IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. III

Excise Appeal No. 956/2008 with Misc Application No. 682/2010
Excise Appeal No 1358/2008 with Misc Application No. 680/2010
Excise Appeal No 381/2009 with Misc Application No. 683, 782/2010
Excise Appeal No 393/2009 with Misc Application No. 681, 761/2010
Excise Stay Application No. 1432/2010 in Appeal No. 1397/2010
Excise Appeal No. 1206/2009 and Service Tax Appeal No. 436/2008 and 802/2009
Excise Appeal No. 1513/2010

[Arising out of Order-In-Original No. MP(ST-15/2005) 06/2008 dated 1.2.2008, MP(ST-143/2006) 17/2008 dated 20.3.2008, MP(ST-01/2009) 67/2009 dated 22.9.2009, MP(ST-142/2006) 18/2008 dated 20.3.2008 MP(ST-49/2008) 101/2008 dated 24.11.2008, MP(ST-21/2007) 100/2008 dated 24.11.2008, MP(ST-20/2008) 24/2009 dated 27.2.2009, MP(ST-65/2009) 11/2010 dated 4.3.2010, MP(ST-48/2009) 12/2010 dated 11.03.2010 passed by CCE, Allahabad]

For approval and signature:
Hon'ble Ms. Archana Wadhwa, Judicial Member
Hon'ble Mr. Manmohan Singh, Technical Member

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
3	Whether Their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes.

M/s. Hindalco Industries Ltd. Appellant

Vs.

CCE, Allahabad Respondent

Coram: Hon'ble Ms. Archana Wadhwa, Judicial Member
Hon'ble Mr. Manmohan Singh, Technical Member

Appearance:

Shri B.L. Narsimhan, Advocate for the Appellants
Ms. Shweta Bector, AR for the Respondent

Date of Hearing: 06.09.2013
Date of Decision: 21.7.2014

Interim **ORDER NO.** 705-712, 766/2014

Per Archana Wadhwa (for the Bench):

All the appeals ~~had~~ are ~~been~~ being decided by a common order as the issue involved in all of them is identical.

2. The short issue involved is as to whether the appellant is entitled to the Cenvat credit of duty paid on the inputs and input services utilized at their Captive Power Plant, which is located at Renusagar, almost 50 KM away from the factory. Though, the learned advocate has drawn our attention to various decisions but we find that the said issue stands decided in the appellant own case reported as M/s Hindalco Industries Ltd. Vs. CCE, Allahabad final order No. 561/2011-EX(BR) dated 07.05.2012. For better appreciation, we reproduce~~d~~ the conclusive portion of the said order:-

> *"11. We have considered the rival contentions and perused the records. There is no dispute of fact between the parties. Undisputedly, Renusagar Power Plant is supplying the entire power production to the appellant company. Undisputedly, the insurance policies cover only loss to the plant and none of the employees.*
>
> *12. From the above submissions made on behalf of the respective parties, it is obvious that the main dispute in this case whether or not Renusagar Power Plant is captive plant of*

appellant company. Captive plant has not been defined in the Act or rules. However, by the terminology used, it obviously means power generation plant supply only to the parent company. 'Captive generating plant' is defined under Section 2(8) of Electricity Act, 2003 which reads:

> *"Captive generating plant" means a power plant set up by any person to generate electricity primarily for its own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association.*

This definition also states that captive generating plant means a power plant set up by any person or company to generate electricity for his own use. In the instant case, there is no dispute between the parties because power generated by Renusagar Power Plant was exclusively supplied to the appellant company, and, therefore, in our consider view, the power plant is captive power plant of the appellant. As such, the input service used in the power plant would entitle the appellant to claim Cenvat credit because power generated in the power plant is essential for the concerned final product. In our aforesaid view, we are supported by the judgment of Hon'ble Supreme Court in the matter of Vikram Cement vs. CCE, Indore – 2006 (9197) ELT 145 (SC) wherein while dealing with the issue of eligibility of Modvat/Cenvat credit on capital goods relating to captive mine, the Supreme court held thus –

> *"5. As regards the Modvat/Cenvat credit on capital goods, if the mines are captive mines so that they constitute one integrated unit together with the concerned cement factory, Modvat/Cenvat credit on*

capital goods will be available to the assessee. On the other hand, if the mines are not captive mines but they supply to various other cement companies of different assessee, Modvat/Cenvat credit on capital goods used in such mines will not be available to the concerned assessee under the appropriate Modvat/Cenvat Rules. The matters are remanded to the respective original authorities for decision only on the above issue."

