CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH

Excise Appeal No. 1787 of 2012

(Arising out of Order-in-Appeal No. BR/34-40/LTU/MUM/2012 dated 13.09.2012 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

VERSUS

Commissioner of Central Excise & Service Tax ....Respondent
(LTU), Mumbai
8th Floor, Large Tax Payer Unit,
Centre-I, World Trade Centre,
Cuffe Parade, Mumbai – 400 005

(ii) Excise Appeal No. 1788/2012 (M/s. Ambuja Cements Ltd.); (iii) Excise Appeal No. 1789/2012 (M/s. Ambuja Cements Ltd.); (iv) Excise Appeal No. 1790/2012 (M/s. Ambuja Cements Ltd.); (v) Excise Appeal No. 1791/2012 (M/s. Ambuja Cements Ltd.); (vi) Excise Appeal No. 1792/2012 (M/s. Ambuja Cements Ltd.); (vii) Excise Appeal No. 1793/2012 (M/s. Ambuja Cements Ltd.)

(Arising out of Order-in-Appeal No. BR/34-40/LTU/MUM/2012 dated 13.09.2012 passed by the Commissioner of Central Excise & Service Tax (Appeals), LTU, Mumbai.)

APPERANCE:

Shri Rajesh Ostwal, Advocate for the Appellant with
Ms. Hanisha Jatania, Chartered Accountant

Shri Amrendra Kumar Jha, Dy. Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85617-85623/2023

Date of Hearing: 17.02.2023
Date of Decision: 17.02.2023

PER: DR. SUVENDU KUMAR PATI

Legality of the order passed by the Commissioner of Central Excise & Service Tax (Appeals), LTU, Mumbai *vide* his above referred order confirming the Order-in-Original that denied CENVAT Credits to the Appellant on various inputs and capital goods utilised between the period ranging from September, 2008 to March, 2010 amounting to Rs.1,93,80,857/- in total for generation of electricity in its Captive Power Plants (CPP) for use in the manufacture of dutiable final products at its various plants located at Bhatapara, Sankrail, Rabriyawas, Ambujanagar, Chandrapur, Ropar and Chandrapur is assailed in these seven appeals.

2. Factual backdrop of the case, in a nutshell, is that Appellant is a manufacturer of Cement Clinker and Cement falling under Chapter 25 which is chargeable to excise duty. To meet its electricity requirements for the purpose of manufacture of cement etc, it has its own Captive Power Plants. Electricity generated therein is completely consumed in the plants itself and not wheeled out. Against inputs used during generation of electricity namely Hydrochloric acid, grease, lubricant, furnace oil etc. and capital goods such as components, machinery and equipment used at Captive Power Plants for generation of electricity, Appellant had availed CENVAT Credits on duty paid on such inputs and capital goods. Appellant was put to several show-cause notices with proposals for denial of such CENVAT Credits availed by it in its CPPs

at various units in the aforesaid period with a demand for interest and penalty on the value of those allegedly inadmissible inputs that was contested by the Appellant who had undergone adjudication process that resulted in passing of two Orders-in-Originals on 19.10.2011 and 08.11.2011 respectively in respect of which 5 appeals as mentioned in Cause Title at Sr. No. (i) to (v) and two appeals at Cause Title Sr. No. (vi) & (vii) have been preferred before this forum.

3. During the course of hearing of the appeal learned Counsel for the Appellant Mr. Rajesh Ostwal and Ms. Hanisha Jatania, with reference to several judicial decisions, argued that the issue has been settled in favour of Appellant in Appellant's own case by the Hon'ble Supreme Court, as reported in *2022 (65) GSTL 3 (SC)* wherein it has been held that CENVAT Credit on capital goods used in the power plant is admissible credit since the same is further used in the manufacture of dutiable goods that had been cleared on payment of duty and also concerning use of credits on capital goods, this Tribunal's order passed on 25.11.2022, in Excise Appeal No. 1637 of 2012, CESTAT, Mumbai in Appellant's own case can be taken as a judicial precedent.

4. Mr. Rajesh Ostwal further argued that during relevant period also Rule 2(k) & 2(a) of CENVAT Credit Rules, 2004 expressly permitted availment of such credits by way of its incorporation within

