

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/625 /2005 - EX[DB]

Date 02/12/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
KISAN SHANKAR CHINI MILLS LTD.
GADARPUR DISTT., U.S, NAGAR(UTTRANCHAL)
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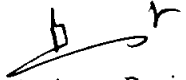
C.C.E. MEERUT II

I am directed to transmit herewith a certified copy of Final order No. 1268/
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944

Appellant

Vs
Respondent

2009 EX[DB] dated 20-10-09


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

C.C.E. MEERUT II

OPP. SAHEED PARK (NEAR ASHOK KI LAT) DELHI ROAD, MEERUT (UP)

2. Adv. / Consult

MR.BIPIN GARG

B-1/1289,A-VASANT KUNJ, NEW DELHI

3 C.D.R

~~4 J.C.D.R.~~

5 Bar association, CESTAT, New Delhi

6 Director Publications, Customs, Excise. I.P. Estate, New Delhi

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18. HON'BLE PRESIDENT


Assistant Registrar
(Excise Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-DB

COURT - I

Excise Appeal No. E/625/05-Ex

[Arising out of Order-in-Appeal No. 252-CE/App/MT-II/2004 dated 13.10.2004 passed by the Commissioner (Appeals), Central Excise, Meerut-II].

Date of Hearing:20.10.2009
Date of decision:20.10.2009

For approval and signature:

Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Mr.Rakesh Kumar, Member (Technical)

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether Their Lordships wish to see the fair copy of the Order?	See
4	Whether Order is to be circulated to the Departmental authorities?	Yes

Kisan Sahkari Chini Mills Ltd., Uttaranchal

...Appellants

Vs.

Commissioner of Central Excise, Meerut-II

... Respondent

Present for the Appellants : Shri Bipin Garg, Advocate &
Shri Atul Gupa, CS

Present for the Respondent : Shri Virendra Choudhary, SDR

Coram: Hon'ble Mr.Justice R.M.S. Khandeparkar, President
Hon'ble Mr. Rakesh Kumar, Member (Technical)

FINAL **ORAL ORDER NO. 1268/09-EX DATED:03.11.2009**

PER: JUSTICE RMS KHANDEPARKAR

This appeal arises from order dated 13th October 2004 passed by the Commissioner (Appeal), Meerut whereby the appeal filed by the appellants against the order of the Original authority was dismissed. The Dy. Commissioner, Rampur by

order dated 31.12.2003 had ordered recovery of Cenvat credit amounting to Rs.34,940.45 from the appellants in terms of rule 12 of the Cenvat Credit Rules 2002 read with section 11A and section 38 A of the Central Excise Act 1944 on the ground that they had wrongly availed Cenvat credit on the goods, namely, welding electrodes and the appellants were also directed to pay interest on the said amount and further imposed penalty equivalent to the amount to be recovered. The appellants are engaged in the manufacture of V.P. sugar and molasses falling under sub-heading No.1701.31/1701.39 and 1701.10 of the Central Excise Tariff Act, 1985.

2. The appellants had taken credit of the duty paid to the tune of Rs.34,940.45 on the items like welding electrodes for the period from November, 2002 to June 2003. The welding electrodes are classifiable under sub-heading 8311.00 of the said Tariff Act were claimed to be the capital goods within the meaning of the said expression under the Cenvat Credit Rules 2002 to avail the Cenvat Credit in respect of the duty paid thereon. A show cause notice dated 4th September, 2003 came to be issued to the appellants in that regard and after hearing the parties, the Dy. Commissioner by the said order dated 31st December 2003 rejected the claim regarding Cenvat Credit and passed said order directing recovery of the amount. The appeal against the same did not yield successful result to the appellants, except setting aside the penalty and hence the present appeal.

3. While assailing the impugned order, the Id. Advocate for the appellants submitted that the authority below has failed to consider the fact that the item in question being welding electrodes, the same is squarely covered by clause (iii) read with clause (i) of the definition, Rule 2 (b) of the Cenvat Credit Rules 2002 and being so, the appellants were entitled to claim the Cenvat credit in relation to the duty paid on such items. He further submitted that taking into consideration the utilisation of the item in question in relation to the functioning of the welding machine which falls under Chapter 84/85, the same forms accessory to such machine classifiable either under Chapter 84 or 85 and, therefore, stands fully covered by the meaning of the expression 'capital goods' under rule 2 (b) of the said rules. In that regard, attention was sought to be drawn to the decision of the Apex Court in the matter of Mehra Brothers vs. Joint Commercial Officer reported in 1991 (51) E.L.T. 173 (S.C.), of the Tribunal in Wipro Infotech Ltd. vs. Collector of Central Excise, Bangalore reported in 1994 (69) ELT 82 (Trib.) and in the case of Banco Products (India) Ltd. vs. Commissioner of Central Excise, Vadodara-I reported in 2009 (235) ELT 636 (Tri. - L.B.). According to Id. Advocate, the process of welding could not be completed without the use of welding electrodes and, therefore, the same forms accessories to the welding machine. Without prejudice to this submission, it is also sought to be contented that the appellants are also entitled to claim the Cenvat credit in relation to the duty paid on the said item considering the same

