IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

EXCISE APPEAL NO. E/446/2009

(ARISING OUT OF ORDER-IN-ORIGINAL NO.52/COMMR/BOL/09 DATED 06.04.2009 PASSED BY COMMISSIONER OF CENTRAL EXCISE, BOLPUR)

M/S. Jai Balaji Industries Ltd.
…APPLICANT(S)

VERSUS

COMMISSIONER OF CENTRAL EXCISE, BOLPUR

.**RESPONDENT(S)**

APPEARANCE:

Shri S.Mohapatra, GM(Taxation) for the applicants.

Shri D.Haldar, AC(AR) for the Respondent.

CORAM:
Hon'ble Shri P.K.Choudhary, Member (Judicial)
Hon'ble Shri Bijay Kumar, Member (Technical)

Date of Hearing/Decision : 05.07.2018

ORDER NO.FO/76655/2018

Per Shri P.K.Choudhary

The facts of the case in brief are that the appellant is engaged in the manufacture of Iron and Steel products of different grades such as Pig Iron, Sponge Iron, M.S.Billets/Ingots, Ferro Alloys and rolled products in the form of rods and bars classifiable under Chapter 72 of the first schedule to the Central Excise Tariff Act, 1985. While setting up their factory and power plant at Durgapur various inputs in the form of M.S Angle, M.S.Channel, Joist, Plate, H.R.Sheet, Mill Plate etc. classifiable under Chapter 72, M.S. Rounds, Lancing Pipes classifiable under Chapter 73 and Aluminum Balls classifiable under Chapter 76 of the first schedule to the Central Excise Tariff Act, 1985, were used as inputs for manufacturing of capital goods in the factory. Show Cause Notice dated 09.07.2008 was issued alleging illegal availement of cenvat credit. It is the case of the department that the impugned goods are not defined under Rule 2(b) of the Cenvat Credit Rules, 2004. The period of dispute is from 2003-2004 to 2007-2008 (upto February, 2008). The Adjudicating Authority confirmed the demand alongwith interest and imposed equal penalty under Rule 13(2)/Rule 15(2) of the Cenvat Credit Rules, 2002/2004. Hence, the present appeal before this Tribunal.

2. Ld. Representative (GM Taxation) appearing on behalf of the appellant company submits that they have availed cenvat credit on various steel items used in fabrication of capital goods and their accessories inside the factory premises. All the input items were purchased and used in fabrication of capital goods and their accessories and the supporting structures and the details of the said inputs were entered in the statutory Books of Accounts and intimated to the department under monthly ER-1 Returns on regular basis. It is the submission of the Ld. Representative that all necessary formalities and procedures were duly complied with and the goods have been exclusively utilized in the factory of production for the manufacture of Storage Tank, Pipes and Tubes, cooling tower and all other capital goods including the furnace & furnace accessories which have been captively used. He further submits that the aforesaid capital goods are integral part of the plant and the collective performance of all such capital goods virtually,

contributed to fulfill the sole objective of coordinating the operating system for manufacturing the excisable final products. He categorically submitted that no credit was taken in respect of manufacture of exempted goods and other civil construction other than the manufacture of capital goods. Ld. Representative strongly relied upon the Chartered Engineer certificate dated 09.02.2009 wherein it has been certified that the inputs were used in the manufacture of capital goods such as Pollution Control System, Water Cooling System, Mill Bed & Accessories conveyor System, material handling system, Storage Tank, Furnace & Furnace Accessories, Crane Operating System, Transformer & Electrical Installation, Concast Machine and Accessories etc.

3. Ld. DR reiterates the discussions and findings of the adjudicating authority.

4. Heard both sides and perused the appeal records.

5. We find that the appellant have submitted certificate of Chartered Engineer to substantiate their claim that such steel items have been used to fabricate and install capital goods only. It was submitted that the impugned order failed to appreciate the facts as narrated in the certificate.

