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

REGIONAL BENCH – COURT NO. 1

Excise Appeal No. 76971 of 2018

(Arising out of Order-in-Original No. 38/COMMR/CGST & CE/HWH/Adjn/2017-18 dated 06.03.2018 passed by the Commissioner of Central Tax, G.S.T. Howrah Commissionerate, M.S. Building, Custom House, 15/1, Strand Road, Kolkata – 700 001)

M/s. ITC Limited **: Appellant**
PSPD Unit: Tribeni,
P.O.: Chandrahati, District: Hooghly,
West Bengal – 712 504

VERSUS

Commissioner of Central Tax **: Respondent**
G.S.T. Howrah Commissionerate,
M.S. Building, Custom House, 15/1, Strand Road, Kolkata,
West Bengal – 700 001

APPEARANCE:

Shri Abhijit Chatterjee, Senior Advocate,
Shri Arnab Chakraborty, Advocate
For the Appellant

Shri B.K. Singh, Authorized Representative,
For the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 76117 / 2026

DATE OF HEARING / DECISION: 05.08.2026

ORDER: [PER SHRI ASHOK JINDAL]

The appellant is in appeal against the impugned order wherein the Ld. Commissioner has ordered recovery of CENVAT credit amounting to Rs. 5,02,42,749/- for the period from 2012-13 to 2015-2016 (December 2015), under Rule 14 of the CENVAT Credit Rules, 2004 (hereinafter referred to as "the Rules") read with Sections 11A and 11AA of the Central Excise Act, 1944 (hereinafter referred to as "the Act"), together with applicable interest, and imposed penalty under Rule 15(2) of the said Credit Rules read with Section 11AC of the said Act.

2. The facts of the case are that the appellant is a company incorporated under the provisions of the Companies Act and is, inter alia, engaged in the manufacture of finished goods, being particularly, paper, paperboards and allied excisable goods (henceforth, "finished goods") at its manufacturing facility situated at Tribeni, District Hooghly, West Bengal.

2.1. The manufacture of the appellant's final products is an energy-intensive continuous process requiring uninterrupted availability of steam and electrical power for the operation of paper machines, process heaters, pumps, auxiliaries and other manufacturing equipment. With a view to ensuring a reliable and efficient captive source of both electrical energy and process steam for use in its manufacturing operations, the appellant undertook the establishment of a Captive Cogeneration Power Plant (hereinafter referred to as the "said CCPP") within its factory premises. The said CCPP was designed as an integrated manufacturing utility, whereby high-pressure steam generated by the boiler is utilised for generation of electricity through a steam turbine, while medium-pressure and low-pressure steam extracted therefrom is simultaneously supplied for captive consumption in the appellant's manufacturing process..

2.2. For the purpose of establishing the said CCPP, the appellant entered into an Equipment Supply Agreement dated July 8, 2011 (hereinafter referred to as the "said Equipment Supply Agreement") with M/s. Enmas GB Power Systems Projects Limited (hereinafter referred to as the "said EPC contractor"). In terms thereof, the said EPC contractor was entrusted with the supply of all equipment and materials required for establishment of the said CCPP in accordance with the technical specifications contained in Annexure-I thereto. The said Equipment Supply Agreement specifically provided that the project site would be the appellant's mill premises at Chandrahati, District Hooghly, West Bengal; that the equipment to be supplied thereunder comprised the 12 MW coal-based captive cogeneration power plant and every part thereof; that all applicable excise duty, CST, VAT and other statutory levies payable on such supplies would be borne by the appellant as owner; that the commercial invoices issued in respect of the supplies would reflect the actual taxes and duties paid together with the supporting documents; that the risk and title in the equipment and materials would pass to the appellant upon delivery thereof at the project site; and that the said EPC contractor would furnish cenvatable duty-paying documents in respect of the applicable duties and taxes paid thereon.

2.3. For ready reference, relevant provisions of the said agreement dated 08.07.2011 are reproduced hereunder:

> "Whereas, the Owner is setting up a 12MW Coal-based thermal power plant at its existing Paper mill at PO Chandrahati, District Hooghly, West Bengal, hereinafter referred to as the CPP (Cogeneration Power Project) Project or the Site.
>
> …
>
> The broad scope of Supply of the Equipment and Materials, salient technical details [in respect of coal fired steam generator and its auxiliaries, steam turbine generator and its auxiliaries, cooling tower and its auxiliaries, coal handling system, ash handling systems, water treatment plant, air conditioning and ventilation systems, plant electrical system, control and instrumentation, fire protection, civil and structural

supplies as more particularly described in Annexure I], terminal points, exclusions and schedules (hereinafter collectively referred to as the "Technical Document") attached as Annexure I to this Agreement.

…

Article 1 – Contract, Commencement and Completion

> 1.6 Project Site means mill premises of the Company at PO Chandrahati, District Hooghly, West Bengal State, India, where the Equipment is to be supplied under this Agreement.

