

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

REGIONAL BENCH

Excise Appeal No. 85078 of 2013

(Arising out of Order-in-Original No. 10 to 12/CEX/Commr/2012 dated 24.05.2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad Commissionerate.)

M/s. The India Cements Ltd.

.....Appellant

**Parli Vaijanath Grinding Unit,
Dharmapuri Road,
Parli Vaijanath Dist. Beed
Maharashtra – 431 122**

VERSUS

Commissioner of Central Excise,

.....Respondent

Aurangabad

**Town Centre N-5, CIDCO,
Aurangabad – 431 030**

WITH

(ii) Excise Appeal No. 85159/2013 (M/s. The India Cements Ltd.); (iii) Excise Appeal No. 85160/2013 (M/s. The India Cements Ltd.); (iv) Excise Appeal No. 88159/2013 (M/s. The India Cements Ltd.)

(Arising out of Order-in-Original No. 14/CEX/Commr/2013 dated 14.05.2013 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad Commissionerate.)

APPEARANCE:

Shri Rajesh Ostwal, Advocate with
Shri Aditiya Jain, C.A. for the Appellant

Shri P.K. Acharya, Supdt. 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/85706-85709/2023

Date of Hearing: 03.04.2023

Date of Decision: 03.04.2023

PER: DR. SUVENDU KUMAR PATI

These four appeals, which were heard and decided on 03.04.2023, is taken up for passing a common order.

2. Fact of the case, in a nutshell, is that Appellant is a manufacturer of Cement and Clinker having excise registration under Aurangabad Central Excise Commissionerate. While setting of Cement plants between the period 2008 and 2010, Appellant had used substantial quantity of steel items including Angles, Plates, Flats, Rounds, Square etc. as well as QST Bars, Parallel Flange Beams, TMT Rebars, Channels, Beams etc. for the purpose of fabricating capital goods and it had also procured number of capital goods, spares and components through which several capital goods such as cement mills, grinding media, silos, several conveyer systems, substation, truck loader, Wagon Tippler etc. were fabricated for the purpose of manufacture of cements as those were essential capital goods in such manufacturing process. Appellant accordingly had availed CENVAT Credit on those iron & steel items as well as capital goods, used for manufacturing of cement, in terms of CENVAT Credit Rules, 2004. Additionally, it had availed CENVAT Credit on inputs/capital goods used as concrete railway sleeper, railway track, wagon loading machine etc. and obtained certificate of Chartered Engineer to the effect that iron & steel were used for setting up of plant & machinery in the cement manufacturing units. Owing to change of definition of "inputs" service by way of insertion of Explanation 2 to Rule 2(k) of CENVAT Credit Rules, 2004 that excluded cement, angles, channels, Centrally Twisted Deform Bar

(CTD) or Thermo Mechanically Treated bar (TMT) etc. used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods from the purview of input services *vide* Notification No. 16/2009-CE(NT) dated 07.07.2009 that was held to have retrospective effect from 2004 by the Larger Bench of this Tribunal in the case of *Vandana Global Ltd. Vs. Commissioner of Central Excise* reported in 2010 (253) ELT 440 (Tri.-LB), Appellant was put to show-cause notice with a demand for recovery of inadmissible credit of Rs.5,30,92,339/- with interest and equal penalty by invoking extended period that was adjudicated and confirmed by the Commissioner. In Appeal No. E/85078/2013, Appellant had assailed the legality of the said order passed by the Commissioner, while in Appeal No. E/85159/2013, E/85160/2013 & E/88159/2013 legality of Order-in-Original passed by the Commissioner for the period from July, 2010 to August, 2010, September, 2010 to March, 2011 and April, 2011 to September, 2011 periodic demand on the aforesaid items for Rs.4,84,665/-, Rs.1,78,393/- and Rs.16,44,765/- respectively are assailed by the appeal before this forum. It is required to be mentioned here that E/85078/2013, E/85159/2013 & E/85160/2013 were decided by the Commissioner through a common order passed on 24.05.2012 while the other appeal No. E/88159/2013 for the period between April, 2011 and September, 2011 was decided separately on 14.05.2013 *vide* his Order-in-Original No. 14/CEX/Commr/2013.

3. We have heard the submissions from both the sides and perused the case record as well as relied upon case laws. As could

be understood the entire dispute is based on the finding of the Larger Bench of this Tribunal in *Vandana Global Ltd.* judgement cited *supra* by which retrospective effect was given to the Notification No. 16/2009-CE(NT) and accordingly Respondent-Department had issued periodic notices demanding recovery of credits which were excluded from the definition of 'inputs' through Explanation 2 of Rule 2(k) of CENVAT Credit Rules, 2004. However, the said judgment of the Larger Bench had been reversed by the Hon'ble High Court of Chhattisgarh in the case of same *Vandana Global Ltd.*, as reported in *2018 (16) GSTL 463 (Chhattisgarh)* and learned Counsel for the Appellant Mr. Rajesh Ostwal had rightly drawn our attention to para 5, 6 & 8 of the judgment that had crystallised the issue by holding that such explanation, being not in the nature of proviso, can be considered to be operative only from the date of its insertion. For better clarity we reproduce the relevant portion of those paras below:-

"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.

...

8. We are in complete agreement with the ratio of Mundra Ports (supra) and M/s. Thiruarooran Sugars (supra) on all fours..."

