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

REGIONAL BENCH – COURT NO.2

Excise Appeal No. 76189 of 2018

(Arising out of Order-in-Original No. 53/CCE/CEX/RKL/2017-18 dated 20.12.2017 passed by Commissioner GST & Central Excise, Rourkela Commissionerate)

M/s JINDAL STEEL & POER Ltd.,
(Chhendipada Road, S.H.-63, P.O.-Jindal Nagar,
District:- Angul, Odisha-759111)

...Appellant

VERSUS

COMMISSIONER OF CENTRAL TAX, ROURKELA.
(Central Tax GST & CX, Commissionerate, Rourkela,
KK-42, Civil Township, Rourkela-759004)

...Respondent

APPERANCE :
Shri B.L. Narshima, Shri Rahul Tangri & M/s Udita Saraf, all Advocates for the Appellant
Shri J. Chattopadhyay, Authorized Representative for the Respondent

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

FINAL ORDER No…75613/2023

DATE OF HEARING : 05.06.2023

DATE OF PRONOUNCEMENT: 08th June, 2023

PER K. Anpazhakan :

The Appellant is an Integrated Steel Plant to manufacture Iron and Steel, with a capacity of 1.5 MT in Odisha. They have received various 'input services' for setting up of the Steel Plant , on which they have availed CENVAT Credit prior to commencement of its production. The Appellant commenced their production in the new unit on 22.08.2012

2. Based on CERA Audit conducted for the period 2011-12 to 2013-14, the Appellant was issued a Show-Cause Notice dated 08.04.2016 which was adjudicated by the Ld. Commissioner of Central Tax vide Order-in-Original

No.53/CCE/CEX/RKL/2017-18 dated 20.12.2017 ('Impugned order'), wherein the following demands were confirmed:

a. Rs.77,34,31,157/- under Section Rule 14 of CENVAT Credit Rules, 2004 read with Section 11A(4) of the Central Excise Act, 1944.

b. Interest under Rule 14 of CENVAT Credit Rules, 2004 read with 11AA of the Central Excise Act, 1944.

c. Penalty of Rs.77,34,31,157/- under Rule 15(2) of CENVAT Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944.

3. Aggrieved by the Impugned order, the Appellant filed the present appeal. The ground for denial of CENVAT credit in the present case is that the subject services availed for 'setting up of a factory' do not fall within the purview of 'input services' as defined under Rule 2(l) of the CCR, w.e.f. 01.04.2011 inasmuch as the same has been specifically omitted from the "includes' part of the definition vide Notification No. 03/2011 dated 01.03.2011.

4. Relevant portion of Rule 2(l) w.e.f. 01.04.2011 is as under :-

'input service' means any service

i. Used by a provider of [output service] for providing an output service; or

ii. Used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal, and includes services used in relation to modernization, renovation or repairs of a factory, premises, of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal;

5. In their submissions the Appellant stated that the aforesaid definition has three limbs- (1) 'means clause' (2) 'includes clause' (3) 'excludes clause'. They submitted that the services in dispute availed prior to the commencement of commercial production have been inter alia used for setting up of the plant. These 'input services' are directly linked to the manufacture of

the final product inasmuch without availing the aforesaid services, the Appellant could not have set up the factory for manufacture of the goods. Hence, the input services utilized for setting up of the factory are covered with the ambit of means clause i.e. service "used by a manufacturer whether directly or indirectly in or in relation to the manufacture of the final products". Accordingly, they contended that since the subject 'input services' are covered in the main clause of the definition of input service, the credit cannot be denied.

6. The Appellant cited the decision of the Tribunal in the case of Pepsico India Holdings Pvt. Ltd. v. CCT, Triupati, 2021 (7) TMI 1094-CESTAT Hyderabad, where the question in respect of eligibility of CENVAT Credit of the service tax paid towards setting up of plant came up for consideration and the Tribunal held that '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 for the period post 1.4.2011 also. The mere fact that it is again not mentioned in the inclusive part of definition makes no difference'.

