CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH-COURT NO. I

EXCISE APPEAL NO. 50688 of 2021

[Arising out of Order-in-Appeal No. 361(CRM)CE/JDR/2020 dated 16.12.2020 passed by the Commissioner(Appeals), Central Excise and CGST, Jodhpur,]

Commissioner of Central Excise and CGST, Udaipur — **APPELLANT**

VS.

M/s. Hindustan Zinc Ltd. — **RESPONDENT**
Debari
District Udaipur (Raj)

APPEARANCE:

Shri O P Bisht, Authorized Representative of the Department
Ms Sukriti Das, Advocate for the Respondent

CORAM:
HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING : 03 March, 2023
DATE OF DECISION : 10 July, 2023

FINAL ORDER No. 50856 /2023

PER HEMAMBIKA R PRIYA

1. The present appeal has been filed by the department to assail the Order-in-Appeal No. 361(CRM)CE/JDR/2020 dated 16.12.2020 wherein he allowed the respondent to avail Cenvat Credit of Rs.58,16,363/-. The brief facts are reproduced hereinafter.

2. The respondent, is engaged in manufacture of Zinc ingots, lead etc. falling under Chapter 79 to the Central Excise Tariff Act, 1985. Cenvat credit is availed on various inputs, capital goods and

input services in terms of the provisions of the Cenvat Credit Rules, 2004.

3. In order to treat effluent/tail gases emitting from factory, the Respondent engaged M/s Thermax Ltd., Pune for setting up Tail Gas Treatment Plant (**"TGT Plant"**) inside the factory premises. TGT Plant was installed for removal of particles and Sulphur Dioxide mist from tail gas. The Respondent entered into contract with Thermax Ltd. (in short referred to as **'the contractor'**) for supply of materials for building of TGT Plant, including complete electrical and instrumentation and all other materials as well as spares at the factory site. The Respondent also entered into separate contracts with the Contractor for preparing engineering, technical performance specification for imported equipments and placed work order for erection, commissioning and installation of TGT Plant at the site inside the factory premises of the Respondent. Accordingly, the Contractor placed orders with various suppliers for parts/components required for installation of the TGT Plant which were directly consigned to the Respondent's factory premises. The parts/components of capital goods were received at the factory premises under duty paying invoices issued in the name of Respondent. Upon complete commissioning and inspection of functional TGT Plant, the same was handed over by the Contractor to the Respondent.

4. A Show Cause Notice dated 8.11.2007(**"impugned SCN"**) was issued to the Respondent, proposing to deny and recover Cenvat credit availed on duty paid parts, components, spares, accessories used in the TGT Plant, along with interest and penalty, during the period from February 2006 to January 2007 ("the relevant period"), alleging *inter alia* as under:

1. The parts, equipments purchased and received by Respondent at its factory were handed over to the Contractor for setting up of TGT Plant inside the factory premises, accordingly, the Contractor is the real manufacturer of TGT Plant who is entitled to take credit and not the Respondent, according to Rule 3(1), Rule 2(a)/Rule 2(k) of the Credit Rules.
2. Upon erection and commissioning of TGT Plant at site, the same becomes an immovable property, therefore the same is an exempted goods for which no credit is admissible in light of CBEC Circular No. 58/1/2002-CX dated 15.1.2002.
3. Upon commissioning of TGT Plant, the ownership of the said Plant transferred from the Contractor to the Respondent after issuance of performance acceptance certificate, accordingly, Cenvat credit has been wrongly availed on parts, components used in assembly of TGT Plant which at that time,was not in their possession.