Learned Counsel for the Appellant further submitted that after the effective date of Notification of such amendment i.e. on 07.07.2009, Appellant had not taken any credit on the items which are mentioned to be excluded by the amended explanation but disregarding the said fact learned Commissioner had rejected the entire CENVAT Credit of Rs.5,30,92,339/- proposed for recovery instead of disallowing demand to the tune of Rs.1,95,91,425/- that pertains to other inputs/capital goods including concrete railway sleeper, railway track, wagon machine, wire rope etc. We have gone through Annexure 'A' of the show-cause notice and found that alongwith the items mentioned in the explanation some other items, as pointed out by learned Counsel for the Appellant, are also figuring in the said Annexure 'A' but it would be practically imposable at our end to compute with accuracy and reference to invoices as to if confirmed demand includes also admissible credit of Rs.1,95,91,425/- for which

while agreeing with the Appellant's claim that credits in respect of all items including the items explained in Explanation 2 are admissible to the Appellant for the period from February, 2008 to 07.07.2009, non-availability of credits, as indicated in Explanation 2, to the Appellant would be effective from 07.07.2009 to June 2010, which Appellant claims to have not availed while Commissioner confirmed the entire demand including the other credits admissible to the Appellant. We consider it proper that for this limited purpose appeal could be remanded to the Original Authority.

4. We are also of the view that for the purpose of computation of the demand in Annexure 'A' of the show-cause notice for the period beyond 07.07.2009 and for consideration of the issue on merit in respect of Annexure 'B' containing list of other credits availed by the Appellant allegedly held in the Order-in-Original as completely inadmissible, re-adjudication is to be done on the basis of relied upon case laws cited by the Appellant here and to be placed before the Commissioner during the remand proceeding.

5. Now coming to the issue in respect of other periods, it is undisputed fact that goods excluded under Explanation 2 annexed to Notification No. 16/2009-CE(NT) were not included by the Appellant as inputs for the purpose of availment of CENVAT Credits but in respect of other items namely concrete railway sleeper, other iron & steel items, welding electrodes, Railway track material etc. which were supposed to be admissible credits as the same issues are no more *res integra*, in view of series of judgments passed in

Appellant's own case by CESTAT as reported in *2011-TIOL-185-CESTAT-MAD*, *2015-TIOL-650-HC-MAD-CX*, *2004 (175) ELT 476 (Tri.-Chennai)*, *2012 (285) ELT 341 (Mad.)*, *2014 (305) ELT 558 (Mad.)*, *2013 (296) ELT 513 (Tri.-Chennai)*, *2014 (310) ELT 636 (Mad.)*, *2005 (181) ELT 258 (Tri.-Chennai)*, *2013 (297) ELT 508 (Mad.)* and in respect of other Assessee's passed in the case of *CCE Vs. Rajasthan Spg. & Wvg Mills Ltd. – [2010 (255) ELT 481 (SC)]*, *UOI Vs. Grasim Industries Ltd. – [2008 (223) ELT 582 (Raj.)]*, Hon'ble Bombay High Court order dated 19.07.2007 in *CCE Vs. Ispat Industries Ltd.*, *Lloyds Metals & Engg. Ltd. Vs. CESTAT, Mumbai etc.* are placed permitting availment of credits on iron & steel items. Likewise *Samruddhi Cement Ltd Vs CCE [2013 (297) ELT 562 (Tri.-Del.)]*, *CCE Vs ACE Glass Container Ltd [2013-TIOL-257-HC-UKHAND-CX]*, *Singhal Enterprises Pvt. Ltd. Vs. CC & CE [2016 (314) ELT 372 (Tri.-Del.)]* Affirmed by Chhattisgarh High Court in *CC & CE Vs. Singhal Enterprises Pvt. Ltd. [2018 (359) ELT 313 (Chhattisgarh)]* are cited in respect of admissibility of credits on welding electrodes rods as well as *Jayaswal Neco Ltd. Vs. CCE [2015-VIL-31-SC-CE]*, *Tata Steel Ltd. Vs. CCE [2016(335) ELT 303 (Tri.-Kol.)]*, *Ultratech Cement Ltd. Vs. CC & CE [2016 (339) ELT 127 (Tri.-Hyd.)]*, *The India Cement Ltd. Vs. CCE [2018 (6) TMI 581 – CESTAT Chennai]*, *M/s Ultra Tech Cement Ltd. Vs. CCE [2018 (1) TMI 822- CESTAT Mumbai]*, *Jaypee Rewa Plant Vs. CCE [2018 (9) TMI 633- CESTAT New Delhi]* are cited in respect of availability of credits on Railway track materials that had crystallised and settled the issues as judicial precedent are binding on subsequent decisions. We are in total agreement with his submissions, even though learned

Authorised Representative reiterates the findings of the Commissioner we found no substance in his order to confirm the same in denying credits to the Appellant in respect of other inputs, admissible to the Appellant. Hence the order.

THE ORDER

6. Appeal No. E/85078/2013 is partly allowed and CENVAT Credit availed by the Appellant for the period prior to 07.07.2009 as per Annexure 'A' to show-cause notice is entirely admissible and CENVAT Credit in respect of items shown in Annexure 'B' relating to items referred in Explanation 2 of Rule 2(k) are inadmissible to the Appellant. In respect of other items, our decision on its admissibility, as noted above is to be followed. Appeal Nos. E/85159/2013, E/85160/2013 & E/88159/2013 are allowed and the orders passed by the Commissioner *vide* his orders dated 24.05.2012 and 14.05.2013 in respect of these 3 appeals are accordingly set aside. In respect of show-cause notice dated 12.04.2011, the matter is remanded to the original authority to decide the issue on merit and judicial precedents as noted above.

(Operative portion of the order pronounced in open court)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)