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

Appeal No. E/340 -342 /2006,356 -358 /2006,360-361 /2006,
369 -376/2006, 652 /2006,718 -720/2006 - EX[DB]

Date **06/07/2011**

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

To :
BIRLA CORPORATION LIMITED
P.O. CEMENT FACTORY, CHANDERIYA,
CHITTORGARH (RAJASTHAN)

BIRLA CORPORATION LIMITED Appellant

Vs

C.C.E. JAIPUR I Respondent

I am directed to transmit herewith a certified copy of **Final order No.521-540/ 2011 EX[DB]** dated 04-7-11 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
C.C.E. JAIPUR I
N.C.R.BUILDING, STATUE
CIRCLE, "C" SCHEME, JAIPUR
302005.

2. Adv. / Consult SH. G.K. SARKAR + SAURAV YADAV, ADV., HO
MR.K.K ANAND
A-5,BASEMENT,LAJPAT NAGAR-III NEW DELHI-24

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Harvana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file
14. HON'BLE PRESIDENT.
15. J.K. CEMENT WORKS
KAILASH NAGAR, NIMBAHERA,
DISTT.CHITTORGARH(RAJASTHAN)

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

Excise Appeal No. 340-342 of 2006

[Arising out of the Order-in-Appeal No. 606-638 (HKS) CE/JPR-II/ 2004 dated 09/11/2005 passed by The Commissioner of Central Excise (Appeals), Jaipur.]

M/s Birla Corporation Limited — Appellant

Versus

CCE, Jaipur – II — Respondent

Excise Appeal No. 356 to 358, 360,361,369 to 376, 652, 718 to 720 of 2006

[Arising out of the Order-in-Appeal No. 606-622 (HKS) CE/JPR-II/2005 dated 09/11/2005 passed by The Commissioner (Appeals), Central Excise, Jaipur.]

J.K. Cement Works — Appellant

Versus

CCE, Jaipur – II — Respondent

For Approval and signature :
Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri 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? :

2. Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? :

3. Whether their Lordships wish to see the fair copy of the order? :

4. Whether order is to be circulated to the Department Authorities? :

Appearance

S/Shri G.K. Sarkar and Saurav Yadav, Advocates – for the appellant

Shri V. Choudhary, Authorized Representative (DR) - for the Respondent.

CORAM : **Hon'ble Shri Justice R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

DATE OF HEARING : 15/02/2011.
DATE OF DECISION : 4/7/11

Final Order No. 521-540/2011-EX Dated : 4/7/11

Per. Rakesh Kumar :-

All these appeals arise out of common order-in-appeal dated 09/11/05 passed by Commissioner, Central Excise (Appeals), Jaipur – II. The appellant are manufacturers of cement chargeable to Central Excise Duty. They avail Cenvat credit of Central Excise duty paid on inputs and capital goods used in or in relation to the manufacture of their final product. The period of dispute in respect of appeal No. E/372/06 filed by M/s J.K. Cement Works is March 1997 and in all other appeals, the period of dispute is from January 2001 to March 2004. There are six issues involved in these appeals –

(i) whether the M.S. plates, beams, angles, channels, sheets etc. used for repair and replacement of damaged parts of cement plant and machinery – clin , pre-heater, cement mill, raw mill, coal mill etc. are eligible for Cenvat credit either as capital goods or as inputs ;

(ii) whether iron and steel structures and tower material falling under chapter heading 73.08 are eligible for Cenvat

(iii) whether unmachined steel castings and rough HRCS castings used for replacement of damaged parts of the cement plant and machinery are eligible for Cenvat credit ;

(iv) whether rope asbestos/sheet steam jointing and similar items used for plugging the leakages are eligible for Cenvat credit ;

(v) whether nitrogen gas falling under Chapter 28 and PVC sheets plastic sheets of Chapter 39 are eligible for Cenvat credit ;

(vi) whether aluminium conductors falling under sub-heading 7614.10 are eligible for Cenvat credit.

