IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-SM

COURT –III

Excise Appeal No. E/51362/2018 [SM]

[Arising out of Order-in-Appeal No. BHO-EXCUS-001-APP-500-17-18 dated 30.11.2017 passed by the Commissioner(Appeals) CGST & Central Excise, Bhopal]

M/s Kareli Sugar Mills P. Ltd. ...Appellant

Vs.

CGST-CC & CE, Jabalpur ... Respondent

Present for the Appellant : Mr. P.C. Kaushik, Consultant
Present for the Respondent: Mr. H.C. Saini, D.R.

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing/Decision: 29.06.2018

FINAL ORDER NO. 52442/2018

PER: RACHNA GUPTA

The Order of Commissioner (Appeals) dated 30.11.2017 has been challenged vide the present Appeal.

2. The relevant factual matrix for the adjudication is that the appellant is engaged in manufacture of sugar and molasses, the excisable goods and the appellants are availing the facility of cenvat credit on inputs and capital goods for the manufacture of sugar. The Department during scrutiny of the records of the appellants noticed that they have availed cenvat

credit on iron and steel items like angle, channel, joist, bar played sheet and coil falling under Chapter 72 of Central Excise Tariff Act, 1985 under the category of them being the capital goods. While relying upon Rule 3 Sub-Rule 1 of Cenvat Credit Rules, 2004 the said availment has been denied on the ground that the aforesaid items are of the nature of construction material and appear in no way used in or in relation to the manufacture of final products. Resultantly, a Show Cause Notice dated 13.06.2008 was issued calling upon the appellant to deposit back the cenvat credit as has already been availed by them alongwith the interest. The said notice was initially adjudicated by Assistant Commissioner Customs and Central Excise Jabalpur Division vide Order dated 31.05.2017 vide which the aforesaid recovery was confirmed alongwith the interest. In addition, the penalty as mentioned therein was also imposed upon the appellant. In an Appeal to this Order, Commissioner (Appeals) vide the impugned order dated 30.11.2017 has confirmed the Order-in-Original. Resultantly, the present Appeal.

3. I have heard Shri PC Kaushik, Ld. Consultant for the appellant and Shri H.C. Saini, Ld. DR for the Department.

4. It is submitted on behalf of appellant that the Department has wrongly denied the iron and steel items on which the appellant has availed the cenvat cedit to be the capital goods. It is submitted that all those items were used by the appellant very much in the premises where the

appellant was manufacturing sugar and molasses and was paying the excise duty thereof. The decision of Hon'ble Supreme Court in **Union of India vs Hindustan Zinc Ltd. 2007(214)ELT 115 (S.C.)** has been relied. It is in addition submitted that prior to 07.07.1999 availment of such credit was always available. It is only after the decision of Larger Bench in the case of **Vandana Global Pvt. Ltd. Vs CCE, Raipur 2010 (253) ELT 440** that the credits on such iron and steel items on the ground of these being construction material has been denied. It is also submitted that though the certificate of the CE was called upon by the Adjudicating Authority, but the certificate is dated 25.03.2017 and the period during which the impugned items were used is 2003-08. Hence, it was not practically possible for the CE to precisely certify about the use. With these submissions the appellant has prayed for the impugned order to be set aside and Appeal to be allowed.

5. While rebutting these arguments, it is submitted by the Ld. DR that at this stage, the appellant cannot backout from the CE certificate because it is on the basis of this certificate only that the impugned cenvat credit amounting approximately to 31 lakhs has been availed. While justifying the impugned order it is submitted that the Commissioner (Appeals) has rightly held the iron and steel items as the items purely for manufacture of structures, roofs or columns and as such are neither covered under the definition of capital goods as in Rule 2 Sub-Rule (a) of CCR, 2004 nor in the definition of inputs

as Rule 2(k) of the said Rules. While justifying the said Order, Appeal is prayed to be set aside.

