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

Excise Appeal No. 1214 of 2012

(Arising out of Order-in-Original No. 14/CEX/COMMR/KOP/2012 dated 30.03.2012 passed by the Commissioner of Central Excise, Kolhapur)

Commissioner of Central Excise, Kolhapur **Appellant**
Vasant Plaza, Rajaram Road, Kolhapur 416 003.

Vs.

M/s. Finolex Industries Ltd. **Respondent**
Ranpur, Pawas Road, Ratnagiri.

WITH

Excise Appeal No. 1215 of 2012

(Arising out of Order-in-Original No. 14/CEX/COMMR/KOP/2012 dated 30.03.2012 passed by the Commissioner of Central Excise, Kolhapur)

Commissioner of Central Excise, Kolhapur **Appellant**
Vasant Plaza, Rajaram Road, Kolhapur 416 003.

Vs.

Shri Gouri Nandan Dave **Respondent**
Head of Department (Electrical),
Finolex Industries Ltd.
Finolex Colony, Phase-II,
MIDC Zadgaon, Dist. Ratnagiri.

AND

Excise Appeal No. 1216 of 2012

(Arising out of Order-in-Original No. 14/CEX/COMMR/KOP/2012 dated 30.03.2012 passed by the Commissioner of Central Excise, Kolhapur)

Commissioner of Central Excise, Kolhapur **Appellant**
Vasant Plaza, Rajaram Road, Kolhapur 416 003.

Vs.

Shri J.S. Arora **Respondent**
Executive President (Projects & Dev.)
Finolex Industries Ltd.
Finolex Guest House,
MIDC Zadgaon, Dist. Ratnagiri.

Appearance:

Shri Shamshad Alam, Additional Commissioner, Authorised Representative for the Appellant
Shri Gajendra Jain, Advocate, for the Respondent

CORAM:

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

Date of Hearing: 02.03.2022
Date of Decision: 02.03.2022

FINAL ORDER NO. A/85393-85395/2022

PER: SANJIV SRIVASTAVA

These appeals filed by the Revenue are directed against Order-in-Original No. 14/CEX/COMMR/KOP/2012 dated 30.03.2012 passed by the Commissioner of Central Excise, Kolhapur. By the impugned order Commissioner has held as follows:

"ORDER

I drop the proceedings in respect of demand cum show cause notice bearing F No V (39) 15-59/ADJ/KOP/2011/10 dtd 15/6/2011.

(All the legal provisions cited above are as they stood at the relevant time)"

2.1 The respondents are engaged in manufacture of PVC resin, PVC pipes and pipe fittings. In the process of manufacture, uninterrupted power supply is required, for which they had erected and installed a captive power plant. They claimed the CENVAT credit of the Capital Goods, used for setting up the Captive Power Plant.

2.2 Revenue disputed the admissibility of the credit in respect of the capital goods used for setting up, erection and commissioning of the said power plant and show cause notice was issued to the respondents, alleging that:

"10. From the discussions made herein above, it appears that an exempted / non excisable product i.e. electricity is generated in the CPP by using the Capital goods on which CENVAT Credit was availed and the same has been entirely sold to MSEDCL for financial consideration. They have not utilized a single unit of electricity so generated in the manufacture of their final product during the period December 2009 till 2.5.2011. This act of the

assessee has led to exclusive utilization of capital goods in the manufacture of exempted / non-excisable goods i.e. "Electricity". Thus, they did not use the electricity so generated, for captive consumption, instead sold it totally to outside agency for monetary consideration. In view of these facts, it appears that the CENVAT credit availed on the capital goods by the assessee is inadmissible. By not reporting the above arrangement to the department till the same was inquired into, shows the intention of the assessee to suppress the material fact with an intention to gain extra financial accommodation by simultaneously availing inadmissible CENVAT Credit and receiving consideration in cash by way of sale of electricity

11. In the instant case, on receipt of capital goods for the CPP the Capital goods Credit was availed during the period 2006-07 to 2009-10. "Electricity" an exempted/non-excisable goods, generated out of the said CPP was sold and not utilized in the manufacture of dutiable finished product PVC resin and since there was no electricity line connecting the CPP to the PVC plant, the total electricity generated was sold to M/s MSEDCL via MSETCL for consideration in cash as per MOUs signed between the assessee and M/s MSEDCL. During investigation, while scrutinizing the records, it was observed that the chairman of Assessee Company in his speech to the shareholders of the company in the year 2006-07 declared their intention to generate revenue out of the CPP when commissioned. Thus an element of intention to sell the electricity for monitory consideration was present since 2006-07, at the time of commissioning of the CPP in December 2009 and there was no intention to utilize the electricity so generated in the CPP for the PVC plant as there was no provision of any connection line of electricity from the CPP to the PVC Plant during the relevant period.