…

> 1.8 Equipment means 12MW Coal-based Thermal Power plant and any part thereof to be supplied under this Agreement.

…

Article 8 – Transfer of Risks and Title of Goods

> 8.1 The transfer of title in risks relating to the Equipment and Materials furnished under this Agreement shall be passed to the Owner upon delivery of the Equipment at the Project Site.

…

Article 38 – Reimbursement of Taxes and Duties

The Owner shall pay to the Contractor the cenvatable and local vatable taxes and duties as per the following limits computed at currently applicable rates of excise duty, VAT and CST.

a) Excise Duty: Rs. 370 lacs

b) West Bengal VAT: Rs. 28 lacs

c) Central Sales Tax: Rs. 72 lacs

The Contractor hereby undertakes to submit cenvatable documents for the aforementioned taxes/duties. The Contractor hereby agrees that in case he is not able to produce the documents with values aggregating to the

> aforementioned amounts, the Owner will deduct the differential amount from the amounts payable to the Contractor under the agreement. As long as there is no increase in the current rates of excise duty, VAT and CST, any increase in tax burden over and above limits will be to the supplier's account. However any increase in tax burden over and above the above limits solely on account of increase in the rates of ED and/or VAT and/or CST shall be to the Owner's account."

2.4 During the said period, various capital goods, components, accessories and allied equipment required for establishment of the said CCPP were procured by the said EPC contractor from different manufacturers in terms of the said Equipment Supply Agreement. Such goods were supplied under cover of central excise invoices issued by the respective manufacturers, wherein the said EPC contractor was reflected as the purchaser and the appellant, at its Tribeni factory, was reflected as the consignee. The said capital goods were directly received within the appellant's factory premises and were thereafter utilised for erection, installation and commissioning of the said CCPP.

2.5. Upon receipt of the said capital goods within its factory under cover of the aforesaid duty-paying documents prescribed under the Rules, the appellant, being the manufacturer of the said finished goods, duly availed CENVAT credit of the duty of excise specified in the respective invoices in accordance with the provisions of the Rules. The said capital goods were duly accounted for in the appellant's statutory records and, upon erection and commissioning, became integral components of the appellant's factory, and has since been continuously utilised for captive generation of electricity and process steam for use in the manufacture of the said finished goods.

2.6. Upon commissioning of the said CCPP in or around March, 2014, the records and transactions of the appellant were subjected to departmental audit. In the course of such audit, the departmental officers issued Spot Memo No. 9 dated August 8, 2014 alleging, inter alia, that CENVAT credit in respect of the duty paid on the capital goods supplied for establishment of the said CCPP would not be admissible until the said CCPP had been fully completed and ownership thereof had passed from the said EPC contractor to the appellant.

3. Subsequently, proceedings were initiated against the appellant by issuance of a Show Cause Notice dated 24.07.2017 alleging that CENVAT credit amounting to Rs. 5,02,42,749/- availed during the period from 2012-13 to 2015-16 (up to December, 2015) upon the capital goods forming part of the said CCPP was inadmissible principally on the ground that the appellant was not the manufacturer or purchaser/owner of the said capital goods, the procurement having been undertaken by the said EPC contractor in the course of execution of the said EPC Contract.

3.1. The appellant submitted a detailed reply dated February 16, 2018 denying and disputing the allegations contained in the said show cause notice. The appellant, inter alia, contended that the said capital goods had been directly received within its factory under cover of valid duty-paying documents prescribed under the Rules; that the appellant was reflected as the consignee in the invoices issued by the respective manufacturers; that under the terms of the said Equipment Supply Agreement, the title and risk in the said capital goods stood transferred to the appellant upon delivery at the project site; that the applicable duties and taxes payable on the supplies were contractually borne by the appellant; that the said EPC contractor was obliged to furnish cenvatable documents in respect of such duties; and that the said capital goods had been utilised within the appellant's factory in the establishment of the said CCPP for manufacture of the said finished goods. The appellant further contended that no CENVAT credit had been availed by the said EPC contractor in respect of the subject invoices and that the contractual structure governing procurement of the said capital goods did not disentitle the appellant from availing CENVAT credit otherwise admissible under the Rules.

3.2. Thereafter, the matter was adjudicated vide the impugned order whereby the proposals contained in the said Show Cause Notice were substantially confirmed. Consequently, CENVAT credit amounting to Rs. 5,02,42,749/- was ordered to be recovered under Rule 14 of the Rules read with Sections 11A and 11AA of the Act together with applicable interest, and penalty was imposed upon the appellant under Rule 15(2) of the Rules read with Section 11AC of the Act.