as the inputs used in the process of maintenance and repairs of the machinery which is used for the manufacture of the final product and since the maintenance and repairs forms integral part of the manufacturing process of the final product, the items used in such process of maintenance and repairs would also be the inputs within the meaning of the said expression under clause "(g)" of Rule 2 of the said Rules. Reliance in that regard is placed in the decision of the Apex Court in the matter of M/s. Maruti Suzuki Ltd. Vs. Commissioner of Central Excise, Delhi III reported in 2009 (240) ELT 641. Reliance is also placed in the decision in the matter of India Sugars and Refineries, Bangalore reported in 2006 (205) ELT 717, Commissioner of Central Excise, Chandigarh-II Vs. National Fertilizer Ltd. reported in 2002 (140) E.L.T. 372 (P&H) and it is further sought to be contended that the decision of the Tribunal in the case of Vikram Cement Vs. CCE, Indore delivered on 23rd and 24th July 2009 under Final Order No. 603/09 would not apply to the matter in hand as the point which is sought to be canvassed in this matter did not arise for consideration in the case of Vikaram Cement matter.

4. The Id. DR on the other hand, submitted that the contention regarding the welding electrodes being accessories of the goods specified under Rule 2 (b) (i) was never raised either before the adjudicating authority or before the Commissioner (Appeals) and, therefore, there was no occasion for the authorities to deal with the same and the appellants are not entitled to raise the same for the first time at this stage.

He further submitted that the welding electrodes get consumed in the welding processes and being so, they cannot be said to be the accessories to the capital goods specified under clause (b) (i) of rule 2. They do not help the welding machine either in its functioning or enhancing its functioning activity for the process of manufacture of the final products. He further submitted that there is neither any evidence produced by the appellants disclosing the functioning and use of welding electrodes to establish the same to be the accessories of the goods specified under clause (i) of Rule 2 (b) of the said rules. As regards the claim regarding the item to be the inputs, the learned DR placing reliance in the decision of the Tribunal in Vikram Cement case, has submitted that such a claim in that regard is no more maintainable as the issue is no more resintegra and stands concluded by the said decision.

5. The fact that the appellants had not specifically raised the point that welding electrodes form accessories of the goods classifiable under Chapter 84 or Chapter 85 of the First Schedule to the Tariff Act and that therefore they are capital goods within the meaning of said expression under the said rules was not raised in so many words with necessary supporting evidence being led by the appellants is not in dispute as the Id. Advocate for the appellants has candidly admitted the same. He, however, submitted that the issue in that regard clearly arises from the contentions which were sought to be raised on behalf of both the sides before the original authority and though this aspect was clearly noted by

the adjudicating authority, he failed to consider the same in the manner it was required, in accordance with provisions of law.

6. Indeed perusal of the discussion and findings by the Original authority in the Order-in-Original dated 31st December 2003, it does disclose that the appellants had sought to contend that welding electrodes being accessories of plant/machines were entitled to be defined as the capital goods under the said Rules and particularly under rule 2 (b) (i) thereof, and the said contention was clearly noted in the said order. It was observed thus:

"the contention of the party regarding the welding electrodes being an accessories of plant/machines is not tenable inasmuch as a welding electrodes have never been defined as capital goods under rule 2 (b) (i) of the Cenvat Credit Rules, 2002, nor these items by virtue of their nature/description and their classification under CETA, 1985 are components, spare an accessories of capital goods defined under rule 2 (b) (i) of the Cenvat Credit Rule 2002. Moreover such welding electrodes are also other than the capital goods defined under clause (iii) to clause (vii) of Rule 2 (b) of Cenvat Credit Rules 2002."

7. In other words, the appellants did try to bring to the notice of the adjudicating authority that the appellants would be entitled to claim the welding electrodes as the capital goods within the meaning of the said expression under the said Rules. Though the Adjudicating authority as well as the lower appellate authority have rejected the claim of the cenvat credit

in relation to the duty paid on the said items on the ground that the same are not the capital goods in terms of rule 2 (b) (i) of the said Rules, neither in the order passed by the adjudicating authority nor in the order passed by the lower appellate authority, there is any discussion regarding the use and function of the said item in the factory of the appellants. The claim of the appellants being that the items in question were the capital goods within the meaning of the said expression under the said Rules, the authority dealing with such claim was primarily required to ascertain whether the appellants have been able to establish the use of those items in the factory of the appellants and in that connection ought to have analysed the materials produced in that respect by the appellants. Neither the impugned order refers to any lapse on the part of the appellants to produce any material in that regard nor it discloses analysis of materials, if any, produced by the appellants in that regard.

