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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.403 of 2012

(Arising out of Order-in-Original No.07/MP/Comm/2012 dated 27 March 2012 passed by Commissioner of Central Excise & Service Tax, Patna.)

M/s. Harinagar Sugar Mills Limited
(P.O.-Harinagar, Distt. W.Champaran (Bihar), Pin-845103.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Patna
.....Respondent
(Revenue Building (Annexee), Birchand Patel Path, Patna-800001.)

APPEARANCE

Shri Arvind Baheti, Chartered Accountant for the Appellant (s)
Shri Tapas Kr. Mondal, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI C.J. MATHEW, MEMBER(TECHNICAL)

FINAL ORDER NO. 76939/2019

DATE OF HEARING : 23 September 2019
DATE OF DECISION : 23 September 2019

P.K.CHOUDHARY :

Excise Appeal No.403 of 2012 has been filed against the Order-in-Original dated 27 March 2012, confirming denial of Cenvat credit of Rs.52,15,642/- along with equal penalty and interest.

2. Briefly stated the facts of the case are that the Appellant is a composite Sugar factory operating under the Cenvat Credit Scheme. The Appellant had installed a distillery division within the said factory premises which commenced production in June 2008. The various sub-plants, machineries and materials required for installation of the distillery unit were sourced from M/s. Praj Industries Limited and the

erection/commissioning were carried out by M/s. Peackon Industries Limited. The Appellant had availed Cenvat credit of Rs.52,15,642/- as capital goods on HR Coil, HR Plate, MS Bar, MS Flat, MS Angle etc. (in short **structural items**) used for installation/commissioning of the distillery division and for repairs and maintenance of various capital goods within the sugar division.

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3. Pursuant to and inspired by the CERA Audit, a Show-cause Notice dated 19 January 2011 was served upon the Appellant proposing denial of Cenvat credit on the structural items on the purported ground that these were used as construction/structural material in the distillery division and being general purpose item do not qualify as capital goods within the meaning of Rule 2(a) of the Cenvat Credit Rules (CCR). The demand proposed in the Notice was confirmed by the Commissioner vide Order dated 27 March 2012 on multifarious grounds..

4. Shri Arvind Baheti, Learned Chartered Accountant for the Appellant has assailed the Order-in-Original on the following alternate grounds :-

A. Assuming without admitting that the structural items were used as construction/structural material in the distillery division as alleged in the Notice, the **credit thereon was admissible as inputs** within the meaning of **Rule 2(k) of the CCR** during the relevant period being prior to the amendment introduced to the said definition vide **Notification No. 16/2009-CE dated 7 July 2009** when the structural items were specifically excluded from its purview. Reference in this regard is invited to the following decisions:

- ***Thiru Arooran Sugars Vs. CC – 2017 (355) ELT 373 (refer para 14.1, 29 to 31.3 and para 35 to 36.1);***

- ***Vandana Global – 2010 (253) ELT 440 (refer para 6) reversed in 2018 (16) GSTL 462;***
- ***Ambuja Cement Eastern Ltd. – 2017 (357) ELT 55 (refer para 7 to 9);***

Further, such items **also qualified as capital goods by applying the user test** evolved by the Hon'ble Supreme Court in Jawahar Mills Case, re-iterated in Rajasthan Spinning Case and followed by the Hon'ble Madras High court in India Cements reported in 2014 (310) ELT636.

B. The structural items, involving credit of Rs.43,66,551 in the instant case were used for fabrication of tanks (fermentation/storage) and pollution control equipments within the distillery division as evident from the certificate dated 2 November 2011 issued by the Chartered Engineer, M.G. Bhat & Associates. The adjudicating authority could not have questioned the domain knowledge and wisdom of an expert and could not have brushed aside the said Certificate unless another expert opinion was obtained to the contrary. *[Refer -* ***Shree Narmada Khand Udyog Sahakari Mandli Ltd. – 2015 (329) ELT 820*** *and* ***Intercontinental India – 2003 (154) ELT 37]*****.**

C. The structural items, involving credit of Rs. 8,48,532/- was availed for repairs and maintenance of capital goods falling under Chapter 84 and Chapter 85 of the CETA within the sugar division. It is also settled by various decisions that credit is available on structural items used for repairs and maintenance of Plant & Machinery. Reference in this regard is also invited to the following decisions:

- ***DSCL Sugar – 2019 (6) TMI 199;***
- ***Hindustan Zinc Ltd. – 2007 (214) ELT 510;***

- ***Savita Oil – 2018 (6) TMI 980***

D. The Adjudicating Authority has travelled far beyond the Notice and the Audit Objection and each of these extraneous observations have been dealt with in the table below.