3.3. Against the said order, the appellant is before us.

4. The Ld. Senior Counsel appearing on behalf of the appellant submits that the issue as to whether the appellant would be entitled to take CENVAT Credit of the duty paid on the equipment/capital goods purchased by the contractor and supplied to their factory premises for establishment of the CCPP, is no

longer res integra. In support, he relied on the following precedents:

i. *Indian Oil Corporation Ltd. v. Commissioner of Central Excise & Service Tax, Panchkula [2021 (46) G.S.T.L. 61 (Tri.-Chandigarh)];*

ii. *JSW Steel Ltd. v. Commissioner of Central Excise, Salem [2014 (307) E.L.T. 929 (Tri.-Chennai)];*

iii. *CCE, Salem v. JSW Steel Ltd. [(2023) 4 Centax 244 (Mad.)]*

iv. *Commissioner of Central Excise, Pune-II v. Rajaram Bapu SSK Ltd. [2019 (365) E.L.T. 14 (Bom.)];*

v. *Rajarambapu Patil SSK Ltd. v. Commissioner of Central Excise, Pune-II [2007 (208) E.L.T. 372 (Tri.-Mumbai)]*

4.1. Further, the appellant also made the following submissions: -

(i) The learned Commissioner has denied the appellant's entitlement to CENVAT credit principally upon the premise that the subject capital goods had been procured through the EPC contractor for establishment of the said captive cogeneration power plant and, therefore, the appellant could not lawfully avail credit thereon. The said conclusion proceeds upon considerations which are wholly extraneous to the statutory scheme of the CENVAT Credit Rules, 2004 and is liable to be rejected.

(ii) Rule 2(a) of the Rules defines "capital goods" with reference to the nature of the goods and their use in the factory of the manufacturer of the final products. Rule 3(1) entitles a manufacturer of final products to take CENVAT credit of the specified duties paid on capital goods received in the factory of manufacture of the final products. Rule 4 prescribes the stage at which such credit may be taken, while Rule 9 stipulates the prescribed duty-paying documents upon which such credit may be availed. Collectively, the Rules prescribe an exhaustive code governing the admissibility of credit upon capital goods.

(iii) The legislative intent is further evident from Rule 4(3) of the Rules, which expressly permits availment of CENVAT credit even where the capital goods are acquired on lease, hire purchase or loan agreement. The Rule thus recognises that ownership of the capital goods is not a condition precedent to entitlement. The Commissioner's reasoning, which elevates ownership into a substantive condition for availment of credit, is therefore directly contrary to the scheme of the Rules

(iv) Upon a plain reading of the aforesaid provisions, the statutory requirements for availment of CENVAT credit upon capital goods are limited to the following, namely, that the claimant is a manufacturer of final products; the goods qualify as capital goods within the meaning of Rule 2(a) of the Rules; the prescribed duty has been paid thereon; the goods are received within the factory of the manufacturer under valid duty-paying documents; and the capital goods are intended for use in or in relation to the manufacture of the final products. Significantly, neither Rule 2, Rule 3, Rule 4 nor Rule 9 of the Rules prescribes ownership of the capital goods, direct procurement from the original manufacturer, or completion of erection, commissioning or formal handover of the plant as conditions precedent to availment of CENVAT credit.

(v) In the instant case, there is no dispute that:

- the appellant is a manufacturer of excisable paper and paperboard products, being the said finished goods manufactured at the appellant's factory premises.

- Equally, there is no dispute that the subject goods comprise boilers, turbines, generators and other machinery, components and equipment falling within the definition of "capital goods" under Rule 2(a) of the Rules, and

- that central excise duty had been discharged on the subject goods by their suppliers, and

- that the subject goods were received directly within the appellant's factory under valid excise invoices, and

- that the said goods were utilised in establishing the captive cogeneration power plant supplying electricity and steam for manufacture of the appellant's dutiable final products/finished goods.

(vi) The appellant, therefore, satisfied every statutory condition prescribed under the Rules for availment of CENVAT Credit.

(vii) The proposition that CENVAT credit cannot be denied merely because the capital goods were procured or installed through an EPC contractor is now well settled:

(viii) Procurement through an EPC contractor does not disentitle the manufacturer from availing CENVAT credit. The Tribunal held that the mere fact that the capital goods had been procured, supplied or installed through an EPC contractor engaged for establishment of the plant did not affect the manufacturer's entitlement to avail CENVAT credit under the Rules. The identity or role of the contractor in executing the project was held to be irrelevant once the statutory requirements governing availment of credit stood satisfied by the manufacturer.

(ix) The CENVAT Credit Rules do not require direct procurement from the original manufacturer or supplier. The Tribunal observed that the Rules nowhere prescribe that the manufacturer claiming CENVAT credit must himself place the purchase orders upon, or make payment directly to, the original manufacturer or supplier of the capital goods. The mode of procurement adopted by the parties was regarded as a matter of commercial arrangement having no bearing upon the statutory entitlement to credit.

