

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI**

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 89 of 2012

(Arising out of Order-in-Original No. 005/COMMR(KAP)/LTU-M/CX/2011 dated 22.10.2011 passed by the Commissioner of Central Excise & Service Tax, LTU, Mumbai)

M/s ACC Ltd.

Cement House, 121, Maharshi Karve Road,
Mumbai - 400020

.... Appellant

Versus

Commissioner of CE & ST (LTU), Mumbai Respondent

29th Floor, Centre-I, World Trade Centre,
Cuffe Parade, Mumbai - 400005

Appearance:

Shri Pradeep Sawant, Authorized Representative for the Appellant

Ms. A.S. Parab, AC, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85043 / 2022

Date of Hearing: 08.09.2021

Date of Decision: 21.01.2022

Per: P. Anjani Kumar

M/s ACC Ltd., the appellant, are engaged in manufacture of cement; it appeared to the Department that they availed credit of steel used in civil structures etc. which is in contravention of CENVAT Credit Rule 2004. A show cause notice, dated 17.11.2008, was issued seeking recovery of the credit and imposition of penalty. The show cause notice dated was confirmed by the Commissioner, LTU, Mumbai, vide order dated 17/10/2011. The appellants are challenging the same by this appeal.

2. Learned Counsel for the appellant submits that they have utilized the steel in the construction of storage tanks and Chimney, in the Thermal Power Plant, classifiable as capital

goods and therefore, have rightly claimed CENVAT Credit. He further submits that some of the items may be used as capital goods; however, if some items cannot be treated as capital goods, the same can be treated as inputs, if they use, in relation to the manufacture, of final product is established; the definition of input has a wide coverage and therefore, CENVAT Credit availed by them is admissible as 'inputs' under Explanation 2 of Rule 2(k) of the CENVAT Credit Rules, 2004 as the appellant acted in *bona fide*, minor penalty also cannot be imposed.

3. Learned Counsel for the appellants further submit that the adjudicating authority has erred and failed to appreciate the fact that the impugned items are used in fabrication/ creation/ installation of capital goods falling under chapter 84; credit cannot be denied as the impugned items are used for the essential activity of manufacture. The learned Counsel submits that the issue is no longer *res integra* and is covered by various judgments of the Courts and Tribunal in its favor. He relies upon the following cases:-

- a. Vandana Global Ltd.- 2018 (16) GSTL 462 (Chattisgarh)
- b. Rajasthan Spinning and Weaving Mills Ltd - 2010 (255) ELT 481 (SC)
- c. Thiru Arooran Sugars - 2017 (355) ELT 373 (Mad.)
- d. CCE & ST, Tiruchirapalli- 2017 (356) ELT 201 (Mad)
- e. ICL Sugars Ltd. - 2011 (271) ELT 360 (KAR)
- f. India Cements Ltd. - 2012 (285) ELT 341 (MAD)
- g. Dalmia Cements (Bharat) Ltd. - 2015 (330) ELT 645 (Tri-Chennai)
- h. Hindalco Industries Ltd. - 2012 (286) ELT 503 (KAR)
- i. Bajaj Hindustan Ltd. - 2013 (294) ELT 590 (Tri-Del)
- j. GESTAMP SUNGWOO AUTOMOTIVE (Chennai) Pvt. Ltd.- 2018 (363) ELT 1191 (Tri-Chennai)
- k. Singhal Enterprised Pvt. Ltd.- 2016 (341) ELT 372 (Tri-Del)
- l. India Cements Ltd.- 2014 (310) ELT 636 (Mad)
- m. India Cements Ltd - 2015 (321) ELT 209 (Mad)
- n. Jawahar Mills Ltd.- 2001 (132) ELT 3 (SC)

4. Learned Authorized Representative appearing for the Department reiterates the findings of the OIO and relied upon the following judgments:-

- a. BSN Medical Pvt. Ltd. – 2012–TIOL-2203-CESTAT-MUM
- b. BHARTI AIRTEL LTD. - 2014 (35) S.T.R. 865 (Bom.)
- c. VODAFONE INDIA LTD. - 2015 (324) E.L.T. 434 (Bom.)
- d. TOWER VISION INDIA PVT. LTD.- 2016 (42) S.T.R. 249 (Tri. - LB)
- e. SARASWATI SUGAR MILLS- 2011 (270) E.L.T. 465 (S.C.)
- f. K.B. ROLLING MILLS (P) LTD.- 2014 (299) E.L.T. 466 (Tri. - Bang.)
- g. SREE RAYALASEEMA HI-STRENGTH HYPO LTD.- 2012 (278) E.L.T. 167 (A.P.)
- h. J.K. SYNTHETICS LTD.- 1995 (77) E.L.T. 142 (Tribunal)