The original Adjudicating Authority had disallowed the Cenvat credit in respect of the above items and on appeals being filed against those orders, the Commissioner (Appeals) vide impugned order-in-appeal dated 9/11/05 upheld the original Adjudicating Authority's orders.

It is against this order of Commissioner (Appeals) that these appeals have been filed.

2. Shri G.K. Sarkar, Advocate assisted by Shri S. Yadav, advocate, the learned Counsels for the appellant, pleaded that the Chapter 72 items like M.S. Angles, Channels, Plates, Beams, Joists, etc. used for repair and maintenance of the plant and machinery are eligible for Cenvat credit, that in this regard they rely upon the judgments of – (a) Hon'ble Rajasthan High Court in the case of **Union of India vs. Hindustan Zinc Ltd.** reported in **2007** ... SLP against which

has been dismissed by Hon'ble Supreme Court vide judgment reported in **2007 (214) E.L.T. A115 (S.C.)** ; (b) the judgment of Hon'ble Chhattisgarh High Court in the case of **Ambuja Cements Eastern Ltd. vs. CCE, Raipur** reported in **2010 (256) E.L.T. 690 (Chhattisgarh)** and (c) judgment of Hon'ble Karnataka High Court in the case of **CCE, Bangalore – I vs. Alfred Herbert (India) Ltd.** reported in **2010 (257) E.L.T. 29 (Kar.)**, that in view of the above judgments of High Courts, any items used for repair and maintenance of plant and machinery would be eligible for Cenvat credit, hence the Cenvat credit in respect of asbestos jointing sheets used for plugging the holes in the pipeline cannot be denied, as in view of their use, the same have to be treated as component and integral part of the machinery and in this regard they rely upon the Tribunal's judgment in the case of **Oswal Overseas Ltd. vs. CCE, Meerut – II** reported in **2010 (254) E.L.T. 338 (Tri. – Del.)**, that the steel castings have been used as replacement for various components and hence being component of the cement plant, and machinery, would be covered by the definition of 'capital goods', that even the M.S. Angles, Channels, Joists, Beams etc. used for fabrication of supporting structures and tower material falling under heading 73.08 would be eligible for Cenvat credit and in this regard they rely upon the judgment of Hon'ble Supreme Court in the case of **CCE, Jaipur vs. Rajasthan Spinning & Weaving Mills Ltd.** reported in **2010 (255) E.L.T. 481 (S.C.)**, wherein Hon'ble Supreme Court has held that steel plates and ... diesel generating sets are covered by the definition of 'capital goods' and would be eligible for Cenvat credit, that aluminium conductors are used for power supply and hence have to be treated as part of the cement plant machinery and the same would be eligible for Cenvat credit and in this regard they rely upon the judgment of the Hon'ble Himachal Pradesh High Court in the case of **CCE vs. A.C.C. Ltd.** reported in **2009 (236) E.L.T. 38 (H.P.)**, that nitrogen gas is used in connection with repair and maintenance and, hence, the same would also be eligible for Cenvat credit, and that in view of the above submissions, the impugned order is not correct.