12. It appears that the fact of Commissioning of the CPP and sale of total electricity

generated in the CPP to M/S MSEDCL via grid of M/s MŞETCL, which started with effect from December 2009, was never reported by the assessee to the department. It was only on an *inquiry about the same by the Superintendent of Central Excise, Ratnagiri, vide his letter No.CEX/RTN/FIL/EPP/10-11/20 dtd. 18.1.2011 assessee confirmed the same vide their letter dtd. 21.2.2011. This act of omission by the assessee, lead to suppression of the material fact of non utilization of the electricity generated in the CPP, in the manufacture of their final dutiable product and also proved their intention to sale the same for cash consideration.*

The assessee was well aware of the fact that CENVAT Credit was availed by them on Capital Goods used for erection of the CPP under the provisions of rule 3 of CENVAT Credit rules and they were also aware of the provisions of rule 6(4) of the said rules, which disallows such CENVAT Credit, if exclusively used in the manufacture of exempted goods. The product "Electricity" is exempted from Central Excise Duty and the same was sold to M/S MSEDCL for cash consideration, without being utilized in the manufacture of dutiable final product i.e. PVC resin/pipes and pipe fittings

Thus the fact of availing of CENVAT Credit immediately on receipt of capital goods in the premises of the assessee since 2006-07 under the provisions of rule 3 of the CENVAT Rules shows the knowledge and awareness of the assessee about the provisions of the law in the matter. At the same time, non reporting of the fact to the department, of commissioning of the CPP in December 2009 and sale of total generated electricity for monetary consideration to M/s MSEDCL via M/s MSETCL, without utilizing a single unit of such captive generation, in the manufacture of their dutiable final product, also by not providing any electrical connection of whatsoever nature between the CPP and their final product plant of PVC/pipes and pipe fittings during the period December 2009 till 2.5.2011 leads to prove that, the assessee had no intention to use the generated electricity in the manufacture of their finished dutiable product.

13. M/s Finolex Industries Ltd, Ranpar - Pawas road, Tal & Dist - Ratnagiri, is registered with Central Excise for more than 15 years and discharging Central Excise duties in excess of Rs. 100 cores per annum, thus there is not even an iota of doubt that *they were not aware of the provisions laid down under Central Excise Act and Rules made there under. They had intentionally availed the CENVAT Credit wrongly from 2006-07 on capital goods procured for the CPP, as the electricity generated from the CPP was never used for the manufacture of their finished goods but instead it was sold to MSEDCL via M/s MSETCL. Thereby they have suppressed the material fact by not informing to the department-*

i. of not having any electricity line connection between the CPP to the PVC plant,

ii. the date of generation of electricity from the CPP,

iii. the sale of total generated electricity w.e.f. December 2009 to M/s MSEDCL via M/S MSETCL,

which shows, inter-alia, their intention to avail unlawful financial accommodation by way of availing wrong CENVAT Credit, to the tune of Rs. 17.06 cores. Thus, it appears, by the acts of commissions and omissions as above, assessee have contravened the provisions of Rule 6(4) of the CENVAT Credit Rules 2004 in as much as they availed CENVAT Credit on capital goods used in the erection of Captive Power Plant, which was used exclusively in the manufacture of electricity, an exempted product and NO unit of said electricity so generated was used for their captive consumption but was sold to M/s MSEDCL for monetary consideration as per Electricity Purchase Agreements signed between assessee and M/s MSEDCL.

14. Thus it appears that, by suppressing the material facts from the knowledge of the department, as detailed above, the assessee has wrongly availed an amount of Rs. 17,06,34,666/- (Rs. Seventeen Crore Six Lakh Thirty four thousand Six hundred sixty six only.) as CENVAT Credit lying in balance as on December 2009 and subsequent credit availed till December 2010 and the said amount is liable to be demanded and recovered along with interest from the assessee under the provisions of Rule 14 of CENVAT Credit Rules 2004 read with provisions of proviso to Section 11A (1) of the Central Excise

Act. 1944 and provisions of Section 11AB of Central Excise Act, 1944. The Assessee, by their acts of omission and commission, narrated above have also rendered themselves liable for penalty under Rule 15 (2) of CENVAT Credit Rules 2004. Since, the assessee have knowingly availed inadmissible Cenvat credit on capital goods in contravention of Cenvat Credit Rules, 2004 in order to avail undue benefits, it appears that the said Capital goods are liable for confiscation under Rule 15 (1) of Cenvat Credit Rules, 2004."