(x) Receipt of duty-paid capital goods in the factory of the manufacturer constitutes the material statutory requirement. The Tribunal emphasised that the relevant enquiry under the CENVAT Credit Rules is whether the goods qualify as capital goods, whether the prescribed duty has been paid thereon, whether they have been received within the factory of the manufacturer under valid duty-paying documents, and whether they are used in or in relation to the manufacture of the final products. Once these statutory requirements are fulfilled, the entitlement to CENVAT credit follows.

(xi) The participation of the EPC contractor does not substitute or displace the manufacturer's entitlement under the Rules. The Tribunal rejected the Revenue's contention that the contractor, by reason of having procured or erected the capital goods, became the person entitled to CENVAT credit. The entitlement under the Rules accrues to the manufacturer satisfying the statutory conditions and is not displaced merely because the project is executed through a contractor.

(xii) The learned Commissioner has further proceeded on the premise that the statutory nexus contemplated under the Rules between the subject capital goods and the manufacture of the appellant's said finished goods stood interrupted merely because the subject capital goods were supplied, assembled, erected and commissioned by the said EPC contractor in the course of establishing the said CCPP. The aforesaid premise is fundamentally misconceived and proceeds upon a complete misappreciation of the statutory scheme of the Rules.

(xiii) Rule 2(a) of the Rules defines "capital goods" with reference to their use in the factory of the manufacturer of the final products. Equally, Rule 3(1) entitles the manufacturer of the final products to avail CENVAT credit upon capital goods received in the factory of manufacture of such final products. The Rules thus establish a direct statutory relationship between the capital goods and the manufacture of the final products within the claimant's factory. Neither provision contemplates that such nexus is destroyed because another person undertakes procurement, fabrication, erection or commissioning of the capital goods before they are put to use in the manufacturing process.

(xiv) In the present case, the subject capital goods were procured exclusively for establishment of the said CCPP within the appellant's factory. Upon erection and commissioning, the said CCPP did not manufacture any independent excisable commodity intended for clearance or sale. It functioned solely as an integral captive utility supplying electricity and process steam for uninterrupted use in the manufacture of the appellant's paper and paperboard products. The subject capital goods accordingly retained an immediate and direct nexus with the manufacture of the appellant's said finished goods throughout the relevant period.

(xv) The procurement, assembly, erection and commissioning activities undertaken by the said EPC contractor constituted nothing more than the contractual mode adopted for establishment of the said CCPP. Such activities neither altered the character of the subject capital goods nor introduced any intervening manufacturing activity capable of severing the statutory nexus recognised under the Rules. The role of the said EPC contractor concluded upon establishment of the said CCPP, whereafter the entire facility formed part of the appellant's manufacturing facility and was exclusively employed in the manufacture of the said finished goods.

(xvi) The approach adopted in the said impugned order effectively treats the said EPC contractor as having manufactured an intermediate product which interrupts the statutory relationship between the subject capital goods and the appellant's manufacture of the said finished goods. No such concept finds place either in Rule 2(a), Rule 3 or any other provision of the Rules. The admissibility of CENVAT credit depends upon the use of the capital goods in the factory of the manufacturer of the final products, and not upon the identity of the person who assembled or commissioned the plant in which such capital goods ultimately function.

(xvii) The aforesaid construction of the Rules is equally supported by the consistent judicial authorities governing the concept of statutory nexus under the CENVAT Credit Rules, 2004. In *JSW Steel Ltd. (supra),* from the observations of the Tribunal it follows plainly that the use of duty-paid capital goods in establishing an Air Separation Plant supplying oxygen for captive consumption in the manufacture of the assessee's final products constituted a direct and sufficient nexus with the manufacturing activity, and that the involvement of an independent contractor in establishing the plant did not sever or dilute such nexus.

(xviii) Similar view has been recognised in *Commissioner of Central Excise v. NRC Ltd., 2001 (135) E.L.T. 1012 (Tri.-Mumbai), Gujarat Ambuja Cements Ltd. v. Commissioner of Central Excise, 2001 (130) E.L.T. 129 (Tri.-Delhi), Aditya Cement Ltd. v. Commissioner of Central Excise, 2002 (140) E.L.T. 501 (Tri.), Chemplast Sanmar Ltd. v. Commissioner of Central Excise, 2004 (177) E.L.T. 446 (Tri.), Commissioner of Central Excise, Pune-II v. Rajaram Bapu Sahakari Sakhar Karkhana Ltd., 2019 (365) E.L.T. 14 (Bom.), affirming Rajarambapu Patil SSK Ltd. v. Commissioner of Central Excise, Pune-II, 2007 (208) E.L.T. 372 (Tri.-Mumbai), and Usha Martin Ltd. (supra),* wherein it has been consistently held that the statutory nexus required under the Rules is between the duty-paid capital goods and the manufacture of the assessee's final products. It is plain from such precedents that such nexus is not interrupted merely because the capital goods are procured, assembled, erected or commissioned through an EPC contractor for establishment of an integrated manufacturing facility/section within the assessee's factory.

