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

REGIONAL BENCH – COURT NO.2

**Excise Appeal No. 975 of 2011**

(Arising out of Order-in-Original No.34/Commr./BOL/11 dated 21.04.2011 passed by Commissioner of Central Excise, Bolpur.)

**M/s. Amit Metaliks Limited**
(Angadpur, Durgapur-713215, Dist. Burdwan, W.B.)

**Appellant**

*VERSUS*

**Commr. of Central Excise, Bolpur**
(Sian, Bolpur, Dist. Birbhum, W.B.)

R**espondent**

**APPEARANCE :**
Mr. Sourabh Bagaria & Mr. Indranil Bnerjee, both Advocate for the Respondent
Mr. P. K. Ghosh, Authorized Representative for the Appellant

**CORAM:**
**HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)**
**HON'BLE MR. K. ANPAZHAKAN, MEMBER (TECHNICAL)**

**FINAL ORDER NO.77488/2023**

Date of Hearing : 17 October 2023
Date of Pronouncement:17/11/2023

**PER R. MURALIDHAR:**

The Appellants are manufacturers of MS Ingots, MS Billets and other Re-rolled MS products falling under Chapter 72 of CETA, 1985. They have taken Cenvat Credit on various inputs, Capital goods and consumables for the manufacture of their end products as well as for manufacture of captively consumed capital goods like Furnace, Accessories, Cooling Bed, Conveyor System, Mill Accessories, EOT Crane Operating System, Pollution Control System and Electrical Installation System, etc. The Show Cause Notice dated 17/05/2010 was issued on the ground that they are not eligible to take the Cenvat Credit for various capitals goods and inputs. The demand was made by invoking the extended period provisions. The Appellants clarified the usage of items like TMT Bar, GS Sheets, MS Angles, MS Channels, Plates, Joists and HR Coil etc. in the manufacture of their Capital goods as well as for providing support mechanism for their capital goods. They also submitted the Chartered Engineer's Certificate dated 20/05/2009 giving the details of such items used in various capital goods. The Appellant submitted that the Capital Goods, inputs and consumables were procured and utilized in the manufacture of capital goods, even during the period when the Appellant's factory was previously owned by M/s. Dutta Iron & Steel Pvt. Ltd. They have submitted that since all the goods have been used within the factory premises and they have taken over the entire assets and liabilities of the earlier Company, they are eligible to take the Cenvat Credit. The Adjudicating Authority, after following due process has confirmed the demand. Being aggrieved, the Appellant is before the Tribunal.

2. The Learned Counsel appearing on behalf of the Appellant submits that the confirmed demand is basically on the following two counts:-

(a) Cenvat Credit taken on Capital goods and inputs used for Capital goods-96,39,797/-

(b) Cenvat Credit taken on Refractory material-13,53,896/-

3. He submits that all these items in question have been used in the manufacture of various capital goods within the factory premises. All the capital goods emerging thus are essential for manufacture of the finished goods by the Appellant. He takes us through the Certificate issued by the Chartered Engineer where the quantity of Angles, Channels, Beam, Plates, H. R. Coil, etc. used for various capital equipment like Furnace & Accessories, Crane Operating System, Cooling Tower etc. have been elaborately given. This Certificate has been issued by the Chartered Engineer after physical verification and site inspection of the factory premises and they have ascertained the quantity of each of the items used in various capital goods and then only they have issued the Certificate.

4. The Commissioner has held that the Capital Goods have been embedded and hence the Cenvat Credit cannot be allowed. He has also relied on the case law of **Vandana Global Ltd. Vs. CCE, Raipur-2010 (253) ELT 440 (Tri-LB)** to deny the Cenvat Credit.

5. The Learned Counsel submits that the issue is no more *res integra*. He cites the following case laws in support of their submissions that even if the capital goods are embedded, the Cenvat Credit cannot be denied:-

(a) Triveni Engineering & Industries Ltd. Vs. CCE-2000 (120) ELT-273 (SC)

(b) Sirpur Paper Mills Ltd. 1998 (97) ELT-3(SC)

6. He relies on the following case Laws in respect of Cenvat taken on various MS items:-

(i) CCE, Trichy Vs India Cements Ltd.-2004 (175) ELT-476 (Tri.-Chennai)

(ii) Divi's Labrotaries Ltd. Vs. Commissioner of Central Excise, Visakhapatnam-2006 196) ELT-285 (Tri.-Bang.)

(iii) Ashok Ispat Vs. CCE, Raipur-2009 (244) ELT-482 (Tri.-Delhi)

(iv) Andhra Pradesh Paper Mills Ltd. Vs. CCE, Vishakhapatnam-2009 (240) ELT-555 (Tri-Bang.

