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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.75015 of 2019
(Arising out of Order-in-Appeal No.168/HAL/CE/2018-19 dated 13 September 2018 passed by Commissioner of CGST & Central Excise (Appeals), Kolkata-II.)

M/s. MCCPTA India Corporation Private Limited
(Bengal Eco Intelligence Park, Tower-1,
Block-EM, Plot No.3, 3rd Floor, Sector-V,
Saltlake City, Kolkata)

...Appellant

VERSUS

Commissioner of CGST & CX, Haldia Commissionerate
.....Respondent
(Tripathy Complex, Debhog, Haldia-721657, East Midnapur.)

APPEARANCE
Shri B.N.Chattopadhyay, Consultant for the Appellant (s)
Shri D.Halder, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

FINAL ORDER NO. 76487/2019

DATE OF HEARING : 1 November 2019
DATE OF DECISION : 1 November 2019

P.K.CHOUDHARY :

The issue in dispute is regarding availment of Cenvat Credit during the period March 2016 to February 2017 on Furnace Oil consumed for generation of electricity, a part of which was not used in or in relation to manufacture of their final product. Show Cause Notice dated 25.07.2017 was issued for disallowance of Cenvat Credit amounting to Rs.5,97,610/- and recovery of the same. The adjudicating authority disallowed the Cenvat Credit and ordered for recovery of the same along with applicable interest. He however chose to impose a penalty @ 25% of the Cenvat Credit so disallowed under Rule 15(1) of the Cenvat Credit Rules, 2004 read with Section 11AC (1)(b) of Central Excise Act, 1944. On appeal the learned Commissioner(Appeals) upheld the denial of Cenvat Credit, but held that in absence of any *mala fide* intention, the penalty is not imposable and accordingly set aside the penalty imposed @ 25% under section 11AC. Being aggrieved, the appellant assessee is in appeal before the Tribunal.

2. Learned Consultant appearing on behalf of the appellant made the Bench go through page No.72-73 of the appeal paperbook and he vehemently argued that since the date of commencement of production in the appellant's factory there was no electricity connection and hence they were consuming Furnace Oil for generation of electricity. However, electricity connection was installed i.e. one line in the month of April 2015 and another line in the month of June 2015 and thereafter during the period under dispute i.e. March 2016 to February 2017 no Furnace Oil was consumed for generation of electricity which has been shown as Nil in Annexure-A i..e page 73 of the appeal paperbook. It is his submission that since there was no consumption of any Furnace Oil, the allegation as made in the Show Cause Notice is not tenable and accordingly the impugned orders are fit to be set aside.

3. Learned Authorized Representative appearing on behalf of the respondent justified the impugned orders and further submits that the appeal is devoid of any merit and is fit to be dismissed.

4. Heard both sides and perused the appeal records.

5. I find that in the appellant's own case for the period from July 2014 to August 2015 there was a similar disallowance of Rs.7,49,876/- on such portion of Furnace Oil consumed for generation of electricity which was not used in or in relation to manufacture of final products. The learned Commissioner(Appeals) vide Order-in-Appeal No.54/HAL/CE/2017-18 dated 16.11.2017 has discussed the entire issue in details and finally concluded that the appellant assessee had rightly availed Cenvat Credit on Furnace Oil used in the generation of electricity in a captive power generating machine, even though a part of such generated electricity is used in factory office, workers' canteen etc.. Para 6 of the order-in-appeal dated 16.11.2017 is reproduced for appreciation of facts and issue in dispute.

"6. I find that the moot issue in the instant appeal is whether CENVAT credit is allowable on Furnace Oil used in the generation of electricity in a captive power generating machine where a part of such generated electricity is used in factory office, worker's canteen etc. which are not purely manufacturing activities. To have a proper understanding of the issue we need to look into the definition of 'input & factory' as defined under rule 2 of the said Rules and section 2 of the said Act respectively, which are reproduced as under:

Rule 2(k) of CENVAT Credit Rules, 2004 – Definition of 'input' – prior to 01.04.2011.

"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;

<u>Rule 2(k) of CENVAT Credit Rules, 2004 – Definition of 'input' – w.e.f. 01.04.2011.</u>

"input" means-

(i) all goods used in the factory by the manufacturer of the final product; or

(ii) any goods including accessories, cleared along with the final product, the value of which is included in the value of the final product and goods used for providing free warranty for final products; or

(iii) ***all goods used for generation of electricity or steam for capitive use;*** *or*

(iv) all goods used for providing any output service;

but excludes-

(A) light diesel oil, high speed diesel oil or motor spirit, commonly known petrol;

(B) any goods used for- (a) construction of a building or a civil structure or a part thereof; or (b) laying of foundation or making of structures for support of capital goods, except for the provision of any taxable service specified in sub-clauses (zn), (zzl), (zzm), (zzq), (zzzh) and (zzzza) of clause (105) of section 65 of the Finance Act;

(C) capital goods except when used as parts or components in the manufacture of a final product;

(D) moto9r vehicles;

(E) any goods, such as food items, goods used in a guesthouse, residential colony, club or a recreation facility and clinical establishment, when such goods are used primarily for personal use or consumption of any employee; and