2.3 On the basis of above respondents were called upon to show cause as to why :

a. Capital Goods CENVAT Credit of Rs. 17,06,34,666/- (Rs. Seventeen Crore Six Lakh Thirty four thousand Six hundred sixty six only.) lying in balance as on December 2009 and subsequent credit wrongly availed till availed by them till December 2010 on capital goods for the CPP, which was exclusively utilized for manufacture of exempted/non excisable goods, should not be disallowed and recovered under the provisions of Rule 14 of CENVAT Credit Rules, 2004 read with proviso (1) to Section 11A of Central Excise Act 1944;

b. Interest on the above said demand should not be demanded and recovered from them under the provisions of Rule 14 of the CENVAT Credit Rules 2004 read with Section 11AB of Central Excise Act 1944;

c. Penalty under the provisions of Rule 15(2) of CENVAT Credit Rules 2004 read with Section 11AC of Central Excise Act 1944 should not be imposed upon them.

d. The said Capital goods should not be confiscated under the provisions of Rule 15(1) of CENVAT Credit Rules, 2004.

2.4 By the Corrigendum issued subsequently, respondents in the appeal No E/1215/2012 and E/1216/2012 were called to show cause as to why personal penalty under the provisions of Rule 27 of the Central Excise Rules, 2002 read with Rule 15A of the CENVAT Credit Rules, 2004 be not imposed on them.

2.4 The show cause notice and its corrigendum have been dropped by the Commissioner by the impugned order and aggrieved Revenue has filed these appeals.

3.1 Revenue has filed these appeals on the following grounds:

4.0 GROUNDS FOR REVIEW:

- Commissioner has failed to consider the ratio of the decision of Hon'ble Apex Court in the case of Maruti Suzuki Ltd. [2009(240) E.LT 641(S.C)], holding as follows:
  "in the case of Collector of Central Excise v. Rajasthan State Chemical Works reported in 1991 (55) E.L.T. 444 (S.C.) the test laid down by this Court is whether the process and the use are integrally connected. As stated above, electricity generation is more of a process having its own economics. Applying the said test, we hold that when the electricity generation is a captive arrangement and the requirement is for carrying out the manufacturing activity, the electricity generation also forms part of the manufacturing activity and the "input" used in that electricity generation is an "input used in the manufacture" of final product. However, to the extent the excess electricity is cleared to the grid for distribution or to the joint ventures, vendors, and that too for a price (sale) the process and the use test fails. *In such a case, the nexus between the process and the use gets disconnected. In such a case, it cannot be said that electricity generated is "used in or in relation to the manufacture of final product, within the factory". Therefore, to the extent of the clearance of excess electricity outside the factory to the joint ventures, vendors, grid etc. would not be admissible for CENVAT credit as such wheeled out electricity, cleared for a price, would not fall within the definition of "input" in Rule 2(g) of the CENVAT Credit Rules, 2002*"........ inter alia.
- in the case of Ellora Times Ltd. [2009 (235) E.L.T. 661 (Tri.Ahmd.)] examining the issue of Maintenance and Repair Services received in Wind energy plant situated 200 KMs from factory and Wind energy plant uploading the

power to the grid it was held that transaction of delivery of power to electricity board and sale of power by electricity board are two independent transactions. There is no direct nexus between service received in power plant and items manufactured in factory and hence the power plant cannot be treated as captive power plant. The ratio of the judgment is applicable in the instant case also.

- The respondent uploaded electricity in the grid of MSETCL and subsequently obtained electricity separately for their consumption. As per the case of Ellora Tiles, it should be treated as two independent transactions.
- Respondent had during the period December, 2009 to 02.05.2011 sold out entire electricity generated from the so called CPP to MSEDCL on pure commercial consideration and this transaction had no relation with the manufacturing process which started at later date. This aspect has been ignored in the impugned order.
- The adjudicating authority held that the aspect of selling of electricity, as alleged in the SCN, for substantiating use of capital goods not for the manufacture of exempted goods, ceases to be relevant as soon as the noticee started utilizing the electricity in the manufacture of dutiable goods. The view of the adjudicating authority that subsequent use of capital machinery in manufacturing process would render them entitled to CENVAT credit is not correct.
- In the case of Brindavan Beverages Pvt. Ltd. [2008 (232) E.L.T. 475 (Tri. Del.)] held that

