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

DATE OF HEARING : 27/01/2017.
DATE OF DECISION : 13/02/2017.

Excise Appeal No. 543 of 2011

[Arising out of the Order-in-Original No. 21-22/Aayukt/2010 dated 30/11/2010 passed by The Commissioner, Central Excise and Customs, LTU, New Delhi.]

M/s Dalmia Cements (Bharat) Ltd. Appellant

Versus

CCE & ST (LTU), New Delhi Respondent

Appearance

Shri P.K. Sahu, Advocate – for the appellant.

Shri R.K. Manjhi, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Shri Justice Dr. Satish Chandra, President**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 50813/2017 Dated : 13/02/2017

Per. B. Ravichandran :-

The appeal is against order dated 30/11/2010 of Commissioner of Central Excise, New Delhi. The appellants are engaged in the manufacture of cement. They are also availing Cenvat credit of duty paid on various inputs, capital goods and input services. Proceedings were initiated against the appellant by way of two show cause cum demand notices covering the periods August 2007 to March 2008 and November 2008 to September 2009, to deny a total Cenvat credit of Rs. 55,01,01,964/-. There are three main grounds on which denial of credit was proposed in these notices :-

(a) an amount of Rs. 5,91,15,893/- availed as credit on goods used for fabrication of plant and machinery is not available as the appellant was not the manufacturer of capital goods. The contractor who executed the work is the manufacturer ;

(b) an amount of Rs. 33,77,73,662/- availed as credit on capital goods was sought to be denied on the ground that the appellant could not have taken the credit on these capital goods as they have not commenced production at the relevant time ;

(c) an amount of Rs. 15,32,12,449/- availed as credit on input services for construction of factory was sought to be denied on the ground that the construction is with reference to immovable property and accordingly the credit is not available.

2. The Original Authority on adjudication confirmed the denial of Cenvat credit of Rs. 55,01,01,964/. He also imposed penalty of equivalent amount under Rule 15 of Cenvat Credit Rules, 2004.

3. The learned Counsel for the appellant contested the findings in the impugned order on the following grounds :-

(i) denial of credit on goods used in the fabrication of plant and machinery was sought to be made originally, as per show cause notice, on the ground that it is the contractor who is the manufacturer and not the appellant. However, the impugned order accepted the fact that the appellant is the manufacturer. Still the credit was denied on entirely a different ground that the plant and machinery erected has become immovable property as they are embedded to earth. Thus, the Original Authority has traveled beyond the allegation made in the show cause notice and as such on this ground alone the findings are to be set aside. Further, on merit it is submitted that the reliance placed by the Original Authority on the decision of Larger Bench of the Tribunal in **Vandana Global Ltd. vs. CCE, Raipur** reported in **2010 (253) E.L.T. 440 (Tri. – LB)** is not appropriate. The said decision stands over-ruled by Hon'ble Gujarat High Court in **Mundra Ports & Special Economic Zone Ltd. vs. CCE & CUS** reported in **2015 (39) S.T.R. 726 (Guj.)**. Reliance was placed on the decision of Hon'ble Supreme Court in **CCE, Jaipur vs. Rajasthan Spinning & Weaving Mills Ltd.** reported in **2010 (255) E.L.T. 481 (S.C.)** and the decision of Tribunal vide final order No. 53775/2016 dated 27/09/2016 in **Lafarge India Pvt. Ltd.**

(ii) regarding the denial of credit on capital goods prior to the commencement of production of cement, the learned Counsel submitted that here also the allegation made in the show cause notice regarding ineligibility to take credit before commencement of production was not the only reason on which credit was disallowed. The Original Authority again relied on decision of the Tribunal in **Vandana Global Ltd.** (supra) on the ground that the purchased capital goods have become immovable on completion of construction. This ground is beyond the scope of the show cause notice. It is submitted that the appellant merely kept an account of all the credits of capital goods received and they have not utilized any credit before the commencement of production in the factory. There is no dispute regarding receipt of these capital goods in the premises of the appellant. Such credit can naturally be used only for payment of duty which will be after commencement of production and clearance of dutiable final product. A distinction was also made regarding the applicability of Circular dated 26/12/1994 issued by the Board which is with reference to erstwhile Rule 57Q. Rule 3 of Cenvat Credit Rules, 2004 allows credit in respect of specified duty paid on inputs or capital goods received in the factory of manufacture of final product on or after 10/09/2004.