6. We find that the amendment of the definition of Rule 2(k) of Cenvat Credit Rules, 2004 made w.e.f. 07.07.2009 is not applicable to the facts and the present case since all the goods have been purchased and used before the amendment. The exclusion made is to the effect that the inputs used in the manufacture of capital goods eligible for credit shall not include cement, angles, channels, CTD bar, TMT bars and other items used for construction

of factory shed, building or laying foundation for support of capital goods. The applicability of such exclusion for the period prior to 07.07.2009 has been exempted by the Hon'ble Gujarat High Court in the case of Mundra Ports & Special Economic Zone Ltd. [2015 (04) LCX0197]. In the above case the Hon'ble High Court held that exclusion brought in by the amendment cannot be given retrospective effect. The Honble Madras High Court in Thiru Arooran Sugars [2015-TIOL-1734-HC MAD-CX] held as under:

> *"8. Learned Standing Counsel appearing for the Revenue heavily relied upon the decision reported in - 2011-TIOL-73-SC-CX (Saraswati Sugar Mills V. Comissioner of Central Excise, Delhi - III) in Civil Appeal No.5295 of 2003 dated 02.08.2011. However, we find that this Court has earlier considered the issue in C.M.A.No.1301 of 2005 dated 31.12.2012, wherein, while dismissing the appeal filed by the Revenue the Division Bench of this Court held as follows:*
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> > *"8. Even though learned standing counsel appearing for the Revenue submitted that the judgment in the assessee's own case reported in AIT-2011-358-HC = 2011-TIOL-558-HC-MAD-CX (The Commissioner of Central Excise V. M/s. India Cements Limited) had been appealed against, as of today, there are no details; in any event, the fact herein is that the Revenue does not controvert the facts found by the Assistant Commissioner that the impugned goods were used for fabrication of structurals to support various machines like crusher, kiln, hoppers, pre-heaters conveyor system etc. and that without these structurals, the machinery could not be erected and would not function.*
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> > *9. In the decision reported in AIT-2011-358-HC = 2011-TIOL-558-HC-MAD-CX (The Commissioner of Central Excise V. M/s. India Cements Limited), pointing out to Rule 57Q and the interpretation placed by the Apex Court in the decision reported in 2010 (255) E.L.T.481 = 2010-TIOL-51-SC-CX (Commissioner of Central Excise Jaipur V. Rajasthan Spinning & Weaving Mills Ltd.) and in particular Paragraph Nos.12 and 13, wherein the Apex Court had applied the user test by following the Jawahar Mills's case, this Court held that steel plates and M.S.Channels used in the fabrication of chimney would fall within the ambit of "capital goods". In the face of this decision in the assessee's own case there being no new circumstance or*

decision in favour of the Revenue, we do not find any good ground to take a different view herein too.

10. As far as the reliance placed by the Revenue on the decision reported in 2011 (270) E.L.T.465 (SC) = 2011-TIOL-73-SC-CX (Saraswati Sugar Mills V. Commissioner of C.Ex., Delhi-III) is concerned, we do not think that the said decision would be of any assistance to the Revenue, considering the factual finding by the Tribunal therein in the decided case that the machineries purchased by the assessee were machineries themselves. Thus, after referring to the decision reported in 2010 (255) E.L.T.481 = 2010-TIOL-51-SC-CX (Commissioner of Central Excise Jaipur V. Rajasthan Spinning & Weaving Mills Ltd.), the Apex Court held that in view of the findings rendered by the Tribunal that the machineries were complete and having regard to the meaning of the expression "components/parts", with reference to the particular industry in question, the Apex Court rejected the appeal filed by the assessee.

11. Thus going by the factual finding, which are distinguishable from the facts found by the Authorities below in the case on hand, we have no hesitation in rejecting the Revenue's appeal, thereby confirming the order of the Tribunal.

12. Learned standing counsel appearing for the Revenue pointed out that the Tribunal had merely passed a cryptic order by referring to the earlier decisions. We do not think that this would in any manner prejudice the case of the Revenue, given the fact that on the identical set of facts, the assessee's own case was considered by this Court and by following the decision reported in 2010 (255) E.L.T.481 = 2010-TIOL-51-SC-CX (Commissioner of Central Excise Jaipur V. Rajasthan Spinning & Weaving Mills Ltd.), the Revenue's appeal was also rejected. In the circumstances, this Civil Miscellaneous Appeal is dismissed. No costs. Consequently, C.M.P. No.16107 of 2005 is also dismissed."