(F) any goods which have no ***relationship whatsoever with the manufacture of a final product.***

Explanation.- For the purpose of this clause, "free warranty" means a warranty provided by the manufacturer, the value of which is included in the price of the final product and is not charged separately from the customer;

<u>Section 2(e) of the Central Excise Act, 1944 – Definition o 'factory':</u>

"factory" means any premises, ***including the precincts thereof****, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on;*

From the study of the above quoted rules and section s of the said Rules and Act it is quite evident that in terms of the definition of 'input' as was prior to 01.04.2011, input includes goods used *for generation of electricity used in or in relation to manufacture of final products or for any other purpose, within the factory of production*. Hence, as was prior to 01.04.2011, input, inter alia includes, goods satisfying the following conditions-

i) the goods may be used for generation of electricity, and

ii) electricity so generated shall be used in or in relation to manufacture of final products, or **for any other purpose,**

iii) electricity so generated shall be used within the **factory** of production.

Further, the terms ***'factory*** means any premises, **including the precincts thereof**, wherein or in any part of which excisable goods other than salt are manufactured or process, connected to manufacturing, is carried out. Oxfotd Dictionary defines the terms 'precincts' as *"the area within the walls or perceived boundaries of a particular building or place"*. Hence, the terms 'factory' includes all the facilities, including that of manufacturing process, within its boundary wall.

Therefore, the above discussion unambiguously infers that, as was prior to 01.04.2011, CENVAT credit was available on goods used in generation of electricity and consumed within the boundary wall of the factory of production in or in relation to manufacture of final products, or for any other purpose which may not have direct relation to manufacture. This view was also ratified by the Hon'ble Supreme Court in the judgement in the case of Maruti Suzuki Ltd. Vs. Commissioner of Central Excise, Delhi-III [2009 (240) E.L.T. 641 (S.C.)] wherein the Hon'ble Court has inter alia observed that *assessee is entitled to credit on the eligible inputs utilized in the generation of electricity to the extent to which they are using the produced electricity within their factory (for captive consumption).* Also, Hon'ble Tribunal in the similar case of Manali Petrochemicals Ltd. Vs. CCE, Chennai [2004 (167) E.L.T. 434 (Tri.-Chennai)] held that Nitrogen used for chilling water and if a portion of that chilled water was used for administrative purposes, such portion of nitrogen should not suffer duty.

However, with effect from 01.04.2011, with the abolition of the phrase *"used in or in relation to manufacture of final products"* from the definition of 'input' vide Notification No.3/2011-CE(Nt) dated 01.03.2011, the scope of input has not only been more widened, it has also become more inclusive. With effect from 01.04.2011, 'input' inter alia, includes *all goods used for generation of electricity for* ***captive use***. The Institute of Cost and Works Accountants of India (a Statutory Body under an Act of Parliament) in their Guidance Note on Cost Production of Captive Consumption (under rule 8 of Central Excise Valuation Rules, 2000) has defined the terms 'Captive Consumption' as follows:

> *"The word 'Captive Consumption' refers to goods produced or manufactured in a factory and used within the factory in the manufacture of other goods. When goods manufactured by one division/plant are transferred to and consumed by another division/plant of the same organization or related undertaking for manufacturing another product (s), such goods are also said to be captively consumed."*

In view of above, I find that with the amendment of rule 2(k) of the said Rules w.e.f. 01.04.2011 and thereby rescinding the phrase "*used in the factory of production"* with the word "*captive use"*, the legislature has made its intention clear that a goods will qualify as input if it is used in the generation of electricity and

> the electricity so generated is consumed in a manner that has whatsoever relationship with the manufacture of a final product. Even, the goods will not lose its input status if the electricity, so generated, is consumed outside the factory premises by another division/plant of the same organization or related undertaking for manufacturing another product (s), as such use are also said to be captively consumed.
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> Therefore, in view of foregoing discussions, I find that the Appellant has rightly availed CENVAT credit on Furnace Oil used in the generation of electricity in a captive power generating machine, even though a part of such generated electricity is used in factory office, worker's canteen etc.."

6. I find that since the period covered in the above appellate order is after the installation of electricity connection i.e. April and June 2015, the facts are no different in the present appeal before me. Here it would be pertinent to mention that the Show Cause Notice alleges consumption of Furnace Oil whereas the appellants have tried to convince the authorities below that after installation of the electricity there was no occasion for them to continue with the old system and they had stopped using any Furnace Oil for generation of electricity for smooth running of their manufacturing facility. It is my considered view that I need not go into the allegation and counter allegation and the facts of the Show Cause Notice and the impugned orders are identical and have been elaborately dealt with by the learned Commissioner(Appeals) in Order-in-Appeal No.54/HAL/CE/2017-18 dated 16.11.2017. I do not find any justifiable reason for the learned Commissioner(Appeals) to hold an altogether different view in the impugned order and therefore the same is set aside. The appeal filed by the appellant is thus allowed with consequential benefits, if any.

(Dictated and pronounced in the open Court.)

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(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

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