CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 991 of 2012

(Arising out of Order-in-Original No. 26/COMMR (KAP)/LTU/Ex/2011 dated 30.03.2012 passed by the Commissioner of Central Excise & Service Tax, LTU, Mumbai)

M/s. Ambuja Cements Ltd. **Appellant**
Elegant Business Park,
MIDC Cross Road 'B',
Off Andheri-Kurla Road,
Andheri (E), Mumbai 400 059.

Vs.

Commissioner of CE & ST (LTU), Mumbai **Respondent**
8th floor, Centre-I, World Trade Centre,
Cuffe Parade, Mumbai 400 005.

WITH

Excise Appeal No. 1000 of 2012

(Arising out of Order-in-Original No. 25/COMMR (KAP)/LTU/Ex/2011 dated 30.03.2012 passed by the Commissioner of Central Excise & Service Tax, LTU, Mumbai)

M/s. Ambuja Cements Ltd. **Appellant**
Elegant Business Park,
MIDC Cross Road 'B',
Off Andheri-Kurla Road,
Andheri (E), Mumbai 400 059.

Vs.

Commissioner of CE & ST (LTU), Mumbai **Respondent**
8th floor, Centre-I, World Trade Centre,
Cuffe Parade, Mumbai 400 005.

WITH

Excise Appeal No. 1153 of 2012

(Arising out of Order-in-Appeal No. YDB/50&51/LTU/MUM/2012 dated 14.05.2012 passed by the Commissioner of Central Excise & Service Tax (Appeals), LTU Mumbai)

M/s. Ambuja Cements Ltd. **Appellant**
Elegant Business Park,
MIDC Cross Road 'B',
Off Andheri-Kurla Road,
Andheri (E), Mumbai 400 059.

Vs.

Commissioner of CE & ST (LTU), Mumbai **Respondent**
8th floor, Centre-I, World Trade Centre,
Cuffe Parade, Mumbai 400 005.

AND

Excise Appeal No. 1154 of 2012

(Arising out of Order-in-Appeal No. YDB/50&51/LTU/MUM/2012 dated 14.05.2012 passed by the Commissioner of Central Excise & Service Tax (Appeals), LTU Mumbai)

M/s. Ambuja Cements Ltd. **Appellant**
Elegant Business Park,
MIDC Cross Road 'B',
Off Andheri-Kurla Road,
Andheri (E), Mumbai 400 059.

Vs.

Commissioner of CE & ST (LTU), Mumbai **Respondent**
8th floor, Centre-I, World Trade Centre,
Cuffe Parade, Mumbai 400 005.

Appearance:

Shri Rajesh Ostwal, Advocate, for the Appellant
Shri Sydney D'Silva, Additional Commissioner and Shri N.N. Prabhudesai, Superintendent, Authorised Representatives for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

Date of Hearing: 03.03.2022
Date of Decision: 03.03.2022

FINAL ORDER NO. A/85386-85389/2022

PER: SANJIV SRIVASTAVA

These appeals have been filed by the appellant against the orders as detailed in the table below:-

Appeal No.	Period in dispute	Show Cause Notice date	Impugned order date	Amount of credit (in Rs.)	Penalty imposed (in Rs.)
E/991/12	May 2009 to Sept. 2009	26.04.2010	30.03.2012	71,89,482	8,00,000
E/1000/12	April 2009 to Sept. 2009	26.4.2010	30.03.2012	1,12,27,397	12,00,000
E/1153/12	Oct 2009 to	18.10.2010	14.05.2012	35,36,258	35,36,258

	March 10				
E/1154/12	April 2009 to Sept. 2009	23.04.2010	14.05.2012	28,07,247	28,07,247

2.1 The appellant is engaged in the manufacture of cement in their factory at Chandrapur. For the storage of raw materials, the appellant manufactured/erected/installed silos (special storage tanks) for manufacture of cement and iron and steel items against which they have taken the credit.

2.3 Revenue initiated proceedings for denial of the credit so availed by issuance of show cause notices as indicated in the table above and for imposition of penalties on the appellant. These show cause notices have been adjudicated by the original authority and two appeals against these orders have been dismissed by the Commissioner (Appeals) as per the impugned orders. Hence these appeals.