8. Rule 2 (b) of the said rules defines the capital goods and it states that:

2 (a)

2 (b) "capital goods" means –

"(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No.68.02 and sub-heading 6801.10 of the First Schedule to the Tariff Act;

"(ii)

(iii) components, spares and accessories of the goods specified at (i) and (ii) above;

(iv)

(v)

(vi)

(vii)

"used in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office;"

9. Plain reading of the relevant portion of the definition of the expression "capital goods" under rule 2 (b) would disclose that it essentially refers to the items used in the factory of the manufacturer of the final product. Obviously, therefore, whenever a dispute arises as to whether particular items satisfies the criteria of being capital goods within the meaning of the said expression under the said provisions of law or not, it is necessary for the adjudicating authority to ascertain whether the item falls under the specified chapter heading and whether the same is used in the factory of the manufacturer. In the absence of such exercise, the adjudication would be incomplete. As already observed above, neither order of the Adjudicating authority nor lower appellate authority discloses any such exercise having been done by either of them while disposing the matter. Being so, the Id. Advocate for the appellants is justified in contending that the authority below failed to address itself to the issue which was relevant to be

decided in the matter in hand. On this ground itself, the impugned orders are liable to be set aside.

10. In the circumstances of the case, therefore, it will be too pre-mature for this Tribunal to deal with the issue as to whether the welding electrodes in the facts and circumstances of the case would amount to be the accessories to the welding machine or not. It would all depend upon the use of the item in the factory of the manufacturer and the same has to be primarily ascertained by the Adjudicating Authority on the basis of the materials placed on record.

11. As regards the contention that the appellants are entitled to claim welding electrodes as the inputs, we are afraid that as rightly contended by Id. DR, the issue in that regard stands already concluded by the decision of the Tribunal in the matter of Vikram Cement. We have already held therein that the welding electrodes used for repair and maintenance of machinery cannot form the inputs within the meaning of the said expression either under Cenvat Credit Rules 2002 or Cenvat Credit Rules 2004. At this stage it is also to be remembered that the process of maintenance and repair defers from that of manufacture. They are independent and distinct. This is abundantly clear from the decision of the Supreme Court in the matter of Vijayawada Bottling Co. Ltd. vs. CCE Guntur, reported in 1997 (94) ELT 433 (S.C.).

12. It is true that referring to the decision of the Apex Court in Maruti Suzuki case, an attempt was made to convince us to

take a different view on the ground that the Apex Court while deciding the matter in Maruti Suzuki case has taken a different view in relation to the decision in J.K. Cottons, Spinning and Weaving Mills v/s. STO reported in 1997 (91) ELT 34 SC and Union Carbide India Ltd. reported in 1996 (86) ELT 613 (Tri), which is contrary to what has been observed in respect of the said decisions by this Tribunal in Vikram Cement case.

13. The said contention is devoid of substance. The decision of the Apex Court in Maruti Suzuki case rather than lending any support to the contention sought to be raised on behalf of the appellants confirms the view that has been taken by this Tribunal in Vikram Cement Case.

14. In Maruti Suzuki case, the Apex Court has clearly observed thus:

*"coming to the specific part, one finds that the word "input" is defined to mean all goods, except light diesel oil, high speed diesel oil and 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. The crucial requirement, therefore, is that all goods "used in or in relation to the manufacture" of final products qualify as "inputs". **This presupposes that the element of "manufacture" must be present.**"*

(emphasis supplied)

15. Further, referring to the decision in J.K. Cotton Spinning Mills case, it was observed that therein Apex Court had held

that the expression "in the manufacture of goods" should normally encompass the entire process carried on by the dealer of converting raw-material into finished goods. It has also been observed that where any particular process (generation of electricity) is so integrally connected with the ultimate production of goods that, but for that process, manufacture or processing of goods would be commercially inexpedient, goods required in that process would fall within the expression "in the manufacture of goods." Referring to the decision in Union Carbide India Ltd. case, it was observed that the Larger Bench of CEGAT Delhi had observed that a wide impact of the expression "used in relation to manufacture" must be allowed its natural play. It was further observed that according to the Special Bench of CEGAT the purpose behind the above expression is to widen the impact of the definition so as to attract all goods, which do not enter directly or indirectly into the finished product but are used in any activity concerned with or pertaining to the manufacture of the finished product.

