and their importance in the manufacture of final products so that the same can be covered under the main clause of the definition of input service or specifically covered under the inclusive clause of the definition.

a. Erection, Commissioning or Installation services have been used to expand the capacity of the plant. This expansion of the capacity is only done to manufacture cement and clinker. These services are directlyused for the manufacture of the finished products. It is submitted that they must necessarily qualify to be input services.

b. Management or Business Consultancy services, are input services as they help in increasing the efficiency of the plant. They help in the management of the organization and result in higher production of the final products at the plant. Without proper management, the plant will not be able to function in the long term and at a profitable level. The expansion of the plant involves many processes and many people need to work in a cohesive manner in order to ensure that the expansion can be carried out in the right manner and maximum returns can be derived from the said expansion. These services are essential for the expansion of the plant and areused in relation to the manufacture of the final product.

c. Consulting Engineer's services, a consulting engineer is one who provides their expertise. In the present case, the expansion of the plant requires the services of many experts including engineers. These engineers will be necessary to set up the machinery whichis required to increase the capacity of the plant. They are providing their expertise to ensure that the expansion is carried on smoothly and the finished plant can function properly. Without their services, it would be impossible to carry out the expansion. Therefore, these services are used in the manufacture of the final product and credit should be allowed to be availed on the service tax paid for these services.

d. Management, Maintenance or Repair Services, Manufacturing of cement being a complex process which involves use of various plant and machinery. In the regular usage of the said machineries, repairs occur to the machinery and the regular operations are obstructed. In this regard, the Respondent avails the services of specialists, who come to the factory and undertake the repair.The repair and maintenance service has a direct impact on the manufacture of goods and helps in carryout of manufacturing operations without any interruptions.

13. Thus it is clear that the above-mentioned services would fall within input services, if any relation can be shown to the manufacture of the products. In the present case, the services were actually used for the betterment of the manufacturing plant. They have a very clear link to the manufacture and must qualify to be input services.

14. In light of the above submission, it is submitted that services received by the Respondent are directly or indirectly used in the manufacture of goods. Further, these services are indispensable for the functioning of the business of the Respondent.Therefore, Cenvat credit of service tax paid on such services is rightly eligible to the Respondent as the said services satisfy the definition of 'input services' under Rule 2(l) of the Credit Rules.

15. The case of the Department in the present case is that since the term 'setting up' has been omitted from the definition of input service w.e.f 01.04.2011, the Respondent is not eligible to avail Cenvat credit of the service tax paid on services received at the time of setting up of the factory.

16. The Respondent submits that the fact that the term 'setting up' being removed from the definition does not ipso facto mean every service used for setting up of manufacturing facility has been excluded from the ambit of input service. A service received by a manufacturer for setting up or in relation to their plant, machinery or equipment would still qualify as input service as long as it can be established that service is used directly or indirectly in the manufacturing activity and the same is not excluded from the

definition of 'input service'.In other words, the amended definition of input service specifically provides for exclusion to specific services like service portion in the execution of a works contract and construction service in so far as they are used for construction or execution of works contract of a building or civil structure or part thereof or laying of foundation or making of structures for support of capital goods, etc. Thus, if any service is specifically covered under the exclusion part of the definition, no Cenvat credit is eligible to the Respondent.

17. The Respondent further submitted that had the intention of the Government is to exclude any service relating to setting of factory from the definition of input service, they would have specifically provided in the exclusion part of the definition of 'input service'. Since, the said exclusion is not provided under the amended definition of 'input service', still a service can qualify as input service, if the same is covered under the means/includes clause of the definition of 'input service'. In other words, the omission of term 'setting up' from the inclusive definition of 'input service' should be seen in the context and read with exclusion clause of the definition and other than those specifically excluded would qualify as input service under the main clause or includes clause of the definition of the 'input service'.

18. It is also submitted that once a service is covered under the main clause of the definition of input service, non-mention of the same in the inclusive part of the definition would not exclude such service from the definition of input service. It is a settled legal position that an includes clause prefixed by a means clause only widens the scope of provision and does not restrict it. Therefore, the Respondent submits that they have started the manufacturing of the final product from the expanded capacity and also paying the excise duty on the aforesaid product. Thus, it has satisfied the conditions of amended definition of the Cenvat credit and hence, the Respondent is eligible for Cenvat credit on the input services.

