

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.2

Excise Appeal No.76720 of 2018

(Arising out of Order-in-Appeal No.20/CE/BBSR-GST/2018 dated 14.02.2018 passed by Commissioner(Appeals), GST, CX & Customs, Bhubaneswar.)

M/s. Maithan Ispat Limited

(Kalinga Nagar Industrial Complex, At-Dasamania, P.O.:Jakhapura, Dist: Jajpur-755026, Odisha.)

...Appellant

VERSUS

Commissioner of CGST & CX, Bhubaneswar Commissionerate

.....Respondent

(C.R.Building, Rajaswa Vihar, Bhubaneswar, Odisha.)

APPEARANCE

Shri K.K.Acharya, Advocate for the Appellant (s)

Shri K.Chowdhury, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

FINAL ORDER NO. 75538/2022

DATE OF HEARING : 4 July 2022

DATE OF DECISION : 30 September 2022

P.K.CHOUDHARY :

The Appellant is engaged in the manufacture of sponge iron and MS billet. The Books of Accounts of the Appellant pertaining to Financial Year 2012-13 and 2013-14 were audited by the Auditor General(Odisha), Bhubaneswar and an objection to availment of Cenvat Credit by the Appellant amounting to Rs.28,522/- on "Welding Electrodes" as capital goods was raised. This objection was raised on the ground that the Tribunal in the case of SAIL Vs. CCE, Ranchi [2008 (222) ELT 233 (Tri.-Kolkata)] had held that welding electrodes are not eligible for Cenvat credit and the said decision of the Tribunal was upheld by the Hon'ble Supreme Court as reported in 2008 (229) ELT A 127 (SC). On the basis of such objection the jurisdictional range

Superintendent required the Appellant to pay back the aforesaid amount of Rs.28,552/- with interest and to furnish the payment particulars enabling to close the audit objection. In response thereto, the Appellant informed that welding electrodes are used for fabricating Steel Formers (size: Diameter 1100mm & Height 2350mm with 16mm rods as Spiders inside) which are consumed in its induction furnace and hence Cenvat credit thereon is admissible as having been used in the manufacture of its final product. Subsequently a Show Cause Notice dated 28.09.2015 was issued for recovery of Rs.28,552/- with interest and for imposition of penalty under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944. The Adjudicating authority confirmed the demand which was upheld by the First Appellate authority. Hence the present Appeal before the Tribunal.

2. Heard both sides and perused the Appeal records.

3. I find that the AG Auditors raised the objection in respect of availment of Cenvat Credit on Welding Electrodes in light of the decision of this Tribunal in the case of SAIL (supra), rendered on 17.07.2007, by placing reliance upon the Larger Bench decision in the case of Jaypee Rewa Plant [2003 (159) ELT 553 (Tri.-LB)], which was holding the field at the relevant point of time. On that ground, the Hon'ble Supreme Court dismissed the appeal against the Tribunal's decision in the case of SAIL (supra).

4. In its reply to the Show Cause Notice, the Appellant submitted that after the Tribunal's decision in the SAIL's case on 17.07.2007, the Hon'ble Rajasthan High Court in the case of Hindustan Zinc Ltd. [2008 (228) ELT 517 (Raj.)], decided on 01.07.2008 overruled the Larger Bench decision in Jaypee Rewa Plant case (supra), and held that welding electrodes used for repairs and maintenance of plant and machinery are eligible for Cenvat Credit both as capital goods as well as inputs. Admittedly the Revenue's appeal against the said Hindustan

Zinc Ltd. case has been admitted on 09.01.2009, however, the said judgement has not been stayed by the Hon'ble Supreme Court.

