

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO.405

Excise Appeal No. 800 of 2011

(Arising out of Order-in-Appeal No. SR/264-265/NGP/2011 dated 25/02/2011
passed by the Commissioner of Central Excise & Customs (Appeals), Nagpur)

M/s Ambuja Cement Ltd.

.....Appellant

Corporate Office,
Elegant Business Park,
MIDC Cross Road 'B'
Andheri Kurla Road, Andheri (E)

VERSUS

CCE, Nagpur

.....Respondent

Telangkhedi Road, Civil Lines,
Post Box No. 81

WITH

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APPEARANCE:

Shri Rajesh Ostwal, Advocate for the Appellant
Shri Sanjay Hasija, Superintendent Authorised Representative for the
Respondent

CORAM:

HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO. A / 86462-86463 / 2019

Date of Hearing: 06/05/2019
Date of Decision: 22/08/2019

PER: AJAY SHARMA

These Appeals have been filed assailing the order dated 25/02/2011 passed by the Commissioner of Central Excise & Customs (Appeals), Nagpur in Order-in-Appeal No. SR/264-265/NGP/2011. Since a common impugned order has been passed by learned Commissioner while disposing of two Appeals, therefore I am also disposing of both the Appeals by this common order.

2. The issue is whether the Cenvat Credit in respect of the inputs and capital goods purchased by the Appellants for setting up its Fly Ash Handling Plant at the site of Chandrapur Super Thermal Power Station (CTSPS), for exclusive use by the Appellants for manufacture of cement in their factory, can be denied to the Appellants merely on the ground that the said Plant is not situated within the factory premises of the Appellants?

3. It is not disputed that the Cenvat credit was denied to the Appellant only on the ground that the capital goods in question was not installed or utilized in the Appellant's cement factory. According to the department since these capital goods/ inputs were used/installed in the premises of Chandrapur Super Thermal Power Station (CTSPS), which is 60 kms away from the Appellant's factory, therefore the Appellants are not entitle for availing the Cenvat credit in respect of inputs/capital goods used/purchased by the Appellants for setting up the Fly Ash Handling Plant at the premises of CTSPS. The period involved is January, 2007 to June, 2007 and July, 2007 to March, 2008. For the period January, 2007 to June, 2007, two show cause notices dated 28.1.2008 and 25.4.2008 for the amount 47,53,412/- were issued, whereas for the period July, 2007 to March,

2008 show cause notices dated 10.7.2008 and 16.10.2008 respectively were issued to the Appellants for the amount of Rs.6,30,156/-, proposing to disallow the Cenvat Credit of the aforesaid amounts so availed by the Appellants. Those show cause notices were adjudicated vide Orders-in-Original dated 30.9.2008 and 29.12.2008 respectively by which the adjudicating authority confirmed the recovery of the aforesaid amounts of Cenvat credit wrongly availed by the Appellants alongwith interest and penalty. On Appeal filed by the Appellants, the learned commissioner vide common impugned order dated 25.2.2011 rejected the appeals and upheld both the Orders-in-Original.

4. Learned counsel for the appellants submitted that fly ash is one of the most important raw material used by the appellants in the manufacture of cement. According to him, various capital goods/inputs were used in setting up the Fly Ash Handling Plant like Fly Ash Loading System, Central Control System, Fly Ash Silo, Valves, Weigh Bridge etc. He also submitted that although the aforesaid plant was set up at the site of Chadnrapur Super Thermal Power Station (CSTPS) but the fly ash from the aforesaid plant is exclusively used by the appellants for manufacturing of dutiable products. The fly ash is not at all supplied to any other person/entity. The said Fly Ash Handling Plant is nothing but a captive plant. He also submitted that it is an extension of the factory of the appellants which is away from the factory premises of the appellants. In other words Fly Ash Plant is essentially integrated unit of the appellants manufacturing factory as it ensures timely supply of the input i.e. fly

ash to the appellants which is essential raw material for the manufacturing activity of the appellants and therefore Cenvat Credit in respect of capital goods used for settling the Fly Ash Handling Plant is admissible to the appellants. In support of his submissions, the learned counsel relied upon the following decisions:-