3.1 We have heard Shri Rajesh Ostwal, Advocate, for the appellant and Shri Sydney D'Silva, Additional Commissioner and Shri N.N. Prabhudesai, Superintendent, Authorised Representatives for the Revenue.

3.2 Arguing for the appellant, learned counsel submits that:-

- The various issues involved in the present case have been decided by various authorities and hence the issue is no longer res integra.
- Following decisions have been relied upon in their support:-

  Storage tank is specifically covered under Rule 2(a)(A)(vii) of Cenvat Credit Rules, 2004. Hence cement and iron & steel items used for construction of storage tank is admissible as part/compondents/accessories of capital goods.

  - RSPL Ltd. [2016 (338) ELT 607 (T)]
  - Agrawal Structures Mills Pvt. Ltd. [2013 (296) ELT 111 (T)]

- Dhampur Sugar Mills Ltd. [2016 (344) ELT 285 (T)]
- Purti Sakhar Kharkhana Ltd. [2016-TIOL-2627-CESTAT-MUM]
- Rai Mata Pvt. Ltd. [2015-TIOL-2648-CESTAT-DEL]
- Ultratech Cement Ltd. [2015-TIOL-1943-CESTAT-MUM]
- Monnet Ispat & Energy Ltd. [2015-TIOL-2850-CESTAT-DEL]

Cenvat credit in respect of cement and iron and steel items used in manufacture of storage tank is available.

- OCL India Ltd. [2018 (1) TMI 155-CESTAT KOLKATA]
- Singhal Enterprises Pvt. Ltd. [2016 (9) TMI 682-CESTAT NEW DELHI
- Ultratech Cement Ltd. [2017 (6) TMI 796 – CESTAT BANGALORE
- Mangalam Cement Ltd. [2018 (3) TMI 1547-CESTAT NEW DELHI
- Ramco Cements Ltd. [2019 (5) TMI 129-CESTAT CHENNAI
- Dalmia Cements (Bharat) Ltd. [2015 (330) ELT 645 (T)] affirmed by Madras High Court [2017 (356) ELT 201 (Mad.)
- Gujarat Ambuja Cement Ltd. [2008 (6) TMI 213-HIGH COURT OF HIMACHAL PRADESH
- OCL India Ltd. [2018 (7) TMI 310-CESTAT KOLKATA
- Ambuja Cement Ltd. [2018 (8) GSTL 161 (All.)]

Amendment to Explanation 2 of Rule 2(k) of Cenvat Credit Rules, 2004 with effect from 7.7.2009 was prospective.

- Vandana Global Ltd. [2010 (253) ELT 440 (T)]
- Mundra Ports & Special Economic Zone Ltd. [2015 (39) STR 726 (Guj.)

Capital goods becoming immovable property is irrelevant.

- Sai Sahmita Storages (P) Ltd. [2011 (270) ELT 33 (AP)]
- Vodafone Mobile Services Ltd. [2018 (11) TMI 713-DELHI HIGH COURT
- Rajaram Bapu Sahakari Sakhar Karkhana Ltd. 92019 (365) ELT 14 (Bom.)
- ICL Sugars Ltd. [2011 (271) ELT 360 (Kar.)]
- Bannari Amman Sugars Ltd. [2010 (250) ELT 326 (Kar.)]
- SLR Steels Ltd. [2010 (249) ELT 394 (T)] affirmed by Karnataka High Court [2012 (280) ELT 176 (Kar.)]
- Doodhganga Krishna Sahakari Sakhare Karkhane Niyamit [2013 (297) ELT 361 (Kar.)].

- Hence he prays that the appeals be decided in appellant's favour.

3.3 Arguing for the Revenue, learned ARs submit that:-

- The storage tank/silos manufactured by the appellant are immovable properties as have been held by various authorities that for being goods, the same should be movable and immovable property attached to earth is not goods. These silos are not movable. Hence the processes undertaken on them cannot be said to be processes of manufacture.
- The definition of capital goods specifically covers storage tanks and hence the credit in respect of storage tank is eligible as capital goods only, i.e. if it is goods first immovable property. Immovable property cannot be goods and hence cannot be capital goods.
- They would rely upon the following decisions in their support:-
- Bharti Airtel Ltd. [2014 (35) STR 865 (Bom.)]