13. In this case, since as discussed above, the Renusagar Power Plant is a captive power plant of the Appellant's manufacturing unit, the two have to be treated as one intergrated unit and therefore, the Cenvat credit of service tax paid on insurance policy for the power plant would be admissible.

14. The result of the above discussion is that impugned order of Commissioner (Appeals) is not sustainable in law. Appeal is accordingly accepted and the impugned order is set aside."

3. Inasmuch as the issue stands decided in the appellant's own case, we set aside the impugned order and allow all the appeals with consequential relief to the appellant.

(Dictated and pronounced in open court on.............................)

30/9/13

(Archana Wadhwa)
Member (Judicial)

(Manmohan Singh)
Member (Technical)

Jyoti

Hindalco Industries Ltd.
E/956/2008

PER: MANMOHAN SINGH

I have gone through proposed order prepared by the Member (J), which involves the question of availability of credit of service tax to the Appellants on that part of the insurance premium, which relates to insurance coverage of the power plant belonging to Renu Sager Power Company Limited, a subsidiary of Hindalco Industries Limited.

2. The order proposes to allow credit by quoting Paras 11 to 14 from an earlier order No.561/2011-EX (BR) dated 07.05.2012 passed by this Tribunal in the matter of the Appellants themselves. The said order dated 07.05.2012, in absence of definition of captive plant, borrowed the definition of 'captive generating plant' given under Section 2(8) of the Electricity Act, 2003 and goes on to hold that there being no dispute that power generated by Renusagar Power Plant was exclusively supplied to the appellant company. In the previous Paras of the said order dated 07.05.2012 a reference was also made to the judgment of the Hon'ble Supreme Court In the matter of State of UP and ors. v. Renusagar Power Company and others (involving question of levy of electricity duty on power generated by Renusagar Power Company Limited) as reported in AIR 1988 SC 1737. The said order dated 07.05.2012 also relied upon the ratio of the judgment of the

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Hon'ble Supreme Court case of Vikram Cements v. CCE, Indore, reported in 2006 (197) ELT 145 (SC).

3. While we would be duty bound to follow the order of a coordinate Bench, I find that there are a few factual details that seem to have escaped the attention of the Bench passing the said order dated 07.05.2012. Since the order was passed by following the ratio of the judgment of the Hon'ble Supreme Court in the cases of State of UP and ors. v. Renusagar Power Company and others and Vikram Cements v. CCE, Indore, without having regard to certain factual details as well extant law governing grant of Cenvat credit to an assesse, I find it to be a fit case for revisiting the issue involved in the present matter.

4. Before proceeding further to list out the reason for which I find this to be a fit case for revisiting the issues involved, I would like to refer to the judgment in CCE v. Fiat India Limited, 2012(283) ELT 161 (S.C.), in which the Hon'ble Supreme Court, on the question of what constitutes a precedent, quoted the following extracts from the their judgment in Sushil Suri v. Central Bureau of Investigation & Anr as, (2011) 5 SCC 708:

> *"Each case depends on its facts and a close similarity between one case and another is not enough because either a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one against the colour of another. To decide, therefore, on which side of the line a case*

falls, the broad resemblance to another case is not at all decisive."

5. I am making a reference to these lines as I feel that the cases of State of UP and ors. v. Renusagar Power Company and Vikram Cements v. CCE, Indore, which are the basis for the decision of this Tribunal, did not deal with identical facts and the ratio thereof was applied by extended logic completely ignoring the law governing availability of input service credit to a manufacturer. I have explained the reason for coming to this conclusion at appropriate places in the following Paras.

6. Now coming to the distinguishing facts, I would like to point out that Hindalco Industries Limited (Hindalco) and Renusagar Power Company Limited (Renusagar) are two distinct legal entities, the later being a subsidiary of the former. The Plant of Renusagar is located about 50 Kms. away from Hindalco's plant though power is supplied to Hindalco and their some other facilities like residential colony etc.