- (i) *Vikram Cement vs. CCE; 2006(194) ELT 3 (SC)*
- (ii) *Vikram Cement vs. CCE; 2006(197) ELT 145 (SC)*
- (iii) *Birla Corporation Ltd. vs. CCE; 2005 (186) ELT 266(SC)*
- (iv) *Birla Corporation Ltd. vs. CCE; 2007 (212) ELT 162(SC)*
- (v) *CCE vs. Manikgarh Cement Ltd.; 2005(190) ELT 7 (SC)*
- (vi) *Reliance Industries Ltd. vs. UOI; 2018(360) ELT 244 (Bom.)*
- (vii) *Hindalco Industries Ltd. vs. CCE; 2014 (313) ELT 311 (T)*
- (viii) *Hindalco Industries Ltd. vs. CCE; 2017 (52) STR 408 (T)*
- (ix) *Glaxo Smithkline Consumer Health Ltd. vs. CCE; 2017(348) ELT 328(T)*
- (x) *Jaypee Bela Plant vs. CCE; 2005 (180) ELT 31 (T)*

Per contra learned Authorised Representative reiterated the findings recorded in the impugned order and prayed for the dismissal of Appeal. In support of his submissions, the learned Authorised Representative relied upon the following decisions:-

- (i) *Vandana Global Ltd. vs. CCE&C, Raipur; 2018(16) GSTL 462(Chhatisgarh)*
- (ii) *Bharti Airtel Ltd. vs. CCE, Pune-III; 2014(35) STR 865 (Bom.)*

5. I have heard rival submissions and gone through the case records including the decisions cited from both sides. During the course of hearing I have been informed by the learned counsel for the appellants that for the subsequent period i.e. February, 2009 to March, 2013, in Appellants own case for the same Plant, the Cenvat credit on capital goods used in the Fly Ash Handling Plant was allowed by the Commissioner (Appeals), Nagpur vide Order-in-Appeal dated 18.12.2018 in Appeal No. NGP/EXCUS/000/APPL/318/18-19/2314. He also handed over the

copy of the said Order-in-Appeal during the course of hearing in the instant matter. The relevant paragraphs of the said order are as under:-

“xxx

xxx

xxx

36. The issue before to be decided is whether the Cenvat Credit availed by the appellant as Capital goods for setting up of Fly Ash Handling Plant at the site of CSTPS, which is 60 Kms outside the factory premises of the appellant.

37. The issue is no longer res-integra in view of the Hon'ble Supreme Court judgement in the case of Vikram Cement Vs. CCE reported in 2006(197)ELT 145 (SC), wherein it has been clearly held that in respect of Capital goods, it observed that

“As regards the Modvat/Cenvat credit on capital goods, if the mines are captive mines so that they constitute one integrated unit together with the concerned cement factory, Modvat, Cenvat credit on capital goods will be available to the assessee. On the other hand, if the mines are not captive mines but they supply to various other cement companies of differed assesseees, Modvat/Cenvat credit on capital goods used in such mines will not be available to the concerned assessee under the appropriate Modvat/Cenvat Rules.

38. To substantiate further, I hereby rely on one more decision of the Hon'ble Tribunal in the case of M/s Maharashtra Seamless Ltd., Vs. CCE reported in 2012 (276) ELT-209 (Tri.-Mum), wherein the head-note of the said decision is given below:-

Cenvat/Modvat-Input services need not be used within same factory-Services rendered for maintenance of wind mills for generation of electricity which in turn transmitted to appellant's unit, falls under definition of input service as there exists direct nexus in the manufacture of final product-Absence of any provision in Cenvat Rules which stipulates input services to be used in the factory and not at the different place- Services rendered for maintenance of wind mill integrally connected with the manufacture of final product and hence, eligible for Cenvat credit-rules 2(I)(ii), 4(1) and 4(7) of Cenvat Credit Rules, 2004.

