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

Excise Appeal No. 76293 of 2017

(Arising out of the Order-in-Original No. 11/COMMR/AUDIT/CEX/RKL/2016-17 dated 31.03.2017 passed by Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar.))

M/s Aditya Aluminium,
(A Division of Hindalco Industries Limited)
Lapanga, P.O- Rengali, District-Sambalpur, Odisha-768232.

...Appellant (s)

VERSUS

Commissioner of Central Excise, Customs & S. Tax, Bhubaneswar.
(Audit Commissionerate, Rajaswa Vihar, Bhubaneswr-751007.)
. ...**Respondent(s)**

APPERANCE :
Shri Deepro Sen, Advocate for the Appellant
Shri J. Chattopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. ASHOK JINDAL MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...75326/2023

DATE OF HEARING : 01.08.2023
DATE OF DECISION : 01.08.2023

PER K. ANPAZHAKAN :

The Appellant is a division of Hindalco Industries Ltd., and is *inter alia* engaged in the manufacture of aluminium ingots. The Appellant's factory is situated at Sambalpur, Odisha. The setting up of the said factory was commenced in the month of June 2010 and in October 2013, the appellant commenced commercial production. During the process of setting up of the unit, the Appellant had received various input services and availed credit on such input services. Availment of such credit has been duly indicated by the Appellant in Form ER-1 return. An enquiry was initiated by the department which culminated into issuance of the Show Cause Notice dated 17.02.2016, which proposed recovery of CENVAT Credit of Rs.64,62,12,397/- availed by the Appellant during the period April 2011 to September 2013 for setting up of the factory under Section 11A(4) of the Central Excise Act, 1944 (hereinafter referred as 'the Act'), along with demand of interest under Section 11AA of the Act and imposition of equivalent penalty under Rule 15(2) of CENVAT Credit Rules, 2004 read with Section 11AC(1) of the Act.

2. The said Notice was adjudicated by the Commissioner, vide Order-in-Original dated 31.03.2017, wherein the demand of Rs.52,97,86,556/- was confirmed under Section Rule 14 of CENVAT Credit Rules, 2004 read with Section 11A(4) of the Central Excise Act, 1944. Interest was demanded under rule 14 of CENVAT Credit Rules, 2004 read with Section 11AA of the Central Excise Act, 1944. Penalty of Rs.52,97,86,556/- under Rule 15(2) of CENVAT Credit Rules, 2004 read with Section 11AC (c) of the Central Excise Act, 1944 was also imposed. The present appeal has been filed by the Appellant against the impugned order.

3. In the Grounds of appeal, the Appellant made the following submissions:

(i) The credit availed by them was denied on the ground that credit is related to 'setting up' of a factory, which is not covered under the definition of 'input services' under Rule 1(I) of the CENVAT Credit Rules, 2004, (hereinafter 'CCR') vide Notification No. 03/2011-CE (NT) dated 01.03.2011.

(ii) The Learned Commissioner vide impugned order dated 31.03.2017 partially dropped the demand to the extent of Rs.11,64,25,841/- on the ground that the same pertained to' input services' availed for the period prior to April, 2011. However, the balance demand amounting to Rs.52,97,86,556/- has been confirmed vide impugned order dated 31.03.2017 along with interest and penalty.

(iii) The issue is no longer res integra, as the services utilized towards setting up of factory has been held as eligible 'input services' by the Tribunal in the case of Pepsico India Holdings Pvt. Ltd., Vs. CCT, Tirupati, 2021 (7) TMI 1094-CESTAT Hyderabad, wherein it has been observed 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 (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.

(iv) Identical question in respect of eligibility of CENVAT Credit of the service tax paid towards setting up of plant came up for consideration before this Tribunal in the case of M/s Bharat Coking Coal Ltd., Vs., CCE & ST, Ranchi 2021 (10) TMI 383-CESTAT Kolkata, wherein by following the ratio laid down in the case of Pepsico India (supra), the Tribunal held that the credit is admissible.

(v) Based on the above decisions, the Appellant has prayed for allowing the credit and setting aside the impugned order.

4. The Ld. A.R. submitted that input services availed for 'setting up of a factory' do not fall within the purview of input services defined under Rule 2(I) 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. Accordingly, he prayed for rejecting the appeal filed by the Appellant.