2.2 Shri V. Choudhary, the learned Departmental Representative, defending the impugned order, pleaded that in all these cases the appellant have made only a general claim regarding use of the M.S. Angles, Channels, Beams etc. for repair and maintenance without specifying as to which item is used for repair and maintenance of which machine, that in any case, M.S. Angles, Channels, Beams, Joists etc. are neither covered by the definition of capital goods nor the same are covered by the definition of input, that the M.S. Angles, Channels, Beams etc. and other supporting structures falling under heading 73.08 are not eligible for Cenvat credit and in this regard he relies upon the judgment of the Larger Bench of the Tribunal in the case of **Vandana Global Ltd. vs. CCE, Raipur** reported in **2010 (253) E.L.T. 440 (Tri. – LB)**, that aluminium conductors falling under heading 7614.10 are not covered by the definition of capital goods, that it has not been specified by the appellant as to whether this item is part of some machinery, that Cenvat credit is not available in respect of this item and in this regard he relies upon the judgment of the Tribunal in the case of **Sarita Steel & Industries Limited vs. CCE, Visakhapatnam – I** reported in **2004 (172) E.L.T. 61 (Tri. – Bang.)**, that the asbestos jointing sheet used for plugging the holes in the pipes is neither covered by the definition of 'capital goods' nor by the definition of 'input' and, hence, no Cenvat credit is available in respect of this item, that nitrogen gas used in connection with repair and maintenance is neither an input nor capital goods and hence no Cenvat credit is available, that the appellant have not specified as to for what purpose the synthetic rolls, PVC sheets and plastic sheets of Chapter 39 are used, and that in view of this there is no infirmity in the impugned order. He emphasised that while the issue regarding eligibility of M.S. Angles, Channels, Beams Joists etc. used for fabrication of supporting structures stands decided in Department's favour by the judgment of Larger Bench of the Tribunal in the case of **Vandana Global Ltd. vs. CCE, Raipur** (supra), the items used for repair and maintenance also cannot be said to be either inputs or capital goods as repair and maintenance is not part of the manufacture.

3. We have carefully considered the submissions from both the sides and perused the records.

3.1 The first point of dispute in these appeals is as to whether maintenance of plant and machinery are eligible for Cenvat credit or not. On this issue, we find that Hon'ble Rajasthan High Court in the case of **Union of India vs. Hindustan Zinc Ltd.** (supra) has held that M.S./S.S. Plates used in the workshop for repair and maintenance of the machinery, which is used for the manufacture of final product are eligible for Cenvat credit. The Government's SLP against this judgment of Hon'ble Rajasthan High Court has been dismissed by Hon'ble Supreme Court vide judgment reported in **2007 (214) E.L.T. A115 (S.C.)**. Besides this, we find that Hon'ble Chhattisgarh High Court in the case of **Ambuja Cements Eastern Ltd. vs. CCE, Raipur** (supra) has held that welding electrodes used for repair and maintenance of the plant and machinery are entitled for Cenvat credit. In this judgment, Hon'ble High Court relied upon the judgment of Hon'ble Rajasthan High Court in the case of **Union of India vs. Hindustan Zinc Ltd.** (supra) and in para 21 and 22 of the judgment, Hon'ble High Court with regard to the Revenue's plea that the Tribunal in the case of **Steel Authority of India Ltd. vs. CCE** reported in **2008 (222) E.L.T. 233 (Trib.)** had held that welding electrodes used for repair and maintenance of plant and machinery are not eligible for Cenvat credit and the SLP filed by M/s SAIL against the Tribunal's order has been dismissed by Hon'ble Supreme Court in view of the facts of this case vide judgment reported in **2008 (229) E.L.T. 127 (S.C.)**, Hon'ble High Court observed that refusal of special leave to file appeal by a non-speaking or speaking order does not attract the doctrine of ... revision is provided against the order passed by the Court, Tribunal or any other authority before a superior forum and such superior forum modifies, reverses or affirms the decision put in issue, the decision by the subordinate forum merges in the decision by the superior forum and it is the later which subsists, remains operative and is capable of enforcement in the eyes of law, as held by Hon'ble Supreme Court in the case of **Kunha Yammed vs. State of Kerala** reported in **2001 (129) E.L.T. 11 (S.C.)**. In view of the judgment of Hon'ble Chhattisgarh High Court in the case of **Ambuja Cements Eastern Ltd. vs. CCE, Raipur** and of Hon'ble Rajasthan High Court in the case of **Union of India vs. Hindustan Zinc Ltd.** (supra), which is the Jurisdictional High Court for the present appeals, we are of the view that the items used for repair and maintenance of plant and machinery would be eligible for Cenvat credit and the Commissioner (Appeals)'s order denying Cenvat credit in respect of the same is not sustainable.