39. In the instant case, the appellant's Fly Ash Plant is located 60 kms away from the factory in the premises of M/s CSTPS and it is exclusively used by the appellant's factory only and is not at all supplied to any other customers. Thus applying the ratio of the judgement of the Hon'ble Supreme Court cited above, the Cenvat credit on capital goods used in the Fly Ash Plant which is meant exclusively for the appellant, will be eligible for availing the Cenvat credit.

40. In view of the I have no hesitation to set-aside the impugned order and allow the appeal of the appellant. I order accordingly.”

6. Only because the fly ash handling plant is situated 60 kms. away from the factory premises of the Appellant, it cannot be a ground to deny the Cenvat Credit Cenvat credit on capital goods used in the Fly Ash Handling Plant. ‘Captive’ does not mean that it has to be within the factory premises only. In *Vikram Cements v. CCE, 2006 (194) ELT 3 (S.C.) (supra)*, the Hon’ble Supreme Court has specifically held that explosives in the mines are used for manufacture of final products and hence Modvat credit cannot be denied even though not used in the factory. The Hon’ble Supreme Court has made it clear that if the capital goods are used by the assessee for their own use, be it inside the factory premises or outside the factory premises, they are entitled for Modvat credit. Similarly the Hon’ble Supreme Court in the matter of *Madras Cements Ltd. v. CCE, Chennai; 2010 (257) ELT 321 (SC)* has held that capital goods credit which are installed in the captive mines are eligible for the entire capital goods credit even though they are located outside the factory. In the instant matter, the Fly Ash so handled at the plant is used entirely in the appellant’s factory for the manufacture of dutiable products and hence the said plant can be said to be a captive plant and therefore in view of the aforesaid decisions of the Hon’ble Supreme Court, the Appellants are entitle for the Cenvat Credit. The purpose of extending credit of the duty paid on capital goods, inputs and input services is to avoid the cascading effect of double taxation on the finished goods. But, the extent of

credit admissible, is regulated and prescribed under Cenvat Credit Rules, 2004. To be eligible for Cenvat Credit, the inputs/capital goods have to be used in the factory for use in manufacture of final product. In view of the material placed on record there is no doubt that the fly ash produced in the Plant in question exclusively used in the factory of the appellants. Although the recent decision of the learned Commissioner (supra) in Appellants' own case is not binding, but I completely agree with the findings recorded in the said Order-in-Appeal. In the said order the learned commissioner has recorded a clear finding that the Fly Ash produced in the Plant in question is exclusively used by the appellant's factory and is not at all supplied to any other customers. Therefore, there is no iota of doubt about the exclusive use of the fly ash in Appellant's factory. In view of the above, the finding which has been recorded by the Commissioner in paragraph 10.3 of the impugned order, is erroneous and is without any basis. So far as the distance from the factory premises is concerned, the same hardly matters in view of the decisions of the Hon'ble Supreme Court. The learned Commissioner is also erred in distinguishing the decisions of the Hon'ble Supreme Court as cited by the Appellant before him only on the ground that in none of those cases the distance of the factory premises is 60 kms. He has to see the law laid down by the Hon'ble Supreme Court, which is clear and unambiguous. He must keep it in mind while passing the orders that any law declared by the Hon'ble Supreme Court is law of the land and the same is binding on all the Judicial as well as quasi-judicial Courts/ Authorities in India. Therefore in my considered view, as per

the discussions made hereinabove and as per the law laid down by the Hon'ble Supreme Court, the impugned order is liable to be set aside.

6. The Appeals are therefore allowed with consequential relief, if any as per law.

(Order pronounced in the open Court on 22/08/2019)

(Ajay Sharma)
Member (Judicial)

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