

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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.235 of 2009

(Arising out of Order-in-Original No.07-09/Commissioner/09 dated 05.02.2009 passed by Commissioner of Central Excise & Service Tax, Jamshedpur.)

M/s. Kohinoor Steel Private Limited

(16A, Everest House, 46C J.L. Nehru Road, Kolkata-700071.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Jamshedpur

.....Respondent

(143, New Baradwari, Sakchi, Jamshedpur-831001.)

APPEARANCE

NONE for the Appellant (s)

Shri S.S.Chattopadhyay, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO. 75172/2023

DATE OF HEARING : 22 March 2023
DATE OF DECISION : 22 March 2023

P.K. CHOUDHARY :

When the matter was called, none appeared on behalf of the Appellant, neither any prayer for adjournment has been received. Since it is an old Appeal pertaining to the year 2009 and the dispute in the

present Appeal lies in a narrow compass, hence it is taken up for hearing with the consent of the Ld.Authorized Representative for the Department.

2. The facts of the case in brief are that the Appellant is a manufacturer of Sponge Iron. During the period from November 2006 to March 2008 they have availed CENVAT Credit on steel items such as TMT bars, Chequered Plate, M.S. Angles, Channels, Plates, Joists, Beams, HR Plate, Sheet and Coils, G.C. Sheet etc.. Three Show Cause Notices were issued alleging irregular availment of CENVAT Credit on the impugned items and also to recover the alleged irregular availment of CENVAT Credit along with interest and for imposition of penalty as under:-

Sl. No.	Show Cause Notice date	Period	Amount Rs.
1.	19.11.2007	November 2006 to March 2007	90,57,199/-
2.	01.05.2008	April 2007 to September 2007	1,38,11,898/-
3.	18.09.2008	October 2007 to March 2008	36,83,946/-

The Ld.Commissioner disallowed the CENVAT Credit and ordered for recovery and imposed penalty of Rs.2,65,53,043/- under Section 11AC of the Central Excise Act, 1944 read with Rule 15 of CENVAT Credit Rules, 2002. Hence the present Appeal before the Tribunal.

3. Heard the Ld.Authorized Representative for the Department and perused the Appeal records.

4. We find that the issue is no more *res integra* since the period of dispute is from November 2006 to March 2008 and the amendment to the definition of 'input' was made on 07.07.2009 and which was made to be not retrospective. It is the case of the Appellant that the disputed items of iron and steel, cement, TMT Bar, MS Flat, Plate, MS Channel, MS Angle, MS Joist, MS Beam, HR Plate Bar Rods, HR Plate Coil, Mill Plate, GC Sheet, Flange Beam, GP Sheet, GP Coil, HR Sheet, HR Coil etc. were used in the factory in the manufacture of final capital goods and have been used for Kiln Support, Base, Ground Hoppers, Intermediate Bunkers, Conveyor support, Crusher support, screen

support and Cooler platform and thus are eligible as inputs and are squarely covered by the definition of 'input'. Reliance has been made on the decision of the Tribunal in the case of Singhal Enterprises Pvt.Ltd. v. Commr. Of Cus. & C.Ex., Raipur reported in 2016 (341) E.L.T. 372 (Tri.-Del.). The relevant paragraphs are reproduced:-

"9. *We proceed to decide the appeal on the two following issues :*

- (i) Entitlement of Cenvat credit on welding electrodes; and*
- (ii) Availability of Cenvat credit on various structural items, such as, MS Angles, Channels, CTD bar, TMT bar, etc. which have been used in support structure of the capital goods.*

10. *As regards the credit of duty on welding electrodes, the appellants have cited the following judicial pronouncements to support the contention that the said credit will be allowable :*

- (i) [2006 \(194\) E.L.T. 3](#) (S.C.);*
- (ii) [2002 \(140\) E.L.T. 372](#) (P&H)*
- (iii) [2004 \(173\) E.L.T. 117](#) (Guj.).*

11. *On the other hand, the Revenue seeks to disallow the same and specifically cited the case of Dwarikesh Sugar Industries Ltd. v. Commissioner of Central Excise, Meerut, [2016 \(334\) E.L.T. 58](#) (All.).*