- Kailash Oil Cake Industries [1993 (63) ELT 693 (Tribunal)]
- Hyderabad Race Club [1996 (88) ELT 633 (SC)]
- TTG Industries [2004 (167) ELT 501 (SC)]
- NC Budharaja & Co. [AIR 1993 SC 2529]
- Quality Steel Tubes (P) Ltd. [1995 (75) ELT 17 (SC)]
- Thermax Ltd. [1998 (99) ELT 481 (SC)
- Triveni Engineering & Indus. Ltd. [2000 (120) ELT 273 SC)]
- Damodar Ropeways & Construction Co. P. Ltd. [2003 (151) ELT 3 (SC)]
- General Engg. Servicing Workshop [1989 (42) ELT 104 (Tribunal)]
- Vodafone India Ltd. [2015 (324) ELT 434 (Bom.)]
- Vodafone Essar South Ltd. [2020 (43) GSTL 249 (Tri.-Bang.)]
- DSCL Sugar [2012 (280) ELT 89 (Tri.-Del.)]
- Madras Cements Ltd. [2010 (254) ELT 3 (SC)]
- Max GB Ltd. [2003 (159) ELT 203 (Tri.-Del.)
- Cosmos Ispat Pvt. Ltd. [2012 (284) ELT 721 (Tri.-Del.)]
- Hissar Pipes Pvt. Ltd. [2017-TIOL-3258-CESTAT-CHD]
- Asian Colour Coated Ispat Ltd. [2018-TIOL-118-CESTAT-MUM]
- Mohan Breweries & Distilleries Ltd. [2010-TIOL-675-HC-MAD-CX]
- Nalco [2016-TIOL-1613-CESTAT-KOL]
- Hemadri Cement Ltd. [2012-TIOL-1544-CESTAT-BANG]
- Rathi Steel & Power Ltd. [2015 (321) ELT 200 (All.)]

- They further pointed out that in the appellant's own case, the Tribunal has remanded the matter back to the original authority.

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 We find that the issue involved in this matter is squarely covered by the decision of the Tribunal vide final order No. A/87273/2021 dated 01.12.2021 in appellant's own case. In paras 5 & 6, the Tribunal has held as follows:-

"5. Considering the fact that the matter which has been remanded on 20th June 2013 is still pending and thereafter, the issue has been considered by this Tribunal and finally settled in the case of Monnet Ispat and Energy Ltd (supra) wherein this Tribunal has observed that

> *"7. These steel items used in this manner by the appellant has not been factually disputed. However, the point of dispute is that the resultant fabricated items became part of structures which are embedded to earth and become immovable, thereby losing the name of 'goods'. Hence, Revenue contends that these items used are outside the purview of capital goods or inputs. We find that the Hon'ble Supreme Court evolved 'user test' to answer the question whether the items falls within the purview of 'capital goods' and held that in the case of Rajasthan Spinning Mills (supra) that steel plates and MS channels used in the fabrication of chimney would fall within the ambit of 'capital goods'. The Hon'ble Karnataka High Court in the case of SLR Steels Ltd. [2012 (280) ELT 176 (Kar.)] held as under :*
>
> > *"7. A perusal of the aforesaid provision makes it very clear though storage tanks may be immovable property and the pollution control equipment are included within the definition of "capital goods", input as defined in Rule 2(k) makes it clear that "input" includes in goods used in the manufacture of capital goods which are further used in the factory of the manufacturer. Therefore, the input is not necessarily to be used in the manufacture of final product. By virtue of explanation 2 - goods used in the manufacture of capital goods which are further used in the factory of the manufacturer also falls within the definition of input. In 2009, this explanation has been amended to the following effect :*
> >
> > > *"but shall not include cement, angles, channels Centrally Twister Deform bar (C.T.D.) or Thermo Mechanically Treated bar (TMT) and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods."*