7. So far as the Cenvat Credit Rules are concerned, they do not contain any provision for allowing credit of Service tax to a holding company in respect of the services availed of by a subsidiary company. There is nothing to this effect in the submissions made by the Appellants while canvassing their case for availability of credit. In my opinion, it is a fundamental proposition that the relevant law should be taken into consideration as the first step to decide an issue. The role of precedent is to support the proposition of law. In the absence of specific provision permitting availability of credit to a holding

company for the services received by a subsidiary, I do not subscribe to the view that credit can be allowed by extending the logic underlying the judgment in other cases rendered in a different context.

8. It may be relevant to point out here that the facility of availability of input credit in respect of the captive power plant was extended effective from dated 01.4.2012 by amending the Cenvat Credit Rules by Notification No. 18/2012-CE(NT) dated 17.3.2012. Even this amendment also does not permit availability of input credit to the holding company of a subsidiary company or vice versa. In the absence of any specific provision in the law permitting credit in the facts and circumstances in the present matter, I am of the view that credit of input services received at the power plant of subsidiary Renusagar Power Company Limited would also be not available to Hindalco Limited, the holding company.

9. Now coming to the judgments relied upon the order dated 07.05.2012 of this Tribunal in the Appellants' own case, I have the following observations to make:

State of U.P. and ors. v. Renusagar Power Company and others

10. This judgment was rendered in the context of levy of electricity duty on the power generated by the Renusagar Power Plant, which was supplied to Hindalco's manufacturing unit and their other establishments. The Hon'ble Supreme

Court came to the conclusion that Renusagar Power Plant was 'own source of generation' for the purposes of the Electricity Act. This conclusion was reached by the Hon'ble Supreme Court after lifting the corporate veil and considering the fact that the State Government and the Electricity Board themselves were treating these two as one in the matter of power cuts. The very fact that the Hon'ble Supreme Court had to lift the corporate veil leads to conclusion that they are two distinct legal entities. It was only after considering the conduct of the State Government and the Electricity Board that the Hon'ble Supreme Court took a view that in the given circumstances Renusagar was to be regarded as the 'own source of generation' for Hindalco.

11. The Service tax authorities in the present matter have not treated them to one and the same unit for any purpose. On the contrary they have been attempting to deny credit by holding that they were two distinct units. Since there is no provision in the Cenvat credit Rules for permitting credit of service tax on the input services received in respect of or by a subsidiary company, I am of the view that there is no warrant to import the ratio of the aforesaid judgment to hold that for the purposes of Cenvat Credit also, they have to be regarded as one unit, as held in the order dated 07.05.2012 and as is being proposed now on the basis of the said order.

Vikram Cements v. CCE, Indore

12. In this matter, the Hon'ble Supreme Court dealt with the issue of availability of credit to Vikram Cements on the

capital goods used in the mines located in the proximity of the manufacturing unit. While remanding the matter, the Hon'ble Supreme Court observes as under:

> "5. *As regards the Modvat / Cenvat credit on capital goods, if* ***the mines are captive mines so that they constitute one integrated unit together with the concerned cement factory****, Modvat/ Cenvat credit on capital goods will be available to the assesse. On the other hand, if the mines are not captive mines but they supply to various other cement companies of different assesses, Modvat/ Cenvat credit on capital goods used in such mines will not be available to the concerned assesse under the appropriate Modvat/ Cenvat Rules. The matters are remanded to the respective original authorities for decision only on the above issue."(Emphasis supplied)*

13. Thus, to attract the ratio of this judgment, the mines not only should be captive ones but should also constitute **'one integrated unit together with the concerned cement factory'**. In the present matter, given the fact that the power plant belongs to subsidiary company of Hindalco and is located about 50 kms. away, I am unable to come to terms with the proposition that these two independent units located at a considerable distance from one another, have necessarily to be regarded as one integrated unit. In my opinion, facts have to be seen first to examine the applicability of the ratio of a particular judgment rather than ratio of judgments being used for modifying facts of a case.

