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

Appeal No. E/4056/2012-EX(DB)

[Arising out of Order-in-Original No. 38 & 39/ Commr/ CEX/ ADJ/STN/2012 dated 21.09.2012, by the Commissioner of Customs, Central Excise & Service Tax (Appeals), Bhopal].

M/s. Prism Cement Ltd. ....Applicants

Vs.

C.C.E. & S.T. Bhopal ....Respondent

Appearance:

Shri B.L. Narsimhan, Advocate for the Appellant
Shri Yogesh Agarwal, DR for the Respondent

CORAM:
Hon'ble Shri. M. V. Ravindran, Member (Judicial)
Hon'ble Shri V. Padmanabhan, Member (Technical)

Date of Hearing: 02.03.2017
Date of Pronouncement: 24.03.2017

FINAL ORDER NO. 52521/2017-EX(DB)

Per M. V. Ravindran:

This appeal is directed against the order in original no. 38 & 39/Commr/CEX/ADJ/STN/2012 dated 21.09.2012.

2. The relevant facts that arise for consideration are appellant is engaged in the manufacture of cement falling under chapter 25 of the first schedule to the Central Excise Tariff Act 1985. For manufacturing of cement appellant requires electricity which is used at various stages of production for conversion of raw material into final products for which the appellant entered into an agreement

with M/s. Madhya Pradesh Poorva Kshetra Vidyut Vitran Company (Vidyut Company) for supply of electricity to appellants manufacturing plant. Appellants also engaged one M/s. Kailash Constructions (Contractor) for undertaking the entire work of erection of dedicated Transmission line from Sitpura Sub-station to appellants manufacturing factory. During the period August 2008, September 2008 and October 2009, the appellant availed Cenvat Credit of main components of transmission line like towers or pylons made up of MS duly galvanized, aluminum conductors, insulators and was other hardware like clamp, vibration dampers, cable connectors, etc. Revenue authorities were of the view that availment of Cenvat Credit of cement, cables, etc used for erection / construction of transmission line is incorrect and coming to such conclusions, issued the show cause notice for the reversal of the said ineligible Cenvat Credit. Appellant contested the show cause notice on merits justifying their claim for availment of Cenvat Credit. The adjudicating authority after following the due process of law rejected the contention of the appellant and confirmed the demand raised with interest and also imposed penalties on the ground that the transmission line which is erected is immovable property and they do not appear to be capital goods or inputs used or in relation to manufacture of the appellant’s final product, Vidyut Company is an independent legal entity and on construction of these transmission lines they are property of the said Vidyut Company and the transmission line or parts thereof have no integral relation co-extensive with the process of manufacture of appellants final products.

3. Ld. Counsel submits that Cenvat Credit is admissible as usage of electricity in relation to manufacturing process is not disputed and it is essential for the purpose of which, in order to keep uninterrupted power supply, a dedicated power line was proposed by the appellant to the Vidyut Co. which was accepted and they were permitted to lay dedicated transaction line. It is his submission that the said dedicated transmission line supplies power only to appellant's factory. He would submit that similar issue came up before Tribunal in the case of ***Birla Corporation Ltd.*** wherein Tribunal disallowed credit on spares of ropeway used for transporting the crushed limestone from mines on the ground that the same is not material handling equipment within the factory; said decision was upturned by the Hon'ble Apex Court on appeal as reported at ***2005 (186) ELT 266 (SC).*** Following the said decision of the ***Hon'ble Apex Court the Tribunal, in the case of Sanghi Industries Ltd. Vs. CCE Rajkot 2006 (206) ELT 575 (Tri-Del)*** allowed credit on galvanized structure used as part of transmission line which brings power to the factory from power plant. He would submit that ownership of the transmission line is irrelevant to decide eligibility and admissibility of credit is already settled by the Hon'ble High Court of Bombay in the case of ***CCE Raigad Vs. Modernova Plastyles Pvt. Ltd. 2015 (323) ELT 312 (Bom).*** It is his further submission that immovability of goods is not a criteria for denying the credit, as has been held by the Hon'ble High Court

of Gujarat in the case of ***Mundra Ports and Special Economic Zone Ltd. Vs. CCE 2015-TIOL-1288-HC-AHM-ST***. In view of this, it is his submission that the appeal be allowed and the impugned order be set aside.

4. Ld. DR reiterates the findings of the lower authorities.

5. On careful consideration of the submissions made by both the sides, we find that the issues that falls for consideration is whether the appellant is eligible to avail cenvat credit on the items which are used in the transmission line which has been erected as dedicated transmission line only for the appellant's use.

6. The Adjudicating authority has in para 16.1 & 16.4 come to a conclusion that the transmission line which is laid down is undisputedly a immovable property but also is the dedicated line for the appellants factory. But held against the appellant only on the ground that if it is immovable property, Cenvat Credit cannot be allowed; also on the findings that the said transmission line do not have any relation to the process of manufacture of the final products of the appellant.

