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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD

REGIONAL BENCH

SERVICE TAX APPEAL NO. 30122 OF 2018

(Arising out of Order-in-Original No. TTD-EXCUS-000-COM-04-17-18 dated 12.10.2017 passed by the Commissioner of Central Tax, GST Commissionerate, Tirupati.)

PEPSICO INDIA HOLDINGS (PVT.) LTD **.....Appellant**
3010, Peepul Boulevard, Sector 40,
Sri City, Satyavedu Mandal, Chittoor District,
Andhra Pradesh – 517 588.

VERSUS

Commissioner of Central Tax **.....Respondent**
GST Commisionerate, Tirupati
9/86-A, Amaravathi Nagar, West Church Compound,
Tirupati -517 502

WITH

EXCISE APPEAL NO. 31153 OF 2018

(Arising out of Order-in-Original No. TTD-EXCUS-000-COM-04-17-18 dated 12.10.2017 passed by the Commissioner of Central tax Tirupati)

MONDELEZ INDIA FOODS PVT. LTD **.....Appellant**
(Formerly M/s. Cadbury India Ltd.)
Sector 25, Sri City, Varadaiahpalem (M)
Chittoor District,
Andhra Pradesh – 517 544

VERSUS

Commissioner of Central Tax **.....Respondent**
GST Commisionerate, Tirupati
9/86-A, Amaravathi Nagar, West Church Compound,
Tirupati -517 502

APPEARANCE:

Shri B L Narasimhan, Advocate for the Appellant
Shri C. Mallikarjun Reddy, Authorized Representative for the Department

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 16.07.2021
DATE OF DECISION: 26.07.2021

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FINAL ORDER NO. A/30247-30248/2021

P. VENKATA SUBBA RAO

Both these appeals involve a common question as to whether or not the appellants are entitled to CENVAT Credit on the input services used in setting up their plants at the industrial township called Sri City after the definition of 'input service' under Rule 2(l) of the Cenvat Credit Rules, 2004 has been amended with effect from 1-4-2011. Consequently, if any CENVAT is recoverable from the appellants along with interest and if any penalty is imposable on them. The specific details of the two cases are as follows:

Appeal ST/30122/2018- Pepsico India Holdings (Pvt.) Ltd.

2. The appellant manufactures aerated water and other non-alcoholic beverages falling under Chapter 22 of the Central Excise Tariff. It had entered into a lease agreement with M/s. Sri City to lease land for a period of 99 years to set up a manufacturing plant. M/s Sri City paid service tax on the amounts charged by it for the leasing the land as well as on the amounts charged as development services. Similarly, services of consultants were obtained by the appellant to set up the plant on which also service tax was paid by the consultants. The appellant took CENVAT credit of the service tax amounting to Rs. 7,34,30,532/- so paid by the service providers between August 2014 to February 2015.

3. A show cause notice dated 16.12.2016 was issued by the Revenue to the appellant which culminated in the issue of the impugned order dated 12.10.2017. In this order, the CENVAT credit

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has been denied on the ground that the services in question do not qualify as 'input services' post 1.4.2011. The CENVAT credit has been ordered to be recovered along with interest and a penalty has also imposed under Section 11AC of the Act read with Rule 15 (2) of CCR, 2004.

Appeal E/31153/2018- Mondelez India Foods Pvt. Ltd.

4. The Appellant is engaged in the manufacture of Chocolates and other food preparations containing cocoa falling under CETSH 18063200 of the First Schedule to the Central Excise Tariff Act, 1985 [CETA]. It had entered into a lease and infrastructure deed agreement dated 07.08.2013 with M/s. Sri City Pvt. Ltd.[1] for lease of 134.10 acres of land in Domestic Tariff Zone in Sri City, for a period of 99 years to enable setting up of a new manufacturing plant on the land.

5. As per clause 2 of the agreement, Sri City had provided various infrastructure facilities known as 'Common Infrastructure Facilities 'as follows: -

a) Building a straight entry and exit road
b) Upgrading Central Express Highway
c) Upgrading the Raavi road to a complete, at least two-lane straight road,
d) Providing pedestrian and bicycle walkways adjoining the Ravi Road to provide access from Central Express Highway to the lease land
e) Providing adequate street lighting within Sri city and more particularly from the lease land and along the Central Express Highway and Raavi Road

[1] **Sri City**

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f) Providing parking spaces for trucks of the assessee within the designated truck parking lots in the DTZ area of M/s Sri City Private Limited
g) Providing uninterrupted water supply
h) Provision of power supply network
i) Provision of telecom infrastructure facilities
j) Provision of infrastructure facilities such as Sewage, Waste and Storm water i.e. Construction of Sanitary Treatment Plant and the connecting network, Storm Water discharge network and reservoirs for discharge of storm water from lease land.

