

**CUSTOMS, EXCISE AND SERVICE TAX APPELLAT TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Division Bench – Court No. - I

Excise Appeal No.23786 of 2014

(Arising out of Order-in-Original No.VSP-EXCUS-001-COM-013-14-15 dated 24.09.2014 passed by Commissioner of Central Excise, Customs & Service Tax, Visakhapatnam.)

M/s. Berry Alloys Limited

(Plot No.368, APIIC Growth Centre, Bobbili-535558, Vizianagaram District, Andhra Pradesh.)

...Appellant

VERSUS

Commissioner of Central Tax, Visakhapatnam-I

.....Respondent

(Central Excise Building, Port Area, Visakhapatnam-530035.)

APPEARANCE

Shri R. Murlidhar, Advocate for the Appellant (s)
Shri Hanuma Prasad, Authorized Representative

**CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI P.V.SUBBA RAO, MEMBER(TECHNICAL)**

FINAL ORDER NO. A/30058/2022

DATE OF HEARING : 28 February 2022

DATE OF DECISION : 09 May 2022 .

P.K.CHOUDHARY :

M/s. Berry Alloys Limited (hereinafter referred to as the Appellant) is engaged in the manufacture of Silico Manganese classifiable under Chapter Heading 72 of the First Schedule to the Central Excise Tariff Act, 1985. The Appellant has been availing Cenvat Credit on various inputs, capital goods and input services. Pursuant to an audit, a Show Cause Notice dated 10.06.2013 was issued alleging that the Appellant had availed credit during the period from September 2010 to July 2012 to the tune of Rs.1,25,71,873/- on various capital goods which appear to be not eligible for credit under the definition of capital goods. The Appellant assailed the allegations contained in the Show Cause Notice vide their reply dated 06.09.2013 and contended

that they are entitled to take credit on the disputed goods. The Appellant also filed a Written Submission at the time of personal hearing before the Adjudicating authority along with an Annexure duly certified by a Chartered Engineer along with details of utilization area, with description and the main equipments to which it related in the worksheet. The Ld.Commissioner of Central Excise, Visakhapatnam-I Commissionerate passed the impugned order and confirmed the demand as proposed in the Show Cause Notice and imposed equal penalty. Hence the present Appeal before the Tribunal.

2. The Ld.Advocate, appearing on behalf of the Appellant, submitted that the Ld.Commissioner has not taken into consideration the various submissions of the Appellant. The Appellant had filed Chartered Engineer's Certificate regarding utilization of various items. No finding has been given by the Ld.Commissioner in respect of the Chartered Engineer's Certificate. It is his submission that the Chartered Engineer's Certificate indicates whether the various items were used in the factory and its purpose. When an expert viz. a Chartered Engineer has examined each and every disputed item and has considered its usage and its necessity, the same cannot be questioned unless there is a contra evidence. The Ld.Advocate further submitted that the Ld.Adjudicating authority has denied the Cenvat credit on the sole ground that the capital equipments in question are embedded to earth and hence become immovable property. The Ld.Advocate also argued that the Show Cause Notice has been issued on 21.06.2013 for the period September 2010 to July 2012. The Cenvat credit taken has been properly reflected in the monthly ER-1 returns. There is no column in the ER-1 to show the credits taken individually. The returns also does not call for invoice-wise details of Cenvat credit availed. Since the Cenvat Credit has been properly disclosed in the ER-1 return, the question of suppression does not arise. It is the case of the Appellant that they were under the bona fide belief that they are eligible for the Cenvat credit on the goods in question and therefore in such a situation the question of suppression does not arise.

3. The Ld.Authorized Representative, appearing on behalf of the Department, submitted that the Appellant utilized Cenvat credit on steel items for laying foundation/making structures for support of capital goods and therefore the Appellant utilized Cenvat credit irregularly. He further submits that the Appellant failed to adduce any evidence that the details of these items of capital goods fabricated was declared in ER-1 returns filed by the Appellant. It is his submission that the drawings and designs of the capital goods claimed to have been fabricated with the materials used were produced before the Adjudicating authority failing which it could not be ascertained as to how much quantity of structural steel materials were used for various items of capital goods as claimed to have been fabricated. As regards limitation, it is submitted that the irregular availment of Cenvat has come to light only after conducting audits of the Appellant. Accordingly, he prayed that the Appeal, being devoid of any merits, may be dismissed.