14. In the present matter, it is being proposed that since in the context levy of electricity duty it has been held by the Hon'ble Supreme Court after lifting the corporate veil and taking into account the conduct of the State Government and the Electricity Board that Renusagar is 'own source of generation' for Hindalco, the same proposition will hold good in the context of Cenvat credit Rules as well for treating it as a captive power plant of Hindalco. And once it is so held, it necessarily has to be considered as constituting 'one integrated unit' with Hindalco's plant. **I am of the opinion that facts should be looked as they are and should be analyzed in the context of the Rules governing availability of Cenvat credit. There is no scope for any intendments. The fact remains that power plant belongs to subsidiary company of Hindalco and is located at a distance of about 50 kms. Can we say with certainty, without adverting to the ratio of the aforesaid judgments, that Renusagar belonging to its subsidiary company is a captive power plant of Hindalco and that such a plant belonging to a subsidiary, located at distance of 50 kms., can be regarded as constituting one integrated unit with Hindalco's factory**?

15. If we come to a positive answer based on the facts and facts alone then only the ratio of these judgments can be of help in allowing credit. In my opinion under the given circumstances, where power plant does not belong to Hindalco and is located at a distance of about 50 kms., neither can the power plant be regarded as a captive power plant of Hindalco

nor can it be regarded as constituting one integrated unit with Hindalco's manufacturing unit.

16. In view of above discussions and findings, I do not agree with the conclusions drawn by the learned Member (J) and record my difference.

14.7.2014
(MANMOHAN SINGH)
MEMBER(TECHNICAL)

K. Gupta

Difference of Opinion

Whether appellant is entitled to credit of duty paid on inputs and input services utilized at their power plants situated out side the factory but considered as captive power plant based on Tribunal's earlier judgement in the case of same party i.e. M/s Hindalco Industries Ltd. as held by Member (Judicial).

OR

Whether appellant credit of duty paid on inputs or input services utilized at power plant situated outside the factory but not considered as captive power plant of independent power plant of the same company, will not be available as per analysis of various judgement as held by Member (Technical).

14.7.2014

(MANMOHAN SINGH)
MEMBER (TECHNICAL)

18/7/14

(ARCHANA WADHWA)
MEMBER (JUDICIAL)

K. Gupta

(Pronounced)

21.7.2014

21/7/14

Per: B. Ravichandran:

These bunch of appeals deal with the same issue and hence were taken up for decision together. The subject matter of decision was whether the appellant is entitled to cenvat credit of duty paid on various input services utilised for their power generation plant located at Renusagar about 50 km. away from the manufacturing plant. When the matter came up for decision before the Division Bench, there was a difference of opinion between Member (Judicial) and Member (Technical) on admissibility of such credits. Thus, the matter stands referred to third Member for a decision.

2. The admitted facts of the case are that the appellants are engaged in the manufacture of aluminium and products liable to Central Excise duty. They are availing cenvat credit of duty paid inputs, capital goods and input services. They have a power generating plant located away from the aluminium manufacturing unit. The present dispute is on the eligibility credit of duty paid various services availed for such power unit.

3. I have heard the ld. Counsel for the appellant and ld. AR for Revenue. I have perused the appeal records and findings recorded by both Member (Judicial) and Member (Technical).

4. The ld. Member (Technical) held that the input services credits cannot be allowed in respect of power plant. The main ground for denial is that the power plant does not belong to appellant (Hindalco) and

services availed by subsidiary company (Renusagar Power Plant) cannot be given credit to appellant.

5. The ld. Counsel for appellant submitted that there is a complete factual error in the findings of the ld. Member (Technical). The power plant is not a separate legal entity. It is a division of appellant company and is part and parcel of the appellant unit. The ld. AR on the other hand contended that there are separate financial accounts for the power plant and the manufacturing unit and hence these two are not to be considered as belonging to same legal entity. The power plant belongs to a group company of appellant.

6. I find that Hon'ble Supreme Court in (1988) 4 SCC 59 observed:

> *"69. In the facts of this case Hindalco and Renusagar were inextricably linked up together. Renusagar had in reality no separate and independent existence apart from and independent of Hindalco.*
>
> *70. ... We are therefore, of the opinion that in the facts of this case the corporate veil must be lifted and Hindalco and Renusagar should be treated as one concern and if that is taken the consumption of energy by Hindalco must be regarded as consumption of energy from its own source of generation".*

The Hon'ble Delhi High Court in their order dated 09.07.1993 followed the above decision in allowing exemption to electricity supplied by Renusagar to appellant. In any case, further development in this matter made the position amply clear. Hon'ble Bombay High Court vide order dated 22.04.1993 in company Petition No. 128 of 1993 approved the scheme of amalgamation which resulted in the merger of Hindalco Industries Limited and Renusagar Power Company Limited. As such, there can be no dispute about the fact that power plant at Renusagar belonging to the appellant. Hence, the basis of Member (Technical) finding that the power plant belongs to subsidiary unit is factually incorrect. Hence, the reasoning followed is untenable.