<u>Para</u>	**<u>Commissioner's Finding</u>**	**<u>Contentions of the Appellant</u>**
10	Disputes the receipt of structural items and the duty paid nature thereof.	• Travels far beyond the Notice as that was never the subject matter of dispute. The Audit objection at **page 39** also never disputed the same. Discloses no material to come to such conclusion. • Sample Invoices from Praj Industries/Jindal and JSW enclosed duly mapped with the Annexure to the Notice
11	Credit was taken in August 2008 and April 2009 whereas the distillery division stood installed in February/March 2008 and therefore, the structural items were not used in the fabrication of tanks.	The invoice from the suppliers of the structural items pertains to the period 2007-08 as evident from the sample invoices enclosed as part of the Paper Book *[**refer Page 15 to 22 of index**]* and no provision in law that credit unless taken simultaneously with receipt of inputs is lost *[Refer Page 118 of Index]*.

12	Structural items were used for general purposes like support structure, platform etc. as evident from photographs, it cannot be concluded that the equipments manufactured were out of disputed structural items within the disputed period.	Credit eligible even when structural used as support structure/platform being integral part of the tanks/equipments.
13	Not furnished any evidence regarding the actual date of erection of the distillery unit, the contracts entered with Praj Industries Limited and Peackon Engineering Limited to ascertain whether goods-in-question were purchased on payment of excise duty. Moreover, since the tanks were fabricated by the contractors, the Appellant does not seem to be the owner of the structural material and therefore, could not have taken the excise duty of such goods.	• Purchase of the material from M/s. Praj Industries Limited and the use thereof in the distillery division was not at all in dispute even as per the Audit objection from **CERA** at **page 39** and therefore, did not find any mention even in the Show-cause Notice. Moreover, all such documents were available with the Revenue Authorities as evident from **page 50** of the **Paper Book** much prior to issuance of the Notice. Therefore, the 'O-I-O' travels far beyond the Notice. • Ownership of the structural items were never in dispute

		as this was sourced from M/s. Praj Industries Limited and supplied directly to the Appellant at its factory premises. Furthermore, explanation 2 to the definition of inputs does not require that the capital goods manufactured within the factory of production should be manufactured by the manufacturer taking credit on the corresponding inputs. It is also settled law that if capital goods are manufactured within the factory of production through a contractor, the manufacturer of final product is entitled to credit on the inputs used in the manufacture of such capital goods. *[Refer* - ***International Tractor Ltd – 2007 (220) ELT 155; & International Tractors Ltd. – 2010 (255) ELT 196]***

E. Lastly, the confirmation of demand has also been challenged on the ground of being hit by limitation as the credit taken was duly disclosed in the ER-1 returns by inviting our attention to the following decisions:

- ***Diamond Power Infrastructure – 2016 (44) STR J60 (Guj HC)***
- ***Ultratech Cement – 2017 (347) ELT 3 (Chattisgarh HC)***

5. The learned Authorized Representative appearing on behalf of the Respondent Revenue supports the Order-in-Original and reiterates the findings of the adjudicating authority.

6. Heard both sides and perused the appeal records.

7. We find that the Notice dated 19 January 2011 issued based on the Audit Objection from CERA did not dispute the receipt of the structural items in the factory premises of the Appellant or the duty paid nature thereof. The eligibility of credit in the Notice was questioned only on the ground that the structural items were general purpose items used as construction/structural material in the Distillery Division. The Certificate dated 2 November 2011 from the Chartered Engineer also evidences the use of the structural items in installation/commissioning of the Distillery Division. Therefore, the Adjudicating Authority clearly misdirected himself in questioning the receipt and the duty paid nature of these items without any evidence to the contrary. We are in agreement with the contentions of the Appellant that such iron and steel article used for installation of the Distillery Division are eligible for credit both as inputs as well as capital goods within the meaning of Rule 2(k) and Rule 2(a) respectively of the CCR. We find that the definition of input as contained in Rule 2(k) of the CCR was amended by insertion of Explanation 2 to specifically exclude iron and steel articles used in foundation or for making structures to support capital goods from its purview. The said

exclusion could only operate prospectively as held by the various High Courts in the following cases:

- ***Thiru Arooran Sugars Vs. CC – 2017 (355) ELT 373 (refer para 14.1, 29 to 31.3 and para 35 to 36.1);***
- ***Vandana Global – 2010 (253) ELT 440 (refer para 6) reversed in 2018 (16) GSTL 462;***
- ***Ambuja Cement Eastern Ltd. – 2017 (357) ELT 55 (refer para 7 to 9);***

Further, such items also qualify as capital goods by applying the user test evolved by the **Hon'ble Supreme Court in Jawaharlal Mills case – 2001 (132) ELT 3** reported in **Rajasthan Spinning Case – 2010 (255) ELT 481**. Even if these items were used for repairs and maintenance of capital goods, the same were eligible for credit in view of the decision of the Hon'ble Allahabad High Court in DSCL Sugar (supra). We also find force in the contention of the Appellant that the demand was even otherwise hit by limitation following the decision of the Hon'ble High Court in Ultratech case (supra) and Diamond Power Infrastructure (supra).

In view of the above, the appeal is allowed both on merits and on limitation.

(Operative part of the order was pronounced in the open Court.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/
(C.J.MATHEW)
MEMBER (TECHNICAL)

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