Q CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, BANGALORE

REGIONAL BENCH - COURT NO. 1

Excise Appeal No. 1802 of 2011

[Arising out of Order-in-Original No. 15/2011 dated 28.03.2011 passed by the Commissioner of Central Excise and Customs, Belgaum]

UltraTech Cement Ltd.
Ginigera Grinding Unit,
Gangavathi Road,
Ginigera – 583228 **...Appellant**

VERSUS

C.C, C.E. & S.T., Belgaum
No. 71, Club Road,
Central Excise Building
Belgaum-590001 **...Respondent**

Appearance:

Mrs. Neethu James & Mr. Mohammed Ibrahim, Advocates for the Appellant

Mr. H. Jayathirtha, Authorised Representative for the Respondent

Coram:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 21523/ 2023

Date of Hearing: 03.08.2023

Date of Decision: 03.08.2023

Per: Pullela Nageswara Rao

M/s. UltraTech Cement, the appellant is engaged *inter alia* in the manufacture of cement falling under Chapter 25 of the First Schedule to Central Excise Tariff Act, 1985.

2. The brief facts are the appellant receives clinker as input for the manufacture of cement from their unit at Tadapatri,

Andhra Pradesh and they avail credit of central excise duty paid on inputs, capital goods, tax on input services used in manufacture of cement on which central excise duty is paid. The appellants during the course of erection of a factory, procured iron and steel materials such as Angles, Channels, M.S Joists, M.S Beams, GI/GC Sheets, M.S Plates, M.S Rails, etc.

3. The iron and steel were used in the factory by the appellants as under.

Description of the impugned items	**Function of impugned items**
MS Beams and MS Joists	Used in fabrication of columns which are further used in fabrication of Conveyor system, Hoppers, Silos etc., in the factory of the appellant.
MS Angles, MS Channels	Used for bracing for support of columns.
MS Plates	Used in the fabrication of Hoppers and Ducts.
GI/GC Sheets	Used for covering Conveyor system, Hoppers and Grinding Mills.
MS Rails	Used in the Railway Sidings.

4. The iron and steel items above are used in the factory premises of the appellant for fabrication and erection of support structures for installation of capital goods. The iron and steel items were subjected to various processes such as cutting, drilling, bending, welding, punching before they were made

suitable for fabrication of structures. During the period 2008 to June 2009, they have received a total quantity of 5227.91 MTs of iron and steel items, which were used for fabrication of conveyor systems, silos, hoppers, etc., within the appellant's factory. However, they have availed Cenvat credit only on 4696.69 MTs of iron and steel items of Rs. 2,03,75,134/- (Rupees Two Crore Three Lakh Seventy Five Thousand One Hundred and Thirty Four only). In the returns for the month of March, April and May 2008, the appellants indicated that they were availing Cenvat credit on iron and steel items by submitting a separate sheet enclosed to the ER-1 returns. There was correspondence between the Superintendent of Central Excise and the appellant with regard to seeking details of the use of Angles, Channels, M.S Joists, M.S Beams, GI/GC Sheets, M.S Plates, M.S Rails, etc., in the factory. The appellants have submitted a letter dated 12.09.2009 to the Superintendent of Central Excise stating that M.S Rails are used for laying out railway siding. A show-cause was issued dated 04.05.2010 denying the cenvat credit availed of Rs. 2,03,75,134/- (Rupees Two Crore Three Lakh Seventy Five Thousand One Hundred and Thirty Four only) on iron and steel items during the relevant period holding that the iron and steel items do not satisfy the definition of 'inputs' as defined in Cenvat Credit Rules, 2004 and hence, the credit has been incorrectly availed. The department contended that; the iron and steel items used in the fabrication of structure are not eligible for Cenvat credit, since the resultant final product i.e., structures do not fit into the definition of 'capital goods'; structures, chimney, hoppers, ducts etc., have been fabricated stage by stage by using iron and steel and therefore structures are non-excisable, since the structures are non-excisable, Cenvat credit will not be available on inputs used in manufacture of such structures. As regards the GI/GC sheets, which are used for covering the conveyor systems, hoppers and grinding mills etc., as no goods have been manufactured using these sheets Cenvat credit will not be available. Further MS Rails have been used for laying railway sidings and hence no goods are manufactured. Therefore, GI/GC sheets and MS Rails are not inputs and they cannot also be treated as capital goods. Reliance in this regard has been placed on the decision of Vikram Cement Vs. CCE-2005 (187) E.L.T 145 (SC). Further, Department has invoked suppression of facts and larger period has been invoked. The learned Commissioner confirmed the demand along with interest and imposed penalties. Hence this appeal.