5. The aforesaid demand was raised invoking extended period of limitation under the proviso to Section 11A(1) of the Central Excise Act, 1944 on the ground that the fact regarding assembling/manufacture of TGT Plant by Thermax Ltd. came to the knowledge of department only at the time of audit by department, which would otherwise have escaped attention. The impugned Show cause notice was transferred to Call Book as in a similar matter in the case of **Aditya Cement Ltd. v. CCE,**

Jaipur, the department had filed a Reference Application No. 18/2003 before the Hon'ble Rajasthan High Court against the **CESTAT's Final Order No. A/369/2002-NB dated 6.3.2002**. The Hon'ble High Court vide Order dated 27.3.2008, rejected the department's appeal and upheld the CESTAT's Final Order dated 6.3.2002. Against the Hon'ble High Court's Order dated 27.3.2008, the Department filed a Special Leave Petition (Civil) No. 871 of 2009 before the Hon'ble Supreme Court which was converted to Civil Appeal No. 5256 of 2009. The said Civil Appeal was dismissed by Hon'ble Supreme Court vide Order dated 6.2.2019 as not pressed by department due to low monetary limit in Commissioner Customs, Central Excise & S.T., Bilaspur v. Nalwa Steel and Power Ltd. Consequent to the dismissal of Department's Civil Appeal, the impugned show cause notice was retrieved from Call-book for adjudication.

6. The Additional Commissioner vide Order-in-Original dated 27.7.2020 confirmed the denial of Cenvat Credit amounting to Rs. 58,16,363/- along with interest and imposed penalty equal to the confirmation of credit demand.

7. On appeal by the Respondent, the Commissioner (Appeals) vide the impugned order dated 16.12.2020 set aside the entire demand in favour of the Respondent. The relevant portion of the order is reproduced below:

> 1. the machineries, components, spares and accessories used in installation of TGT Plant is directly used in the process of manufacture of dutiable final product i.e. lead, zinc etc. The TGT Plant assembled at site, is not the final product of the Respondent, but the capital goods had been used for manufacture of dutiable final products. Therefore, the credit availed on such parts/spares/accessories of TGT Plant by the Respondent, qualify as capital goods and is admissible.

2. Identical issue raised in **Aditya Cement** has been settled in favour of assessee vide CESTAT's Final Order dated 6.3.2002 which was upheld by Hon'ble Rajasthan High Court vide Order dated 27.3.2008 and further appeal against the same before the Hon'ble Supreme Court has been withdrawn by department. Identical issue was also decided in the case of Vasavadatta Cement v. CCE.

3. The judgments referred above have not been set aside by any higher court so far, therefore, it is a settled principle of justice that decision of higher court are binding unless the same is set aside by higher court. Accordingly, the ratio of the said decisions are applicable and Cenvat credit is admissible."

8. Being aggrieved with the aforesaid impugned Order-in-Appeal dated 16.12.2020, the Department has preferred the present Appeal before the Hon'ble Tribunal.

9. While reiterating the findings of the adjudicating authority, learned authorised representative emphasized the following:

i) The Cenvat credit is not admissible to the respondent, as they were not the manufacturers of the final product TGT plant, as the contractor viz., Thermax Ltd. was actual manufacturer.

ii) TGT plant was handed over only after its commissioning and ownership passed on the respondent only after issuance of performance acceptance certificate.

iii) When the Cenvat credit was taken by the respondent, on capital goods used in the assembly /manufacture of the TGT plant, the said TGT plant was not in their possession.

iv) TGT plant manufactured at site is exempted from payment of duty, hence no credit is admissible on inputs/capital goods used in the manufacture of TGT plant. He placed reliance on Hon'ble High Court's judgment in the case of M/s Suzuki Spinners Vs CCE, Udaipur.

v) In the case of **Vasavdatta Cement vs CCE, Belgaum**[1] the contract was for erection and commissioning, whereas in the present case first contract was to supply components to the respondent, who received the same and supplied the same to M/s Thermax. Before handing over the TGT plant, ownership remained with M/s Thermax.

(vi) On the issue of extended period of limitation And penalty imposed, he supports the findings of the adjudicating authority.