5. It may be worthwhile to note that till 2008 there were several decisions of different Benches of this Tribunal such as:-

- CCE, Belgaum Vs. Panyam Cements & Minerals Indus. Ltd.,
[2003 (160) E.L.T. 278 (Tri.-Bang.)]
- Kanoria Sugars & General Manufacturing Co. Vs. CCE
[1996 (87) E.L.T. 522 (Tri.)]
- CCE, Noida Vs. DSM Ltd.
[2003 (162) E.L.T. 987 (Tri.)]
- J.K. Cement Works Vs. CCE, Jaipur
[2007 (6) S.T.R. 60 (Tri.)]
- SAIL Vs. CCE, Ranchi
[2008 (222) E.L.T. 233 (Kol.)], and above all
- Jaypee Rewa Plant Vs. CCE, Raipur
[2003 (159) E.L. T. 553 (Tri.-LB)]

Wherein it was held that Cenvat Credit is not admissible on welding electrodes.

6. In 2007 the Tribunal in the case of Ramala Sahkari Chinni Mills Ltd. Vs. CCE, Meerut-I [2007 (211) E.L.T. 412 (Tri.-Del.)] held that welding electrodes are not eligible for credit either as capital goods or as inputs. This decision was appealed against in the Supreme Court as reported 2010 (260) E.L.T. 321 (S. C.) wherein the Hon'ble Supreme Court referred the issue, more particularly the question of interpretation of the term "*includes*" as used in the definition of 'Input', to a Larger Bench. The Larger Bench of the Supreme Court, as reported in 2016 (334) E.L.T. 3 (S.C.) disposed of the reference by holding that:-"*the word "include" in the statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension, and not with restriction*".

7. In the case of Hindustan Zinc Ltd., Vs. UOI [2008 (228) E.L.T. 517 (Raj)] the Hon'ble Rajasthan High Court overruled the Larger Bench decision of the Tribunal in Jaypee Rewa Plant case.

8. Subsequently, the Hon'ble Chhattisgarh High Court in the case of Ambuja Cements Eastern Ltd. Vs. CCE, Raipur [2010 (256) E.L.T. 690 (Chhattisgarh)] relied upon the decision of the Hon'ble Madras High Court in Commissioner Vs. India Cements Ltd. [2009 (238) E.L.T. 411 (Mad.)] to hold that the decision of the Larger Bench of the Tribunal in the case of Jaypee Rewa Plant is not good law.

9. Similar view has also been taken by different High Courts and the Tribunal in the following cases:-

CCE, Bangalore-I Vs. Alfred Herbert (India) Ltd., [2010 (257) ELT 29 (Kar.)]

CCE Vs. Hindusthan Engg. & Ind. Ltd., [2011 (264 ELT 161 (Cal.)]

CCE, Meerut-I Vs. Monnet Sugar Ltd., [2011 (265) ELT 233 (Tri.-Del.)]

CCE Vs. Honeywell Sugars Pvt. Ltd., [2013 (5) TMI 264 (Tri.-New Delhi)] and

U.G. Sugar & Industries Ltd., Vs. CCE [2014 (311) ELT 665 (Tri.-Del.)]

10. In view of the decision of the Hon'ble Calcutta High Court in Hindusthan Engg. & Ind. Ltd.(supra), which is the jurisdictional High Court of this Bench, and particularly in the absence of any contrary decision holding the field, the issue regarding admissibility of Cenvat Credit on Welding Electrodes has to be decided in favour of the appellant, as the same being no longer *res integra*.

11. In any view of the matter, in light of the undisputed fact that the Appellant was regularly filing the periodic statutory Returns disclosing

therein the factum of availment of credit as impugned herein, to the satisfaction of the jurisdictional Authorities, the demand in the present case is barred by limitation and therefore, the penalty on the Appellant is not imposable under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11AC of the Act.

12. Also, the Show Cause Notice in the present case having been issued purely on the basis of the AG Audit objection, without any independent investigation, is not sustainable in law.

13. In view of the above discussion, the impugned orders cannot be sustained and are accordingly set aside. The Appeal filed by the Appellant is allowed with consequential relief, if any.

(Order pronounced in the open court on 30 September 2022.)

Sd/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

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