7. In the above cases, it has been held that all the MS Items used for manufacturing of capital goods within the factory premises are eligible for Cenvat Credit. He also relies on the case law of Commissioner Vs. Madras Aluminium Co. Ltd.-2008 (226) ELT-342 (Mad. H.C.), wherein the Cenvat Credit on the Steel Articles used for fabrication of capital goods has been held as eligible.

8. He submits that the refractory items have been used in the Boiler and Furnace which are essential for manufacturing of the finished goods. In respect of the goods like Lightening Arrester, the

same falls under Chapter 85 and is eligible for Cenvat Credit as capital goods.

9. He relies on the case law of Jawahar Mills Ltd. Vs. CCE, 1999 (108) ELT 67 (Tri.). In case of Excavator, he submits that it is a specific capital goods falling under Chapter 84 and the same is used for segregating the emerging slag. Thus this equipment is essential for their manufacturing process. Finally, he submits that so long as the goods received are inputs or capital goods and they are used within the factory of manufacture, the Cenvat Credit cannot be denied on them. He relies on the case law of Singh Alloys & Steel Ltd.-1993 (66) ELT 594, Calcutta High Court and Hindalco Industries Ltd. Vs. CCE-1996 (88) ELT-519 (New Delhi-CEGAT).

10. He further submits that the Commissioner has not given proper consideration for the Certificate issued by the Chartered Engineer and holds that the same has been procured only in 2009. The Counsel submits that when the Cenvat Credit was being taken during the period 2005-06 to 2007-2008, no query whatsoever was raised by the Department only when the Department took up the investigation, the Appellants have approached the Chartered Engineer who has issued the Certificate after proper verification of all the records and physical verification of the capital goods.

10. So far as the objection that the capital goods have been procured by the previous owners, the Learned Counsel submits that on 10/02/2009, they have submitted the RC-1 Certificate to the Divisional Assistant Commissioner to amend the Central Excise Registration by incorporating the present name in place of the earlier name. They have submitted a copy of the Letter of Undertaking where they have clearly submitted that all the liabilities towards the Central Excise and Service Tax in respect of the earlier Company M/s Dutta Iron Steel Pvt. Ltd., the same would be borne and paid by the new Company M/s. Amit Metaliks Ltd. Therefore, he submits that as

per the provisions of Rule 10 of Cenvat Credit Rules, 2004, they have fulfilled all the conditions. The earlier Company has transferred all the assets and liabilities including capital goods, within the factory premises to the present appellants. He relies on the case law of Apco Industries Ltd. Vs. CCE-2004 (177) ELT 647 and Solaris Bio-Chemicals Ltd. Vs. CCE-2005 (179) ELT-216 (Mumbai-CESTAT).

11. In view of the foregoing, he submits that the confirmed demand is required to be set aside on merits.

12. He further submits that the Department is in error in invoking the extended period to deny the Cenvat Credit. There is no dispute that the Appellants have been filing their Monthly Returns with the Department and were also subjected to various audits. All the details of purchase of the inputs, capital goods and consumables are properly recorded in their Books of Account. It is also to be noted that in respect of the Steel items used all over India, several cases were booked against the manufacturers only the basis of Vandana Global case decided by the Larger Bench. Subsequently, in all these cases, the Tribunals have been holding that the assesse is eligible for Cenvat Credit. In many cases, it has been held that since it was the matter of interpretation, it was held that the question of suppression would not arise. In view of this, he submits that the demand confirmed for the extended period is hit by time bar.

13. The Learned AR reiterates the findings of the Adjudicating Authority.

14. Heard both sides and perused the Appeal papers and documents placed before us.

15. From the Order passed by the Adjudicating Authority, it is observed that he has been guided by the Larger Bench decision in the case of Vandana Global. The Appellant has provided proper Chartered Engineer’s Certificate clearly specifying the usage of Steel items in various capital goods. The Tribunals/Courts have been consistently

holding that when the capital goods that are embedded are required for manufacture of the finished goods, Cenvat Credit cannot be denied. Some of the important decisions of the Tribunals and Courts are as under:-

