IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Excise Appeal No.77734 of 2018

(Arising out of Order-in-Original No.81/Central Excise/Pr.Commr./2018 dated 28.03.2018 passed by Commissioner of CGST & Excise, Ranchi)

M/s Bharat Coking Coal Ltd.
Govindpur,Katras Mahuda Road, P.O.Sonardih,Dhanbad-828125

Appellant

VERSUS

Commr. of Central Excise & S.Tax, Ranchi
Central Revenue Building, 5A, Main Road, Ranchi-834001

Respondent

Appearance:
Shri Rajeev Kumar Agarwal, Advocate for the Appellant
Shri A.Roy, Authorized Representative for the Respondent

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE SHRI RAJU, TECHNICAL MEMBER

FINAL ORDER NO.75645/2021

DATE OF E-HEARING : 23.08.2021
DATE OF PRONOUNCEMENT : 07.10.2021

Per P.K.Choudhary :

The present appeal has been filed by M/s. Bharat Coking Coal Limited, assailing the Adjudication Order dated 28.03.2018 passed by the Ld. Commissioner, CGST & CX, Ranchi, whereby the Cenvat Credit of Rs.5,92,50,563/- has been denied on the services availed for setting up of Coal Handling Plant for the period from June 2013 to November 2015. The Ld. Commissioner has also imposed equivalent penalty and applicable interest.

2. Briefly stated the facts of the case are that the appellant is a subsidiary of Coal India Limited, a PSU, engaged in the business of mining and selling of coal at its mines located in the State of Jharkhand. In order to modernise the coal loading process so as to

facilitate coal loading within shortest possible time with the most advanced automated system, the appellant awarded contract to one, M/s. S K Samanta & Co. (the Contractor), for the work of "Planning, Designing, Engineering, Construction, Fabrication, Supply, Erection, Trial Run, Commissioning and Testing of Coal Handling Plant (CHP) of 5.0 Mtpa capacity with loading arrangements through 'SILO' consisting of all Civil, Structural, Electrical and Mechanical works and all other accessories and facilities required to make it complete in all respect along with approach road on Turn-Key basis".

The Contractor in his invoices charged service tax on 40% of the total value of contract inclusive of goods and services in compliance with Rule 2A of the Service Tax (Determination of Value) Rules, 2006 for discharging his service tax liability, of which the appellant availed Cenvat credit under Rule 2(l) of the CENVAT Credit Rules, 2004. The Ld. Commissioner in the impugned order has disputed the said valuation to deny the credit to the appellant. He has observed in para no. 5.6 to para 5.8 of the impugned order that the subject contract is pre-dominantly for construction of structural works in order to bring into existence the Coal Handling Plant including SILO which falls under the exclusion clause of input service. He has also observed that the service tax reimbursed by appellant against exclusive supply of goods for construction of SILO cannot be defined as 'input service'.

3(i). The Ld. Advocate for the appellant submitted that the Commissioner has disputed the payment of service tax by the service provider on 40% of the total contract value including goods and services. He submitted that the Ld. Commissioner has failed to appreciate that the appellant has no control on the value to be adopted by the Contractor, i.e. service provider, for payment of service tax. He relied on the following decisions to submit that availment of credit cannot be disputed by the Department at the recipient's end when the valuation has not been disputed at service provider or manufacturer/supplier's end:-

- CCE vs. MDS Switchgear 2008 (229) ELT 485 (SC)

- Sarvesh Refractories 2007 (218) ELT 488 (SC)
- CCE vs. Purity Flexpack Ltd vs. 2008 (223) ELT 361 (Guj)
- Newlight Hotels and Resorts Ltd vs. CCE 2016 (44) STR 258 (Tri-Ahm)

(ii) He further submitted that credit has been allowed on the portion of the contract which the Department assumed to be pure services e.g. planning, designing, etc. He submitted that by allowing the said credit, the Department has in-principle agreed with regard to the eligibility of credit on the CHP. He further submitted that there is no mechanism in the statute to artificially split the contract to allow the credit on portion of the input service and disallow on the balance portion. He submitted that the appellant in the instant case has received the services for creation of CHP with allied facilities as per the contract awarded and it cannot be presumed that the appellant has received pure services (e.g. designing and drawing, etc.) for which the department is allowing the credit and, vice versa, it cannot be presumed that the appellant has received services in the nature of civil works so as to disallow the credit to that extent.