(xix) The learned Commissioner has further proceeded upon the footing that notwithstanding receipt of the subject capital goods within the appellant's factory under valid duty-paying documents, CENVAT credit could not be availed until the said CCPP had been fully completed, commissioned and formally handed over by the said EPC contractor to the appellant. The aforesaid finding is wholly unsupported by the statutory scheme of the Rules and introduces a condition for availment of credit which the legislature has not incorporated or imposed upon the appellant.

(xx) Rule 4(2)(a) of the Rules specifically governs the stage at which CENVAT credit upon capital goods may be taken. The Rule provides that CENVAT credit in respect of capital goods received in a factory at any point of time in a given financial year shall be taken only for an amount not exceeding fifty per cent of the duty paid on such capital goods in the same financial year, with the balance credit becoming available in any subsequent financial year provided that the capital goods continue to be in the possession of the manufacturer. The legislative focus is therefore upon the receipt of the capital goods in the factory and not upon completion of the plant, commencement of commercial production therefrom, or formal handover by the supplier or contractor.

(xxi) The statutory language employed in Rule 4(2) is both express and exhaustive. The Rule identifies the precise point of time at which the entitlement to avail CENVAT credit arises and simultaneously prescribes the extent to which such credit may be taken during the relevant financial year. Significantly, neither Rule 4 nor any other provision of the Rules postpones such entitlement until completion of erection, commissioning, trial operation, performance testing or formal acceptance of the plant by the manufacturer. Had the legislature intended that CENVAT credit upon capital goods forming part of large industrial projects should become available only after completion of the entire facility, it would have expressly so provided. No such condition is found anywhere in the statutory scheme.

(xxii) The interpretation adopted in the said impugned order effectively rewrites Rule 4 by substituting the statutory requirement of "receipt of capital goods in the factory" with an altogether different requirement, namely, completion and handover of the manufacturing facility of which such capital goods ultimately form part. Such an interpretation is plainly impermissible. It is well settled that neither administrative authorities nor adjudicating authorities are competent to engraft additional substantive conditions upon a fiscal statute which the legislature itself has not prescribed.

(xxiii) In the present case, it is an undisputed position that the subject capital goods were received within the appellant's factory under cover of valid central excise invoices issued by the respective manufacturers. The appellant accordingly became entitled to avail CENVAT credit in accordance with Rule 4 of the Rules immediately upon such receipt. The subsequent activities of erection, installation, integration, testing and commissioning undertaken by the said EPC contractor were merely stages in bringing the said CCPP into operation and had no bearing whatsoever upon the point of time at which the statutory entitlement to avail CENVAT credit accrued to the appellant under the Rules. Reference in this regard is also drawn to the precedents cited hereinabove, which permitted such availment of credit in almost identical factual circumstances.

(xxiv) The said impugned order thus proceeds upon a fundamental misdirection in law. In construing the appellant's entitlement to CENVAT credit, the learned Commissioner has failed to appreciate the true scope and ambit of Rules 2, 3, and 4 of the Rules, and has instead imported considerations relating to ownership of the subject capital goods, direct procurement thereof, contractual arrangements governing the establishment of the said CCPP, and completion, commissioning and formal handover of the facility, none of which constitutes a statutory condition for availment of CENVAT credit. The learned Commissioner has further failed to appreciate that the statutory nexus between the subject capital goods and the appellant's manufacture of the said finished goods remained wholly unaffected by the procurement, erection and commissioning activities undertaken by the said EPC contractor, and that the appellant became entitled to avail CENVAT credit immediately upon receipt of the subject capital goods in its factory under valid duty-paying documents, in accordance with the provisions of the Rules. The findings recorded in the said impugned order, being founded upon considerations extraneous to the provisions of the Act and the Rules thereunder, and contrary to the settled judicial interpretation thereof, are manifestly unsustainable in law and liable to be set aside entirely.

(xxv) Without prejudice to the appellant's principal submissions on the admissibility of CENVAT credit, it is respectfully submitted that the entire demand is independently unsustainable inasmuch as the appellant had, throughout the relevant period, maintained sufficient unutilised balance in its CENVAT credit account far in excess of the credit alleged to have been irregularly availed. Consequently, even assuming, without admitting, that the availment of the subject credit ought to have been deferred until completion or handover of the said CCPP, the same could not have resulted in any excess utilisation of credit, short-payment of duty or loss of revenue warranting recovery under Rule 14 of the Rules.

(xxvi) In view of the aforesaid there can be no basis for alleging any short payment of duty on the part of the appellant abovenamed, or for demanding recovery of any duty under Section 11A of the Act from the appellant read with Rule 14 of the Rules, the conditions precedent for their invocation not being fulfilled in the present case.

(xxvii) It follows further that in the absence of any liability for duty as aforesaid, there can also be no basis for demanding interest under Section 11AA of the Act.