10. The learned advocate for the respondent submitted that they have availed CENVAT credit correctly as the goods have been used within the factory of Production, and all conditions under the, CENVAT Credit Rules have been satisfied. Rule 3(1) of the CENVAT Credit Rules entitles a manufacturer of final product to take credit of excise duty on "paid on any input or capital goods received in the factory of production of final product". In the present case, there is no dispute that the components/parts of TGT plant was received at the factory premises, under duty paid invoices, issued in the name of the respondent. The department has not disputed that the said plant had been manufactured out of such parts/spares/components and this plant was used in the manufacture of the dutiable, final product of zinc

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1 [2002 (148) ELT 1046 (Tri-Bang)]

and lead. He relied on the following judgements to buttress his case:-

i) **Gujarat Ambuja Cement- 2001(130) ELT 129 (Tri-Del)**
ii) **CCE, Mumbai -II v NRC Ltd - 2001(135)ELT 1012(Tri Mum)**
iii) **Aditya Cement Ltd vs CCE Jaipur**
iv) **Vasavadatta Cement vs CCE, Belgaum- 2002(148)ELT 1046 (Tri- Bang**)

11. The learned counsel stated that the ownership of goods is irrelevant to decide the admissibility of credit. He added that the factum of receipt of capital goods in the factory of the respondent has not been disputed in the appeal. Further, the identity of the goods qualifying as capital goods has also not been disputed by the department. The property in the goods rests with the respondents from the very moment they were received in the factory under duty paid invoices. Hence, the credit availed on the capital goods in the form as mentioned in the duty per invoices is correct. He submitted that the reliance placed on the Board Circular number 58/1/2002 – CX dated 15. 01. 2002 to deny the credit, since the TGT plant was exempted was incorrect. The respondent had admittedly availed credit on the parts/spares/components of TGT plant on the basis of the invoices issued in its name and not on the complete plant erected and commissioned by the contractor. He contended that the extended period is not in invokable as the department had complete access to all statutory records, including the credit records of the respondent.

12. We have heard the authorised representative and the learned counsel for the respondent. We note that the respondent had availed credit on goods mentioned in the invoices provided by the contractor to the respondent. The goods on which such credit was taken are components, spares and/or accessories of goods classifiable under chapter 84, 85 or 90 of the First Schedule to the Central Excise Tariff Act, 1985. It is not disputed that the component/parts of TGT plant were received in the factory premises of the respondent under duty paid invoices which was in the name of the respondent. Admittedly, the TGT plant was manufactured out of such parts/spares/components and such plant was used in the manufacture of the dutiable final product. There is no dispute that machineries/components received at the factory of the respondent on which the credit has been availed are indeed capital goods in terms of Rule 2(a) of the CENVAT Credit Rules as is evident from the fact that the credit arrangement has been restricted in the impugned show cause notice to 50% in each year. We note that the Tribunal in several earlier decisions has held that the prerequisite for availment of CENVAT credit in respect of capital goods in the factory of manufacturer is its receipt in the factory and use in the manufacture of dutiable final product. The Tribunal in a similar factual matrix in the case of **Gujarat Ambuja Cements Vs. Commissioner of Central Excise[2],** held as follows:-

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2 [2001(130)ELT 129(Tri Del)]