9. From a perusal of the above said judgment, it is seen that there is no change in the circumstance and this Court had already considered the issue and held that the decision reported in - 2011-TIOL-73-SC-CX (Saraswati Sugar Mills V. Commissioner of Central Excise, Delhi - III) in Civil Appeal No.5295 of 2003 dated 02.08.2011 is distinguishable on facts. This Court applied the principles laid down in the decision reported in 2010 (255) E.L.T.481 = 2010-TIOL-51-SC-CX (Commissioner of Central Excise Jaipur V. Rajasthan Spinning & Weaving Mills Ltd.) and held in favour of the assessee.

10. Hence, following the principles laid down in the decision reported in 2010 (255) E.L.T.481 = 2010-TIOL-51-SC-CX (Commissioner of Central Excise Jaipur V. Rajasthan Spinning & Weaving Mills Ltd.) and the earlier decision of this Court in C.M.A.No.3101 of 2005 dated 13.12.2012, we are inclined to allow the appeal, thereby set aside theorder of the Tribunal. Accordingly, the above Civil Miscellaneous Appeals stand allowed. No costs. Consequently connected Miscellaneous petitions are closed."

7. Accordingly, the reliance placed by the impugned order on the decision of the Tribunal in Vandana Global Ltd. 2010 (253) ELT 440 (Tribunal-LB) for retrospective application of such exclusion is not legally tenable.

8. We note that the eligibility of steel items for cenvat credit has been a subject matter of decision by the Tribunal, Hon'ble High Courts and the Hon'ble Supreme Court in various cases. It has been held by the Tribunal consistently that the steel items when they were used in fabrication of capital goods and their accessories inside the manufacturing premises are eligible for credit. The principle of user test evolved by the Honble Supreme Court in Rajasthan Spinning and Weaving Mills (supra) has been applied in this regard. A reference can be made to the latest decision of the Tribunal in Singhal Enterprises vide Final Order No.53013 dated 12.08.2016. The findings are as under:-

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 emphasised 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 Honble Gujarat High Court in the case of Mundra Ports & Special Economic Zone Ltd. 2015 (04) LCX0197, wherein it 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."

9. We also note that emphasis was made by Revenue on the immovability of the capital goods, the fabrication of which was done using the duty paid items. We note that the capital goods as defined under Rule 2

(a) if CCR, 2004 includes apart from all goods falling under Chapter 82, 84, 85, 90, etc. Pollution Control Equipment, moulds, dies, jigs and fixtures, refractory and refractory materials, tubes and pipes and fittings thereof, storage tank, etc. For instance, it cannot be said that the credit on storage tank and other large capital goods will be allowed only if they are brought into the premises of the manufacturer as such in a movable condition. Storage tanks and pollution control equipments, etc are fabricated and integrated to the other machines of the plant in a factory. When a storage tank is linked to the other processing machine, the pipe and other fittings including their accessories, which hold such linkage will necessarily form part of the machinery and cannot be denied credit on the ground that they are fixed permanently. In any case, except for a summary assertion in the impugned order, it is not categorically established in the present case that all the steel items are used in creation of immovable assets only. On the contrary, the appellants submitted detailed certificate by a Chartered Engineer. We have perused the same. The said certificate records that upon physical examination, it was certified that the steel items have been used for fabrication of various equipments/accessories in various locations of the plant. A detailed list of the description of location and nature of use has also been provided. We have noted that the impugned order summarily concluded that the usage as mentioned in the chart submitted by the appellant clearly suggest that these items, which fabricated are only civil structures unique to civil plant. We are not able to accept such summary conclusion by the Original Authority. A perusal of the usage of the detailed summary as well as supporting photographs submitted by the appellant will show that the various steel items have been used in different manner in capital machinery or associated structure and can rightly be considered as accessories closely inter-connected to the capital goods for their function. The categorical assertion of facts by the appellant as supported by the

Chartered Engineer Certificate should have been rebutted with evidences of such nature before making summary conclusion on the basis of the presumption. We find the original order is not legally sustainable.

10. As examined earlier, the various High Courts and Honble Supreme Court have been taking consistent view regarding these steel structures and their eligibility to cenvat credit, which is also being followed by the Tribunal in various decisions. As discussed above, we find that the impugned order cannot be sustained and the same is set aside. The appeal is allowed.

(Operative portion of the order have already pronounced in the Open Court)

S/d.	S/d.
(BIJAY KUMAR)	**(P. K. CHOWDHARY)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

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