7. We find that the adjudicating authority has mis-directed his findings in denying the cenvat credit to the appellant. It is undisputed that the transmission line which is laid is for the exclusive and dedicated use of the appellant. It also cannot be disputed that electricity is the prime / essential requirement in the manufacturing of cement. We find that there is also no dispute as to the fact that the items used for laying down the dedicated

transmission line were duty paid and the duty paying documents are in the name of the appellant.

8. On such a factual matrix, we find that the adjudicating authority holding Cenvat Credit is not eligible only on the ground that these goods are immovable is against the law as settled by the Hon'ble High Court of Gujarat in the case of ***Mundra Ports and Special Economic Zone Ltd. (Supra)***. In that case, the Tribunal had denied the Cenvat Credit on the steel and cement used in the construction of jetty which is used for providing port services / cargo holding services after considering the entire law on the subject, the Hon'ble High court in para 7 held as under:

> *"7. It is not disputed that jetty was constructed and input credit was claimed on cement and steel. The aforesaid definition of Rule 2(k) was applicable and Explanation 2 did not provide that cement and steel would not be eligible for input credit. According to learned Counsel for the appellant, the appellant is not manufacturer and, therefore, the provisions of Explanation 2 of Rule 2(k) would be applicable only to the factory and manufacturer. The appellant is neither having any factory nor he is manufacturer. The appellant is a service provider of port. We need not go into this question as to whether the appellant is a factory or manufacturer or service provider in view of the fact that it is not disputed by Mr. Y.N. Ravani, learned counsel appearing for the Revenue in this Tax Appeal that the appellant provides service on port for which he is getting jetty constructed through the contractor and the appellant has claimed input credit on cement and steel. The cement and steel were not included in Explanation 2 from 2004 up to March, 2006. The Cenvat Credit Rules, 2004 were amended in exercise of the powers conferred by Section 37 of the Central Excise Act, 1944 with effect from 7-7-2009, the date on which it was notified by the Central*

Government from the date of the notification. According to learned Counsel for the appellant, this amended definition would apply only to the factory or manufacturer and would not apply to the service provider. According to him, either before the amendment made in the year 2009 or thereafter, the appellant was neither factory nor manufacturer and he has only constructed jetty by use of cement and steel for which he was entitled for input credit as jetty was constructed by the contractor, but the jetty is situated within the port area and the appellant is a service provider. According to the appellant, his case is squarely covered by the judgment of the Division Bench of the Andhra Pradesh High Court in Commissioner of Central Excise, Visakhapatnam-II v. Sai Sahmita Storages (P) Limited, 2011 (270) E.L.T. 33 (A.P.) = 2011 (23) S.T.R. 341 (A.P.) wherein in Paragraph 7, it has been clearly held that a plain reading of the definition of Rule 2(k) would demonstrate that all the goods used in relation to manufacture of final product or for any other purpose used by a provider of taxable service for providing an output service are eligible for Cenvat credit. It is not in dispute that the appellant is a taxable service provider on port under the category of port services. Therefore, the appellant was entitled for input credit and the decision of the Division Bench of the Andhra Pradesh High Court squarely applies to the facts of the case and answered the question on which the appeal has been admitted."

9. In yet another case of ***Singhal Enterprises Pvt. Ltd. Vs. CC Raipur 2016-TIOL-2451-CESTAT-CC*** this Tribunal applying the ratio of user test on structural items used in fabrication of support structure allowed the Cenvat Credit of the duty paid on such structural items. We reproduce the ratio in para 13, 14, 15:

"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. 07.07.2009. 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 structurals, they would not be eligible for the credit. Considering the amendment made w.e.f. 07.07.2009 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, wherein ti was observed that the amendment made on 07.07.2009 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 vs Rajasthan Spinning & Weaving Mills Ltd., 2010 (255) ELT 481 (SC), 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 vs Jawahar Mills Ltd., 2001 (132) ELT 3 (SC), 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."*

10. The adjudicating authority has also held that the transmission lines which is laid down by the appellant is bringing electricity from Sitpura which is situated 32 kms away from the factory premises and is not within the factory premises hence the Cenvat Credit is inadmissible. We find that similar issue cropped up before the Tribunal in the case of ***CCE Chennai Vs. Pepsico India Holdings Ltd. 2001 (130) ELT 193 (Tri-Chennai).*** In that case, the respondent therein availed Cenvat Credit on PVC pipes which is used for drawing water from the well situated away from factory premises. The Tribunal held that since the PVC pipes are used exclusively for drawing the water and supplying it to the factory of the respondent therein, Cenvat Credit cannot be denied.

11. In view of the facts and circumstances of this case as indicated herein above and the judicial pronouncements as relied upon, we find that the impugned order is unsustainable and liable to be set aside and we do so. The impugned order is set aside and appeal is allowed.

[Pronounced in the open Court on 24.03.2017]

(V. Padmanabhan)
Member (Technical)

(M. V. Ravindran)
Member (Judicial)

Bhanu