7. The Appellant also referred the decision of the Tribunal in M/s. Charat Coking Coal Ltd. v. CCE & ST, Ranchi 2021 (10) TMI 383-CESTAT Kolkata, following the ratio laid down in the case of Pepsico India (supra) held as follows:

> "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:-
>
> 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 modernization of the coal loading process. The definition of input service specifically include services received by a manufacturer for modernization 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 a 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:-

7.We thus find that services used for setting up of the factory even after 01.04.2011 would be eligible for credit."

8. The Appellant cited the following decisions in support of their contention:

- **Shell India Pvt. Ltd. v. Commissioner of Central Tax, Bangalore North 2021-VIL-820-CESTAT-BLR-ST maintained in 2023-VIL-01-KAR-ST**
- **Reliance Corporate IT Park Ltd. v. Commissioner of Central Excise Thane-II 2023-VIL-136-CESTAT-MUM-ST**
- **Hindustan Zinc Ltd. v. Commissioner of CGST, Excise & Customs, Udaipur 2021 (8) TMI 872-CESTAT New Delhi**
- **Kelogs India Pvt. Ltd. v. CCT, Tirupathi GST, 2020(7) TMI 414 – CESTAT Hyderabad**
- **CCE, Kolkata v. Texmaco UGL Rail, 2019 (7) TMI 1651 – CESTAT Kolkata**
- **Hindalco Industries Ltd. v. CCGST, Jabalpur, 2019 (5) TMI 1620-CESTAT New Delhi**
- **Linde India Pvt. Ltd. v. Commissioner of CGST & CX, Rourkela 2023 (5) TMI 718-CESTAT Kolkata**

9. The Ld Departmental Representative stated that 'setting up of the plant' have been specifically excluded from the definition of 'input services' and hence they are not eligible for the credit.

10. Heard both sides and perused the appeal records.

11. The issue involved in the present case is eligibility of CENVAT credit of 'input services' availed for setting up of the plant. The definition of 'input services' was amended w.e.f 1.04.2011, wherein the words 'setting up of the plant' available in the earlier definition has been specifically excluded. Hence, the department contended that the Appellant was not eligible for the input services credit used in setting up of the plant after 1.04.2011. However, the Appellant contended that the definition still covers input services used for setting up of the plant under the 'means' part of the definition. We find that the issue has been dealt by the Tribunal in the case of Pepsico India Holdings Pvt. Ltd. v. CCT, Triupati, 2021 (7) TMI 1094-CESTAT Hyderabad, wherein it has been observed as under:

16. We find that the definition of 'input service prior to 1.04.2011 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 1.04.2011, 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 manufacturer 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 of CCR 2004 reads as follows

RULE 2 Definitions. - (1) in these rules, unless the context otherwise requires:

(a)

(b)….

(I)

(2) The words and expressions used in these rules and not defined but defined in the Excise Act shall have the meanings 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 manufacturer; 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 labeling 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 manufacturer.

21.For a service to qualify as 'input service' under CENVAT Credit Rules, 2004 post 2011, the service in question need not be covered even by the very wide definition of manufacturer under section 2(f) of the Central Excise Act. 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 used in the definition of input service. 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(I) (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. Service used in setting up the factory are, therefore, unambiguously covered as 'input services ' under Rule 2 (I) (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.

12. In view of the above discussion, we observe that the subject input services used in setting up of the plant have a direct nexus with the manufacture of final goods. Therefore, these 'input services' used in setting up of the plant are covered within the ambit of 'means' clause of the definition of 'input service'. Accordingly, we hold that even if the word 'setting up' is specifically excluded from the definition of 'input service', w.e.f. 01.04.2011, such services used in setting up of the plant would still qualify as an 'input service' as per Rule 2(l) of CCR, 2004.

13. In view, of the above discussion, we allow the appeal filed by the Appellant.

(Pronounced in the open court on. 08th June, 2023….)

Sd/-

(P. K. Choudhary)
Member (Judicial)

Sd/-

(K. Anpazhakan)
Member (Technical)

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