5. The appellant in their appeal contended that the Commissioner in the impugned order held that; according to the tariff classification of Iron and steel items, the said goods do not fall under clause (i) to (vii) of Rule 2(a) of the Cenvat Credit Rules, 2004. Hence, the same cannot be called as capital goods. Further, reliance is placed on the decision of Supreme Court in the case of Vikram Cement to hold that an item will be classified as capital goods for the purpose of cenvat credit only, if the said item fall under the definition of the capital goods as prescribed under Rule 2(a); as per the explanation 2 to Rule 2(k), angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated bar (TMT) and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods are not the inputs. Further, the said explanation though inserted with effect from 07.07.2009, however, in view of the Larger Bench decision, the said explanation is retrospective in nature; Reliance has been placed on the decision of **Vandana Global Ltd. Vs. CCE– 2010 (253) E.L.T. 440 (T-LB)** and the subsequent decision of the Tribunal, where the decision of the Vandana Global is followed, for the denial of credit on Iron and steel items; the appellants have not produced any documents in support of the contention that the iron and steel items have been used in the manufacture of Hoppers, Bag House, Ducts, Cement Silo, Clinker Silo, conveyor system, etc. No duty has been paid on the manufacture of the said goods. Further, if the said goods have indeed been manufactured by the appellants, exemption from

payment of duty is required to be claimed under Notification No. 67/95-CE dated 16.03.1995. The appellants had not claimed any such claim in the returns and also not disclosed to the Department that they are availing the benefit of 67/95-CE; the appellants have produced consumption account of inputs and photographs, which show that the Iron and steel items have been used in the fabrication of structures. However, Annexure-I to the further submission dated 07.02.2011, fabrication or manufacture of such structure are not shown; decision of Vandana Global is well reasoned and the appellants had not cited any subsequent decision contrary to the decision of Vandana Global. The appellants had failed to prove that the cenvat credit on iron and steel items is correctly availed.

5.1. Appellant contended that it was accepted by the Commissioner that for the month of March 2008 to May 2008, the appellants had filed separate sheet showing the details of cenvat credit availed on iron and steel items along with the monthly return. However, the Commissioner held that mere informing for the availment of cenvat credit is not enough, the appellants should have informed the use of the said iron and steel items. Hence, the appellants have suppressed the facts from the Department.

5.2. Further, appellant contended that the Commissioner has relied on the decision of ***CCE Vs. Mehta & Co., - 2011 (264) E.L.T. 481 (SC)*** and decision of Gujarat High Court in the case of CCE Vs. Neminath Fabrics in the Tax Appeal No. 338/2009 to hold that the appellants had suppressed the facts with intent to evade payment of duty.

5.3. The appellant further contended that the impugned Order-in-Original relies on the decision of Larger Bench in the case of ***Vandana Global Ltd. Vs. CCE–2010 (253) E.L.T. 440 (Tri.-LB)*** and amendment to Explanation-2 to Rule 2(k) of Cenvat Credit Rules, 2004 to deny the credit on the Iron and steel items used in the manufacture of capital goods. The show-cause notices adjudicated in the impugned Order-in-Original, had never relied upon the amendment to Explanation-2 to Rule 2(k) of Cenvat Credit Rules, 2004 as well as on the decision in the case of Vandana Global Ltd. The only ground in the show-cause notice was that the intermediate goods manufactured by the appellants are immovable and non-excisable and hence credit on the said iron and steel items is incorrect. Therefore, the impugned Order-in-Original to the extent it relies on the amendment to Explanation-2 to Rule 2(k) of the Cenvat Credit Rules, 2004 and reliance on the decision of Larger Bench in the case of Vandana Global Ltd., is beyond the scope of show-cause notice. It is well settled that the Order-in-Original beyond the scope of show-cause notice is bad in law and liable to be set aside on this ground.

5.4. The appellant contends that the iron and steel items under dispute satisfy the definition of 'inputs' inasmuch as they are used in or in relation to the manufacture of final products, whether or not contained in the final products, including those cleared along with final products. The definition of "inputs" in Rule 2(k) of Cenvat Credit Rules, 2004 during the period relevant to this case (01.03.2008 to 30.06.2009) is as under:

(k) "input" means –

(i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production;

(ii) all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service;

Explanation 1. – The light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

Explanation 2. – Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer [1][but shall not include cement, angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated bar (TMT) and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods];

> [1][inserted by Notification No. 16/2009-CE (NT) dated 07.07.2009]

5.5. The definition of 'inputs' covers all the goods used in or in relation to the manufacture of the final product, whether directly or indirectly.