19. The Respondent submits that; the Show Cause Notice was issued to the Respondent on 18.03.2015 to demand the Cenvat credit availed during the period April, 2011 to September, 2014.

Hence, on application of the normal period of limitation of one year, the demand for period April, 2011 to January, 2014 is barred by limitation.

20. The Respondent submits that; there was no suppression as the departmental authorities possessed complete information with regard to the present case as the Respondent are regularly filing the ER-1 returns disclosing the availment of Credit; it is not the case of the department that the Respondent has not disclosed the credit availment in their accounts or in ER-1 returns;it is settled law that when the demand is based on audit objection, the extended period is not invokable and also that suppression cannot be alleged when the matter involves interpretation of legal provisions and when the assessee is under bonafide belief that they are entitled to Cenvat credit on disputed services. Reliance is placed on the following decisions:

***a) CCE & ST, Tirupathi vs. Sri Sai Sindu Industries - 2017 (49) S.T.R. 84 (Tri. - Hyd.)***
***b) Commissioner vs. Dyamic Industries Ltd. – 2014 (307) ETL 15 (Guj.)***
***c) Ultratech Cement Ltd. vs. CC & CE, Tirupathi – 2016 (339) ETL 127 (Tri.-Hyd)***
***d) Ispat Industries Ltd. vs. CCE - 2006 (199) ELT 509 (Tri.-Mum)***
***e) Cambay Organics Pvt. Ltd. vs. CCE, Vadodara - 2007 (217) ELT 586 (Tribunal)***

21. In view of the above, the demand is not sustainable and consequently the department’s appeal is liable to be dismissed.

22. Per contra, the learned AR for the Revenue contended that even after the change of definition of input service after 01.04.2011 and deletion of the expression services used for setting up the plant would only mean that this specified category of services is excluded from the purview of Cenvat credit and it would not be construed that all the services used

for setting up of plant are excluded from the purview of input service. The Appellant is still eligible for Cenvat credit on services so long they are covered by the main part of input service definition i.e used in or in relation of manufacture of goods directly or indirectly. The Department has contended that the adjudicating authority has not focused on the importance of the amended definition of input service in the inclusive portion of the definition in as much as the terms setting up is completely, omitted. The amendments enumerate the legislative intent to keep the services in relation of setting up a factory out of the scope of input services and thereby disallow the Cenvat credit in respect of such services, which were hitherto available as a Cenvat credit. The amendments in the definition omitting the term setting up substantiates that the services utilized for setting up of a factory will no longer qualify as an input service. Further the Learned AR reiterated the contentions in the grounds of appeal.

23. In the grounds of appeal, the appellant-Department has contended that;

(a) the definition of input service has been amended w.e.f. 01.04.2011, wherein the term setting up has been omitted from the inclusive portion of the definition of input service under Rule 2(l) of Cenvat Credit Rules, 2004 and there was no substantial change in the definition of input service during the further period covered in the show-cause notice. The allegation in the show-cause notice that the impugned services are used in setting up of the cement plant has not been disputed in the findings of the impugned order. The adjudicating authority without focusing due importance to the amended definition of input service in the inclusive portion of the definition allowed the service tax credit of Rs. 13,91,22,878/-.

(b) The definition of the input service in the inclusive portion expressly covered the service relating the setting up of factory prior to 31.03.2011. The term setting up is omitted from the inclusive portion of the definition w.e.f. 01.04.2011 which enumerates the legislative intent to keep the services in relation to setting up of a factory out of the scope of input service and thereby deny the Cenvat credit in respect of such services to the manufacturer, which were hitherto available as Cenvat credit. Thus, the term setting up has been consciously deleted in the inclusive portion of input service definition to exclude services used in relation to setting up of a factory from the scope of definition input service from 01.04.2011,2 onwards.

(c) The inclusive portion of the input service definition in Cenvat Credit Rules,2004 amplifies the scope of the definition, to clarify that the services specified therein qualify as input service. The amendment in the definition w.e.f. 01.04.2011 omitting the term setting up substantiates that the services utilized for setting up of a factory will no longer qualify as input service hence the decision of the adjudicating authority that the service tax involved in the services used for setting up cement plant are eligible for Cenvat credit and accordingly allowing the service tax Cenvat credit is not legal and proper.