(xxviii) The invocation of the extended period of limitation is independently unsustainable. The subject capital goods were received within the appellant's registered factory under cover of central excise invoices in which the appellant was expressly shown as the consignee. The goods were duly accounted for in the appellant's statutory records and the corresponding credit was openly entered in its CENVAT account. The establishment of the said CCPP, the engagement of the said EPC contractor, the receipt of the capital goods within the factory and the availment of credit thereon were therefore matters forming part of the appellant's regularly maintained records and were at all material times capable of verification by the Department.

(xxix) The proceedings themselves arose out of a departmental audit conducted upon commissioning of the said CCPP, culminating in issuance of Spot Memo No. 9 dated August 8, 2014. The Department was thus admittedly aware, at least from August 8, 2014, of the precise facts upon which the subsequent demand came to be founded. Notwithstanding such knowledge, the said show cause notice was issued only on July 24, 2017. The extended period cannot be invoked to overcome departmental inaction after all relevant facts had already come to the knowledge of the jurisdictional authorities through audit.

(xxx) There was, in any event, no suppression, wilful misstatement, fraud, collusion or contravention with intent to evade payment of duty on the part of the appellant. The appellant had availed credit upon disclosed duty-paying documents, after receipt of the subject capital goods within its factory and upon the bona fide understanding that such credit was expressly admissible under Rules 2, 3 and 4 of the Rules. The dispute raised by the Department concerns only the legal effect of the procurement arrangement with the said EPC contractor and the stage at which credit upon capital goods could be availed. A dispute involving interpretation of the Rules and the legal consequences of disclosed contractual arrangements cannot, without anything further, furnish the ingredients necessary for invocation of the extended period.

(xxxi) The terms of the said Equipment Supply Agreement themselves negate any allegation of concealment or intent to evade duty. The agreement expressly identified the appellant as the owner of the project, provided for delivery of the capital goods at the appellant's factory, stipulated transfer of title and risk upon such delivery, required the appellant to bear the applicable duties and taxes and obligated the said EPC contractor to furnish cenvatable documents. The credit was therefore availed under a disclosed contractual arrangement upon documents specifically contemplated thereunder. The learned Commissioner has not identified any document withheld by the appellant, any incorrect declaration made by it, or any positive act undertaken with the object of evading payment of duty.

(xxxii) Mere detection of the disputed credit during audit cannot establish suppression or intent to evade payment of duty. Audit constitutes only the occasion upon which the Department examined the appellant's statutory records; it does not convert entries openly appearing in such records into concealed transactions. The burden of establishing the jurisdictional facts necessary for invocation of the extended period rested upon the Department and could not be discharged merely by stating that the objection arose during audit or that the appellant had not itself reversed credit which it consistently regarded as lawfully admissible.

(xxxiii) The said impugned order has failed to record any specific finding, founded upon affirmative evidence, that the appellant deliberately withheld any material fact or availed the subject credit with knowledge that the same was inadmissible and with intent to evade payment of duty. Instead, the learned Commissioner has inferred suppression solely from the appellant's availment of credit and its failure to accept the interpretation subsequently advanced by the audit authorities. Such reasoning impermissibly equates a disputed interpretation of the Rules with deliberate evasion and does not satisfy the statutory requirements for invocation of the extended period under Section 11A of the Act.

(xxxiv) The subject issues of dispute are also purely interpretational in nature and militates against any finding of fraud, misstatement, wilful suppression and/or intent to evade payment of duty.

(xxxv) Consequently, given that the entirety of the demands fall beyond the normal period of limitation of 2 years, the same are barred by limitation and are hence, liable to be set aside on this ground alone.

(xxxvi) The penalty imposed under Rule 15(2) of the Rules read with Section 11AC of the Act is also liable to be set aside. In the absence of any short payment of duty, as aforesaid, there can be no scope for imposing penalty under the stated provisions.

(xxxvii) Furthermore, without prejudice to the aforesaid, given the absence of any fraud, misstatement, suppression or intent to evade payment of tax on the part of the appellant herein, there can also be no basis for imposing penalty under the stated provision, the condition precedent therefor, not being satisfied in the present case.

4.2. Therefore, the Ld. Counsel appearing on behalf of the appellant have prayed that the said impugned order be set aside in entirety, with all consequential relief made available to the appellant.

5. On the other hand, the Ld. Authorized Representative of the Revenue reiterated the findings in the impugned order.

6. Heard the parties and considered their submissions.

7. Upon hearing the parties, we find that the sole issue involved is whether CENVAT Credit can be denied to the appellant in respect of capital goods procured by the contractor of the appellant, which were supplied to be used in the installation of a Captive Cogeneration Power Plant (CCPP), which resulted in coming into existence of a plant which was immovable in nature, or not.