(iii) regarding denial of credit on input services, the learned Counsel submitted that the reliance placed by the Original Authority on the decision of the Tribunal in **Vandana Global Ltd.** (supra) is not appropriate. The definition of "input service" in the Cenvat Credit Rules is broad and the same is extended to include services in relation to setting up, modernization, renovation or repairs of a factory. Reliance was placed on certain decided cases, which are dealt with later in this order.

4. The learned AR supported the findings in the impugned order. He stated that the credit availed in respect of supporting structures and foundation created by using various steel items is not correct. The resultant items are immovable assets and cannot be categorized as capital goods. No credit can be allowed in respect of immovable assets for creation of which the duty paid iron and steel items were used.

5. We have heard both the sides and perused the appeal records. On the first issue regarding credit availed on goods used for fabrication of plant and machinery we note that the show cause notice proposed denial of credit only on the ground that the manufacturer of the capital goods were actually the contractors and not the appellant. Whereas, the Original Authority accepted the plea of the appellant that appellants are to be considered as manufacturers and not the contractors. However, he proceeded to deny the credit on a different ground that the appellants are not eligible for the credits as the items used are for fabrication of plant and machinery embedded to earth and these items are mainly foundation or supporting structures. Reliance was placed on the decision of the Tribunal in **Vandana Global Ltd.** (supra), we find that the allegation made in the show cause notice was not the basis on which a final decision was taken by the Original Authority. On this ground alone the confirmation ordered can be held as unsustainable. The impugned order travelled beyond the show cause notice and as held by Hon'ble Supreme Court in **CC, Mumbai vs. Toyo Engineering India Limited** reported in **2006 (201) E.L.T. 513 (S.C.)**, the same is not permissible. Even on merit, we find that the reliance placed by the Original Authority on the decision of the Tribunal in **Vandana Global Ltd.** (supra) is not appropriate. The finding of the Tribunal that Explanation 2 of Rule 2 (k) of Cenvat Credit Rules, 2004 was only clarificatory was not agreed upon by the Hon'ble Gujarat High Court in **Mundra Ports &**

Special Economic Zone Ltd. (supra). We also note that the Original Authority did not bring out the factual details regarding the actual usage of various iron and steel materials in the fabrication of plant and machinery in the premises of the appellant. Since, the allegation in the show cause notice is entirely on different ground, the denial of credit without clear finding on the actual nature of fabrication and emergence of capital goods in the form of plant and machinery, is not legally sustainable. The usage of various iron and steel items in the fabrication of capital goods are to be examined keeping in view the decision of the Hon'ble Supreme Court in **Rajasthan Spinning & Weaving Mills Ltd.** (supra). As there is no discussion regarding the actual use of the iron and steel items and the allegation in the notice is entirely on different ground, we find that denial of credit of Rs. 5,91,15,893/- as ordered by the Original Authority is not legally sustainable. We also note that eligibility of various iron and steel items for Cenvat credit, when used in the fabrication of capital goods, technological structures associated with capital goods have been subject of various decisions by the Tribunal. In **Singhal Enterprises Pvt. Ltd. vs. CC & CE, Raipur** reported in **2016 (341) E.L.T. 372 (Tri. – Del.)** the Tribunal found as below :-

> "13. Now we turn to the question, whether credit is admissible on various structural steel items, such as, MS Angles, Sections, Channels, TMT Bar, etc., which have been used by the appellants in the fabrication of support

structures on which various capital goods are placed? The same stands denied by the lower authority. The learned DR has sought disallowance of the same by citing the decision of the Larger Bench in the case of *Vandana Global Ltd.* (supra) and other judgments. Further, he has brought to our notice and emphasized the amendment carried out in Explanation-II to Rule 2(a) which defines the term "Input" w.e.f. 7-7-2009. It has further been pleaded that the Cenvat credit claimed for the period prior to this will be covered within the decision of the Larger Bench in the case of *Vandana Global Ltd.* (supra).

14. The Larger Bench decision in *Vandana Global Ltd.'s* case (supra) laid down that even if the iron and articles were used as supporting structures, they would not be eligible for the credit. Considering the amendment made w.e.f. 7-7-2009 as a clarification amendment and hence to be considered retrospectively. However, we find that the said decision of the Larger Bench was considered by the Hon'ble Gujarat High Court in the case of ***Mundra Ports & Special Economic Zone Ltd.,*** **2015 (04) LCX0197 = 2015 (39) S.T.R. 726 (Guj.)**, wherein it was observed that the amendment made on 7-7-2009 cannot be held to be clarificatory and as such would be applicable only prospectively.