"**7.** We have carefully considered the rival submissions. We see force in the plea regarding applicability of Rule 57-T(7) to the present case. This Rule states that 'the Assistant Commissioner may, on sufficient cause being shown to him, allow the manufacturer to take credit of the specified duties on capital goods paid by a contractor or job-worker who undertakes the job of initial setting up, renovation, modernisation or expansion of the plant on behalf of the manufacturer of final products, subject to such procedure and conditions as may be specified by the Commissioner or the Central Board of Excise and Customs'. The DG sets in question are power plants. WDIL was engaged for initial setting up of this captive power plant in the factory of GACL. Parts, components and accessories of DG sets are capital goods in terms of the definition given in Rule 57-Q (covered by Sl. No. 5 of the Table to the Rule). Even if the DG sets which have been manufactured out of these parts and components and accessories, have not discharged duty liability, there is no bar to availment of Modvat credit duty paid on such parts, components, accessories. A comparison of the provisions of Rules 57-D(2) and 57-R(2) will clarify the above position. Rule 57-D(2) states that credit of specified duty shall be denied in case inputs are used in the manufacture of capital goods which are not chargeable to excise duty; however, there is no such stipulation in Rule 57-R(2). There was also no need for such stipulation since Sl. No. 5 of the Table appended to Rule 57-Q(1) covers components, parts and accessories themselves as capital goods. The Commissioner's finding in para 23 of the impugned order that it is only complete DG sets which are capital goods within the meaning of Rule 57-T(7) is not correct since credit of duty, if paid on DG sets, would have been availed of by the appellants herein under the provisions of Rule 57-Q itself, as DG sets were undoubtedly used in the factory of the appellants who are the manufacturers of final products - the place where the DG sets were assembled is the factory premises of the appellants cannot be treated as the factory of WDIL - and resort to the provisions of Rule 57-T(7) need not be made by the appellants for availing credit on complete DG sets. In the above view of the matter, we hold that the finding of the Commissioner in para 23 of the impugned order that the benefit of Modvat credit under Rule 57-T(7) is not admissible, is not correct.

8. In view of the fact that we are accepting the alternative submission of the assessees that they are eligible to the benefit of Modvat credit on parts, components and accessories of DG sets in terms of the provisions of Rule 57-T(7) of the Central Excise Rules, we do not deem it necessary to pronounce upon the other submissions of the appellants.

9. In the result, we set aside the impugned order and allow the appeal"

12.1 This decision of the Tribunal was upheld by the **Himachal Pradesh High Court**[3]. It would be pertinent to reproduce the relevant paragraph:

> "5. Both the arguments raised are without any merit. There can be no dispute that excise has been paid on some of the components of the DGPP. Since the DGPP is exempt from payment of excise no Modvat credit can be claimed by the manufacture of the DGPP, in the present case WDIL. However, there is no dispute that this DGPP is part and parcel of the factory of the respondent. It is definitely a capital good and therefore Rule 57Q is applicable. Rule 57Q enables a party to claim credit of duty paid on capital goods by the manufacturer of specified goods. Under Sr. No. 5 to the table of the said Rule, a manufacture is entitled to claim Modvat Credit on account of the excise paid on the components, spares and accessories of the goods exempt. A DGPP is a capital good. If duty is paid on the components used in its manufacture, we see no reason why the manufacturer cannot claim Modvat credit for such duty."

12.2 In a similar decision in the case of **Commissioner of Central Excise, Mumbai-III vs NRC Ltd.**[4] the Tribunal held as follows:

> "4. The grounds in the appeal run as follows. The assembly of the diesel generating sets from its components amounts to manufacture. The generating set so manufactured is exempted from duty. Therefore, by application of Rule 57R(1), credit cannot be taken of the duty paid on capital goods used exclusively in the manufacture of an exempted final product. The provisions of Rule 57T(7) (which the Tribunal in *Gujarat Ambuja Cememt Ltd.* v. *CCE* relied upon) will not apply because the fabricator of the generating set had not undertaken any initial setting up or modification, renovation or expansion of the plant.
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> 5. It is no doubt true that the immediate result of assembly or putting together of the alternator and the diesel engine resulted in the emergence of a diesel generating set To that extent, it would be

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3 [2010(256)ELT 356(HP)]
4 **[2001(135)ELT 1012(Tri-Mum)]**

correct to say that these two components were used in the manufacture of a diesel generating set, which was exempted from duty. It is necessary at this point to take note of the significant difference in phraseology between Rule 57A, relating to Modvat credit, of the duty paid on inputs (other than capital goods) used in or in relation to the manufacture of the final products, and Rule 57Q relating to credit to be taken of duty paid on capital goods. Rule 57A, specifically provides that the inputs must be used in or in relation to the manufacture of the finished product. There is no such requirement in Rule 57Q. All that it requires is that the capital goods must be used in the manufacture of the specified final products. The requirement that the capital goods must be used in or in relation to the manufacture of the final product is absent. That this difference in wordings is deliberate is clear from the circular of the Board explaining the changes made in the budget of 1994 part of which relates to credit on capital goods incorporated in the Central Excise Rules. Paragraph 71.5 of this circular emphasises that "There is no reference to the expression "used in or in relation to the manufacture of final products". It goes on to say that "capital goods acquired by a manufacturer for use in his factory are eligible to Modvat credit."