  "the credit eligibility is not based on capability but based on use in the manufacture of dutiable goods. These conditions are required to be fulfilled at the time of receipt of capital goods which is relevant time. Subsequent development cannot influence the eligibility".
- In the instant case, the capital goods at the time of receipt were not meant for use in manufacture of PVC pipes and tubes. Respondent did not have any electrical connection for transmission of electricity from generating plant to the manufacturing plant to substantiate that they were using electricity generated in their factory of manufacture. The

noticee have availed CENVAT Credit on capital goods received for erection of the CPP, from 2006-07 to 2010-11(Up to Dec 2010). The banking agreement with MSEDCL for transmission and utilization of electricity generated in power plant were entered in Month of March, 2011 as admitted by the noticee in their submissions. Prior to this date. beginning from the Commissioning of the CPP Plant from December, 2009, the noticee had only agreement of sale of electricity generated in the CPP, with the MSEDCL. It is amply clear that the noticee entered into banking agreement with the MSEDCL after a lapse of considerable time period only when the Department started enquiry. Thus, at the time of receipt of capital goods the noticee did not use electricity generated out of CPP plant in the manufacture of dutiable goods. The inference drawn by the adjudicating authority that the noticee had intention to use the capital goods in manufacturing of dutiable product is based on 'subsequent development and is therefore against the decision of the Hon'ble Tribunal as cited above.

- The judgments relied by the adjudicating authority are not applicable on facts in the instant case in as much as in the case of Arvind Mills Ltd. Vs. CCE, Ahmedabad – [2005 (182) ELT 362 (Tri. Mumbai)], the dispute pertained to old rules and not the present rules. Also the judgment on "relevant date" for availing credit of Capital Goods above are a later dated decision and concern the present Cenvat Credit Rules. Similarly in case of judgment of M/s Arisht Spinning Mills Vs. CCE - [2010 (261) E.L.T.417 (Tri. Delhi)), the relevant date for availing credit of capital goods was the issue, when the manufactured goods got exempted at a later date. In the circumstances above judgments were required to be distinguished by the adjudicating authority which has not been done.
- Though not admitted, even if it is assumed that after the manufacturing process started the Capital Goods become eligible to credit, the noticee could not have taken/ availed the credit before the manufacturing started. As the credit involved is quite large, its availment almost two year in advance is an offence in itself and the department is

entitled to recovery of interest as per the decision of Hon'ble Supreme Court in the case of Union of India Vs. Ind-Swift Laboratories Ltd. – 2011 (265) E.L.T. 3 (S.C.), wherein Hon'ble Supreme Court held that liability of interest arises from the date of taking Cenvat Credit as the beneficiary thereafter is at liberty to utilize the credit.

4.1 We have heard Shri Shamshad Alam, Additional Commissioner, Authorised Representative for the Revenue and Shri Gajendra Jain, Advocate for the respondents.

4.2 Arguing for the Revenue, learned AR while reiterating the grounds taken in the appeal submits that:-

- Respondents had taken inadmissible cenvat credit on capital goods used in erection of captive power plant (CPP). Initially the electricity manufactured in CCPP was sold to Maharashtra State Electricity Distribution Co. (MSEDCL) through Maharashtra State Electricity Transmission Co. (MSETCL) and the same was utilised in the manufacture of their goods cleared on payment of duty. As the capital goods against which credit has been taken were not utilised in production of electricity which was supplied outside and not used for manufacture of final product cleared on payment of duty, cenvat credit could not have been availed.
- In the case of Ellora Tiles Ltd. [2009 (235) ELT 661 (Tri.-Ahmd.)], the Tribunal has held that transaction of delivery of power to electricity board and sale of power by electricity board are two independent transactions. There is no direct nexus between services received in the power plant and items manufactured in factory and hence power plant cannot be treated as capital goods.
- Respondents uploaded electricity in the grid of MSETCL and subsequently obtained electricity separately for their consumption. They have sold the entire electricity to MSEDCL during the period December 2009 to February 2011 and since capital goods were used exclusively for manufacture of exempted goods, i.e. electricity, cenvat credit could not have been allowed.

- The following decisions relied upon by the respondent are not applicable in their case.
    - Arvind Mills Ltd. [2005 (182) ELT 362 (T)]
    - ST Cottex Exports (P) Ltd. [2010 (261) ELT 807 (T)]
    - ST Cottex Exports (P) Ltd. [2018 (2) TMI 1313 (T)]

  As these decisions are in relation to textile industry where the capital goods have been used for manufacture of both dutiable and exempted goods whereas in the present cast, the goods have been used exclusively for manufacture of exempted electricity.

- Their submission of suppression is misplaced as without proper investigation and enquiry, these facts could never have been brought forth to the knowledge of the department.
- Their claim with regard to demand being time barred is not sustainable.