15. We find that the controversy can be laid to rest by making a reference to the decision of the Apex Court in the case of ***CCE, Jaipur*** **v.** ***Rajasthan Spinning & Weaving Mills Ltd.,*** **2010 (255) E.L.T. 481 (S.C.)**, wherein the Hon'ble Supreme Court has considered an identical issue of steel plates and MS channels used in the fabrication of chimney for diesel generating set. The credit stands allowed in the light of Rule 57Q of the erstwhile Central Excise Rules, 1944. In the said judgment, the Apex Court has referred to the "user test" evolved by the Apex Court in

the case of ***CCE, Coimbatore* v. *Jawahar Mills Ltd.,* 2001 (132) E.L.T. 3 (S.C.)**, which is required to be satisfied to find out whether or not particular goods could be said to be capital goods. When we apply the "user test" to the case in hand, we find that the structural steel items have been used for the fabrication of support structures for capital goods. The appellants have argued that the various capital goods, such as, kiln, material handling conveyor system, furnace, etc. cannot be suspended in mid-air. They will need to be suitably supported to facilitate smooth functioning of such machines. It is obvious that the structural items have been suitably worked upon for this purpose. Accordingly, the goods fabricated, using such structurals, will have to be considered as parts of the relevant machines. The definition of 'Capital Goods' includes, components, spares and accessories of such capital goods. Accordingly, applying the "User Test" to the facts in hand, we have no hesitation in holding that the structural items used in the fabrication of support structures would fall within the ambit of 'Capital Goods' as contemplated under Rule 2(a) of the Cenvat Credit Rules, hence will be entitled to the Cenvat credit".

In **Lafarge India Pvt. Ltd.** (supra) the Tribunal held as below :-

"6. We find that apart from the various other case laws relied upon by the appellant as above, the decisions of Hon'ble Madras High Court in **India Cements Limited – 2012 (285) E.L.T. 341 (Mad.), 2014 (310) E.L.T. 636 (Mad.)** and **2014 (305) E.L.T. 558 (Mad.)** all on the same set of facts, though with reference to erstwhile Rule 57Q are also relevant. The Hon'ble Supreme Court in **Jayaswal Neco Limited – 2015 (319) E.L.T. 247 (SC)** allowed Cenvat credit on railway track materials used for handling raw material processed goods. The Tribunal in **Bellary Steel and Alloys Limited vs. CCE, Belgaum – 2005 (180) E.L.T. 92 (Tri. – Bang.)** held that Cenvat credit is available on HR sheet, angles, channels etc. used in fabrication and erection of technological structure and blast furnace and material handling system. Such supporting structure are also capital goods and the fact that they are embedded to earth is no reason for denying credit/ credit on input used. The Hon'ble Punjab & Haryana High Court in **CCE, Jullandhar vs. Pioneer Agro Extracts Ltd.– 2008 (230) E.L.T. 597 (P&H)** held that channels and angles, joint of iron steel used for installation of batch vessel or essential plant and machinery and are eligible for credit as capital goods. The Hon'ble Madras High Court in **Thiru Arooran Sugar - 2015-TIOL-1734-HC-Mad.CX** held that credit on M.S. Plates, angles, channels utilized in construction / erection of plant were eligible for credit. The High Court observed that the principle laid-down by the Hon'ble Supreme Court in **Rajasthan Spinning and Weaving Mills Ltd.** (supra) is applicable to such situation.

7. We note that the Tribunal has been consistently following the ratio that the steel items when they are used in fabrication of capital goods and their accessories inside the manufacturer premises are eligible for credit by applying 'user test' as evolved by the Hon'ble Supreme Court in **Rajasthan Spinning and Weaving Mills Ltd.** (supra). A reference can be made to latest decision of the Tribunal in **Singhal Enterprises Pvt. Ltd. vs. CC&CE, Raipur** vide final order No. 53013/2016 dated 12/08/2016".

6. On the second issue regarding denial of credit on capital goods on the ground that no credit is available prior to the