8. We find that the said issue has already been examined by this Tribunal in the case of *Indian Oil Corporation Ltd. v. Commissioner of Central Excise & Service Tax, Panchkula [2021 (46) G.S.T.L. 61 (Tri.-Chandigarh)]* wherein it has been observed as under:-

> *"6. We have considered the submissions from both the sides and perused the records. The Cenvat credit, in question, has been taken in respect of various items of the machinery. It is not disputed that the goods in respect of which Cenvat credit, in question, has been taken are covered by the Chapters 84, 85 & 90 of the Central Excise Tariff or are the item specifically mentioned in Rule 2(a) and accordingly are covered by the definition of the 'capital goods' as given in Rule 2(a) of Cenvat Credit Rules. The Department seeks to deny the [Cenvat] credit on the two grounds, namely :-*
>
> > *(a) at the time of receipt of capital goods in the refinery where the same had been installed for setting up Nephtha Cracker Plant, the appellant were not owner of the goods, as the same had been brought by their contractor for setting up the plant; and*
> >
> > *(b) the goods after being installed had becomes fixed to earth structure which is not*

> *excisable and hence the Cenvat credit of Central Excise duty involved these goods would not be available to the appellant.*

7. In term of the definition of 'capital goods' as given in Rule 2(a) of the Cenvat Credit Rules, 2004, the capital goods are those goods which are specified in this Rule and which (except for office equipment or appliance) are used in the factory of the manufacture of the final products or for providing of output service. Thus any items which is covered by the list of the items mentioned in Rule 2(a) of the Cenvat Credit Rules, except for office equipment or office appliances, and is used in any manner in the factory of the manufacturer of the final products, would be covered by the definition of the capital goods and accordingly would be eligible for Cenvat credit. There is absolutely no requirement that the capital goods at the time of receipt must be owned by manufacturer or that the same would cease to be capital goods, if they are installed in the factory and become fixed to earth. In fact, most of the capital goods the machinery, equipment or instruments covered by Chapters 84, 85 & 90, pipes and tubes, pollution control equipment refractories, and storage tanks are required to be installed and after installation, the same put together constitute a manufacturing plant, which is a fixed to earth structure. Just because after being installed in the factory, the capital goods put together become a plant which is a fixed to earth structure, the Cenvat credit cannot be denied on the basis that the plant which is fixed to earth structure, is not excisable. This preposition of the Department is, in fact absurd, as there is not such condition in Rule 2(a) for capital goods. For capital goods Cenvat credit, the items must be among those mentioned in this Rule and should have been used in the factory of the manufacturer and how the items are not used relevant. The words used in Rule 2(a) are "used in the factory of manufacturer of the final product" not "used in the manufacture of final product". Therefore, once any item received in the factory is "capital goods" in terms of Rule 2(a) of the Cenvat Credit Rules, and is used in the factory, the manufacturer would be entitled to Cenvat credit of excise duty paid in respect of the same. If the logic of the Commissioner in the impugned orders are accepted, no capital goods Cenvat credit can be allowed in respect of any item of capital goods enumerated in Rule 2(a) of the Cenvat Credit Rules, *as all the items - various items of machinery covered under Chapters 84, 85 & 90 of the Tariff, pipes & tubes, tanks, pollution control equipments refractors etc. have to be installed in the factory before being put to use and after installation, the same would become fixed to earth plant. Reading the impugned orders give an impression that the same has been passed without any application of mind. We, therefore, are of the view that impugned orders are not sustainable, the same are set aside."*

8.1. Further, the above issue was also examined by the Hon'ble High Court of Bombay in the case of *Commissioner of Central Excise, Pune-II v. Rajaram Bapu SSK Ltd. [2019 (365) E.L.T. 14 (Bom.)]* wherein the Hon'ble High Court has held as under: -

"17. The undisputed facts before us are as under :-

(a) The final product of the respondent is excisable under the Act;

(b) The equipments/machines received at the factory of the respondent on which the Cenvat credit is being claimed, are capital goods in terms of the Cenvat Credit Rules, 2002 as is evident from the fact that the credit availed is being restricted in the show cause notice to 50% in each year;

(c) The capital goods are received under cenventable invoices bearing the name and address of the respondent;

(d) The capital goods are, in fact, used in the factory of the respondent, for setting up of a sugar plant which is not excisable being an immovable property. Thus, outside the pale of the Act.

18. On plain reading of the Rule 2(b) and 3 of the Credit Rules, 2002, it is clear that the capital goods in the present facts had been received in the respondent's factory and used in the factory. Thus, the duty paid on this capital goods is available to the respondent, to be taken as Cenvat credit as it is duly supported by appropriate cenventable invoices. It is not the case of the Revenue that the machines/equipments are not relating to manufacture of final products. The only case of the

Revenue is that these machines/equipments lose their identity as they became a part of the set up plant and have to work along with other machines/equipments to manufacture final products. This submission of the subject equipment/machines losing its identity in the sugar plant is contrary to the show cause notice as it proceeds on the basis that it is capital goods, as it restricts the allowance only to 50% of the credit for each year of use. Rule 3 of the Cenvat Credit Rules, 2002 requires the receipt of the capital goods in the factory for use in or in relation to manufacture of final products. The subject equipments/machines are undoubtedly used in or in relation to the manufacture of final products. Thus, the literal rule of interpretation when applied to the Cenvat Credit Rules, 2002 would entitle the respondent to the benefit of Cenvat credit on the duty paid equipment/machines (capital goods).

