BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 21.08.2023

PRONOUNCED ON: **30.01.2024**

CORAM:

THE HONOURABLE **DR.JUSTICE ANITA SUMANTH**
AND
THE HONOURABLE **MR.JUSTICE R.VIJAYAKUMAR**

C.M.A.(MD)Nos.910 to 914 of 2018
and
C.M.P.(MD)Nos.7545, 7547, 7551 to 7553 of 2023

M/s.India Cements Limited,
Represented by its Authorised Signatory,
T.S.Padmanaban. ...Appellant in all appeals

/Vs./

Commissioner of Customs,
Central Excise & Service Tax,
Tirunelveli. ...Respondent in all appeals

COMMON PRAYER:- Appeals - filed under Section 35G of the Central Excise Act, 1944, to set aside the impugned final Order No.40498/2018, No.40866/2018, No.40867/2018, No.40868/2018, No.40869/2018 dated 28.02.2018, 13.03.2018, 13.03.2018, 13.03.2018 and 13.03.2018 arising

out of Appeal No.E/40444/2015-DB, No.E/40093/2017-DB, No.E/40094/2017-DB, No.E/41464/2017-DB, No.E/41465/2017-DB, passed by the Customs, Excise & Service Tax Appellate Tribunal, Chennai respectively and allow these appeals.

Appearance in all appeals:

For Appellant : Mr.N.Sri Prakash
for Mr.S.P.Maharajan
For Respondent : Mr.N.Dilipkumar
Standing Counsel for customs

COMMON JUDGMENT

(Judgment of the Court was delivered by **DR.ANITA SUMANTH, J.)**

The appellants have challenged the final order passed by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), Chennai dated 28.02.2018. The Appellant is a manufacturer of cement under the provisions of the Central Excise Act 1985 ('Act'). It had set up a Captive Power Plant (CPP) within its factory premises at Sankar Nagar, Tirunelveli District.

2. The Appellant has two other factories where cement is manufactured at Sankari, Salem District and Dalavoi, Perambalur District and a cement grinding unit at Chennai (referred to hereinafter as 'sister units'). Under an agreement dated 31.08.2012 entered into with the Tamil Nadu Generation and Distribution Corporation Limited ('TANGEDCO') the appellant had been permitted to wheel out a portion of the energy generated by the CPP to TANGEDCO for adjustment against drawal of electricity from the grid by the sister units. The drawal is not for cost and no consideration is received by the Appellant for the same.

3. The appellant had imported coal for the generation of electricity in the CPP availing CENVAT credit of Counterveiling Duty (CVD) on such imports. The imports span the period September 2012 to May 2013. The present litigation commenced with the show cause notice issued on 30.09.2013. The department alleges that no statement of accounts has been maintained for the receipt and consumption of coal for production of electricity.

4. Since the electricity generated had been both consumed in the factory at Sankar Nagar as well as wheeled out to the sister units, the respondents alleged contravention of Rule 6(1), 6(2) and 6(3) of the CENVAT Credit Rules, 2002 ('CCR'), proposing the demand of duty, interest and penalty. The specific allegation was in regard to the availment of CENVAT credit in respect of the quantum of power wheeled out on the ground that it does not fall within the definition of '*input service'* under Rule 2(k) and Rule 2(i) of the CCR.

5. The appellant responded on 16.06.2014 refuting the allegations put forth. It confirmed that separate accounts were, indeed, being maintained as far as the import and utilization of coal was concerned. They also referred to the correspondences exchanged with the department that reflected the availment of CENVAT credit in relation to the power consumed captively and wheeled out through the grid.

6. The Department had relied upon the judgment of the Hon'ble Supreme Court in the case of *Maruthi Suzuki Ltd V.*

Commissioner of Central Excise, Delhi[1] and the Appellant distinguished the same on facts. The Appellant relied instead upon a decision in *Commissioner of Central Excise, Chennai V. M/s. SRF*[2] of this Court as well as several decisions of the CESTAT in support of their entitlement to the entire credit of duty paid on inputs irrespective of the admitted position that a portion of the power have been transferred to their sister units located elsewhere.

7. In any event, and by way of abundant caution, the appellant reversed the proportionate credit towards inputs and input service, attributable to the value of the power transferred to the sister units without prejudice to their right of claiming the same as refund in accordance with law. The details of credit reversed and the periods are as follows:

1 2009(240) ELT 641(SC)

2 2013(298) ELT 521 (Mad.)

Sl. No	Date of Refund Claim	Period	Refund Amount Involved (In rupees)	SCN NUMBER & DATE	OIO NUMBER & DATE	OIA NUMBER & DATE	Second Appeal Number	CESTAT FINAL ORDER NUMBER AND DATE	CMA No.
1	27.10.2024	Sep, 2012 to May, 2013	75,72,120.29/-	1/2015 dated 30.01.2015	R-54/2015 dated 19.10.2015	COMMON Order 117 & 118/2016 dated 17.10.2016	E/40093/2017	40866/2018 dated 13.03.2018	911/2018
		June, 2013 to Nov, 2013	1,20,64,493.33/-				E/40094/2017	40867/2018 dated 13.03.2018	912/2018
		Totalling to	1,96,36,616/-						
2	10.12.2014	Dec, 2013 to Oct, 2014	75,04,407/-	4/2015 dated 09.03.2015	R-55/2015 dated 19.10.2015				
3	21.12.2015	Nov, 2014 to July, 2015	84,99,343/-	1/CE/2016 dated 21.01.2016	R-09/2016 dated 23.02.2016	COMMON Order TNL-CEX-000-APP-36 & 37/2017 dtd 21.04.2017	E/41464/2017	40868/2018 dated 13.03.2018	913/2018
4	21.04.2016	Aug, 2015 to Jan, 2016	46,38,324/-	4/2016 dated 12.05.2016	R-67/2016 dated 14.07.2016		E/41465/2017	40869/2018 dated 13.03.2018	914/2018

8. Consequent on the SCN dated 30.09.2013 and response filed, an order in original came to be passed on 08.12.2014 and the issues framed by the authority were as follows:

> *"4.2……*
> *1. Whether ICL is entitled for the full credit of duty on inputs and input services used for generation of electricity at their CPP, while a substantial portion of the electricity so generated is wheeled out to the grid of TANGEDCO for distribution to and drawal by their other units at Salem, Dalavoi and Chennai?;*

2. Whether ICL, is liable to pay an amount equal to 6% of the value of electricity wheeled out to the grid of TANGEDCO in terms of rule 6(3)(i) of CCR?"2

9. After a detailed consideration of the matter, the proposals under the show cause notice were confirmed as were the demands of duty, interest and penalty. Parallel with these proceedings, the appellant had sought refund of the credit reversed for the periods (i) September 2012 to May 2013 (ii) June 2013 to November 2013 (iii) December 2013 to October 2014 (iv) November 2014 to July 2015 (v) August 2015 to January 2016. Show cause notices came to be issued proposing to reject the prayer for refund.

10. The appellant replied to the show cause notices reiterating their entitlement of refund relying on the ratio of several cases. Orders came to be passed confirming the proposal to disallow the claim for refund as against which first appeals were filed, that met the same fate.

11. Appeals came to be filed before the CESTAT challenging order-in-original dated 08.12.2014 as well as the order of the first

appellate authority confirming the rejection of refund that were dismissed, as against which order the present five appeals have been filed.

12. The submissions of the appellant revolve around the fact that electricity qualifies as an input for the grant of CENVAT credit under the CCR 2004. The excess electricity generated has not been sold as a commodity to outsiders but merely transferred to its own duty paying concerns.

13. Without prejudice, they also argued that the impugned demand at 6% on the notional value of the electricity wheeled out is arbitrary and has no basis. That apart, electricity constitutes neither excisable nor exempt goods under the Act, as no rate of duty has been prescribed under the tariff. If at all it had been an excisable commodity, duty would have been remitted that would have rendered the entire exercise revenue neutral.

14. They further argued that the Electricity Act 2003 defines captive generating plant as a power plant, setup by any person to

generate electricity for its own use or as a plant setup by a society or association of persons for generating electricity for the use of the members of the society/association. Hence the Electricity Act contemplated the wheeling of power from a CPP for the use of member and sister concerns.

15. They also rely on the amendment to the CENVAT Credit Rules in 2011, as per which requirement of usage in a particular location stands deleted. Per contra, respondents argue that captive use would mean consumption of goods only within the factory of manufacture and thus, any electricity wheeled out to TANGEDCO and used by another unit cannot said to be captively consumed by the appellant.

16. We have heard the rival contentions advanced by the parties and have studied the files as well as statutory provisions and Rules. The definition of 'input' under Rule 2(g) of the CCR 2002 and 2004 contained a clear mandate that inputs must be consumed within the factory of production/generation and reads as follows:-

> *"Rule 2 Definitions.- In these rules, unless the context otherwise requires,-*
>
> *……*
>
> *(g) "input" means all goods, except [light diesel oil] (inserted by M.F. & C.A. (D.R) Notification No. 13/2003-C.E.(N.T.), dated 1-3-2003.) high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not, and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used for manufacture of final products or for any other purpose, within the factory of production."*

17. The above definition is what had come up for consideration in the case of *Maruti Suzuki Ltd.*(supra), referred to in extenso by both parties. The definition contains three parts, as amplified by the Bench in that case. The first component relates to the description of the goods that would qualify as 'input' and is wide and inclusive. The second component relates to the use of those inputs as aforesaid in manufacture. The dispute arises from the reference to 'place of use', which is the third component of the definition.

18. The issue considered in that case was the reversal of CENVAT credit proportionate to the extent of power wheeled out by the appellant to its sister units, vendors and joint ventures in terms of Rule 2(g) of the CCR 2002. Maruti Suzuki Ltd., engaged in the business of manufacturing motor vehicles, had installed gas turbines in their factory for generation of electricity of 20 Megawatts each.

19. Till June 2002 as that assessee was using natural gas as fuel for running turbines, there was no excise duty liability and thus, the question of availing CENVAT credit did not arise. During July to December 2002, it used diesel to run the turbines and from February 2003, naphtha as fuel to run the turbines.

20. CENVAT credit was claimed on the purchase of naphtha for generation of electricity in gas turbines. There was a common distribution point for the electricity generated in all three turbines as well as the diesel generator set. To be noted, no CENVAT credit was claimed in respect of the diesel used as fuel.

21. From the common generation point some portion of the electricity was consumed captively and some was wheeled to its joint ventures, vendors etc. The assessee had contested the denial of CENVAT credit on the electricity wheeled to its joint ventures and vendors.

22. The revenue had argued that it is only in the case of inputs used in, or in relation to manufacturing of final products, that CENVAT credit was admissible. The input in that case had been used for production of electricity which was not excisable. The argument was that the Rule covers all inputs as long as they were used in or in manufacturing of final products directly or indirectly.

23. Additionally, they argued that all the inputs mentioned therein had to be used only within the factory or production. That is the point upon which the present appeals revolve. In the interests of clarity, we reiterate that the respondents have not in the matters before us, at any point in time, argued or pursued the stand that electricity is not an 'input' perse, that is not entitled to the grant of CENVAT credit.

24. The stand is restricted to the availment of credit by the principal unit only that is located proximate to the location of the CPP.

25. Paragraphs 19 and 20 of the judgment read as follows:-

> *"19. The question which still remains to be answered is: whether an assessee would be entitled to claim CENVAT credit in cases where it sells electricity outside the factory to the joint ventures, vendors or gives it to the grid for distribution? In the case of Collector of Central Excise v. Rajasthan State Chemical Works reported in 1991 (55) ELT 444 (SC) 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.*

This view is also expressed in para 9 of the judgment of this Court in the case of Collector of Central Excise v. Solaris Chemtech Limited - *(2007) 214 ELT 481 (SC). Further, our view is supported by the observations of this Court in the case of* Vikram Cement v. Commnr. Of Central Excise, Indore - *2006 (194) ELT 3 (SC) which is quoted below:-*

> *"It appears to us on a plain reading of the clause that the phrase "within the factory of production" means only such generation of electricity or steam which is used within the factory would qualify as an immediate product. The utilization of inputs in the generation of steam or electricity not being qualified by the phrase "within the factory of production" could be outside the factory. Therefore, whatever goes into generation of electricity or steam which is used within the factory would be an input for the purposes of obtaining credit on the duty payable thereon."*

> *20. To sum up, we hold that the definition of "input" brings within its fold, inputs used for generation of electricity or steam, provided such electricity or steam is used within the factory of production for manufacture of final products or for any other purpose. The important point to be noted is that, in the present case, excess electricity has been cleared by the assessee at the agreed rate from time to time in favour of its joint ventures, vendors etc. for a price and has also cleared such electricity in favour of the grid for distribution. To that extent, in our view, assessee was not entitled to CENVAT credit. In short, assessee is entitled to credit on the eligible inputs*

utilized in the generation of electricity to the extent to which they are using the produced electricity within their factory (for captive consumption). They are not entitled to CENVAT credit to the extent of the excess electricity cleared at the contractual rates in favour of joint ventures, vendors etc., which is sold at a price. "

26. While the appellant would argue that judgment in *Maruti Suzuki Ltd.* (supra) did not involve the question that arises in this case, the respondents would maintain that it was on point. They specifically draw attention to the paragraphs set out above to support their argument that the final product must be consumed in the original location where input had been consumed.

27. The narration of facts as captured in paragraphs 1 and 7 of the judgment in *Maruti Suzuki* is to the effect that the supply of electricity in that case was to sister concerns, vendors and third parties, and at cost. Thus, the Court was concerned with the factual scenario where the power was sold to other units and whether, in such circumstances, such sale would qualify for the claim of CENVAT credit.

28. In the present case, the electricity has not been sold but has

been supplied though wheeling by TANGEDCO to sister units located elsewhere. All units are engaged in manufacture/grinding of cement and form part of the same group of companies. They admittedly hold separate licenses for manufacture and are independent assessees. In our considered view, the facts that the power in this case has not been sold for consideration and has only been shared with the sister units will be a relevant consideration.

29. That apart, the judgment relates to an interpretation of the term 'input' in regard to production during the period July 2002 and December 2002. The definition of 'input' taken into account was with reference to the definition that was applicable then and with reference to transactions at the relevant point time. However, the definition of 'input' stood substituted w.e.f. 01.04.2011 vide Notification 3/2011-C.E.(N.T), dated 01.03.2011 with effect from 01.04.2011, reading thus:-

> *"(k) "input" means-*
>
> *(i)all goods used in the factory by the manufacturer of the final product; or*
>
> *(ii) any goods including accessories, cleared along with the final product, the*

value of which is included in the value of the final product and goods used for providing free warranty for final products; or
(iii) all goods used for generation of electricity or steam for captive use; or
(iv) all goods used for providing any output service;"

30. Upon a comparison of 2002 and 2004, Rules one would see that under the 2002 Rules, the mandate was categoric that an input must be consumed '*within the factory or production'*. Under the substituted Rules however, inputs have been categorized into four categories

(i) goods used '*in the factory'* by the manufacturer of the final product

(ii) all goods including accessories cleared along with the final product, the value of which is included in the value of the final product and goods used for providing free warranty for final products

(iii) all goods used for generation of electricity or steam for captive use and

(iv) all goods used for providing any output service.

31. Clauses (ii) and (iv) are not relevant for the purposes of this order. Importantly, a distinction has been envisaged between the goods used 'in the factory' by the 'manufacturer of the final product' and the goods used for 'generation of power'. While the former insists that the goods must be used *'in the factory'*, there is no stipulation of place as regards the goods in clause (iii). Therefore, we find merit in the position that electricity captively generated is an input, wherever used by the assessee concerned. The use of the term ‘captive’ is, in our view a qualification of the location where it is generated and not of the location where it is used.

32. In the present appeals, the period in question is September 2012 to May 2013 to which the substituted definition of ‘input’ would apply. There is a substantial cost in the setting up of a CPP. Perhaps the object of the substitution is itself that such expenditure must go to benefit the company as a whole, including the sister concerns to which supply is made.

33. There is no dispute on facts in relation to the power supplied gratis to the sister units. Thus the admitted facts that commend themselves to us are that

(i) the captive power plant has been set up at substantial cost by the appellant at one of the company locations.

(ii) the electricity generated has been used as 'input' only within the Appellant group of companies though at different locations.

(iii) the consumption is in pari materia with the power generation and there is no inflated claim.

(iv) the electricity generated has been wheeled through the grid and thus the process of supply to each of the sister units is transparent and in accordance with the terms of, and procedure under the Wheeling agreement entered into with TANGEDCO.

(v) being related parties and units of one company, it is possible for there to be a check on the methodology adopted by the parties for the transfer of the input, the utilization of the

'input' itself and all other relevant determinants by the department.

34. On a careful consideration of the parameters as above, we are of the view that the appellant must succeed on the specific fact pattern as arising in this appeals. These appeals are allowed in terms of this order. Miscellaneous petitions are closed. In the circumstances there shall be no order as to costs.

[A.S.M.J.,] & [R.V.J.,]
30.01.2024

Index :Yes/No
Speaking Order/Non-Speaking Order
Neutral Citations:Yes/No
mpl

TO:

1.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

DR.ANITA SUMANTH, J.
AND
R.VIJAYAKUMAR, J.

mpl

Pre-delivery Common Judgment delivered in
C.M.A.(MD)Nos.910 to 914 of 2018

Dated:
30.01.2024