commencement of production, we note that the Original Authority relied on the Board Circular dated 26/12/1994. It was clearly recorded in the impugned order that the nature of goods being capital goods as defined under Rule 2 of Cenvat Credit Rules, 2004 is not disputed. The only issue is whether the appellant can take credit before the commencement of production. The Original Authority held that upon completion of installation these capital goods become immovable and are non-excisable. Further, credit is admissible only on capital goods when the appellant commences production. First of all, we note circular dated 26/12/1994 relied upon by the Original Authority has no relevance to the dispute at hand. The said circular dealt with the provisions of erstwhile Rule 57Q and the declaration to be filed for availing credit under the said rule. The procedure is prescribed under Rule 57T of the erstwhile Central Excise Rules, 1944. We find the credit availed by the appellant are in terms of Cenvat Credit Rules, 2004 which does not provide for any declaration etc. for availing credit. Further, as submitted by the appellant the various duty paid capital goods were received in the premises of the appellant in connection with setting up of the plant. Apparently after setting up of such plant only, production of final product can commence. The appellant necessarily has to keep account of all the duty paid capital goods alongwith quantum of eligible credit on such capital goods. It is not the case of the Revenue that the appellants have utilized any of the credit availed on this capital goods before the commencement of production. It is clear that such utilization is possible only when dutiable final products are manufactured and cleared by the appellant. Hence, keeping a record of all the credits available will necessarily help both the Revenue and the appellant for proper accounting and verification of such credit. Regarding the observation recorded by the Original Authority on the immovability of the capital goods, we find that duty paid capital goods have been received in the premises of the appellant. The capital goods are to be installed in a manner for effective use in the production process. The capital goods as they were received by the appellant were duty paid and the credit on the same cannot be denied on the ground that they were embedded to earth after installation. The excisability of capital goods is not a point for decision. There is no irregular utilization of credit by the appellant and no such allegation has been made in the show cause notice. Even if the appellant has entered the credit in their books of accounts no utilization is possible without commencement of production. In effect, the credits available on the capital goods will come to be entered as availed and utilized only on production of dutiable final product. We find no justification to deny Cenvat credit on capital goods which, are otherwise legitimately available to the appellant. The reasoning adopted by the Original Authority placing reliance on the circular dated 26/12/1994 is misplaced and legally unsustainable. Accordingly, we find the appellant’s eligibility for credit cannot be denied.

7. On the third issue regarding denial of credit on input services for construction of factory by the appellant, we note that the appellants availed credit of service tax paid on various input services like works contract service, GTA, telephone, security service, consulting engineering service, rent a cab operator service etc. These credits were denied by the Original Authority on the ground that credit on input services can be allowed only if used for provision of a service liable to service tax or manufacture of goods liable to excise duty. Reliance was placed on Board circular dated 04/01/2008. We note that the reliance placed by the Original Authority on the said circular is misplaced and not appropriate. The said circular dealt with specifically 'commercial or industrial construction service' and 'renting of immovable property service'. Presently, we are dealing with various input services availed by the appellant to set up their production factory. "Input service" in terms of Rule 2 (l) of Cenvat Credit Rules, 2004 means any service used by the manufacturer whether directly or indirectly, in or in relation to the manufacture of final products and includes services used in relation to setting up, modernization, renovation or repairs of a factory. The credits availed by the appellant are with reference to construction of factory. The said activity is covered by the definition of input service during the relevant time. It is also to be noted that the definition of "input service" is very broad and includes those services which are used by the manufacturer

whether directly or indirectly, in or in relation to the manufacture of final products. It is clear that the said service even if used indirectly by the manufacturer in relation to manufacture of final product, the same should be eligible for credit. Apart from this, there is a specific inclusion of services used in relation to setting up of factory. The services availed by the appellants are covered by the definition of input service. The findings recorded by the Original Authority is without any legal support and application of an interpretation which is not relevant to the facts of the present case. Further, the reliance again placed on the decision of Tribunal in **Vandana Global Ltd.** (supra) is not appropriate. We note that the decision of Larger Bench of the Tribunal in **ABB Ltd. vs. CCE & ST, Bangalore** reported in **2009 (15) S.T.R. 23 (Tri. – LB)** which is in favour of the appellant, was referred to by the Original Authority. He did not rely on the same on the ground that the same has not been accepted by the Department and appeal has been filed. We find that such reasoning is not tenable. We also refer to the decisions of the Tribunal in **CCE, Delhi – III vs. Exide Industries Ltd.** reported in **2016 (43) S.T.R. 463 (Tri. – Del.)** and **Steril Gene Life Sciences Pvt. Ltd. vs. CCE, Puducherry** reported in **2016 (42) S.T.R. 355 (Tri. – Chennai)**. Considering the scope of the definition of input service during the relevant time, we find that the reasoning and finding recorded in the impugned order is not legally sustainable.

8. In view of the above discussion and finding, we note that the impugned order is not sustainable and accordingly the same is set aside. The appeal is allowed.

(Order pronounced in open court on 13/02/2017.)

(Justice Dr. Satish Chandra)
President

(B. Ravichandran)
Member (Technical)

PK