(i) **CCE, Trichy Vs India Cements Ltd. 2004 (175) ELT-476 (Tri.-Chennai)**

> ***6.*** *We have considered the rival submissions and the judgments pressed into service and are of the considered opinion that rebar coils, CTD bars, TOR steel, joists and cement have been used for construction of the plant comprising of concrete foundations, concrete silos for storing raw materials, clinker and cement, Pre-heater Tower Structure, Load Centres, etc. The appellant-assessee have emphasized and confirmed that they had not availed of the credit of duty in respect of that quantity of Rebar Coils, CTD Bars, TOR Steel, Joists and Cement which were used for civil construction of their office premises, godown, etc. <u>It is now well settled legal position and the Apex Court in the case of CCE v. Jawahar Mills Ltd. - 2001 (132) E.L.T. 3 (S.C.) has held that the language used in Explanation (1) of Rule 57Q is very liberal and the capital goods can be machines, machinery, plant, equipments, apparatus, tools or appliances, the components, spare parts and accessories thereof. The various decisions cited by the ld. Advocate and ld. Consultant for the appellant-assessee confirm the eligibility to credit in respect of steel structure and various building materials and items such as Rebar coils, CTD bars, TOR Steel, Joists and Cement when used as structural support or in foundation of machineries etc. and therefore these citations are squarely applicable to the facts of their case.</u>*
>
> ***7.*** *We are not in a position to countenance the plea taken by ld. JDR appearing on behalf of the revenue. <u>Respectfully following the ratio of the said decision cited supra and the discussion, we are of the considered opinion that the credit would be admissible on Rebar coils, CTD bars, TOR Steel, joists and cement. We, therefore, allow the appeal filed by the appellant-assessee. [Emphasis supplied]</u>*

(ii) **Divi's Labrotaries Ltd. Vs. Commr. of Central Excise, Visakhapatnam-2006 (196) ELT-285 (Tri.-Bang.)**

*We have gone through the records of the case carefully. <u>The items like angles, channels, beams, pipes, MS tubes, plane plates, flats, cable trays, SS sheets are used as parts of a Technological structures which support a reaction vessel or used in particular Equipment in the manufacture of Bulk Drugs</u>. From the photographs shown by the learned Advocate during the hearing, we are convinced that the above items are used as parts of Technological structures. The learned Commissioner in his order has not taken into consideration the decisions cited by the appellants on the ground that they are not relevant in terms of Rule 2 of the Cenvat Credit Rules, 2002. A careful study of the Modvat/Cenvat provisions right from its inception in 1986 reveals a very gradual trend of liberalized interpretation. In dismissing the case laws cited by the appellants, the Commissioner is trying to put the clock back. The definition of "Capital Goods" as per Rule 2(b) of Cenvat Credit Rules is very broad. The components, spares and accessories of the goods specified at Rule 2(b)(i) & (ii) are also defined as "Capital Goods". The Rule 2(b)(i) & (ii) are as follows :-*

*'(b) "capital goods" means -*

*(i) All goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No. 68.02 and sub-heading No. 6801.10 of the First Schedule to the Tariff Act;*

*(ii) Pollution control equipment.'*

*A close reading of above provisions reveals that the classification of components, spares and accessories is not relevant. What is relevant is whatever we call components, spares and accessories should be the goods specified at (i) & (ii) above. <u>In the present case, the appellant is a manufacturer of drugs who uses various machineries which may fall under any one of the Chapters 82, 84, 85 & 90. All these machineries have to be properly supported and connected. Hence, going by the use to which the impugned goods were put, we are convinced that they are all components, spares and accessories specified at (i) & (ii) above as defined under Rule 2(b) of the Cenvat Credit Rules.[Emphasis supplied]</u>*

(iii) **Ashok Ispat Vs. CCE, Raipur-2009 (244) ELT-482 (Tri.-Delhi)**

***3.*** *I have carefully considered the submissions of both the sides and perused the records. I find that though the SCN alleged that the beams, columns and plates have been used for building of civil structure, at the time of personal hearing before the Asstt. Commissioner and the Commissioner (Appeals), it was pleaded by the respondent that these items have been used as part of the crane operating system and induction furnace and this plea was accepted by the Asstt. Commissioner and subsequently by the Commissioner (Appeals). Even in the grounds of appeal in the Revenue's appeal, this has not been disputed. The crane operating system and induction furnace falling under Chapter 84 are covered by the definition of capital goods and the items, in question, being parts and components of these capital goods are covered by the definition of capital goods. I, therefore, hold that the same are eligible for Cenvat credit. In view of this, there is no infirmity in the impugned order. The Revenue's appeal is dismissed. [Emphasis supplied]*

15. So far as the refractory items are concerned, they are required for maintenance of boiler and furnaces without which finished goods cannot be manufactured, hence the Cenvat Credit on the same cannot be denied.

