

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA**

Excise Appeal No.76313 of 2016

(ARISING OUT OF ORDER-IN-ORIGINAL NO.108-110/Commr./DGP/2015-16
DATED 10-03-2016 PASSED BY COMMISSIONER OF CENTRAL EXCISE,
CUSTOMS & SERVICE TAX, DURGAPUR)

M/s Jai Balaji Industries Limited (Unit IV)

Banskopa, P.O.-Rajbandh, Dist.-Burdwan, Durgapur-713212

Appellant

VERSUS

**Commissioner of Central Excise, Customs & Service Tax,
Durgapur**

Satyajit Roy Sarani, City Centre, Durgapur-713216

Respondent

Appearance:

Shri K.K.Anand, Advocate & Shri S.Mohapatra, GM(Taxation) for the Appellant
Shri H.S.Abedin, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER

HON'BLE SHRI RAJU, TECHNICAL MEMBER

FINAL ORDER NO.75548/2021

DATE OF E-HEARING : 29.07.2021

DATE OF PRONOUNCEMENT : 25.08.2021

Per P.K.Choudhary :

The present appeal is directed against the Order-in-Original 108-110/COMMR/DGP/2015-16 dated 10-03-2016 passed by the Ld. Commissioner of Central Excise, Customs, Service Tax, Durgapur. The period of dispute is April 2009 to Sept. 2010.

2. That the Appellant is engaged in the manufacture of iron and steel products of different grades classifiable under Chapter 72 & 73 of the first schedule to the Central Excise Tariff Act, 1985. They had availed Cenvat credit on Angles, Channels, Joists, Beams, TMT Bars, Plate, H.R. Coils, H.R. Sheets, Rounds, Sheets. Billets, Flats, Paints, Rails, Castings, Coils, Electrode/Welding Electrode and Miscellaneous

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Chemical Products falling under different headings. Three periodical show cause notices were issued by the department. In all the three show cause notices the allegations against the Appellant was that the impugned goods were not defined under Rule 2(a) of the Cenvat Credit Rules, 2004. It was alleged that the said items were not defined as capital goods under Rule 2(a) of the Cenvat Credit Rules, 2004. Accordingly, it was alleged that the credit availed and utilized by the Appellant was irregular.

Three separate adjudication orders were passed in the first round of litigation. The Commissioner vide Order-in-Original No. 32/Commr/BOL/11 dated 12-04-2011 had allowed credit on pipes and on consumables to the extent of Rs. 56,25,648/- and disallowed the remaining credit of Rs.49,16,660/-. In the other Order-in-Original bearing No. 71/Commr/BOL/11 dated 08-11-2011, the Ld. Commissioner had allowed credit of Rs. 5,05,467/- on Aluminium and allowed double entered amount of Rs. 2,62,324/-. He had confirmed the remaining amount of Rs 44,42,790/-.

The Appellant had challenged all the three Orders-in-Original before this Tribunal. All the three cases were remanded to the Commissioner for fresh adjudication vide Tribunal's final Order No. 71162-71164/2013 dated 05-12-2013. The Commissioner was directed to decide the issue afresh, taking into consideration all evidences on record and after due verification of the claim of the Appellants on the use of the items. The Commissioner vide impugned Order has disposed of all the three show cause notices vide one common Adjudication Order.

3. That the Advocate for the Appellant submits that the Commissioner in the remand proceeding has not followed the directions of the Tribunal. No verification was got conducted by the Commissioner despite having been pointed out to him in the remand proceedings. He submitted that the Tribunal in para 5 of their Order took note of the fact that the Appellant had furnished the detail use

and account of each of the capital items along with necessary evidence before the Commissioner. He stated that structural steel materials were issued for processing and fabricating various components, parts and spares of crane installed in D.I Pipe Unit and Panel & Working Platform attached to Annealing Furnace. That the items were also used for fabricated/processed columns, girders which were later superficially fastened on civil foundations through nuts and bolts. It is further submitted that the items were used in installation and erection of the crane and working platform.

The said disputed items were also used in the following segments of various units:-

(A) MBF UNIT

- (i) Blast Furnace Proper
- (ii) Hot Blast Supply Equipments
- (iii) .Gas Cleaning System
- (iv) Raw Material Storage and Handling System
- (v) Liquid Product Disposal
- (vi) Utilities
- (vii) Process control Equipments.

(B) STEEL MELTING SHOP

- (i) Melting Bay
- (ii) Raw Material Handling Bay
- (iii) Refining Bay
- (iv) Billet Yard
- (v) Water System

(C) SINTER PLANT

- (i) Sinter Main Plant
- (ii) Proportioning & Mixing System
- (iii) Raw Material Receiving & Preparation
- (iv) .Cooling & Product Storage Section.
- (v) Pollution Control System
- (vi) Water System
- (vii) Control System.

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The Cenvat credit was disallowed on Electrode/Welding Electrode which were also used in the manufacturing process without which it is not possible to manufacture the finished goods. The Ld. Advocate submitted that this Tribunal has already allowed the appeal in respect of their sister units where similar/identical items were involved. In this regard, the Advocate relied upon final Order No. FO/76655/2018 dated 05-07-2018 and final Order No.76182/2019 dated 30-08-2019 wherein on similar/identical items Cenvat Credit has been allowed.