4. Heard both sides and perused the Appeal records.

5. Both sides have filed synopsis and Written Submissions. However, the Ld.Advocate on behalf of the Appellant, has also filed a compilation of relied upon judicial decisions. We find that during the audit for the period from September 2010 to July 2012, it was noticed that the Appellant had taken Cenvat credit on itsms namely Plates, Angles/MS Angles, ISHC, HR Coils, Channels/MS Channels, MS Lancing Pipes, MS Rounds, MS Bars Short length, Metal Roofing Sheets, SS Plates, MS Plates, Joists, Lightening Arrestors, ISMB, ISMB 600, HR Plates, CI Pipes, MS Joists, HR SS Plates, HR Steel etc. which are classifiable under Chapter Heading 72 and 73 of the Central Excise Tariff Act, 1985 as capital goods. According to the Revenue the aforesaid items did not appear to be covered under the category of capital goods in terms of Rule 2(a) of the Cenvat Credit Rules, 2004, as the aforesaid items were either used as parts in furnace and in pollution control equipments etc..The furnace and other equipments are constructed part by part at site and attached by foundation to earth and the change of identity

from the parts used for the furnace and other equipments takes place in the course of the construction and erection of the same and do not fulfill the conditions of mobility and marketability to be accorded the status of 'goods'. For this purpose a Show Cause Notice dated 10.06.2013 was issued to the Appellant raising a demand of Rs.1,25,71,873/-. We find that the Appellant is a manufacturer of Silico Manganese which are excisable product. It takes Cenvat credit on the Excise Duty/Service Tax paid by it under the Cenvat Credit Rules, 2004. During the period under dispute the Appellant availed Cenvat Credit on Plates, Angles/MS Angles, ISHC, HR Coils, Channels/MS Channels, MS Lancing Pipes, MS Rounds, MS Bars Short length, Metal Roofing Sheets, SS Plates, MS Plates, Joists, Lightening Arrestors, ISMB, ISMB 600, HR Plates, CI Pipes, MS Joists, HR SS Plates, HR Steel etc. by treating these goods as 'inputs' within the meaning of Rule 2 (k) of Cenvat Credit Rules, 2004. These goods were used in the fabrication of furnace, pollution control equipments and other capital goods which were allegedly used in the factory of the Appellant in the manufacture of the finished goods.

6. We find that the main ground for denying the credit as discussed in the impugned order is that the Appellant failed to furnish sufficient documentary evidence that the impugned items were used in fabrication of capital goods/accessories/parts/components. The Chartered Engineer's Certificate though produced before both the authorities has not been considered at all. The said expert has given details regarding the manner and use of the impugned items. Further the fact of purchase of these items and their receipt in the factory of production is not in dispute. Revenue does not have a case that such purchased items were diverted by the Appellant in any manner. The first and foremost point is when the Chartered Engineer's Certificate was produced before the Adjudicating authority, it was incumbent on the authorities to either contradict the Chartered Engineer's Certificate or accept the same. In the absence of any contradictory Certificates on record holding otherwise that the inputs were used for fabrication of

machinery, the non-consideration of the Certificate issued by the Chartered Engineer by the Adjudicating authority seems to be not in consonance with law. Further, receipt of goods and thereafter use for fabrication as per Chartered Engineer's Certificate is not contested, but contested only on a point that the inputs do not fall under the category of capital goods and hence not eligible for Cenvat credit, will not support the case of the Revenue. Since the issue is no more *res integra* and is decided by the higher Courts, we find that the impugned order is unsustainable and is liable to be set aside. We find support from the judgement of Hon'ble Supreme Court in the case of CCE, Jaipur Vs. Rajasthan Spinning & Weaving Mills Ltd. [2010 (225) E.L.T. 481 (S.C.)], where the Hon'ble Supreme Court by relying on the decision of Commissioner of Central Excise, Coimbatore & Others vs. Jawahar Mills Ltd. & Others [2001 (132) ELT 3 (S.C.)], has dismissed the Appeal preferred by the Revenue by applying user test. The relevant paragraphs are reproduced :-