3.2 As regards the eligibility of asbestos jointing sheets for Cenvat credit, since the same is used for plugging the leakages in the pipes, it has to be treated as an item used for repair and maintenance and hence the same would be eligible for Cenvat credit. We find that this Tribunal in the case of **Oswal Overseas Ltd. vs. CCE, Meerut – II** (supra) had also held that asbestos jointing sheets used for welding various pipelines installed in the factory and allowing flow of liquid from one equipment to another during the process of manufacture are components/integral part of the machinery and hence are eligible for Cenvat credit as capital goods. In view of this, the Commissioner (Appeals) order denying Cenvat credit for this item is also not sustainable.

3.3 As regards the rough castings, unmachined steel castings, HRCS castings etc., we find that these items are used as a replacement for parts of the machinery and hence the same have to be treated as components and accessories of the cement, plants and machinery. Therefore, the Commissioner (Appeals)'s order denying Cenvat credit in respect of these items is not sustainable.

3.4 As regards the M.S. Angles, Channels, Joists, Iron and Steel structures, supporting frame etc. which are used for erecting supporting structures, the question of their eligibility for Cenvat credit stand settled against the appellant by the judgment of Larger Bench of the Tribunal in the case of **Vandana Global Ltd. vs. CCE, Raipur** (supra), wherein this Tribunal held that foundation and supporting structures embedded to earth are capital assets and the same do not qualify as capital goods as defined in Rule 2 (a) of Cenvat Credit Rules and hence the steel items used for erection of the supporting structures are not eligible for Cenvat credit. In view of this, the impugned order denying Cenvat credit in respect of these items is upheld.

3.5 As regards aluminium conductors, the same are classifiable under sub-heading 7614.90 of the tariff which is not the heading specified in the definition of capital goods. It is also not the case of the appellant that the aluminium conductors are components or accessories of any item of capital goods. We also find that the Tribunal in the case of **Sarita Steel & Industries Limited vs. CCE, Visakhapatnam – I** (supra) has held that the aluminium conductors falling under sub-heading 7614.90 of the Tariff are not covered by the definition of capital goods. In view of this, the Cenvat credit has been rightly denied in respect of this item.

3.6 As regards nitrogen gas used in connection with repair and maintenance jobs, the same has been held to be eligible for Cenvat credit by Tribunal's judgment in the case of **CCE & Cus., Guntur vs. Andhra Cements Ltd.** reported in **2009 (247) E.L.T. 651 (Tri. – Bang.)** wherein the Tribunal in the case of **CCE & Cus., Guntur vs. Andhra Cements Ltd.** has held that oxygen, nitrogen and welding electrodes used for repair and maintenance of plants and machinery would be covered by the definition of 'input' as given in Rule 2 (k) of the Cenvat Credit Rules, 2004 as the same is very vide and would cover even the items used for repair and maintenance of the plant and machinery.

3.7 As regards PVC sheets and synthetic rolls of plastic sheets of Chapter 39, the appellant have not specified as to how the same are used in or in relation to the manufacture of the finished goods in view of this, we upheld the Commissioner (Appeals) finding denying the Cenvat credit in respect of these items.

4. To sum up, while the Commissioner (Appeals)'s order denying the Cenvat credit in respect of the M.S. Angles,

Channels, Plates etc. used for fabrication of supporting structures and tower material, aluminium conductors of sub-heading 7614 and synthetic rolls, PVC sheets and plastic sheets of Chapter 39 is upheld, the Commissioner's order denying Cenvat credit in respect of M.S. Plates, Beams, Angles etc. used for repair and maintenance, unmachined steel castings, rough HRCS casting etc. used for replacement of old and worn out parts, asbestos jointing, sheets and nitrogen gas used for repair and maintenance is set aside. The matter is, therefore, remanded to the Commissioner (Appeals) for re-quantification of the Cenvat credit demand and re-determine of the quantum of penalty to be imposed on the appellant, which would be in proportion to the quantum of Cenvat credit demand upheld. The appeals stand disposed of, as above.

(Pronounced in open court on 4/7/17)

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK