IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Excise Appeal No. 75688 of 2019

(Arising out of Order-in-Appeal No.569/RAN/2018 dated 18.12.2018 passed by Commissioner (Appeals) of CGST & Central Excise, Ranchi)

M/s. Bharat Coking Coal Ltd.
(Office of General Manager, Area Finance Manager,
Govindpur, Katras Mahuda Road, P. O. Sonardih, Dhanbad-828125)

Appellant

VERSUS

Commissioner of CGST & CX, Ranchi Commissionerate
(Grand Emerald Building, Ashok Nagar, Kadru-Argora Main Road,
Ranchi-834002)

Respondent

APPEARANCE :

Mr. Rajeev Agarwal, Advocate for the Appellant
Mr. S. Mukhopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. ANIL CHOUDHURY, MEMBER (JUDICIAL)

FINAL ORDER NO.75551/2023

Date of Hearing : 05 June 2023
Date of Decision : 05 June 2023

PER ANIL CHOUDHURY

The issue involved in this appeal is whether Cenvat Credit have been rightly disallowed which have been received for construction of Coal Handling plant (CHP) during the period December 2015 to October 2016 for Rs.11,25,283/-.

2. The appellant is a PSU and a 100% subsidiary of Coal India Limited, engaged in the production of coal on which central excise duty has been paid during the period in dispute.

3. The appellant has availed CENVAT Credit of central Excise on inputs and service tax paid on input services, received in connection with the construction and setting up of Coal Handling Plant (CHP) incl. Silo facilities, as its coal mines. The authorities have denied the aforesaid credit on the ground that the input services received by the appellant does not constitute eligible 'input service' in terms of the

definition under Rule 2 (l) of the Credit Rules, under the exclusion clause.

4. The appellant submits that the issue is no longer *res-integra* and has been decided in their favour by the Division Bench of this Tribunal vide Final Order no. 75645/2021 dated 07.10.2021 in Excise Appeal No. 77734 of 2018, wherein the credit was sought to be denied for the earlier period from June 2013 to November 2015.

5. The appellant submits that although the Department has preferred an appeal (Tax Appeal no. 4 of 2022) before the Hon'ble Jharkhand High Court against the aforesaid order dated 07.10.2021 passed by the Tribunal, there is no order for stay of operation of the said order till date. Further the matter has not yet been taken for admission/hearing in the said Departmental Appeal.

6. The appellant thus states that the issue relating to eligibility of credit on CHP stands in favour of the appellant by the order passed by the Hon'ble Division Bench of this Tribunal in appellant's own case and there is no order for stay as on date.

7. The Learned AR for Revenue relies on the impugned order. He further states that Revenue has preferred appeal before the Hon'ble High Court against the Division Bench Final Order being relied upon by the appellant.

8. Having considered the rival contentions, I find that the present Show Cause Notice is by way of continuation as statement of demand have been issued with reference to earlier Show Cause Notice No.V(30)78/CEX/BCCL Govindpur/Adj/DNB(H)/2016/8705 dated 27.09.2016 for the period June 2013 to November 2015.

9. On going through this Tribunal Final Order No. FO/75645/2021 dated 7th October 2021, I find that the very same issue had come up before a Division Bench of this Tribunal and the Division Bench have recorded the following findings:-

> *6. The issue before us is whether credit is available on Coal Handing Plant (CHP), which has been set up by the appellant for evacuation of coal from its mining premises. It is relevant to note the preamble to the contract which reads as below:-*

> *"It is proposed to install a Rapid Loading system through Silo for fast evacuation of coal. The coal handling plant shall have facilities for receiving coal from tippers of 25T capacity, crushing of coal to (-) 100 mm size, conveying, storing, reclamation and loading into railway wagons. The coal handing plant has also been provided with suitable fire-fighting automatic sampling arrangement and communication facilities. This tender document is for construction of Coal Handling on turnkey basis. The scope of this tender broadly includes approach road and construction of receiving arrangement and crushing of ROM coal, storage of crushed coal in a self flowing above ground bunker, rapid loading system, dust suppression and extraction, fire fighting, automatic coal sampling, etc. The plan showing the location of the CHP is given on the drawing bearing no… In case of any construction amongst these parts/sections of the Bidding Documents, the owner should be contracted for clarification. Also where there are discrepancies in the text and drawings, the data given in the text is to be followed. All the equipment and facilities are to be supplied by the successful bidder within the estimated time period. All equipment / system shall be designed, fabricated and selected as per relevant necessary international standards and up to date engineering practices and necessary inspections / test certificates shall be submitted alongwith equipment supply to certify the quality and genuineness of critical components and capacity and other technical parameters of the equipment / systems…*

" From the above, it appears that the purpose of setting up of the CHP is to load the coal into the railway wagons in an automated manner after the coal is crushed into the desired size. It is not in dispute that the services used by the appellant is for modernisation of the coal loading process. The definition of input service specifically include services received by a manufacturer for modernisation of a factory. We have also perused the decision of the Tribunal in the case of Pepsico India Holdings (P) Ltd (supra) relied upon by the appellant. The Tribunal has observed that without setting up of the factory, there cannot be any manufacture and the mere fact that the words „setting up of factory"

has not been retained in the definition of input services post 01.04.2011, the same will not mean that the benefit of credit has been taken away by the legislature. The relevant portion of the decision is reproduced below:-

"15. The department wants to deny them the benefit of the CENVAT credit on the ground that "services related to setting up of a factory" which were specifically included prior to 1.4.2011 were no longer specifically included post 1.4.2011.

16. We find that the definition of "input service" prior to 1.4.2011 had two parts- a main part of the definition and an inclusive part of the definition. This inclusive part specifically included the services availed for setting up the factory. After 1.4.2011, it has three parts- a main part, an inclusive part and an exclusive part. The services used for setting up the factory are neither in the inclusive part of the definition nor the exclusive part of the definition. Therefore, such services were neither specifically included nor were specifically excluded.

17. It takes us to the main part of the definition which must be examined. If it is wide enough to cover the services in question, CENVAT credit will be available, otherwise it will not be available. The main part includes "services used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal." The term manufacture is not defined in the Rules.

18. The definitions as per rule 2 of CCR 2004 reads as follows:

RULE 2. Definitions. —(1) In these rules, unless the context otherwise requires,

(a)

(b)….

(l) (2)

The words and expressions used in these rules and not defined but defined in the Excise Act shall have the meaning respectively assigned to them in the Excise Act.

19. Since the term "manufacture" is not defined in the Rules, the definition under the Central Excise Act, 1944 must be considered. Section 2(f) of the Central Excise Act defines "manufacture" as follows:

2(f) " manufacture" includes any process i) incidental or ancillary to the completion of a manufactured product; ii) which is specified in relation to any goods in the Section or Chapter notes of the Fourth Schedule as amounting to manufacture; or iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer; the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account.

20. Thus, the term „manufacture" itself is very wide and includes anything incidental or ancillary to manufacture.

21. For a service to qualify as "input service" under CENVAT Credit Rules, 2004 post 2011, the service in question needs not be covered even by the very wide definition of manufacture under section 2(f) of the Central Excise Act. <u>Any service which is used not only in manufacture but also „in relation to" manufacture will also qualify as input service. The scope of input service is further enlarged with the expression 'whether directly or indirectly use in the definition of input service.</u> Thus, there are: a) Actual manufacture;

b) Processes incidental or ancillary to manufacture which are also manufacture;

c) Activities directly in relation to manufacture (i.e., in relation to „a" and „b" above);

d) Activities indirectly in relation to manufacture (i.e., in relation to „a"and „b" above);

22. All four of the above qualify as input service as per Rule 2(l) (ii) as applicable post 1.4.2011. Although setting up the factory is not manufacture in itself, it is an activity directly in relation to manufacture. Without setting up the factory, there cannot be any manufacture. Services used in setting up the factory are, therefore, unambiguously covered as „input services" under Rule 2 (l) (ii) of the CENVAT Credit Rules, 2004 as they stood during the relevant period (post 1.4.2011).

The mere fact that it is again not mentioned in the inclusive part of the definition makes no difference. Once it is covered in the main part of the definition of input service, unless it is specifically excluded under the exclusion part of the definition, the appellant is entitled to CENVAT credit on the input services used. This Bench has already taken this view in Kellogs. Similar views have been taken by the other Benches in the other cases mentioned above.

23. In view of the above, the impugned orders denying CENVAT credit and ordering its recovery along with interest and imposing penalties cannot be sustained. The impugned orders are set aside and the appeals are allowed with consequential reliefs, if any."

7. We thus find that services used for setting up of the factory even after 01.04.2011 would be eligible for credit. The Ld. Commissioner has allowed credit on certain invoices assuming the same to be pure services and disallowed the credit on remaining portion by considering the same to be in the nature of civil construction. We find that this Tribunal has been consistently applying the user test to decide the credit eligibility as laid down by the Hon"ble Supreme Court. The Tribunal in B S Sponge Pvt Ltd vs. CCE, Raipur (Final Order no. 50231/2019 dated 08.02.2019) while considering the "user test principle" as laid down by the Supreme Court observed as follows:-

> *"5. After hearing both the parties and keeping in view the various Orders at each stage of this litigation and the case law as relied upon by the appellant, I am of the opinion that the issue has been dealt by various adjudicating authorities and it has now been clearly settled that structures like Ms angle, Ms channels, Ms joists, chequered plates or similar steel structures used in fabrication of supporting structures if are merely the civil structures for supporting the machines/ apparatus used in manufacture of final product stands excluded from the definition of capital goods.But if such structures satisfies the "user test" principle as appreciated by Hon"ble Apex Court in Rajasthan Spinning & Weaving Mills Ltd. (supra) case, all these structural items are as good as spare parts of the capital goods as mentioned in Clause 3 of Section 2(a) of Cenvat Credit Rules, 2004 and thus are eligible inputs/ capital goods for availing*

credit. The final product in the present case is the sponge iron for which the kiln, burning chamber, conveyor gallery, fabrication of walkways of platform, staircases, shed, etc. are the essential machineries. As per appellant, none of these machinery can put to use unless and until the impugned structure is there to support the said machinery as the machinery cannot be held suspended in the air. Thus, these structures are not merely the structural support to these machines but very much become the integral part of these machines manufacturing the final product. The perusal of earlier Order-in-Original reflects that the Department had initially observed that, all the machines in sponge iron plant can become operational or can function only when the design and layout parameters are met. Such design and layout parameters specify the location, height, angle of inclination of the machines and alignment with other related machinery so that the desired result are obtained from the machinery. The kiln, cooler, hopper or material handling system in a sponge of iron plant cannot be suspended in air. Only the structural support for all these machines can facilitate the desired location, height, angle of inclination of the machine. In the absence of the structural support neither the machine can be installed nor it can function nor it can be aligned with other related machinery to produce desired results."…

8. We also find that the user test principles have also been recently followed by the Hon"ble Madras High Court in the case of The Ramco Cements Limited(in Order dated 11.10.2017) wherein the Hon"ble High Court followed its earlier decision dated 10.07.2017 in ThiruArooran Sugars vs. CESTAT, Chennai. While placing reliance on the Hon"ble Supreme Court"s decision in Jawahar Mills Limited"s case, the High Court reiterated the legal position to hold that steel and cements used for the purpose of construction of plant comprising of concrete foundations, concrete silos for storing raw materials, clinker and cement, heater tower structure, etc cannot be said to have been used for civil construction but for the construction which are absolutely necessary for establishing a manufacturing unit. Further, the Hon"ble Chhattisgarh High Court in the case of CCE vs. Vimla Infrastructure

India (P) Ltd (Supra), while taking note of various other High Court decisions, has ruled that the assessee is entitled to avail credit on construction of railway siding which is used for providing cargo handling services during the period covered under the amended Cenvat Credit Rules post 01.04.2011. In view of the decisions of the various High Courts and the Tribunal wherein the user test principle has consistently been followed, we are of the view that Cenvat availed by the appellant for setting up of CHP, which is used for evacuation of coal by rapid loading process, cannot be legally denied.

9. Further, the said CHP has been set up with the view to „modernise the coal loading process in the mines" also satisfies the definition of input service. Moreover, since the credit has been allowed by the Department on certain invoices raised by the Contractor, the Department has in-principle found the service to be eligible for credit. We also agree with the submission made by the appellant that the mode of valuation adopted by the Contractor to discharge service tax on 40% of the contract value is in accordance with law contained in Service Tax Valuation Rules and cannot be disputed while deciding credit eligibility at the appellant"s end. When service tax has been levied only on 40% of the total value, it essentially means that service tax has been paid only on the service portion.

10. In view of the reasons stated above, the impugned demand order cannot be sustained and hence, the same is set aside. The appeal is thus allowed with consequential relief as per law.

10. In view of the categorically findings of the Division Bench in favour of the appellant, I find that the issue is no more *res-integra* and the appeal is allowed.

11. In view of the above, this appeal is allowed with consequential relief. The impugned order is set aside.

(Dictated and pronounced in the open court.)

Sd/-

(Anil Choudhary)
Member (Judicial)

Pooja