"6. Per contra, Mr. B.L. Narsimhan, learned counsel appearing on behalf of the assessee supported the decision of the Tribunal. He submitted that the issue sought to be raised by the Revenue in this appeal stands concluded in favour of the assessee by a decision of this court in Commissioner of Central Excise, Coimbatore & Ors. v. Jawahar Mills Ltd. & Ors., wherein observing that the exemption notification must be so construed as to give due weight to the liberal language it uses and that any goods that may be used in the factory of the manufacturer of final product would be "capital goods" and would be entitled to Modvat credit. It was, thus, asserted that the said items used in the fabrication of chimney, which in turn is an important component of diesel generating set, qualify the test of "capital goods" and would be entitled to MODVAT credit.

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11. In *Jawahar Mills Ltd. (supra)*, heavily relied upon by the learned counsel for the assessee, the question which came up for consideration was whether the claim of modvat credit by some manufacturers in respect of certain items by treating them as capital goods in terms of Rule 57Q was in order. Some of the items under consideration were power cables, capacitors, control panels, cable distribution boards, air compressors, etc. The Court examined the question in the light of the definition of capital goods given in Explanation to Rule 57Q, which read as follows :

"capital goods" means--

(a) machines, machinery, plant, equipment, apparatus, tools or appliances used for producing or processing of any goods or for bringing about any change in any substance for the manufacture of final products;

(b) components, spare parts and accessories of the aforesaid machines, machinery, plant, equipment, apparatus, tools or appliances used for aforesaid purpose; and

(c) moulds and dies, generating sets and weighbridges used in the factory of the manufacturer."

12. Inter alia observing that capital goods can be machines, machinery, plant, equipment, apparatus, tools or appliances if any of these goods is used for producing or processing of any goods or for bringing about any change in the substance for the manufacture of final product, although this view was expressed in the light of the afore-noted definition of "capital goods" in the said Rule, which is not there in Rule 57Q, as applicable in the instant case, yet the "user test" evolved in the judgment, which is required to be satisfied to find out whether or not particular goods could be said to be capital goods, would apply on all fours to the facts of the present case, in fact, in para 6 of the said judgment, the court noted the stand of the learned Additional Solicitor General, appearing for the Revenue, to the effect that the question whether an item falls within the purview of "capital goods" would depend upon the user it is put to.

13. Applying the "user test" on the facts in hand, we have no hesitation in holding that the steel plates and M.S. channels, used in the fabrication of chimney would fall within the ambit of "capital goods" as contemplated in Rule 57Q. it is not the case of the Revenue that both these items are not required to be used in the fabrication of chimney, which is an integral part of the diesel generating set, particularly when the Pollution Control laws make it mandatory that all plants which emit effluents should be so equipped with apparatus which can reduce or get rid of the effluent gases. Therefore, any equipment used for the said purpose has to be treated as an accessory in terms of Serial No. 5 of the goods described in column (2) of the Table below Rule 57Q.

14. We are, therefore, of the opinion that the Tribunal was correct in law in holding that the assessee was entitled to avail of modvat credit in respect of the subject items viz. steel plates and M.S. channels used in the fabrication of chimney for the diesel generating set, by treating these items as capital goods in terms of Rule 57Q of the Rules."

In view of the above discussions and by respectfully following the law as laid down by the Hon'ble Supreme Court, we set aside the impugned order and allow the Appeal filed by the Appellant with consequential relief, as per law.

(Order pronounced in the open court on 09.05.2022.)

(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

(P.V.SUBBA RAO)
MEMBER (TECHNICAL)