> *8. Therefore, the notification of the Legislature is very clear that it is only the "inputs" used in the manufacture or construction of capital goods which is construed as input and Cenvat credit is available on the duty paid in purchase of such inputs. If the cement, angles, channels, Centrally Twister Deform bar (C.T.D.) or Thermo Mechanically Treated bar (T.M.T.) and other items are used in the construction of factory shed, building or laying of foundation, the duty paid on such items the assessee would not be entitled to Cenvat credit. Similarly, though the assessee is entitled to Cenvat credit of cement and steel used in the manufacture of capital goods viz., storage tank, if any structure for support of capital goods is constructed and steel and cement is used for such support, the assessee is not entitled to the benefit of Cenvat credit on the duty paid on such cement and steel. Therefore, there is no ambiguity in any of these provisions. When once a storage tank and pollution control equipment constitutes capital goods and any raw material purchased for construction of those goods, the duty paid could be utilized as a Cenvat credit by the assessee notwithstanding the fact that the storage tank is an immovable property."*

8. The Hon'ble Madras High Court in the case of CCE v. India Cements Ltd. [2014 (310) ELT 636 (Mad.)] held that MS plates, angles, channels, etc. used in the erection of various machineries such as electrostatic precipitator for raw mill project, additional fly ash handling system, MMD crusher, etc. can be considered as eligible for Cenvat credit as component of capital goods. The Hon'ble High Court held after examining the various case laws in favour of assessee. Applying this principles, we find that the allegation in the show cause notice that steel items used by the appellant are neither components nor spares nor accessories is not sustainable."

6. As the facts of the case are not in dispute that the steel items in question has been used for fabrication of the capital goods which has ultimately been used for manufacture of their final product, in that circumstances, we hold that the appellant are entitled to CENVAT credit on the items in question."

4.3 Further we note that the decision of Hon'ble Bombay High Court in Bharti Airtel Ltd. [2014 (35) STR 865 (Bom.) has been considered by the Tribunal again in the case of the appellant, vide final order No. A/85122-85124/2022 dated

21.02.2022 and in paras 5, 6 & 9, the Tribunal has observed as follows:-

"5.According to Learned Authorized Representative, the stand of the first appellate authority that 'silos' are not goods but 'immovable property' is vindicated by the decision of the Hon'ble High Court of Bombay in Bharti Airtel Ltd v. Commissioner of Central Excise, Pune – III [2014 (35) STR 865 (Bom)] which enunciated the statutory framework thus

> *'21. A plain reading of the definition of 'capital goods' as defined under Rule 2(a)(A) of the Credit Rules show that all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, Heading No. 6805, grinding wheels and the like, and parts thereof falling under Heading 6804 of the First Schedule to the Central Excise Tariff Act; pollution control equipments; components, spares and accessories of the goods specified at sub-clauses (i) and (ii) which are used either in the factory for manufacture of final products but does not include any equipment or appliance used in the office and those used for providing output service. A combined reading of sub-clause (a)(A)(i) and (iii) and sub-rule (2) indicates that only the category of goods in Rule 2(a)(A) falling under clauses (i) and (iii) used for providing output services can qualify as capital goods and none other.'*
>
> *and, distinguishing the decision cited by the appellant therein thus*
>
> *'(I) That towers and parts thereof and PFB are not immovable properties:*
>
> *(a) In the case of "Commissioner of Central Excise, Bangalore-II v. SLR Steels Ltd. [2012 (280) ELT 176 (Kar.)]" In this case the issue was whether credit of duty paid on cement and steel used for manufacture for storage tank which is an immovable property can be availed of. The Commissioner of Excise held that as cement and steel was used for manufacture of storage tank which was an immovable property and*

> *non-excisable no credit of duty paid on any inputs used for any non-excisable goods is admissible in view of Rule 6(1) of Cenvat Credit Rules, 2003-04. The assessee had preferred an appeal before the tribunal. The tribunal held that cement and steel used by the assessee for the purpose of construction of iron/coke storage tank, gas storage tanks are capital goods for the purpose of constructing iron/coke and that these inputs being used for pollution control equipments hence the assessee was entitled for Cenvat credit. The Court considered the storage tank as capital goods as the storage tanks were used as pollution control equipments and as pollution control equipments were directly falling under Rule 2(a)(A)(ii) of the Credit Rules. The Court came to a conclusion that once storage tank and pollution control equipments constitute capital goods the duty paid on any raw material purchased for construction of those goods could be utilised as a Cenvat credit by the assessee notwithstanding the fact that the storage tank is an immovable property. However, the facts in the present case are quite different. The towers are not capital goods under the definition of capital goods as defined in Rule 2(a) of the Credit Rules being immovable and are non-excisable. This judgment is therefore of no assistance to the appellants.'*

We are, however, unable to perceive the impact of this judgment on the resolution of the present dispute as the Hon'ble High Court of Bombay has merely distinguished the applicability of the said judgement, and others cited by the appellant therein, without invalidating the eligibility of CENVAT credit on facts similar to the present dispute before us.