12. *We have gone through the judgment of the Hon'ble High Court of Allahabad cited by the Revenue. We find that the Hon'ble High Court has considered the claim of Welding Electrodes under the definition of 'Capital Goods' under Rule 2(a) of the Cenvat Credit Rules, 2004 and have come to the conclusion that the credit will not be allowable under this Rule. However, we find that the credit of duty paid on Welding Electrodes has been held allowable by several decisions of this Tribunal and hence the issue is no more res integra. We also find that several High Courts have also allowed such credit considering the same as allowable within the definition of "Input" under the Cenvat Credit Rules. One such reference can be made to the decision of the Hon'ble*

High Court of Chhattisgarh in the case of Ambuja Cements Eastern Ltd. v. Commissioner of Central Excise, Raipur, [2010 \(256\) E.L.T. 690](#) (Chhattisgarh), wherein welding electrodes used for repair and maintenance purpose were also held to be cenvatable. Similarly, in the case of Hindustan Zinc Limited v. Union of India, [2008 \(228\) E.L.T. 517](#) (Raj.), the Hon'ble High Court of Rajasthan allowed the Cenvat credit on the welding electrodes. By following said decision, we hold that the appellants are entitled to the credit on welding electrodes considering them as "Inputs".

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 amendment carried out in Explanation-II to Rule 2(a) which defines the term "Input" w.e.f. 7-7-2009. 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 structures, they would not be eligible for the credit. Considering the amendment made w.e.f. 7-7-2009 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 Hon'ble Gujarat High Court in the case of Mundra Ports & Special Economic Zone Ltd., 2015 (04) LCX0197 = [2015 \(39\) S.T.R. 726](#) (Guj.), wherein it was observed that the amendment made on 7-7-2009 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

v. Rajasthan Spinning & Weaving Mills Ltd., [2010 \(255\) E.L.T. 481](#) (S.C.), 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 v. Jawahar Mills Ltd., [2001 \(132\) E.L.T. 3](#) (S.C.), 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."

5. We also find support from the decision of the Hon'ble High Court of Karnataka in the case of Commissioner of Central Excise, Bangalore-II v. SLR Steels Ltd. reported as 2012 (280) E.L.T. 176 (Kar.). The relevant paragraphs are reproduced:-

"7. *A perusal of the aforesaid provision makes it very clear though storage tanks may be immovable property and the pollution control equipment are included within the definition of "capital goods", input as defined in Rule 2(k) makes it clear that "input" includes in goods used in the manufacture of capital goods which are further used in the factory of the manufacturer. Therefore, the input is not necessarily to*

be used in the manufacture of final product. By virtue of explanation 2 - goods used in the manufacture of capital goods which are further used in the factory of the manufacture also falls within the definition of input. In 2009, this explanation has been amended to the following effect :

"but shall not include cement, angles, channels Centrally Twister Deform bar (C.T.D.) 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."

8. *Therefore, the notification of the Legislature is very clear that it is only the "inputs" used in the manufacture or construction of capital goods which is construed as input and cenvat credit is available on the duty paid in purchase of such inputs. If the cement, angles, channels, Centrally Twister Deform bar (C.T.D.) or Thermo Mechanically Treated bar (T.M.T.) and other items are used in the construction of factory shed, building or laying of foundation, the duty paid on such items the assessee would not be entitled to cenvat credit. Similarly, though the assessee is entitled to cenvat credit of cement and steel used in the manufacture of capital goods viz., storage tank, if any structure for support of capital goods is constructed and steel and cement is used for such support, the assessee is not entitled to the benefit of cenvat credit on the duty paid on such cement and steel. Therefore, there is no ambiguity in any of these provisions. When once a storage tank and pollution control equipment constitutes capital goods and any raw material purchased for construction of those goods, the duty paid could be utilized as a cenvat credit by the assessee notwithstanding the fact that the storage tank is an immovable property. Therefore, the appellate authority committed a serious error firstly in holding that the storage tank is an immovable property and secondly, on the ground that it cannot be bought and sold in the market, the criteria which is totally unwarranted under the circumstances. Therefore, the Tribunal was justified in setting-aside the said order and holding that the assessee is entitled to the benefit."*

6. In view of the aforesaid decisions, it is our considered view that the impugned order cannot be sustained and is therefore set aside. The Appeal filed by the Appellant is allowed with consequential relief, as per law.

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

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

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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