5.6 Similarly, iron and steel item used for structures, chimney, hoppers, ducts etc., are also used in or in relation to manufacture of final product since without these, it is impossible for the appellants to function in any manner. Hence, these are also used in or in relation to the manufacture of final product.

5.7. In respect of the above contentions, the appellant has cited the following case-laws:

a. JK Cotton Spg. & Wvg. Vs. STO – 1997 (91) ELT 34 (SC)
b. Indian Farmers Fertiliser Vs. CCE – 1996 (86) ELT 177 (SC)
c. CCE Vs. Ballarpur Industries Ltd. – 1989 (43) ELT 804 (SC)
d. Singh Alloys & Steel Ltd. Vs. ACCE – 1993 (66) E.L.T. 594 (Cal.)

The appellant has also cited the case of *Rajasthan Spinning & Weaving Mills Ltd. – 2010 (255) E.L.T 481 (SC).*

5.8. The learned Advocate during the hearing has submitted the decision of the Larger Bench in **Vandana Global** has been reversed by the High Court of Chattisgarh in ***Vandana Global Ltd. Vs. Commissioner of Central Excise & Customs,***

Raipur 2018 (16) G.S.T.L 462 (Chattisgarh) and was further upheld by Hon'ble Supreme Court in Commissioner Customs and Service Tax (CGST) Vs. M/s. Shri Nakoda Ispat Limited – 2018-TIOL-262-SC-CX-LB.

5.9. The learned counsel contended that the Hon'ble High Court of Chattisgarh in M/s. Vandana Global Ltd. has categorically held that Angles, Joists, Beams, Bars and Plates, which go into fabrication of structures embedded in the earth are eligible as inputs for capital goods, since they are used in relation to the final products as inputs. The question as to whether the resultant goods become part of immovable goods is irrelevant for the purpose of determining eligibility. The issue involved in the present matter is no longer res integra and the same has been decided by the Hon'ble Supreme Court, High Courts and Tribunals. Reliance was placed on the following decisions, wherein the admissibility of cenvat credit with respect to duty paid on iron and steel items used for fabrication of capital goods and supporting structures:

a. Commissioner of Central Excise, Jaipur Vs. Rajasthan Spinning Mill Ltd. – 2010-TIOL-51-SC-CX
b. Thiru Arooran Sugars Vs. CESTAT, Chennai – 2017 (355) E.L.T. 373 (Mad.) admitted in the Hon'ble Supreme Court as reported in 2018 (360) E.L.T. A322 (S.C)
c. M/s. Singhal Enterprises Pvt. Ltd. Vs. Commissioner Customs and Central Excise, Raipur – 2016 (341) E.L.T. 372 (Tri.-Del.) further affirmed by Hon'ble High Court of Chhattisgarh 2018 (359) E.L.T. 313 (Chhattisgarh)
d. Commissioner of CGST & Central Excise, Lucknow Vs. DSCL Sugar, 2019 (367) E.L.T. 836 (All.)
e. M/s. Dalmia Cements Bharat Ltd. Vs. CCE, Trichy – 2021-TIOL-182-HC-MAD-CX.

f. CCE, Tirupati Vs. Dalmia Cement (Bharat) Ltd. – 2022-VIL-701-CESTAT-HYD-CE
g. J.K. Cements Vs. CCE, Belgaum – Final Order No. 20247/2023 dated 15.03.2023 passed by Hon'ble CESTAT, Bangalore

5.10. The learned Advocate further contends that the structural steel and materials used for silos are eligible for cenvat credit as the same are used for storage within the factory and are covered within the scope of meaning of storage tanks used in the factory of the manufacturer of the final products as per Rule 2(a)(A)(vii) of the Cenvat Credit Rules, 2004. In this regard, reliance is placed on the following decisions:

a. Bannari Amman Sugars Ltd. V. Commissioner of C.Ex., Mysore – 2010 (250) E.L.T. 326 (Kar.)

b. SLR Steels Limited V. Commissioner of C.Ex., Bangalore-II – 2010 (249) E.L.T. 394 (Tri.-Bang.) upheld by the Hon'ble Karnataka High Court in Commissioner of Central Excise, Bangalore-II V. SLR Steels Ltd. [2012 (280) E.L.T. 176 (Kar.)]

c. Laxmi Pipes Ltd. V. Commissioner of Central Excise, Rohtak – 2012 (280) E.L.T. 448 (Tri.-Del.)

5.11. The learned Advocate contends that alternatively the credit on the items is available as capital goods if not as inputs. She has relied on the following decisions:

a. Commissioner GST & CX, Rourkela V. SPS Steels Ltd. & Power Ltd. – 2022 (382) E.L.T. 49 (Ori) wherein it was held that iron and steel items were used in the fabrication of identifiable capital goods and thereby credit could be availed on the same.
b. Commissioner of Central Excise, Salem V. Madras Aluminum Co. Ltd. – 2017 (349) E.L.T. 133 (Mad.)