6. Similarly, the appellant entered into agreements with other service providers for provision of various other services such as Engineering Services and Project Management Services involving supply of manpower, Lab analysis Services viz., soil testing, ground water testing, Landscaping, Bush Cutting and Irrigation package, etc. The service providers paid appropriate service tax on such services and based on the invoices raised by the service providers, the Appellant took CENVAT credit of the tax paid on such services as per Rule 2(l) of the CCR, 2004. The CENVAT credit was utilized for discharging the liabilities in July 2014 which was duly reflected in the ER-1 returns.

7. A show cause notice dated 06.12.2017 was served upon the appellant proposing to recover the alleged ineligible Cenvat credit of Rs. 10,33,10,938/- on the ground that services used for setting up of their factory is not covered in the definition of 'input service' after 01.04.2011. The CENVAT credit was proposed to be recovered under Rule 14 (1) (ii) of the CENVAT Credit Rules, 2004 read with sub-section (4) of section 11A of the Central Excise Act, 1944 along with

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interest under section 11AA. It was also proposed to impose a penalty under Rule 15(2) read with section 11AC.

8. The appellant contested the demand both on merits and on limitation. Not agreeing with the submissions of the appellant, the Learned Commissioner, in the impugned order, confirmed the demand as proposed along with interest and imposed a penalty equal to the disputed CENVAT credit amount under Rule 15(2) read with Section 11AC.

9. Hence, the appeals were filed on the following common grounds.

(a) The appellants are eligible for CENVAT credit of the disputed amount as input service.

(b) Without the services in dispute, the appellants cannot manufacture any of the final products and hence the services are used in the manufacture of the final product.

(c) On identical issue with respect to another unit set up in Sri City, in the case of **Kellogs India Pvt. Ltd Vs. Commissioner of Central Tax, Tirupathi**[2], this Bench had held as under.:

> "11. Therefore, we find that the services used in relation to setting up of a plant are neither specifically included nor specifically excluded during the relevant period. That takes us to the main part of the definition which, with respect to manufacturer allows CENVAT credit of services used in or in relation to manufacture whether directly or indirectly. This definition, in our considered view, is wide enough to cover in its compass any services used for setting up a Plant especially when the services are used for obtaining the land on lease. Without such land no factory can be set up nor can any manufacture take place. We find a direct nexus between the manufacture of the final products and the services used for setting up of plant by leasing the land."

(d) On the same issue, other Benches of this Tribunal have also taken the same view. They are as follows:

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[2] **GST 2020 (7) TMI 414 - CESTAT Hyderabad**

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i. CCE, Kolkata Vs. Texmaco UGL Rail Ltd – 2019 (7) TMI 1651-CESTAT, Kolkata
ii. Panasonic Energy India Co. Ltd Vs. CCE & ST, Vadodara-II - 2017-VIL-813- CESTAT-AHM-ST
iii. Honda Motorcycle & Scooter India Pvt. Ltd. Vs. CGST & CE-Alwar - 2018 (11) TMI 1588-CESTAT New Delhi
iv. Hindalco Industries Limited Vs. CGST, CE & Customs, Jabalpur -2019 (5) TMI 1620-CESTAT New Delhi
v. Supreme Industries Ltd. Vs. CCE & ST Vadodara – 2020 (1) TMI 1317 -CESTAT Ahmedabad
vi. Shiruguppi Sugar Works Ltd Vs. CGST & CE- Belgaum- 2019 (3) TMI 667 - CESTAT Ahmedabad

(e) The entire demand is time-barred and no case has been made out in the show cause notice and the impugned order for invoking extended period of limitation. It is undisputed that they had filed ER1 returns as required on time and have not suppressed any information.

(f) For the same reason, no penalty can be imposed on them.

10. Learned counsel for the appellants reiterates the above arguments. He submits that the confusion in the minds of the officers arose because of a change in the definition of 'input service' under the Rule 2(l) of Cenvat Credit Rules, 2004 with effect from 1.4.2011.

Before 1.4.2011, it read as follows:

"(l) "input service" means any service,-

(i) used by a provider of taxable service for providing an output service; or
(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal

and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing,

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financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal;

From 1.4.2011, it was amended as follows:

(l) "**input service" means any service**, -

(i) used by a provider of taxable service for providing an output service; or

(ii) **used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal**, and

includes services used in relation to modernisation, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal;

but excludes services,-

(A) specified in sub-clauses (p), (zn), (zzl), (zzm), (zzq), (zzzh) and (zzzza) of clause (105) of section 65 of the Finance Act (hereinafter referred as specified services), in so far as they are used for-

(a) construction of a building or a civil structure or a part thereof; or

(b) laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified services; or

(B) specified in sub-clauses (d), (o), (zo) and (zzzzj) of clause (105) of section 65 of the Finance Act, in so far as they relate to a motor vehicle except when used for the provision of taxable services for which the credit on motor vehicle is available as capital goods; or

(C) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee;"

11. Before 1.4.2011, the term 'input service' had a number of types of services included in the main part of the definition and then it had a 'inclusive' part of the definition which specifically provided for credit of service tax paid on services used in setting up of the plant. After

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1.4.2011, the definition was revised and it had three parts, the main part, an inclusion part and an exclusion part. **The cenvat credit on input services used in setting up of the plant was neither in the inclusive part of the definition nor in the exclusive part of the definition**. However, he would argue that these services were necessary to set up the plant and manufacture the goods. Thus, these services are directly connected to the manufacture of the goods and hence they are covered in the main part of the definition of the 'input service' after 1.4.2011 and therefore credit is available even though such services were no longer specifically in the inclusive part of the definition. Such a view was taken in the case of **Kellogs** by this Bench and in other cases cited above. He, therefore, prays that the appeals may be allowed and the impugned orders may be set aside.