4.3 Arguing for the respondents, learned counsel submits that:-

- Rule 6(4) is not applicable in their case as they have utilized the capital goods for production of dutiable goods in their factory. For this position, he would rely upon the following decisions:-
    - Arvind Mills [2005 (182) ELT 362 (T)]
    - Supreme Industries Ltd. [2002 (149) ELT 659 (T)]
    - S.T. Cottex Exports (P) Ltd. [2010 (261) ELT 807 (T)]
    - S.T. Cottex Exports Pvt. Ltd. [2018 (2) TMI 1313 (T)]
    - Lakshmi Balaji Bottling Pvt. Ltd. [2018 (9) TMI 20 (T)]
    - Brindavan Beverages Pvt. Ltd. [2014 (310) ELT 398 (T)]
    - Gujarat Propack [2009 (234) ELT 409 (Guj.)]
- In the present case, at the initial stage of erection and commissioning of CPC, there was no suitable power supply from the power plant. Hence the same could not have

been directly consumed by them in their factory of production. Therefore the electricity generated during this period was uploaded to the grid of MSETCL and it was only on stabilization of the supply of power plant that the electricity so produced in captive power plant was supplied directly to their production facility.

- It was always the intention of the respondents to use the electricity so generated in captive power plant in their own unit of production. There is no bar on availability of cenvat credit on capital goods if it for sometimes they have been used in the manner for supply of electricity to electricity board during the initial period. Rule 6(4) of Cenvat Credit Rules has been amended by Notification No. 13/2016-CE(NT) dated 01.03.2016 retrospectively and it has been provided that the bar of Rule 6(4) shall apply only if the capital goods are used in manufacture of exempted goods cleared for a period of two years from the date of installation of the capital goods/commencement of commercial production. This amendment has to be considered as retrospective in view of the following decisions:-
  - Indian Tobacco [2005 (187) ELT 162 (SC)]
  - Zile Singh [2004 (8) SCC 1]
  - Mehler Engineered Products India Pvt. Ltd. [2018 (364) ELT 27 (Mad.)]
  - Welspun India Ltd. [2019 (9) TMI 885-CESTAT AHMEDABAD
  - Mohit Industries Ltd. [2019 (11) TMI 292-CESTAT AHMEDABAD
  - Orient Syntex [2020 (12) TMI 634-CESTAT NEW DELHI.
- Further, steam generated in the captive plant was always used within their factory for use in manufacture of final product. The captive power plant is a co-generation unit capable of producing both steam and power. Therefore the capital goods installed in CPC were never used exclusively in the manufacture of electricity which was wheeled out. For this reason also, the provisions of Rule 6(4) are not applicable.

- Major portion of demand is time barred as the same is beyond normal period of limitation.
- Accordingly he submits that the appeals be dismissed.

51 We have considered the impugned orders along with the submissions made by both sides during the course of argument.

5.2 Undisputed facts are that the respondents have set up the captive power plant and on receipt of capital goods for captive power plant, they had availed the cenvat credit during the period 2006-07 to 2010-11 (upto December 2010). Electricity and exempted non-excisable goods were generated within the CPP and were sold during the period December 2009 to 02.05.2011 to MSEDCL on pure commercial considerations and not utilized the same in manufacture of dutiable finished products PVC resin as there was no electricity line connecting captive power plant to the PVC plant.

5.3 Revenue contended that the fact of commissioning of CPP and sale of total electricity generated in the CPP to MSEDCL started with effect from December 2009, was never brought to the notice of the department, suppressing the material fact of utilization of the said capital goods for manufacture of exempted electricity. Therefore the respondents have suppressed vital information and in respect of availment of inadmissible credit. There is no dispute about the fact that initially immediately after the electricity generated in the captive power plant was supplied to MSEDCL. However, it cannot be said that the said capital goods were not used in the manufacture of finished products cleared on payment of duty. In para 25 of his order, the Commissioner has recorded as follows:-

"25. I find that it is a fact that the assessee has established PVC Plant in which they manufacture dutiable excisable goods and Captive Coal Power plant (CPP) where electricity is generated. There is no arrangement for direct supply from PVC plant to CPP plant. However, the electricity from CPP plant is uploaded to the electric grid of established by MSETCL. The MSEDCL, via MSETCL is providing the electricity to the assessee in their PVC Plant for manufacture. The quantum of electricity uploaded and that

supplied to the consumer is adjusted against each other. This is called the banking arrangement. No doubt, the price of uploaded and downloaded electricity is different and either the MSEDCL or the consumer may require to make payments depending upon the agreements between them. In the instant case, during the period from December, 2009 to February, 2011 the assessee had received payments when the banking arrangement between them was not in existence. From March, 2011 onwards the banking arrangement comes into play. The assessee had produced the bills issued by MSEDCL showing that they had consumed total electricity of 14726000 KVAH and 14533000 KVAH in the month of March and April, 2011 respectively. It was also pointed out that 5385355 KVAH and 7214464 KVAH have been deducted respectively. It clearly shows that the compensation has been given to the extent of electricity uploaded. It is evident that this compensation of quantity of electricity is against the quantity of electricity downloaded and used for manufacture of excisable goods. In other words, the uploaded electricity has been compensated being used by the assessee for manufacture. There is no separate grid for transmission of electricity and it is not directly used is not relevant. In fact, to avoid multiple transmission grids, the banking system which is nothing but a barter system is employed. Further, making or receiving payments will not alter the fact that the electricity generated in CPP plant has been utilized in the manufacture of good at PVC plant. I am of the opinion that the electricity generated by utilizing the capital good in CPP plants is utilized for manufacture of dutiable excisable goods in PVC plant."