That apart from the above two judgements, the Advocate has also placed reliance on the following judgments where similar/identical issues were involved and in all cases the Cenvat credit was allowed by holding that even if the iron and steel products have been used in the fabrication of support structures of the capital goods still the credit is to be allowed treating them as part and parcel of the capital goods. The details of the said judgments are as under:-

- (i) M/s. SPS Steel & Power Ltd - Final Order No. 76328/2017 dated 12-05-2017.
- (ii) CCE, Jaipur Vs. Rajasthan Spinning & Weaving Mills Ltd. reported in 2010 (255) ELT 481 (SC).
- (iii) M/s. Singhal Enterprises Pvt Ltd Vs. CCE, Raipur reported in 2016-TIOL-2451-CESTAT-DEL.
- (iv) M/s. Prism Cement Unit-II, - Final order No. 54613/2016 dated 28-10-2016.
- (v) CCE Tiruchirapali Vs. India Cement Ltd reported in 2014 (305) ELT 558 (Mad)
- (vi) Mundra Ports & Special Economic Zone Ltd reported in 2015 (39) STR 726 (Guj).
- (vii) Lafarge India Ltd Vs. CCE, Raipur reported in 2016-TIOL-2875-CESTAT
- (viii) CCE Tirucharapali Vs. India Cement Ltd. reported in 2012 (285) ELT 341 (Mad).
- (ix) Union of India Vs. Associated Cement Company Ltd reported in 2011 (267) ELT 55 (Chattisgarh).

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- (x) CCE Salem Vs. Madras Aluminium Co. reported in 2020 (259) ELT 738 (Tri.-Chennai).
- (xi) India Cements Ltd Vs. CCE, Trichy reported in 2013 (296) ELT 513 (Tri.-Chennai).
- (xii) CCE & St Vs. India Cement Ltd reported in 2014 (310) ELT 636 (Mad).
- (xiii) CCE Salem Vs. Chemplast Sanmar Ltd reported in 2015 (316) ELT 246 (Mad).

That in respect of electrodes/welding electrodes, the Ld. Advocate has placed reliance on the Final Order of the Tribunal in the case of M/s. Singhal Enterprises Pvt Ltd Vs. CCE, Raipur reported in 2016-TIOL-2451-CESTAT-DEL, which has been mentioned at S.No. (iii) above where the Tribunal has allowed the credit of duty paid on welding electrodes. The Advocate has also taken us to a chart, which is placed at pages 262 to 267 of the appeal memo, wherein the use of different disputed items has been explained. The learned Advocate, therefore, prayed for setting aside the impugned Order and allowing the appeal.

4. The learned A.R. reiterates the findings of the Commissioner. He has argued that the department has challenged the various judgments relied upon by the learned Advocate before the different fora and the said judgments have not yet attained finality.

5. Heard both sides through video conferencing and perused the appeal records.

6. The various judgments cited by the learned Advocate have also been perused. We find that this Tribunal vide Final Order No.71162-71164/2013 dated 05-12-2013 had remanded the matter back to the Adjudicating Authority. In para 5 of the remand Order, the Tribunal categorically noted that the Appellant had furnished the detail use and account of each of the capital items along with necessary evidences before the Ld. Commissioner as Adjudicating Authority. The same evidences were also produced before this Tribunal in the first round, but the Ld. Commissioner had not appreciated the said evidences and

disallowed the Cenvat credit on the disputed items. We find that this Tribunal directed the Adjudicating Authority to decide the issue afresh, taking into consideration all evidences on record and after due verification of the claim of the Appellants on the use of the items. We find that instead of carrying out the directions of the Tribunal, the Commissioner mainly reproduced the findings of his predecessor, which is a gross violation of the above directions of this Tribunal. He has further relied upon the Larger Bench judgment of this Tribunal in the case of Vandana Global Ltd Vs. CCE, Raipur reported in 2010 (253) ELT 440 (Tri.LB) and other judgments in which it was held that if a particular plant or structure is embedded to earth the same cannot be termed as capital goods. The Larger Bench ruled that the capital goods defined in the Cenvat Credit Rules have to be excisable goods. It was further held that the foundation and supporting structure for machinery cannot be considered to be part or accessory of the machinery. We find that subsequently the law laid down by the Larger Bench was over ruled by the Chhattisgarh High Court as reported in 2018 (16) GSTL 462 (Chhattisgarh) and also by the Hon'ble Gujarat High Court in the case of Mundra Ports and SEZ Limited as reported in 2015 (39) STR 726 (Guj.).

We note that eligibility of steel items for cenvat credit has been the subject matter of various decisions by the Hon'ble Supreme Court, various High Courts and this Tribunal where it has been categorically held that the steel items when they were used in fabrication of capital goods and their accessories inside the manufacturing premises are eligible for credit. We have gone through the usages of the disputed items in the fabrication of various sections of the plant. We agree with the Advocate that in their own case the Tribunal has already decided the issue in their favour vide final Order No. FO/76655/2018 dated 05-07-2018 and final Order No.76182/2019 dated 30-08-2019. Para 8 of final Order No. FO/76655/2018 dated 05-07-2018 is reproduced below:

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"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 Hon'ble 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 emphasized the amendments 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 structural, they would not be eligible for the credit, considering the amendment made w.e.f. 07-07-2009 as clarification amendment and hence to be considered

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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 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. Rajasathan 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 structural, will have to be

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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."

In respect of electrodes/welding electrodes, the Tribunal in the case of M/s. Singhal Enterprises Pvt Ltd Vs. CCE, Raipur reported in 2016-TIOL-2451-CESTAT-DEL, supra, has allowed the credit of duty paid on welding electrodes.

In view of the above discussions, the impugned Order is set aside and the appeal is allowed with consequential relief, if any.

(Pronounced in the open court on 25 August 2021)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/

(Raju)
Member (Technical)