12. Learned Departmental Representative vehemently opposes these arguments and supports the impugned orders and asserts that since the services related to setting up of a factory were removed from the inclusive part of the definition, it would mean no CENVAT credit was available. On a specific query from the bench, he submits that in the case of **Kellogs** this Bench held that CENVAT credit was available and the Revenue has appealed against the order which appeal is pending before the High Court of Andhra Pradesh for admission.

13. We have considered the arguments on both sides and perused the records.

14. The appellants had entered into an agreements to lease the land and to get various common facilities in the private industrial township

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called Sri City to set up their factories. It cannot be argued that manufacturing can take place without a factory nor can it be argued that a factory can be set up without the services in question. It is also not in dispute that M/s. Sri City, the service provider, paid service tax on the services.

15. The department wants to deny them the benefit of the CENVAT credit on the ground that 'services related to setting up of a factory' which were specifically included prior to 1.4.2011 were no longer specifically included post 1.4.2011.

16. We find that the definition of 'input service' prior to 1.4.2011 had two parts- a main part of the definition and an inclusive part of the definition. This inclusive part specifically included the services availed for setting up the factory. After 1.4.2011, it has three parts- a main part, an inclusive part and an exclusive part. The services used for setting up the factory are neither in the inclusive part of the definition nor the exclusive part of the definition. Therefore, such services were neither specifically included nor were specifically excluded.

17. It takes us to the main part of the definition which must be examined. If it is wide enough to cover the services in question, CENVAT credit will be available, otherwise it will not be available. The main part includes "services used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal." The term manufacture is not defined in the Rules.

18. The definitions as per rule 2 of CCR 2004 reads as follows:

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> **RULE 2. Definitions.** —(1) In these rules, unless the context otherwise requires,
>
> (a)
>
> (b)….
>
> (l)
>
> **(2) The words and expressions used in these rules and not defined but defined in the Excise Act shall have the meanings respectively assigned to them in the Excise Act**.

19. Since the term 'manufacture' is not defined in the Rules, the definition under the Central Excise Act, 1944 must be considered. Section 2(f) of the Central Excise Act defines 'manufacture' as follows:

> **2(f)** " manufacture" **includes any process**
>
> **i) incidental or ancillary to the completion of a manufactured product;**
>
> ii) which is specified in relation to any goods in the Section or Chapter notes of the Fourth Schedule as amounting to manufacture; or
>
> iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer;
>
> the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account.

20. Thus, the term 'manufacture' itself is very wide and includes anything incidental or ancillary to manufacture.

21. For a service to qualify as 'input service' under CENVAT Credit Rules, 2004 post 2011, the **service in question need not be covered even by the very wide definition of manufacture under section 2(f)** of the Central Excise Act. Any **service which is used not only in manufacture but also 'in relation to' manufacture**

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will also qualify as input service. The scope of input service is further enlarged with the expression **whether directly or indirectly** used in the definition of input service. Thus, there are:

a) Actual manufacture;
b) Processes incidental or ancillary to manufacture which are also manufacture;
c) Activities directly in relation to manufacture (i.e., in relation to 'a' and 'b' above);
d) Activities indirectly in relation to manufacture (i.e., in relation to 'a' and 'b' above);

22. All four of the above qualify as input service as per Rule 2(l) (ii) as applicable post 1.4.2011. Although **setting up the factory is not manufacture in itself, it is an activity directly in relation to manufacture**. Without setting up the factory, there cannot be any manufacture. Services used in setting up the factory are, therefore, unambiguously covered as 'input services' under Rule 2 (l) (ii) of the CENVAT Credit Rules, 2004 as they stood during the relevant period (post 1.4.2011). The mere fact that it is again not mentioned in the inclusive part of the definition makes no difference. Once it is covered in the main part of the definition of input service, unless it is specifically excluded under the exclusion part of the definition, the appellant is entitled to CENVAT credit on the input services used. This Bench has already taken this view in **Kellogs.** Similar views have been taken by the other Benches in the other cases mentioned above.

23. In view of the above, the impugned orders denying CENVAT credit and ordering its recovery along with interest and imposing

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penalties cannot be sustained. The impugned orders are set aside and the appeals are allowed with consequential reliefs, if any.

(Order Pronounced on 26.07.2021)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

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