6. Further reliance is placed on the Larger Bench decision of the Tribunal in Tower Vision India Pvt Ltd v. Commissioner of Central Excise (Adj.), Delhi [2016 (42)

STR 249 (Tri.-LB)] which followed that of the Hon'ble High Court of Bombay in re Bharti Airtel Ltd. Furthermore, he states that the alteration of the Explanation in rule 2(k) of CENVAT Credit Rules, 2004 has been elaborated at length in Green Valley Industries Ltd v. Commissioner of Central Excise, Shillong [2020 (11) TMI 540 – CESTAT KOLKATA] to conclude that

'8. We find that the usage of various iron and steels items is to be analysed in light of the decision of the Hon'ble Supreme Court in the case of Rajasthan Spinning & Weaving Mills Ltd. reported as 2010 (255) ELT 481 (SC). In this judgement, the Hon'ble Supreme Court has referred to the 'user test' outlined in the case of CCEx., Coimbatore Vs. Jawahar Mills reported as 2001 (132) ELT 3 (SC), which lays down the ratio in determining whether particular goods could be categorized as capital goods or not.'

and in Shree Tatyasaheb Kore Warana SSK Ltd v. Commissioner of Central Excise, Kolhapur [2017 (10) TMI 890 CESTT MUMBAI] holding that

'6. I find that the appellants have used the steel items on which credit has been availed as supporting structure for the capital goods. On this very issue, the Hon'ble Apex Court in the case of ***Saraswati Sugar Mills (supra)*** *has given its finding as under:-*

> *"19. It appears to us, in the light of the meaning of the expression 'component parts' that the iron and steel structures are not essential requirements in the sugar manufacturing unit. Anything required to make the goods a finished item can be described as component parts. Iron and Steel structures would not go into the composition of vacuum pans, crystallizers etc. If an article is an element in the composition of another article made out of it. such an article may be described as a component of another article. Thus, structures in question do not*

satisfy description of components'. Therefore, in our opinion, the Tribunal was right in the view it took.

……….

21. Now coming to the last contention canvassed by the learned counsel that the Tribunal is not correct in holding that the assessee failed to establish that the steel structures are components of the capital goods as specified in the Table below Rule 57Q of the Rules and, therefore, are not eligible for exemption under the notification. This issue requires to be answered with reference to Circular No. 276/110/96-TRU, dated 2-12-1996 issued by the C.B.E.C. The relevant portion of the Circular is as under :-

"3. The matter has been examined. With effect from 23-7-1996, capital goods eligible for credit under Rule 57Q have been specified either by their classification or by their description. Clauses (a) to (c) of Explanation (1) of the said rule cover capital goods by their classification whereas clause (d) covers goods by their description viz, components, spares and accessories of the said capital goods. It may be noted that there is a separate entry for components, spares and accessories and no reference has been made about their classification. As such, scope of this entry is not restricted only to the components, spares and accessories falling under Chapters 82, 84, 85 or 90 but covers all components, spares and accessories of the specified goods irrespective of their classification. The same was the position prior to amendment in Rule 57Q (i.e. prior to 23-7-1996) when credit was available on components, spares and accessories of the specified capital goods irrespective of their classification.