5. Heard both sides and perused the appeal records.

6. We observe that the impugned order has denied the credit availed by the Appellant on the input services availed for 'setting up of a factory' as the same has been specifically omitted from the 'includes' part of the definition vide

Notification No. 03/2011 dated 01.03.2011, w.e.f.01.04.2011. Thus it is necessary to look into the definition of 'input services', w..e.f.01.04.2011.

7. The relevant portion of Rule 2(I) 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, remises, 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.

8..We observe that the aforesaid definition has three limbs- (1) 'means clause' (2) 'includes clause' (3) 'excludes clause'. It is seen that the credit in dispute, which was availed during the relevant period, were inter alia used for setting up of the plant. These input services are directly linked to the manufacture of the final product in as much as 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 a factor are covered within 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".

Since the subject input services are covered in the 'main clause' of the definition of input service, unless it is specifically excluded under the excludes clause of the definition, the Appellant is entitled to CENVAT Credit on the subject input services used in setting up of the factory. This view has been held by the Tribunal in the case of Pepsico India Holdings Pvt. Ltd., Vs. CCT, Tirupati, 2021 (7) TMI 1094-CESTAT Hyderabad. The relevant part of the decision is extracted below:

> 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 Excise Appeal No. 76189 of 2018 5 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.
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> 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.
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> 18. The definitions as per of CCR 2004 reads as follows RULE 2 Definitions. - (1) in these rules, unless the context otherwise requires:
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> (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.
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> 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
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> 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 Excise Appeal No. 76189 of 2018 6 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 Excise Appeal No. 76189 of 2018 7 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.

9. In the case of M/s Bharat Coking Coal Ltd., Vs., CCE & ST, Ranchi 2021 (10) TMI 383, the Tribunal Kolkata, allowed CENVAT Credit of the service tax paid towards setting up of plant. The relevant portion of the decision is reproduced below:

> "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 service used by the appellant is for modernization of the coal loading process. The definition of input service specifically includes 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 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:- ………………………………………
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> 7. We thus find that services used for setting up of the factory eve after 01.04.2011 would be eligible for credit."

10. We observe that similar position has also been held in the following decisions:

* Jindal Steel and Power Ltd, Vs. Commissioner of Central Tax, Rourkela vide Final order No. 75613/2023 dated 08.06.2023.
* Shell India Pvt. Ltd. Vs. Commissioner of Central Tax, Bangalore North 2021-VIL-820-CESTAT-BLR-ST maintained in 2023-VIL-01-KAR-ST.
*Reliance Corporate IT Park Ltd, Vs. Commissioner of Central Excise Thane-II 2023-VIL-136-CESTAT-Mum-ST.
* Hindustan Zink Ltd., Vs. Commissioner of CGST, Excise & Customs, Udaipur 2021 (8) TMI 872-CESTAT New Delhi.
* Kellogs India Pvt. Ltd., Vs. CCT, Tirupathi GST, 2020 (7) TMI 414 – CESTAT Hyderabad.

* CCE, Kolkata Vs. Texmaco UGL Rail, 2019 (7) TMI 1651-CESTAT Kolkata.
* Hindalco Industries Ltd., Vs. CGST, Jabalpur, 2019 (5) TMI 1620-CESTAT New Delhi.
* Linde India Pvt. Ltd., Vs. Commissioner of CGST & CX, Rourkela 2023 (5) TMI 718 – CESTAT, Kolkata.
* Bharat Coking Coal Ltd., Vs. CCE & ST, Ranchi 2023 (6) TMI 297-CESTAT-Kolkata.

11. Following the decisions cited above, we observe that the subject input services have a direct nexus with the manufacture of finished goods in the 'means' clause of the definition of input services. Accordingly we hold that even if the word 'setting up of a factory' has been specifically excluded from the definition w.e.f.01.04.2011, such services are covered within the ambit of main clause of the definition. Hence , it would still qualify as an input service as per Rule 1(I) of CCR, 2004. In the light of the above discussions, we allow the Cenvat credit availed by the Appellant on the input services used in setting up of the factory. Consequently, the impugned order confirming the demand along with interest and imposing penalty is set aside.

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

(Dictated and pronounced in the open Court)

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Tushar