16. Further referring to the issue which was under consideration before the Apex Court, it was held thus:-

*"13. Electricity generation is a separate and distinct activity. It is an independent activity. It has its own economics. **It does not form part of the process in which "inputs" are transformed into separate identifiable commodity, though it may stand connected to such processes.** It may not have any concern with the manufacture of the finished product. However, it is an ancillary activity.*

*It is an activity which is anterior to the process of manufacture of the final product. It is on account of the use of the above expression "used in relation to manufacture" that such an activity of electricity generation comes within the ambit of the definition **because it is integrally connected with the manufacture of the final product.***

(emphasis supplied)

17. Further taking note of the decision in the matter of Collector of Central Excise, New Delhi vs. M/s. Ballarpur Industries Ltd. reported in (1989) 4 SCC 566, it was observed that the difference between the expression "used in the manufacture" and "used as input" was highlighted in the said case and there after it was held thus:

*"It may, however, be noted that in the definition of "input" the expression "used in or in relation to the manufacture of final product" is not a standalone item. It has to be read in entirety and when so read it reads as "used in or in relation to the manufacture of final product whether directly or indirectly and whether contained in the final product or not". These words "whether directly or indirectly" and "whether contained in the final product or not" indicates the intention of the legislature. What the legislature intends to say is that **even if the use of input** (like electricity) **in the manufacturing process is not direct but indirect still such an item would stand covered by the definition of "input"**. In the past, there was a controversy as to what is the meaning of the word "input", conceptually. It was argued by the Department in a number of cases that if the identity of the input is not contained in the final product then such an item would not qualify as input.*

(emphasis supplied)

18. Proper reading of the above ruling in the Maruti Suzuki case would disclose that it does not take the view different from the one taken by this Tribunal in Vikram Cement case. Para 28 of the said order in Vikram Cement's case reads thus:

"28. If one reads the decision of J.K. Cotton Spg. & Wvg. Mills Co. Ltd. case, it has been clearly held therein that the expression "in the manufacture of goods" should normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. Where any particular process is so integrally connected with the ultimate production of goods that, but for that process, manufacture or processing of goods would be commercially inexpedient, goods required in that process would fall within the expression "in the manufacture of goods". This clearly disclose that the Apex Court in no uncertain term has ruled that of those goods which form part of the process carried out by the manufacturer for converting the raw material into finished goods would be the products used in the manufacture of the goods. In another words, if the product is not integrally connected with the process of the manufacture and which does not results in utilization of such product directly or indirectly into the manufacture of the finished product, then such a product cannot be said to be the input utilized for or in relation to manufacture of the final product. This is also evident from the definition of the term input as found in rule 2(k). The definition clearly uses the word "used" and further clarify the same with the expression "in or in relation to" and further uses these expressions with reference to the term "manufacture of final products". The

definition disclosing the expression like "used", "in or in relation to", "the manufacture of final products" would inevitably disclose, that the same refer to only those products which are used in or integrally connected with the process of actual manufacture of the final product and only such product could be entitled to be classified as the input in or in relation to the manufacture of final products, and not otherwise. When the legislature in its wisdom has specifically defined a term, no Court or Tribunal under the guise of interpretation thereof is empowered to expand the meaning of such term. If the contention on behalf of the appellants is accepted, it would virtually amount to expand the meaning of the term "input" beyond the scope prescribed under the definition clause in Rule 2(k) of the Cenvat Credit Rules 2004."

19. Undoubtedly, it cannot be disputed that in case a party is entitled to avail the Cenvat credit in relation to the duty paid on an item by establishing the same as the inputs, even though, initially the claim was on the basis that the same was the capital goods. A party can be allowed to shift such claim. However, in the case in hand, the fact remains that there has been already final adjudication on the point as to whether welding electrode used in the process of maintenance and repairs could be input or not and decision in that regard is clearly against such claim by the assessee in the Vikram Cement case. Being so, the appellants would not be entitled to claim the welding electrodes as the inputs to avail cenvat credit. The law in that regard stands clearly pronounced by this Tribunal in the said case. In the facts and circumstances of the case, it is not necessary to consider various decisions

sought to be relied upon at this stage. Suffice to say that all the issues in relation to the claim that the items are the capital goods within the meaning of the said expression under said rules being kept open, and to be decided by the adjudicating authority in accordance with provisions of law on the basis of the materials available on record and after hearing the parties, the matter could be disposed of by setting aside the impugned order and remanding the matter for the above purpose.

20. In the result, therefore, the appeal succeeds. Impugned order is hereby set aside and the matter is remanded to the adjudicating authority to deal with the said issue afresh in accordance with provisions of law and bearing in mind the observations made above. The appeal is disposed of in above terms.

(JUSTICE R.M.S.KHANDEPARKAR)
PRESIDENT

(RAKESH KUMAR)
MEMBER (TECHNICAL)

Anita