> *4. Accordingly, it is clarified that all parts, components, accessories, which are to be used with capital goods of clauses (a) to (c) of Explanation (1) of Rule 57Q and classifiable under any chapter heading are eligible for availment of Mod vat credit."*

9. It is all too clear that, under rule 3 of CENVAT Credit Rules, 2004, duty paid on 'inputs' deployed for installation of certain 'capital goods', as enumerated in rule 2(a) of the CENVAT Credit Rules, 2004, are entitled to be availed as credit and that erection of such 'capital goods' within the factory of assessee obtains the same treatment. The single point that arises therefrom is whether 'silos' are 'storage tanks' within the meaning of rule 2(a) of CENVAT Credit Rules, 2004. There can be no doubt that 'silos' are specialized protective facilities for raw materials intended to be used in the manufacture of cement. The objective of CENVAT Credit Rules, 2004 is to enable offsetting of duties/taxes incurred in the procurement of goods/services used in the manufacture of final products for neutralizing the cascading effects of tax. It is pertinent to note that eligibility for CENVAT credit arises from the dutiability of 'output' and not on any intermediate processing that brings 'capital goods' necessary for manufacturing into existence. Hence, the reliance placed upon the decision relating to dutiability under Central Excise Act, 1944 on such capital goods would not be relevant to the present proceedings; those decisions had been handed down in the context of marketability and other relevant factors for determination of leviability under Central Excise Act, 1944. The decision of the Hon'ble High Court of Bombay in re Bharti Airtel Lt, referred to by the Learned Authorized Representative, pertains to CENVAT credit availed on certain 'immovable goods', not specified in the definition of 'capital goods', that were used for rendering of services which also stands on an entirely different footing from manufacturing activity for which specific provisions exist in rule 2(k) of CENVAT Credit Rules, 2004. The reliance placed by the Larger Bench of the Tribunal on this very judgment, while *disposing off the reference in re Tower Vision India Pvt Ltd, also pertains to rendering of 'output service' and not for manufacture. It cannot but be stated, even at the cost of repetition, that manufacturing activity is carried out in factory premises with capital goods essential for the processing; that 'storage tanks', by specific inclusion in the enumeration, are not subject to further evaluation against the benchmarks of excisability. In the absence of any other restriction, it is not open to central excise authorities to distinguish between the 'storage tanks', by reference to its dutiability under Central Excise Act, 1944, when 'storage tanks' are distinctly enumerated in the definition itself."*

4.4 Learned AR relied upon the decision in the case of the appellant vide final order No. A/535/13/EB/C-II dated 20.06.2013. In the said decision, the Tribunal has observed as follows:-

"3.The contention of the appellants is that the appellants are engaged in the manufacture of cement. The appellants set up a cement packing plant at Cochin during the period November 2008 to March 2009. For setting up of the cement packing plant, the appellants received various inputs as well as taxable input services which are used in the manufacture of capital goods. The appellants availed 50% credit of capital goods such as bag filter, belt, conveyor, anti-vibration body, power and motor control centre etc. The appellants availed credit in respect of the inputs such as steel items used in the manufacture of capital goods which are further used for manufacture of excisable goods. The input services which are received in or in relation to manufacture of final product cleared on payment of duty was also availed. Credit has been denied on the ground that the plant is immovable property and not excisable hence the credit in respect of the items in question is not available to the appellants in view of the decision of the Larger Bench of the Tribunal in the case of ***Vandana Global Ltd. vs. CCE, Raipur reported in 2010 (253) ELT 440****.*

"7. We find that in this case, credit in respect of the capital goods, inputs used in the capital goods and input services is denied. The credit in respect of capital goods and inputs services used in the capital goods in the plant is non-excisable. The credit in respect of input services is denied on the ground that the appellants failed to produce evidence regarding the nexus between the input services and their use in or in relation to the manufacture of excisable goods.

8. The admitted facts of the case are that the appellants set up a cement packing plant. The appellants are receiving duty paid cement in bulk and it was further repacked in the plant in question. Repacking of cement amounts to manufacture as per the chapter note, therefore the appellants are clearing the same after repacking on payment of appropriate duty. The inputs are used in the fabrication of capital goods which are further used in the cement packing plant. Duty paid capital goods are also procured for use in the cement packing plant. We have gone through the adjudication order. The adjudication order is passed on the basis that the appellants had set up a cement manufacturing plant. In para 5 the adjudicating authority noted the fact that the cement plant manufactured at site of Ambuja Cement Ltd., being embedded to earth, is immovable. In fact the appellants had set up a bulk handling plant at Cochin. The inputs such as steel items are used for fabrication of capital goods such as silo which is used for storage of the loose cement received in the plant, bag filters, packer, air slide, collecting hopper, bulk loading system, conveyor system etc. The capital goods received in the plant are transformers, DG set, bag filters, control panel etc. The contentions raised by the appellants that the inputs are used for the fabrication of capital goods which are further used in the manufacture of excisable goods are not taken into consideration by the adjudicating authority. The adjudicating authority has decided the issue simply on the ground that the plant is immovable and not excisable, therefore the credit in respect of the capital goods, inputs used in the manufacture of capital goods and input services is not admissible. The appellants produced evidence in respect *of the use of each item before the adjudicating authority, which has not been taken into consideration while passing the impugned order. In these circumstances, the matter requires reconsideration by the adjudicating authority. The impugned order is set aside and the matter is remanded to the adjudicating authority for de novo adjudication and the adjudicating authority will decide afresh after affording an opportunity of hearing to the appellants."*