19. The reliance by the appellant on the decision of the S.S. Engineers (supra), Triveni Engineering & Industries Ltd. (supra) would have no application to the facts which arise for our consideration. In both the above cases the Court was concerned with the issue whether duty is payable on an immovable property. In both the cases, the Court held that immovable property such as a sugar plant is not goods and, therefore, not excisable. In none of the above two cases, the issue arising for our consideration viz. whether duty paid on capital goods under the Cenvat Credit Rules, 2002, would not be available, if the same are used in the factory of the manufacture to set up the plant which, in turn, is used in the manufacture of final products. Thus, the reliance upon the above decisions does not assist the appellant-Revenue.

20. So far as reliance upon the decision in Bharti Airtel (supra) is concerned, the basic/fundamental difference in facts, is that the Cenvat credit in the above case, was being sought to be taken on towers and parts of tower, prefabricated buildings, printers and office chairs all of which were not falling under definitions of capital goods given in the Cenvat Credit Rules, 2004. In the present facts, the show cause notice itself proceeds on the basis that the subject equipments/machines do fall within the definition of capital goods as given in the Cenvat Credit Rules, 2002. Thus, the decisions of this Court *in Bharti Airtel (supra) is inapplicable to the present facts.*

21. It is also to be noticed that independent of our findings as rendered above, we find that on an identical issue arose before the Tribunal in JSW Ispat (supra). In the aforesaid case also (as here), the machines/equipments were used to set up/assemble an oxygen plant i.e. immovable property in the factory of the assessee. This oxygen plant was issued to manufacture the excisable goods i.e. manufacture ingots falling under Chapter 72 of the Excise Tariff Act, 1985. Nevertheless, the Tribunal allowed of Cenvat credit of duty paid on machines/equipments used in setting up a plant, to be utilised on payments of duty on the final products viz. iron and steel ingots cleared by the assessee, therein. This decision of the Tribunal is on all fours in the present facts and was accepted by the Central Board of Indirect Taxes & Customs on the ground that the same is legal and proper. This as was shown to us by the respondent and not denied by the appellants. Moreover, no distinction in facts and law, is pointed out by the Revenue, which would justify its inapplicability to the present facts. In the face of the aforesaid decision taken by the Central Board of Indirect Taxes & Customs, we are unable to understand why the Revenue is agitating this issue before us when in another case, decided by the Tribunal, raising an identical issue, the decision of the Tribunal has been accepted.

22. We are of the view that Rule of law prevailing in this country is one of the key elements to determine ease of doing business. The Rule of law inter alia ensures absence of arbitraries in taking decisions, which would mean equal applicability of law to all concerned. Therefore, an issue as raised herein (being a pure question of law), would have all India implication not only before the Court but at various levels of adjudication under the Act. Therefore, where at the highest level i.e. at the level of the Central Board of Indirect Taxes and Customs, the Revenue has accepted a particular view on a pure question of law, then in all such cases, the Revenue should withdraw the show cause notices and/or pending proceedings. This would bring certainty in the minds of the trade as well as the Department and leading to reduction of litigation. We would direct the Counsel for the Revenue/appellant before us to forward a copy of

> *this order to the C.B.I. & C. to issue appropriate directions in the above regard.*
>
> *23. For the aforesaid reasons, substantial question of law is answered in the affirmative i.e. in favour of the respondent-assessee and against the appellant-Revenue.*
>
> *24. Accordingly appeal dismissed. No order as to costs."*

9. We take note of the fact that at the time of procurement of these equipment / capital goods in the factory of the appellant by way of invoices, the appellant was shown as the 'consignee' and the contractor was reflected as the 'purchaser'. Further, these capital goods have been used in the installation of the plant in question, without which the appellant cannot manufacture their finished goods and therefore, these capital goods are indirectly used by the appellants for their manufacturing activity.

10. In these circumstances and by relying on the decisions cited supra, we hold that CENVAT Credit cannot be denied on such capital goods purchased by the contractor of the appellant and supplied to the appellant, by showing the appellant as the 'consignee' in the invoices issued.

10.1. Consequently, we hold that no penalty is imposable on the appellant in the facts and circumstances of the present case.

11. In view of this, we do not find any merit in the impugned order and accordingly, the same is set aside.

12. In the result, the appeal is allowed, with consequential relief, if any.

(Operative part of the order was pronounced in open court)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd