CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 87666 OF 2013

[Arising out of Order-in-Appeal No: 32/BPS/LTU/2013 dated 15th March 2013 passed by the Commissioner of Central Excise & Service Tax (Appeals), Mumbai – I.]

Commissioner of Central Excise & Service Tax
Large Taxpayer Unit
29th Floor, World Trade Centre, Cuffe Parade
Mumbai - 400005 … ***Appellant***

versus

ACC Ltd
Madukarai Cement Works, 1206/2 Palghat Main Road
Madukkarai, Coimbatore - 641105 ***…Respondent***

APPEARANCE:

Shri P K Acharya, Superintendent (AR) for the appellant

Shri Rajesh Ostwal, Advocate for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 87162/2023

DATE OF HEARING:	05/07/2023
DATE OF DECISION:	22/11/2023

PER: C J MATHEW

This appeal of Revenue, against order[1] of Commissioner of

[1] [order-in-appeal no. 32/BPS/LTU/2013 dated 15th March 2013]

Central Excise and Service Tax (Appeals), Mumbai – II, pertains to disallowance of CENVAT credit of ₹56,05,486 and the order for recovery of the same under rule 14 of CENVAT Credit Rules 2004, along with applicable interest under section 11AB of Central Excise Act, 1944, and imposing of like amount as penalty under rule 15 of CENVAT Credit Rules, 2004 that had been set aside. The respondent is a manufacturer of 'cement' and had availed credit of duty/tax paid on 'inputs', 'capital goods' and 'input services' to the extent of ₹ 56,05,486 during 2002-08 and, holding this to be ineligible, the original authority upheld the proposals in the show cause notice, which, in appeal, was set aside in *toto* leading to this appeal.

2. Learned Authorised Representative submitted that the demand for ₹ 12,74,383, for the period 29th July 2008 to 19th August 2008, availed as credit on procurement of items of iron and steel which were used for 'fabrication' and 'erection and installation' of plant that, according to him, was not excisable, in terms of circular no. 58/12002/CX dated 15th January 2002 of Central Board of Excise and Customs (CBEC). Reliance was placed on several decisions including that of the Hon'ble Supreme Court in *Saraswati Sugar Mills Vs Commissioner of Central Excise, Delhi-III [2011 (270) ELT 465 (SC)]* and of the Tribunal in *Commissioner of Central Excise, Panchkula v. Saraswati Sugar Mills [2004 (178) ELT 804 (Tri.-Del.)]*. On the issue of credit of ₹ 29,25,243, availed on procurement relating to

'accessories' and supplies of 'dumpers' used for transportation of limestone from mines to the factory, it was his contention that the goods were not in conformity with either rule 2(a) CENVAT Credit Rules, 2004, pertaining to capital goods, or rule 2(k) of CENVAT Credit Rules, 2004 and that these came to be excluded for the first time *vide* notification no. 28/2012-CE dated 20th June 2012. It is also contended that the decision of the Tribunal in *Gaurav Contract Co v. Commissioner of Central Excise, Rajkot [2016 (46) STR 764 (Tri.-Del.)]* had held that the benefit of this notification could not be extended retrospectively. On the recovery of ₹ 4,63,500/- and ₹ 7,68,946/-, pertaining to 'annual maintenance contract' for 'windmills' used for generation of electricity, it was the contention of Learned Authorised Representative that use in manufacture of excisable goods therefrom was a necessary condition for availment of credit and that 'windmill', too would not fit either into that category or neither did service availed in relation to such in terms of rule 2(l) of CENVAT Credit Rules, 2004.

3. Learned Counsel for the respondent placed reliance on the decision of the Hon'ble High Court of Bombay in *Commissioner of Central Excise, Pune-II v. Rajaram Bapu Sahakari Sakhar Karkhana Ltd [2019 (365) ELT 14 (Bom.)]* and of the Tribunal in *Ispat Industries Ltd v. Commissioner of Central Excise, Mumbai [2006 (195) ELT 164 (Tri.-Mumbai)]* which found approval of the Hon'ble

High Court Bombay *vide* order dated 19th July 2017 disposing off appeal[2] contending that structures used for capital goods are entitled for the benefit of CENVAT credit. It was also contended that the sole ground for appeal of Revenue is that the amendment in rule 2(k) by insertion of *Explanation 2* below, with effect from 7th July 2009, was to be applied prospectively with credit having been availed prior to such date. It is also contended that the Hon'ble High Court of Chhattisgarh had, in *Vandana Global Ltd v. Commissioner of Central Excise & Customs, Raipur [2018 (16) ELT 462 (Chhattisgarh.)]*, discarded the finding of the Tribunal that this amendment, being clarificatory in nature, was applicable retrospectively following which, in several cases, the Tribunal had restricted applicability of the amendment to the period thereafter. Reliance was placed on the decision of the Tribunal in *Principal Commissioner of Central Excise, Nagpur v. Maharashtra Seamless Ltd [2017 (12) TMI 1179 –CESTAT MUMBAI]*. Insofar as the submissions on ‘dumpers’ are concerned, it is contended that the allegation in the show cause notice was limited to conformity with the definition in rule 2(a) of CENVAT Credit Rules, 2004 despite which the impugned order has travelled beyond to examine ineligibility in terms of other sources of credit. It is their contention that the deployment of transportation for movement of limestone from mines to the crushers is essential to manufacture and therefore entitled to be availed credit.

[2] [central excise appeal no. 187 of 2006]

4. It was contended that the decision of the Tribunal in *ACC Ltd v. Commissioner of Central Excise, Raipur [1999 (108) ELT 169 (Tribunal)]* and in *Mangalam Cement Ltd v. Commissioner of Central Excise, Jaipur-I [2017 (7) TMI 52-CESTAT NEW DELHI]* did allow credit of duty paid on ‘material handling equipment’ as capital goods eligible under CENVAT Credit Rules, 2004.

5. Insofar as the ‘annual maintenance contracts’ for ‘windmills’ is concerned, it was contended that the Hon’ble High Court of Bombay, in *Deepak Fertilizers & Petrochemicals Corporation Ltd v. Commissioner of Central Excise, Belapur [2013 (32) ELT 532 (Bom.)],* had held that there is no restriction, insofar as services are concerned, on inputs being received outside the factory and that the decision of the Hon’ble High Court of Bombay, in *Commissioner of Central Excise & Customs, Aurangabad v. Endurance Technology Pvt Ltd [2017 (52) STR 361 (Bom.)],* specifically permitted services received at site of ‘windmills’ to be eligible. Reliance was also placed on the decision of the Tribunal in *Maharashtra Seamless Ltd v. Commissioner of Central Excise, Raigad [2012 (276) ELT 209 (Tri.-Mumbai)]*.

6. We find that the issue of eligibility of products of iron and steel used for, or in relation to, manufacture of ‘capital goods’ or for fixing of capital goods came to be excluded from availment of credit only

with effect from 7th July 2009 and the present dispute pertains to the period prior to 19th August 2008. The original decision of the Tribunal in *re Vandana Global Ltd,* confirming the retrospective application of the amendment, has since been discarded by the Hon'ble High Court of Chhattisgarh. Accordingly, the first appellate authority was correct in determining the eligibility for CENVAT credit on products of iron and steel. The decision of the Hon'ble Supreme Court in *re Saraswati Sugar Mills,* cited by Learned Authorised Representative, would not apply to the facts relating to availment of CENVAT credit. Furthermore, insofar as the issue relating to 'dumpers' and supplies is concerned the contention of Revenue is that these become eligible only with a specific inclusion with effect from 28th June 2012. *Per contra* we find that in *re Mangalam Cements Ltd,* in an identical issue before the Tribunal, it was held that

> *'5. Being aggrieved the appellant is before this Tribunal. The learned Counsel for the appellant urges that the issue is no longer res-integra and Division Bench of this Tribunal in M/s SD Bansal Iron and Steel Pvt. Ltd. vs. CCE, Bhopal reported in 2017 – TIOL – 784 – CESTAT – DEL. have held in the said case that the appellant has used dumpers/tippers for movement of raw materials such as ingots and billets within the factory. Movement of coal as well as other finished products from one part of the factory to the other have also been handled by making use of dumpers and tippers. Further, Hon'ble Supreme Court in the case of CCE vs. Rajasthan*