24. Heard both sides and perused the records.

25. The issue involved in the present appeal relates to whether services of 'Erection,Commissioning or installation services', 'Management or business consultancy services', 'Consulting Engineer's service"and"Management,Maintenance or repair services"used in the expansion of factory by installation of additional plant to increase the production capacity are covered

by the definition of input service post amendmentomitting the term 'setting up'from the input service definition 2(l) of Cenvat Credit Rules, 2004 with effect from 01.04.2011

26. We find that in this case, the respondent has expanded the capacity of the cement plant from 47Lacs MTs to 90 Lac MTS and the expansion is undisputably taken in the existing factory premises. Further the returns pertaining to the expanded capacity are being filed as a part of the existing plant. The Department contends that since the services are used for the setting up of factory, hence they are excluded from availment of Cenvat credit in view of the amended definition of 2(l) of Cenvat Credit Rules, 2004. We find that the appellants have contended that their case is of expansion of the existing capacity and not setting up of a new factory. Further they have cited the case-law of Pepsico India Holdings Pvt., Ltd., Vs. CCT, GST Commissionerate, Tirupati reported in 2022 (56) G.S.T.L 22 (Tri.-Hyd.) wherein it is held as under:

> ***"20.*** *Thus, the term 'manufacture' itself is very wide and includes anything incidental or ancillary to manufacture.*
>
> ***21.*** *For a service to qualify as 'input service' under Cenvat Credit Rules, 2004 post 2011, the service in question need not be covered even by the very wide definition of manufacture under Section 2(f) of the Central Excise Act. Any service which is used not only in manufacture but also 'in relation to' manufacture will also qualify as input service. The scope of input service is furtherenlarged with the expression whether directly or indirectly used in the definition of input service. Thus, there are:*
>
> *(a) Actual manufacture;*
>
> *(b) Processes incidental or ancillary to manufacture which are also manufacture;*
>
> *(c) Activities directly in relation to manufacture (i.e., in relation to 'a' and 'b' above);*

*(d) Activities indirectly in relation to manufacture (i.e., in relation to 'a' and 'b' above);*

***22.*** *All four of the above qualify as input service as per Rule 2(l)(ii) as applicable post 01.04.2011. Although setting up the factory is not manufacture in itself, it is an activity directly in relation to manufacture. Without setting up the factory, there cannot be any manufacture. Services used in setting up the factory are, therefore, unambiguously covered as 'input services' under Rule 2(l)(ii) of the Cenvat Credit Rules, 2004 as they stood during the relevant period (post 01.04.2011). The mere fact that it is again not mentioned in the inclusive part of the definition makes no difference. Once it is covered in the main part of the definition of input service, unless it is specifically excluded under the exclusion part of the definition, the appellant is entitled to Cenvat credit on the input services used. This Bench has already taken this view in Kellogs. Similar views have been taken by the other Benches in the other cases mentioned above.*

27. We find that the ratio of the decision of Pepsico (supra) was followed in the cases below:

(a) Aditya Aluminium vide Final Order No. 35326/2023 by the Kolkata Tribunal

(b) Tata Steel Ltd., vide Final Order No. 76490/2023

(c) Jindal Steel & Poer Ltd. vide Final Order No. 75613/2023

(d) M/s. Shell India Pvt. Ltd.

(e) Hindalco Industries Vs. Commissioner of Central Excise and GST, Jabalpur-2019(5) TMI 1620-CESTAT New Delhi.

28. In all the above cases, we find that the issue involved is whether the tax paid on the input services utilized in the setting up of a factory or the business premises is entitled for the availment of Cenvat credit post amendment to the definition of input service, wherein the word 'setting up' has been omitted.

28. We find that in the subject case, the issue involved is expansion of the existing factory, hence is on a better footing. We do not find any reason to take a different stand in the matter, when the issues are identical. Hence, we find that the appeal filed by the Department is not tenable. Consequently, the impugned order is upheld and department's appeal is rejected.

(Operative portion of the order was pronounced
in Open Court on 05.09.2023)

**(D.M. Misra)**
**Member (Judicial)**

**(Pullela Nageswara Rao)**
**Member (Technical)**

Pr/iss