the definition of inputs and capital goods available in the rule itself at sub-Rule (I) and (a)(1) of the CENVAT Credit Rules, 2004. Further, citing judicial decisions reported in *2008 (232) ELT 7 (SC)* in the case of *CCE Vs. Gas Authority of India Ltd., 2014 (34) STR 175 (All.)* in the case of *Gularia Chini Mills Vs. UIO approved by Hon'ble Supreme Court* reported in *2015 (322) ELT 76 (SC)* in the case of *UOI Vs. DSCL Sugar Ltd., 2006 (205) ELT 483 (T)* in the case of *Ballarpur Industries Ltd. Vs. CCE,* he argued that electricity being none excisable goods cannot be considered as an exempted goods for the purpose of Rule 6 of CENVAT Credit Rules, 2004 for the period prior to 01.03.2015 and concept of movability is irrelevant for the purpose of determination of dutiability, also the same cannot be equated with determination of eligibility of CENVAT Credit as has been held in the case of *CCE Vs. Bellsonica Auto Components India P. Ltd.* reported in *2015 (40) STR 41 (P&H), Mundra Ports & Special Economic Zone Ltd. Vs. CCE* reported in *2015 (39) STR 726 (Guj.), Guljag Industries Ltd. Vs. CCE* reported in *2003 (159) ELT 791 (T)* for which the order passed by the Commissioner (Appeals) is unsustainable in law and facts.

5. *Per contra* learned Authorised Representative Mr. Amrendra Kumar Jha, objected the grounds raised in the appeal and submitted that there is clear finding in the adjudication order as well as in the Order-in-Appeal that on the basis of clarification issued by the CBEC *vide* Circular No. 58/1/2002-CX dated 15.01.2002, as the final

product is considered as immovable and hence not excisable, CENVAT Credit cannot be allowed on any such capital goods or inputs or even inputs services, for which the order passed by the Commissioner (Appeals) need not be interfered with.

6. We have heard the submissions from both the sides and perused the case record. At the outset, we discard such findings of the Commissioner (Appeals) concerning dutiability on immovable property and equating CPP as immovable property for the reason that no such direction is available in the circular except that it was clarified in the said circular that the immoveable property itself is not dutiable whereas its components units and spares are subjected to excise duty. Going by the show-cause notice, it is observed that the proposal for denial of CENVAT Credit was made primarily on two counts – First, CPP is immoveable property and hence the same is non-excisable goods and second, electricity generated by it is also non-excisable since not dutiable for which no credit can be extended on the inputs used for the purpose of generation of such electricity. At this juncture it is worthwhile to reiterate the ratio of the judgments of the Hon'ble Supreme Court passed in the Appellant’s own case as reported in *2022 (65) GSTL 3 (SC)* and decision of this Tribunal passed on 25.11.2022, apart from the fact that since the year 2000, in *Gujarat Ambuja Cements Ltd. Vs. CCE* case reported in *2001 (130) ELT 129 (T)* that has been affirmed by the Hon'ble Himachal Pradesh High Court as reported in *2010 (256) ELT 356*

(HP), it has been consistently held that such credits on inputs and capital goods are admissible and concerning availment of credits on inputs and capital goods on CPP consistent decision had been passed in the case of *CCE Vs. Larsen & Toubro Ltd.* reported in *2022 (380) ELT 25 (Bom.), CCE Vs. Shree Cement Ltd.* reported in *2018 (16) GSTL 196 (Raj.), Maruti Suzuki Ltd. Vs. CCE* reported in *2009 (240) ELT 641 (SC), CGST Vs. Neelachal Inspat Nigam Ltd.* reported in *2022 (11) TMI 1091 (Orissa High Court)* that those are eligible credits. We also consider it proper to reproduce a portion of relevant paragraph of our own order passed on 25.11.2022 that would further clarify the admissibility of credit:

> *"5. We have heard from both the sides and perused the case record as well as the relied upon judgments noted above. As could be noticed, several judgments have been passed on the issue and it has been consistently held by this Tribunal, by Hon'ble High Courts of different States and even by the Hon'ble Supreme Court that <u>capital goods in the form of Power Plant as immovable property is not the relevant criteria for determining admissibility of credit and capital goods or services used in the manufacturing process. As long as assessee is able to prove that he has used various capital goods for the manufacture of excisable goods CENVAT Credit is admissible. Moreover, in the judgment of Ballarpur Industries Ltd. cited supra, it was clearly held that captive generation of electricity is a manufacturing process and inputs used in such process would be considered as inputs used in the manufacture of final products so as to permit availment of credits.</u>"*
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> (*Emphasis supplied*)

7. In carrying forward the judicial decision set by this Tribunal and various Writ Courts including the order passed by the Hon'ble

Supreme Court in the Appellant's own case, cited supra and to ensure consistency and predictability to the orders of this Tribunal, the following order is passed.

THE ORDER

8. These seven appeals are allowed and the order passed by the Commissioner of Central Excise & Service Tax (Appeals), LTU, Mumbai *vide* Order-in-Appeal No. BR/34-40/LTU/MUM/2012 dated 13.09.2012 is hereby set aside with consequential relief to the Appellant, if any.

(Operative portion of the order pronounced in open court)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

Prasad