5.4 Even if there was no direct connection between the captive power plant and PVC plant, the Commissioner has concluded that it was through a banking arrangement that entire electricity uploaded from captive power plant was supplied to the PVC plant.

5.5 The Commissioner has not disputed that during the period December 2009 to February 2011 electricity was supplied to MSEDCL and was not utilized by the respondent in their PVC plant. After that, the Commissioner has recorded the reason for considering the credit admissible. In case of capital goods, it is now settled that capital goods should have been used for manufacture of the products cleared on payment of duty. The credit could not have been denied in respect of such capital goods which have been so used, even if for some time, the same were used otherwise. The intention of the respondents for setting up the captive power plant was to ensure uninterrupted power supply to their manufacturing unit. There cannot be any other intention which can be inferred from the reason of electricity being supplied for some time using this facility to MSEDCL. In this regard, the Commissioner has observed as follows:-

"If the goods are received in the factory of manufacture where dutiable as well as exempted goods are manufactured, the credit on such goods is eligible on the day of receipt of the goods itself. Secondly, needless to say, every manufacturer receives the capital goods with an intention to use them for manufacture in the factory. In the instant case, evidences such as diagram of direct output connection, agreement to sell the surplus power with a profit motive have been brought on record to establish the initial intention to use the capital goods exclusively for exempted goods. I am of the opinion that the value of such indirect evidences leading to certain conclusions ceases as soon as the assessee had utilized the said electricity in the manufacture of dutiable goods and thereby established their intention to utilize the said machinery for manufacture of exempted as well as dutiable goods.

I find that in the instant case, initially electricity was add or MSEDCL March 2011 and there they started so utilize the electricity for manufacturer of dutiable goods Thus the capital goods were initially used for manufacture of capital goods and subsequently in manufacture of dutiable as well as exempted goods. Moreover, the credit availed by the assessee during the period from Dec-2006 to Dec-2010 is in balance till July 2011 is thus, evident that the assessee had not utilized the credit during the period when the capital goods were exclusively used for manufacture of exempted goods. The instant case is thus, squarely covered by the decision mentioned supra and the ratio *of the sand decision is also applicable in the present case. I, therefore, hold that the capital goods have been used by the assessee in dutiable as well as exempted products and hence, the credit cannot be denied under Rule 6(4) of the Cenvat credit Rules, 2004."*

5.6 The decision of the Hon'ble Apex Court in the case of Maruti Suzuki was rendered in case of inputs used for generation of electricity ion the captive power plant. Part of the electricity so generated was used for manufacture of the finished goods cleared on payment of duty, and remaining was sold either to the electricity board or the joint ventures. Electricity being the excisable commodity subject to nil rate of duty, Supreme Court held that the credit on the inputs used in that part of the electricity that is wheeled out and not used captively credit will not be admissible. However Supreme Court has no occasion to consider the case of Capital Goods credit in this case. The ratio of the decision of the Hon'ble Apex Court is exactly what Rule 6 of CENVAT Credit Rules, 2004 provided for. Since Supreme Court has not even considered the case in respect of Capital Goods, for which no provision like Rule 6, ibid, is available, we do not find any applicability of the said decision in the present case.

5.7 The decision of the Ellora Tiles relied upon by the revenue has been overruled by the Hon'ble Madras High Court in the case of Ashok Leyland [2019 (369) E.L.T. 162 (Mad.)] stating as follows:

"12. *The argument of the Learned Counsel is that the windmill is situated far away from the manufacturing plant, there is no nexus and the type of transaction between the assessee and the TNEB is a barter system and it is, in effect, a sale of electricity at one point and purchase of electricity at the other. Therefore, it is submitted that there are two distinct and independent transaction and they had no nexus with each other and therefore, the question of giving credit, with regard to input services, does not arise. To support his argument, the learned counsel relied on a decision of the Tribunal in the case of Ellora Times Ltd. v. Commissioner of Central Excise, Rajkot, 2009 (13) S.T.R. 168 (Tri. - Ahmd.)*.