6. The manufacturer, in each case, acquired the components of the generating set, not for use in the manufacture of the generating set as a final product, but to generate electricity required for the manufacture of tyre cord and other such goods, which are their final product. It would therefore not be correct to say that the components were used exclusively in the manufacture of the generating set. It would be more appropriate to say that these components were put together into a generating set for the manufacture of tyre cord and other final product. The explanation that the departmental representative tendered, if accepted, would in effect result in denying Modvat credit contrary to the provisions of law, in a very large number of cases. The definition of capital goods in the Table to Rule 57Q, includes components, spares and accessories of various machines, machinery, apparatus, appliances etc. specified therein. Every time any manufacture brings in a component to replace a damaged or worn out component in any of the machinery in its factory, it could be argued that the component it is not directly used in the manufacture of the final product. The component can also be said to be used to manufacture a machine in which it will be fitted as a replacement, that machine already exists even in the absence of the component. Therefore, none of the components would ever be continued to be

used in the manufacture of any commodity and therefore could not be capital goods. The absurdity of this conclusion destroys the merits in the submission.

7. The second ground is also equally without merit. No doubt, the manufacturer of the generating set was M/s. Wartsila NDS (India) Ltd. or M/s. Modi Mirrless Blackstone Ltd. However, the credit that is sought to be taken is not the credit of the duty payable, if any, on the generating set. The credit is sought to be taken on the components of the generating set. Here again, the manufacturer is some one other than the person who has taken the credit. Now if the condition is that it is only the person who paid should take the credit, it will mean that credit will only be available on capital goods, if they are solely utilised in the factory of their production. The credit in no case will be available where the capital goods are taken out for fitment or installation in any other factory. Apart from the fact that there is no such requirement in the rules, such an interpretation will totally frustrate the object of the scheme to provide Modvat credit on capital goods and therefore cannot be accepted.

8. The appeals are accordingly dismissed."

12.3 This judgment was upheld by the Bombay High Court, relying on the Supreme Court's judgment in **Escorts Ltd., vs Commissioner of Central Excise, Delhi**[5]. The two judgments mentioned supra was affirmed by the Supreme Court in **Commissioner of Central Excise, Chandigarh vs Ambuja Cements Ltd.**[6]**,** wherein the court held as follows:

"3. The short question which is posed for consideration of this Court is whether, in the facts and circumstances of the case, the High Court/Tribunal were justified in allowing Modvat credit on parts, components and accessories of Diesel Generating Power Plant [DGPP] sets to assessee?

4. On appreciation of evidence and considering the material on record, the High Court has specifically observed and found that DGPP

5 [2004(171)ELT145(SC)]
6 [2022(65)GSTL3(SC)]

> sets on which Modvat credit is allowed is part and parcel of the factory of the respondent which is ultimately used in the manufacture of end product – cement. Therefore, Sl. No. 5 of the Table appended to Rule 57Q shall be attracted and therefore the assessee shall be entitled to the Modvat credit on such DGPP sets being parts/components of the cement plant/final manufacture product. ”

13. We now come to the submission of the appellant that withdrawal of the Department’s appeal before Supreme Court will not render the issue as the decision of the Rajasthan High Court will have a binding effect. We accept this contention of the learned counsel that the order of the High Court of Rajasthan is binding on this Tribunal.

14. In view of the above, the appeal is dismissed and the impugned order is restored.

(Pronounced in the open court on 10.07.2023)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R PRIYA)
MEMBER (TECHNICAL)

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