State Chemical Works reported in 2002 – TIOL – 66 – SC – CX – LB observed that the processing and handling of raw materials is also in or in relation to manufacture, if integrally connected with further operation leading to manufacture of goods. Accordingly, dumpers tippers which are used within the factory will be entitled to Cenvat credit as capital goods. So far the issue of credit on locomotive engine is concerned, the learned Counsel placed reliance on the coordinate Bench ruling of this Tribunal in the case of CCE, CUS & ST, BBSR – I vs. Bhushan Steel Ltd. reported in 2012 (286) E.L.T. 745 (Tri. – Kolkata), wherein the issue was of credit of duty paid on diesel locomotive used within factory premises. It was held that diesel locomotive used to carry molten metals in torpedo ladle car in the process of manufacturing of iron and steel products in the integrated steel plant, having railway siding within the factory premises and laid down lines within the factory connecting one plant to another plant for movement of raw material, semi-finished and finished goods, Cenvat credit of duty paid on the diesel locomotive is admissible in terms of Rule 3 of Cenvat Credit Rules, 2004.'

7. In view of the said decision and several others of similar nature, we find that the original authority was not correct in determining the ineligibility for CENVAT credit on 'dumpers' and supplies relating to. The sole ground for denial of credit on 'annual maintenance contract' service is that these are not used directly in manufacture of excisable goods and that 'windmills' themselves are not finished products liable to duties of central excise. We find that the Hon'ble High Court of Bombay, in *re Endurance Technology Pvt Ltd*, has considered the identical issue and concluded that

'5. On perusal of these Rules, it becomes clear that the management, maintenance and repair of windmills installed by the respondents is input service as defined by clause "l" of Rule 2. Rule 3 and 4 provide that any input or capital goods received in the factory or any input service received by manufacture of final final product would be susceptible to CENVAT credit. Rule does not say that input service received by a manufacturer must be received at the factory premises. The judgments referred to above, also interpret the word "input" service in similar fashion.

In the case of Commissioner of Central Excise, Nagpur v. Ultratech Cement Ltd. [cited supra], the Division Bench of this Court held that the definition of "input service" is very wide and covers not only services which are directly or indirectly used in or in relation to manufacture of final product but also includes various services used in relation to business of manufacture of final product. The expression "activities" in relation to business is also discussed in this judgment by referring to judgment of Apex Court.

In the case of Deepak Fertilizers & Petrochemicals Corporation Ltd. v. C.C.Ex. Belapur [cited supra] the Division Bench held as under :

> *"The definition of the expression 'input service' covers any services used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products. The words 'directly or indirectly' and 'in or in relation to' are words of width and amplitude. The subordinate legislation has advisedly used a broad and comprehensive expression while defining the expression 'input service'. Rule 2(l) initially provides that input service means any services of the description falling in subclauses (i) and (ii). Rule 2(l) then provides an inclusive definition by enumerating certain specified services. Among those services are services pertaining to the procurement of inputs and inward transportation of inputs. The Tribunal, proceeded to interpret the inclusive part of the definition and held that the Legislature restricted the benefit of Cenvat credit for input*

> *services used in respect of inputs only to these two categories viz. for the procurement of inputs and for the inward transportation of inputs. This interpretation which has been placed by the Tribunal is ex facie contrary to 'the provisions contained in Rule 2(l). The first part of Rule 2(l) inter alia covers any services used by the manufacturer directly or indirectly, in or in relation to the manufacture of final products. The inclusive part of the definition enumerates certain specified categories of services. However, it would be farfetched to interpret Rule 2(l) to mean that only two categories of services in relation to inputs viz. for the procurement of inputs and for the inward transportation of inputs were intended to be brought within the purview of Rule 2(l). Rule 2(l) must be read in its entirety. The Tribunal has placed an interpretation which runs contrary to the plain and literal meaning of the words used in Rule 2(l). Moreover as we have noted earlier, whereas Rule 3(l) allows a manufacturer of final products to take credit of excise duty and Service Tax among others paid on any input or capital goods received in the factory of manufacturer of the final product, insofar as any input service is concerned, the only stipulation is that it should be received by the manufacturer of the final product. This must be read with the broad and comprehensive meaning of the expression 'input service' in Rule 2(l). The input services in the present case were used by the appellant whether directly or indirectly, in or in relation to the manufacture of final products. The appellant, it is undisputed, manufactures dutiable final products and the storage and use of ammonia is an intrinsic part of that process."*

8. Respectfully following the above decisions, we find no merit in the appeal of Revenue which is dismissed

(Order pronounced in the open court on 22/11/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*