26. *In the light of the above, we are of the considered view that the decision in the case of Ellora Times Ltd. (supra) does not lay down the correct legal position and we agree with the decision of the High Court of Bombay in Endurance Technology Pvt. Ltd. (supra), which has been followed by the Larger Bench of the Tribunal in Parry Engg. & Electronics P. Ltd."*

5.8 Revenue has relied upon the decision in the case of Brindavan Beverages [2008 (232) ELT 475 (T)], said decision of the tribunal has been set aside by the Hon'ble Allahabad High Court as reported at [2014 (301) E.L.T. 443 (All.)] and matter remanded back to Tribunal stating as follows:

"8. *Rule 6 of sub-rule (4) of Cenvat Credit Rules, 2004 which is relevant in the present case which provides as follows :-*

"4. No Cenvat credit shall be allowed on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearance made in a financial year".

In the present case, from the facts which emerges from the record, it is clear that the machine which was installed in the factory was used both for manufacture of exempted goods as well as dutiable goods. Dutiable goods were manufactured since October, 2006 which fact has been noted in Paragraph No. 8 of the judgment of the Tribunal. The Tribunal had denied the benefit on the pretext that "the certificate of the manufacturer relied upon by the appellant also confirms that the plant is usable for manufacture of aerated waters only after modification". The certificate which was relied upon by the appellant before the authorities dated 4-1-2007 was to the following effect as under :-

"This is to confirm that the Krones PET line installed and operating at Barielly at the fruit juice Maaza plant and the Filler VP-L-PET is designed to handle carbonated/aerated soft drinks. This is achieved by software changes and minor adjustments.

Krones has supplied several similar equipment and fillers which are operating at various sites across the world."

The manufacture had certified that machine is designed to handle carbonated/aerated soft drinks by software changes and minor adjustments. The certificate never said that the object can be achieved only after modification. The certificate did not use the word 'modification' which has crept in the order of the Tribunal. More so, before us now the appellant has filed certificate dated 25-9-2009 which indicates that no modification in the machine can be done in India since it is manufactured at Germany and imported in India."

5.9 In the remand proceedings, tribunal have vide order reported at [2014 (310) ELT 398 (T)] decided the matter stating as follows:

"6. *The undisputed facts are that the capital goods, in question, had been received by the appellant in their Bareilly unit during September 2004 to August 2005 period. There is also no dispute about the fact that during the period till September 2006, the machinery, in question, had been used only for manufacture of fruit pulp based soft drink called MAAZA which is fully exempt from duty. However the appellant had still availed Cenvat credit amounting to Rs. 1,64,08,716/- in respect of these capital goods. According to the appellant, from October 2006 onwards they have started using these machines for manufacture of aerated waters which are dutiable final product and this fact is not disputed by the Department. According to the appellant, they are eligible for capital goods Cenvat credit, as in terms of the provisions of Rule 6(4) of the Cenvat Credit Rules, 2004, the capital goods Cenvat credit is to be denied only when the capital goods have been used exclusively for manufacture of exempted final product, not when the capital goods are used for dutiable as well as exempted final products and in this case the Cenvat credit cannot be denied as from the very beginning, the appellant's intention was to use the capital goods, in question, for manufacture of both, dutiable as well as exempted final product and that notwithstanding the fact that till September 2006, the machinery was used only for manufacture of fruit pulp based soft drinks (exempted final product), since they started* *using the machinery since October 2006 for manufacture of aerated waters (dutiable final product), they would be eligible for Cenvat credit. According to the appellant, the judgment of the Tribunal in the case of CCE, Indore v. Surya Roshni Ltd. (supra) is not applicable to this case, as in this case, from the very beginning their intention was to use the machinery for manufacture of dutiable as well as exempted final product and that for this purpose, it is not necessary both dutiable and exempted final products have to be manufactured simultaneously.*