4.5 However, we find that the decision of Larger Bench of the Tribunal relied in this decision has been set aside by Hon'ble Chhattisgarh High Court in the case of Vandana Global Ltd. [2018 (16) GSTL 462 (Chhattisgarh) wherein in paras 4, 5 & 6 the Hon'ble High Court has held as under:-

*"**4.** In the light of the contents of the impugned order of the Tribunal and submissions of the assessee and the Revenue following substantial questions of law are formulated for consideration :*

(A) Whether the terms 'capital goods' excludes the structures embedded to earth?

(B) Whether the goods like angles, joists, beams, bars, plates, which go into fabrication of such structures are not to be treated as 'input' used in relation to their final products as inputs for capital goods, or none of the above?

(C) Is the amendment brought in CENVAT Credit Rules, 2004 as per Rule 2 of the CENVAT (Amendment) Rules, 2009 retrospective in nature considering is it clarificatory to be applied to all matters which arise before 7-7-2009, the date of commencement of the CENVAT (Amendment) Rules, 2009 : hereinafter referred to as 'Amendment Rules'.

***5.** The impugned order of the Tribunal had come up for consideration before different High Courts either cited as precedent or as relied upon by the Tribunal in different other matters. The Gujarat High Court in Mundra Ports & Special Economic Zone Ltd. - 2015 (39) S.T.R. 726 (Guj.) referred to* *the contents of the amendment, to the extent it is relevant for the purpose of this case and held as follows :*

"We do not find that amendment made in the Cenvat Credit Rules, 2004 which come into force on 7-7-2009 was clarificatory amendment as there is nothing to suggest in the Amending Act that amendment made in Explanation 2 was clarificatory in nature. Wherever the Legislature wants to clarify the provision, it clearly mentions intention in the notification itself and seeks to clarify existing provision. Even, if the new provision is added then it will be new amendment and cannot be treated to be clarification on particular thing or goods and/or input and as such, the amendment could operate only prospectively."

6. *That view has been quoted with approval by the Madras High Court in M/s. Thiruarooran Sugars v. Customs, Excise and Service Tax Appellate Tribunal (CMA 3814/2014 and connections) decided on 10-7-2017 [2017 (355) E.L.T. 373 (Mad.)] to conclude that the said amendment cannot be treated as clarificatory. M/s. Thiruarooran Sugars also considered the issue as to the effect and fundamental value of the evidentiary statement made by the Finance Minister dealing with an amendment in the budget speech."*

4.6 In appellant's own case reported at [2018 (8) GSTL 161 (All.), Hon'ble Allahabad High Court held as under:-

*"**5.** A perusal of the definition of 'capital goods' clearly goes to show that plant, machine, machinery, equipment, apparatus and tools or appliances and electrical installation, which are used for manufacture or processing of any goods for sale by the dealer, would be included. The parties are not at issue on the factual proposition that goods used herein, are utilized for manufacture or processing of goods sold by dealer. The mere fact that machine, machinery, equipment, apparatus, tools or appliances, etc., are generally understood to be movable property, would not mean that plant also has to be necessarily treated as movable property only. There does not appear to be any rational to import the concept of*

movable or immovable goods while interpreting Section 2(f) of the Act, when the provision does not say so."

5.1 Following the ratio of the above decisions, we do not find any merits in the impugned orders and set aside the same allowing the appeals.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(P. Dinesha)
Member (Judicial)

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