6. After hearing both the parties, I am of the view that the moot question for the present adjudication is as to whether the iron and steel items (angle, channel, joist, bar plate sheet and coil) can clearly fall under the definition of capital goods and the inputs. The definitions are reproduced as below:

> ***Rule 2. Definitions. -***
> *In these rules, unless the context otherwise requires,-*
> *(a) "capital goods" means:-*
> *(A) the following goods, namely:-*
> *(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No. 68.05 grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Excise Tariff Act;*
> *(ii) pollution control equipment;*
> *(iii) components, spares and accessories of the goods specified at (i) and (ii);*
> *(iv) moulds and dies, jigs and fixtures;*
> *(v) refractories and refractory materials;*
> *(vi) tubes and pipes and fittings thereof; and*
> *(vii) storage tank, used-*
> *(1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or*
> *(2) for providing output service;*
> *(B) -------*
>
> *(k) "input" means-*
> *(i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as 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 and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production;*
> *(ii) all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service;*
> ***Explanation 1****.- The light diesel oil, high speed diesel oil or*

> *motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.*
> ***Explanation 2.-*** *Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer; but shall not include cement, angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated bar (TMT) and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods;*

The Sub Clause (i) of Rule 2a of CCR makes it very clear that any item other than those falling under Chapters 82, 84, 85 and 90 will not be a capital good. Apparently and admittedly the impugned iron and steel items are falling under Chapter 72. For these items to still fall under the aforesaid definition, it is for the appellant to show that these items have been used as components, spares and accessories of the goods falling under the above mentioned Chapters, i.e. 82, 84, 85 & 90. From the appellant's own submissions it is clear that appellant has been using these iron and steel items for the purpose of constructing roof, platforms and columns. As is very much apparent from the terminology used, the items are used purely for the construction activity. I find nothing on record as may show that these items have been used in such a structure which is used in or integrally connected with the process of actual manufacture of the final product.

7. The reliance of the appellant on the Circular No. 267/11/2010 dated 08.07.2010 is also not applicable to the given facts and circumstances, as the structures for which the impugned iron and steel items have been used, there is no evidence to show those structures to be the integral part of the

manufacture process yielding sugar and molasses as the final product. In absence thereof, it is held that Commissioner (Appeals) has rightly confirmed the non eligibility of the appellant to avail the cenvat credit on the impugned items.

8. The case of Hindustan Zinc Ltd. Supra as relied upon by appellant is not applicable to the present case. As in that case also, the Hon'ble Apex Court has been absolutely clear that for availing the cenvat credit on any goods which otherwise can be used for construction purposes, it has to be precisely shown that it is associated with the integral part of the process with which the machines engaged for the purpose can be utilized. There is nothing of this sort on record of the present case. Though the certificate of CE of the appellant was produced after it was demanded by the Adjudicating Authority below but that certificate is also miserably silent to certify these iron and steel items to have been used so integrally so as to entitle the appellant to avail the cenvat credit. The conduct of appellant for denying the reliability on CE certificate is also observed as improper for the reason as pointed out by the Ld. DR that on this CE certificate only that the appellant has availed the impugned cenvat credit.

9. The appellant has also objected the imposition of penalty on the ground that the cenvat credit even if is held to have been wrongly availed, it was only on account of mis-interpretation of the provisions on bonafide belief. Accordingly had prayed for setting aside of the penalty. I find that the

Adjudicating Authorities below have rightly relied upon Rule 9(6) of Cenvat Credit Rules, 2004. In view thereof, the Act of the appellant has rightly been held as suppression of relevant facts. Resultantly, I find no infirmity as far as the imposition of penalty under the impugned order is concerned.

10. In the view of entire above discussion, I am of the opinion that the iron and steel items do not fall either under the definition of capital goods or under definition of inputs under Section 2(a) and 2(k) of the Cenvat Credit Rules, 2004. Appellant accordingly was not entitled to avail the cenvat credit. The recovery thereof as claimed vide the impugned Show Cause Notice has rightly been confirmed vide the Order under challenge. Same is accordingly upheld. Appeal is hereby rejected.

[Dictated and pronounced in the Open Court]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

D.J.