7. Considering the other aspects regarding appellant's eligibility for input service credits, it is noted that neither the impugned orders nor the show cause notices have disputed the services in question for their eligibility and coverage under Cenvat Credit Rules, 2004. Credit of input service is with reference to manufacturer, not with reference to factory. Hon'ble Bombay High Court's decision in ***Deepak Fertilizers & Petrochemicals Corporation Ltd. – 2013 (32) STR 532 (Bom.)*** is relevant in this regard. The High Court allowed credit on services received for erection & commissioning of storage tank situated outside the factory of production. Tribunal in ***Endurance Technology Pvt. Ltd. – 2011-TIOL-1045-CESTAT-Mum.*** allowed credit on services availed for repair/ maintenance of windmills situated outside factory of production. The decision was affirmed by Hon'ble Bombay High Court – ***2015-TIOL-1371-HC-Mum-ST***. This decision has been followed in many decisions of Tribunal.

> *"a. Parry Engineering & Electronics P. Ltd. & Ors. vs. CCE, Larger Bench, Interim Order No. 344-353/2015 dt. 29.07.2015 (pg. 135-142)*
>
> *b. Bajaj Auto Ltd. vs. CCE – 2016-TIOL-686-CESTAT-MUM (pg. 155-160)*
>
> *c. India Cements Ltd. vs. CCE – 2015-TIOL-982-CESTAT-MAD (pg. 151-154)".*

In the appellant's own case, the Tribunal vide Final Order No. A/1357/2012-EX(BR) dt. 11.12.2012 held as follows:

> "1.1 *The department being of the view that Renusagar Power Plant being located at a different premises is not part of the factory and is a separate entity and, as such, it could not be termed as captive power plant, issued show cause notice for recovering allegedly wrongly taken cenvat credit amounting to Rs.16,34,633/- in respect of inputs and capital goods during the period from April 2009 to March 2010....*
>
> *6. ....There is no dispute about the fact that though initially the power plant was owned by M/s Renusagar Power Company, this company has been amalgamated with the appellant company in the year 1993 and the merger had been confirmed by the Hon'ble High Court during that year. Thus, during the period of dispute the Renusagar Power Plant was fully owned by the appellant company....*
>
> *6.3 We are of the view that the ratio of the above-mentioned judgments of the Apex Court are squarely applicable to the facts of this case, as the Renusagar Power Plant, which is a captive power plant of the appellant company, together with cement factory of the appellant company constitute one integrated unit....".*

8. The same issue was subject matter of decision by Tribunal in another case of appellant vide Final Order No. A/561/2011 –EX(BR). Dated 07.05.2012. I find in view of factual position as explained above there is no ground or reason to deviate from the earlier decisions of the Tribunal. The factual error in finding of Member (Technical) has been taken note and discussed above.

9. Ld. AR relied on a stay order of Tribunal in appellant's own case – 2013 (292) ELT 416 (Tri. Del.). I note that the said order deals with status of various mines of the appellant and applicability of Rule 7 of Cenvat Credit Rules, 2004 with reference to credit distribution by 'input service distributor'. Apart, from the fact that there can be no binding ratio in a

interim stay order, I note the set of facts dealt with therein are entirely different from that of appeals in hand.

10. After careful consideration of facts, legal position and decided cases by Tribunal, High Courts and Supreme Court I find that credits of duty paid on services availed with reference to Renusagar Power Plant are rightly eligible to the appellant. The view of Member (Judicial) is legal sustainable in this regard.

(B. Ravichandran) 2.9.16.
Member (Technical)

Pronounced.
29.9.16.

FINAL ORDER No.56348-56356 /2016

In view of the decision by the Third Member on reference, based on majority, the appellants are found eligible for credit and accordingly, the appeals are allowed.

(Pronounced in the court on 30.12.2016)

(S K Mohanty)
Member(Judicial)

(B Ravichandran) 30.12.16.
Member(Technical)

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