7. *In terms of the provisions of sub-Rule (4) of Rule 6 of the Cenvat Credit Rules, 2004 Cenvat credit shall not be admissible on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification, where the exemption is granted based on the value or quantity or clearances made in a financial year. From a perusal of this sub-Rule, it is clear that capital goods Cenvat credit would be admissible when the capital goods are used either only for dutiable final product or for dutiable as well as exempted final product. The capital goods Cenvat credit is also admissible when a manufacturer is availing full duty exemption based on the value or quantity of the goods cleared in a financial year, in which case, while initially the manufacturer will be availing full duty exemption (for some months or for several financial years at a stretch) but subsequently at some point of time when he crosses the threshold limit for exemption, his final product becomes dutiable and in such a case, even during the period of full exemption, the manufacture can take capital goods Cenvat credit which he can utilize when this final product becomes dutiable. A question arises as to when capital goods are used for manufacture of dutiable as well as exempted final product, whether for availing capital goods credit, the dutiable as well as exempted final product have to be manufactured simultaneously. In our view this is not necessary, and Cenvat credit would be admissible even if the capital goods are used for manufacture of dutiable goods and exempted goods at different points of time. However, if at the time of receipt of the capital goods, the* *manufacturer was using the capital goods only for manufacture of fully exempted final product and had no plan or intention to use them for dutiable final products and later on, either the final product becomes dutiable or he changes his plans and starts using the capital goods for manufacture of dutiable final products, the judgment of the Tribunal in the case of CCE, Indore v. Surya Roshni Ltd. (supra) and Spenta International Ltd. v. CCE, Thane (supra) would become applicable. But, if at the time of receipt, the manufacturer had clear intention to use the capital goods for manufacture of dutiable as well as exempted final products, in such a situation just because at the time of receipt, he uses the capital goods for manufacture of exempted final product and subsequently he switches over to the manufacture of dutiable final product, the capital goods Cenvat credit cannot be denied. When at the time of receipt of capital goods, capable of use in manufacture of dutiable as well as exempted final products, there is evidence to show that the manufacturer had intention to use them for manufacture of dutiable as well as exempted final product, the eligibility of the capital goods for Cenvat credit cannot depend upon the order in which the same are used - whether first for the manufacture of exempted final products or for the manufacture of dutiable final product. We are supported in this view by the judgment of Hon'ble Gujarat High Court in case of CCE, Vadodara II v. Gujarat Propack reported in 2009 (234) E.L.T. 409 (Guj.), wherein the Hon'ble High Court has held that when the capital goods installed in the year 2000 were used for manufacture of exempted goods on trial basis and subsequently were used for manufacture of dutiable goods when regular production was started, the Cenvat credit in respect of capital goods cannot be denied and the Tribunal's judgment in case of M/s. Surya Roshni Ltd. (supra) would not be applicable.*

8. *In the present case the capital goods had been received during period from September 2004 to August 2005 when the Cenvat credit had been taken and according to the appellant at that time, they had intention to use these goods for the manufacture of fruit pulp based soft drink (exempted goods) as well as for manufacture of aerated waters (dutiable goods) and for this reason only, they had availed capital goods Cenvat* *credit, while initially using the machinery only for manufacture for the exempted final product. This aspect has to be verified on the basis of records. If the appellant at the time of receipt of the capital goods during September 2004 to August 2005 period, had filed any declaration to the Department or had sent some letter to the Department intimating that they would be using this machinery for manufacture of dutiable final product (aerated waters) as well as exempted final product (the fruit pulp based soft drinks), or there is any other evidence indicating that at the time of receipt, the appellant had plans to use the machinery, in question, for manufacture of dutiable as well as exempted final products [like the machinery, without any modification, being capable of manufacture of both the dutiable final products (aerated/ carbonated waters) as well as exempted final products (MAAZ) along with declaration/intimation of dual use], they would be eligible for Cenvat credit. In this regard, as per the directions of Hon'ble Allahabad High Court in its order dated 24-2-2014, the manufacturer's certificates certifying that the machinery, in question, can also manufacture Aerated waters after some minor adjustment and software change, may also be examined. But if there is no such evidence, it would have to be presumed that at the time of receipt, they had plans to use the capital goods, in question, only for manufacture of the fruit pulp based soft drinks (exempted final product) and it is only subsequently they decided to switch over to manufacture of dutiable final product (aerated waters) and in that event, in accordance with the Tribunal's judgment in case of Surya Roshni Ltd. (supra) and Spenta International Ltd. (supra), they would not be eligible for Cenvat credit. Accordingly, the impugned order is set aside and the matter is remanded to the Commissioner for de novo decision, keeping in view our above observations."*

5.9 Undisputedly the captive power plant was set up by the respondent for supply of uninterrupted power to their PVC plant and was supplying power to the PVC plant after stabilization of power supply therefrom. Since the fact of supply of the power to the PVC plant is not in dispute the availment of CENVAT Credit on the Capital Goods used for setting up the same cannot be disputed.

5.10 We do not find any merits in the submissions of the Revenue that just because for some time in the initial stages of installing and commissioning of the plant, the respondents had supplied electricity to MSEDCL on commercial basis from their captive power plant the same can be a reason for denial of the cenvat credit in respect of the Capital Goods used for setting up the Captive Power Plant

5.11 We also do not find any merits in the appeals filed by the revenue against the order dropping the proceedings for imposition of penalty on the employees of respondent.

6.1 Appeals filed by the Revenue are dismissed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(P. Dinesha)
Member (Judicial)

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