5. Heard both sides and perused the records of the case

6. It is the case of the appellant that the steel, which is used in the manufacture of chimney and storage tanks is eligible for credit as they rightly used as inputs in relation to the manufactures of capital goods which are further used for the manufacture of excisable goods cleared on payment of duty. The appellants have relied on so many cases and some cases are with reference to cement companies themselves. Whereas learned AR has relied upon the decision of Mumbai High Court in the case of Bharti Airtel etc. We find that Tribunal Chennai, in the case of Dalmia Cement (Bharat Ltd.) (supra) relying upon the decision of Karnataka High Court in the case of Hindalco Industries Ltd. (supra), held that credit on cement and steels used in manufacture of storage tank " Silos" is admissible to the appellant. We find that Bangalore Bench of this Tribunal in the case of KCP Ltd.- 2009 (237) ELT 500 (Tri-Bang) have gone into the issue in detail and have held

"5- On a very careful consideration of the issue, we find that the appellants used duty paid inputs for fabrication of 'clinker silos'. According to the appellants, the silos are nothing but storage tanks and they are specified in the definition of capital goods. They also invited our attention to Explanation 2 Rule 2(k) wherein inputs are defined as goods which are used in the

manufacture of capital goods which are further used in the factory of production. They stated that all these conditions are satisfied. Therefore they should be entitled for Cenvat credit. We find that the Revenue has denied the credit only on the ground that the capital goods, namely 'clinker silos' manufactured by them are not excisable. Therefore, no credit can be given to the inputs. In our view, the approach of the Revenue is wrong. The credit can be given to the inputs, In our view, the approach of the Revenue is wrong. The point at issue is whether the Explanation 2 to Rule 2(k) is satisfied. The appellants have used Steel in order to fabricate silos. These silos are storage tanks. This is not denied and the storage tank is capital goods in terms of the definition of capital goods in the Cenvat Credit Rules, 2002. These facts are not in dispute. The only point is according to the Revenue this silos were immovable property. Since they are immovable, in terms of Rule 6 of the Cenvat Credit Rules, no credit can be given to the inputs. There is no dispute that the steel plates, sheets etc. have been used in the fabrication of the silos. These silos are used within the factory production for storage of the final products. These silos are also capital goods because the storage tanks are mentioned in the list of the capital goods. So the very fact that inputs have been used in the manufacture of capital goods which are used in the factory is sufficient reason to give Cenvat credit. One need not examine whether such silos are duty paid or not. That is not the point at issue. The silos may be dutiable or may not be dutiable under certain conditions. The Revenue has taken the point that they are immovable. Therefore they are not dutiable. Hence the credit can be denied. That is not the correct approach. In other words, the dutiability of the capital goods is irrelevant. So long as the inputs are used in capital goods which are used within the factory of production, input credit has to be given in terms of Explanation 2 to Rule 2(k). In other words, the said capital goods may be dutiable and if the duty is paid on such capital goods then the appellants would be entitled for Cenvat credit for the duty paid on capital goods. But when such capital goods are exempted or not dutiable, then the inputs would get the credit by virtue of Explanation 2 to Rule 2(k). For clarity, we are reproducing the Rule 2 (k):

Rule 2. Definitions

(k) "input" means-

- I. All goods except light diesel oil, high speed diesel oil and motor spirit, commonly known as

petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production;

II. All goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service;

Explanation 1 :- The light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

Explanation 2:- Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacture."

Therefore it is very clear that the said inputs such as steel plates, sheets, etc. used in the fabrication of silos are entitled for the credit. Hence the impugned order has not merit and it is not legal and proper. Hence we allow the appeal with consequential relief.

(Operative portion of the order has been pronounced in the open court on completion of hearing on 13-10-2008)

7. We find that the Courts and Tribunal have been consistent in holding that inputs which have gone into the manufacture of capital goods are admissible to credit notwithstanding the facts that said capital goods are embedded to the earth. In respect of chimneys used in pollution control equipment, Hon'ble Supreme Court has held the same to be eligible for credit in the case of Rajasthan Spinning and Weaving Mills (supra). In case of Dalmia Cements, it was held by Chennai Bench that the credit is

admissible in respect of inputs used in manufacture of storage tanks/ silos.

8. Learned A. R. for the Department relied upon on Bombay High Court in the case of Bharti Airtel. We find that Tribunal Chennai in the case of Dalmia Cements distinguished the case of Bharti Airtel holding that it is not applicable to the facts and circumstances of the case therein. We hold that the issue involved in Bharti Airtel is about the credit on Tower parts and pre-fabricated buildings in the case of service provider and as such cannot be applied in the case of credit as inputs used in the manufacture of capital goods which are further used in the manufacture of excisable goods. In view of the above, we find that the case law cited by the learned A.R. are not applicable to the facts of the present case. We find that the specific issue of the appellants is covered by various judgments in case of cement companies themselves, wherein the facts of the cases are comparable. Therefore, we are of the considered opinion that the appeal stands on merits of the case and that when the appeal survive on merits, other issue like penalty etc. become irrelevant.

9. In view of the above, the appeal is allowed with consequential relief, if any, as per law.

(Pronounced in open court on 21.01.2022)

(S.K. Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)