5.12. The learned Advocate contends that there was no suppression as the Department possessed complete information with respect to the present case. Further it is their submission that the filing of monthly returns indicate that the Department is well aware of the activities of the appellant and there was neither suppression of facts nor any intention to evade payment of duty. Further larger period cannot be invoked and retrospective amendments were made to the statute as no person can foresee further amendments and act, accordingly. Further the issue involves interpretation of provisions of Central Excise Rules and hence penalty under Section 11AC of the Central Excise Act, 1944 is not sustainable. Reliance is placed on the following decisions:

a. Transafe Services Ltd. Vs. CCE, Haldia – 2017 (3) G.S.T.L. 445 (Tri.-Kolkata)

b. Accenture Services Pvt. Ltd. Vs. CST, Mumbai-II – 2015 (40) S.T.R. 719 (Tri.-Mumbai)

6. Per contra, the learned Authorized Representative for the Revenue has reiterated the findings in the impugned order.

7. Heard both sides and perused the records.

8. We find in this case the issue involved is whether iron and steel items viz. Angles, Channels, M.S Joists, M.S Beams, GI/GC Sheets, M.S Plates, M.S Rails, etc., used in the setting up of cement plant are eligible for cenvat credit as inputs/capital goods.

8.1. We find that the iron and steel items are used for the purpose of fabrication of structures for installation of certain capital goods and these are affixed to the ground. The Department's contention is that since the items are used in fabrication of structures, which are ultimately fixed to the ground they are immovable goods and hence, not excisable, therefore they are not eligible for credit as capital goods/inputs as they are not directly used in the manufacture of the excisable products. However, we find there are catena of decisions by this Tribunal, Hon'ble High Courts and Hon'ble Supreme Court, wherein it is held that these items are used directly or indirectly in the manufacture of a final product. Hence, are covered in the means/includes definition of inputs. We find that the impugned period in this case is 01.03.2008 to 30.06.2009. The definition of 'capital goods' during the period is as mentioned in Rule 2(a) of the Cenvat Credit Rules, 2004.

8.2. Further we find that this issue is no longer res integra as it has been considered in many decisions of this Tribunal, Hon'ble High Courts and Hon'ble Supreme Court. The principle laid down in the case of Vandana Global by the decision of the Larger Bench of this Tribunal has been rejected by several High Courts. This Tribunal also in the case of J.K. Cements Works vide Final Order No. 20247/2023 dated 15.03.2023 has allowed the appeal following the ratio of Hon'ble High Court of Chhatisgarh in the case of Vandana Global Ltd., wherein it is held that:-

> *"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."

8.3. Considering the above, we find that the appellants are eligible for availment of cenvat credit on the iron and steel items used in the fabrication of structures for installation of capital goods/various equipments used in the manufacture of final products.

8.4. Further as regards the Railway Tracks, we find that the same are used in the factory premises for movement of raw-materials and finished products and they are laid within the factory premises and covered by the decision of this Tribunal in the case Tata Steels Vs. CCE, Jamshedpur 2016 (335) E.L.T 303 (Tri.-Kolkata), wherein it is held as under:-

"4.4 Since the department has accepted the admissibility of Cenvat credit on rails and railway track materials involving the same assessee i.e. M/s. SAIL, for subsequent period under the CCR, 2004 and identical issue is also involved in M/s. Tata Steel's case, therefore, adopting the principle of certainty and consistency in tax matters, in our view, the appellants are eligible to credit on rails and railway track materials. Consequently, the discussion on the applicability of the said judgment to the present Cenvat Credit Rules, 2004 and other contentions raised in these appeals would become more of academic in nature rather than resolving the dispute, hence not resorted to.

In the result, the impugned Orders passed in respect of the appeals filed by M/s. Tata Steel Ltd. & M/s. SAIL are set aside and the appeals are allowed, with consequential relief, *if any, as per law. The Revenue's appeals are rejected on the same reasoning.*

9. We find that Railway tracks are used in relation to the manufacture of final product. Hence, they are entitled for availment of cenvat credit.

10. In view of the above discussions and following the decisions of the Hon'ble Apex Court, High Courts and this Tribunal, we find that the impugned order is not maintainable, hence same needs to be rejected. The appeal is allowed with consequential relief, if any, as per law.

(Operative potion of the order was pronounced in
Open Court on 03.08.2023)

(D.M. Misra)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

pr/iss