16. On the point raised by the Adjudicating Authority with regard to the old unit being taken over by the present Appellant is concerned, it is seen that the appellant has filed a letter for amending the name in the Central Excise Registration Certificate on 10/02/2009. They have also placed a copy of Undertaking stating that all the liabilities including that of Excise and Service Tax would be fulfilled by the new Company. This shows that the Appellant has taken over both the assets and liabilities of the going concern. The inputs and capital goods in question stand transferred to the Appellant when the factory as such has been fully transferred to the Appellant. On this issue, the Tribunals/Courts has held as under:-

**(i) Apco Industries Ltd. Vs. CCE-2004 (177) ELT 647**

*3. (c) The plain reading of Rule 57F (20) and (21) indicates that the transfer of the credit in the Account in RG 23A maintained under Rule 57G and lying unutilised on account of shifting of a factory, belonging to the* *manufacturer, to another site, or on account of amalgamation etc. <u>transfer of such unutilized credit to such transferred or merged factory could be permitted by the Commissioner, only if the stock of inputs as such or in process is also transferred.</u> Transfer of balance in accounts only, without transfer of physical stocks of input lying as such or in process will not be permissible. <u>The rules do not indicate or stipulate a correlation between the transfer of an amount of credit with physical transfer of such input as such or in process. The order of the Commissioner placing limits on the transfer of the amount in accounts, relating to the physical quantum of inputs being transferred, therefore cannot be upheld.</u> The contention of the ld. Advocate for the appellant, that sale merger/amalga-mation of transfer contemplating in Rules 57A (20)/(21) and 57S(5)/(6) of Central Excise Rules, 1944 are not sale merger/amalga-mation etc. of a Company but relating to a factory and in this connection reliance on the case of Orient Ceramics (P) Ltd. v. CCE - <u>2001 (130) E.L.T. 520</u> in Para 12 is well founded. <u>Similarly the reliance in the case of K.M. Sugar Mills - 2001 (133) E.L.T. 567 would cause direction of the credit in balance to be transferred.</u> In view of this, no merits are found to uphold the Commissioner's order. The same is required to be set aside and appeal allowed in above terms.[Emphasis supplied]*

**(ii) Solaries Bio-Chemicals Ltd. Vs. CCE-2005 (179) ELT-216 (Mumbai-CESTAT)**

***2**. We have heard both sides. Rule 8 of the Cenvat Credit Rules reads as under :*

***"Rule 8. Transfer of Cenvat Credit. -** (1) If a manufacturer of final products shifts his factory to another site of the factory is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the factory, the manufacturer shall be allowed to transfer the Cenvat Credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated factory.*

*(2) The transfer of the Cenvat Credit under sub-rule (1) shall be allowed only if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory to the new site or ownership and the inputs, or capital goods, on which credit has been availed of are duly accounted for the satisfaction of the Commissioner."*

> *A reading of the above rule shows that no prior permission from the competent authority is required before transfer of credit, which is the ground on which the show cause notice was issued, proposing denial of permission to transfer credit lying unutilized in the account of M/s. Bharat Starch Industries Ltd. The stock of inputs/capital goods has also been duly accounted for to the satisfaction of the Commissioner by M/s. Bharat Starch Industries Ltd. as is obvious from the fact that credit was permitted to be taken by M/s. Bharat Starch Industries Ltd. It appears that the department is insisting upon fresh accountal of stock of inputs/capital goods in terms of Rule 8(2) of the Cenvat Credit Rules, which is not what the rule prescribed. We also note that in the context of Rule 57A of the Central Excise Rules 1944, the Tribunal in the case of Usha Iron & Ferro Metals Corpn. Ltd. v. CCE, Visakhapatnam [1997 (90) E.L.T. 512 (Tribunal)] and Collector of Central Excise v. Coimbatore v. T.T. Maps & Publications Ltd. [1997 (90) E.L.T. 404 (Tribunal)], has held that credit continues to be admissible when the same specified goods are manufactured out of the same inputs in spite of change of management of the company and the declaration filed pre-merger is adequate for Modvat purposes even after merger. The underlying principle laid down in this decision is applicable even in the context of Cenvat Credit Rules. We note that there is no further dispute regarding availability of credit. [Emphasis supplied]*

17. In view of the above, we find that the Adjudicating Authority has confirmed the demands without any proper verification. Since the issue is squarely covered by the cited case law, we set aside the impugned OIO on merits.

18. We are also in agreement with the Appellant that in the present case, no evidence has been brought in by the Revenue to fortify their allegation of suppression on the part of the Appellant. The Appellant has filed their Monthly Returns properly declaring the Cenvat taken by them on various counts. The Tribunals have been consistently holding that when the issue is that of interpretation, suppression clause cannot be invoked against the assesse. Therefore, the assesse could be having bonafide belief that they are eligible for Cenvat Credit. Accordingly, we hold that the demand in respect of the extended

period is required to be set aside on account of time bar also. We do so.

19. We allow the Appeal both on merits as well as on account of limitation also. The Appellant would be eligible for consequential relief, if any, as per law.

(Order was pronounced in the open court on 17/11/2023)

Sd/-
**(R. Muralidhar)**
**Member (Judicial)**

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

Pooja