(iii) He submitted that the credit has been denied on the assumption that the subject services is for construction of civil structure. He submitted that civil works is merely a part of the entire contract and that the essence of the contract is to undertake planning, design, construction and commissioning of turnkey project and not merely the civil and structural works. Turnkey contract is a composite single contract and the same is not excluded from the definition of 'input service' under Rule 2(l) of the Credit Rules. He relied on the decisions in the case of C Cheriathan Vs. P Narayanan AIR 2009 SC 1502 and Ishikawajma-Harima Heavy Industries Ltd. 2007 (6) S.T.R. 3 (S.C.) to submit that it is a well-settled principle of interpretation that the true nature of a transaction is reflected through the intention of the parties to such transaction. The law requires the agreement to be read as a whole and the intention of the parties is to be gathered from a holistic reading of the subject agreement. He submitted that taking into

consideration the intention of the parties to contract and reading the contract as a whole, it would clearly follow that the contract is not related to merely a civil work or structure but setting up of CHP on turnkey basis.

(iv) He relied on the recent decision of the Tribunal in the case of **Pepsico India Holdings (P) Ltd TS-328-CESTAT HYD** wherein it has been held that credit would be allowed even though the words "setting up of factory" has been deleted from the definition of 'input service' w.e.f. 01.04.2011. He also relied on the decision of the Hon'ble Chhattisgarh High Court in **CCE vs. Vimla Infrastructure India Pvt Ltd 2018 (13) GSTL 57 (Chhattisgarh)** wherein the dispute pertained to the period after 01.04.2011 and the Hon'ble High Court held that the construction of Palletising Plant for modernisation purpose is eligible for credit as the same has been specifically covered in the definition of input service. The Ld. Advocate further relied on the Tribunal's decision in the case of **B S Sponge Pvt Ltd vs. CCE, Final Order no. 50231/2019 dated 08.02.2019** wherein the "user test principle", as laid down by Hon'ble Supreme Court in catena of decisions, has been considered to allow the credit on goods and services used in civil structure. He also relied on the following decisions:-

- The Ramco Cements Ltd vs CCE (Madras High Court Order dated 11.10.2017 in Civil Misc Appeal no. 2629 of 2012)
- Shiruguppi Sugar Works Ltd vs. CCE 2019-TIOL-821-CESTAT-BANG
- Ultratech Cement Limited vs. CCE 2017-TIOL-2442-CESTAT-BANG
- Nuvoco Vistas Corporation Ltd vs. CCE 2019-TIOL-2063-CESTAT-CHD

(v) The Ld. Advocate also referred to the terms of the tender contract to show that the whole purpose of setting up of CHP is to modernise the coal evacuation system from the collieries, which includes electrical, mechanical works and that the civil work is only a part of the entire turnkey project. Without setting up such facilities, it

is not possible to carry on the coal production and clearance activities. He also produced photographs of the various sections of the CHP to show the electronic control system, power transformer and heavy motors, conveyor belts and mechanical lifting system, silo for coal storage, etc. which in totality forms as CHP and that the civil structure is only an incidental and part of the entire CHP system to support the said heavy machineries. He submitted that the whole object is to set up the plant i.e. CHP and not to merely undertake the construction of civil structure or building as wrongly observed by the Ld. Commissioner

(vi) The Ld. Advocate also contested the imposition of penalty and invocation of extended period of limitation in absence of any ingredient of fraud or suppression.

4. The Ld. Departmental Representative reiterated the findings made by the Ld. Commissioner and submitted that the credit is not eligible on the civil portion. He emphasised that the words "setting up of factory" has been omitted from the definition of input service w.e.f. 01.04.2011 and hence, credit is not available on services for setting up of CHP. He also submitted that services for civil structure is specifically excluded for availment of credit. He accordingly prayed that the appeal filed by the assesse be rejected being devoid of any merit.

5. Heard both sides through video conferencing and perused the appeal records.

6. The issue before us is whether credit is available on Coal Handing Plant (CHP), which has been set up by the appellant for evacuation of coal from its mining premises. It is relevant to note the preamble to the contract which reads as below:-

> *"It is proposed to install a Rapid Loading system through Silo for fast evacuation of coal. The coal handling plant shall have facilities for receiving coal from tippers of 25T capacity, crushing of coal to (-) 100 mm size, conveying, storing, reclamation and loading into railway wagons. The coal handing plant has also been provided with suitable fire-fighting automatic sampling*

arrangement and communication facilities. This tender document is for construction of Coal Handling on turnkey basis. The scope of this tender broadly includes approach road and construction of receiving arrangement and crushing of ROM coal, storage of crushed coal in a self flowing above ground bunker, rapid loading system, dust suppression and extraction, fire fighting, automatic coal sampling, etc. The plan showing the location of the CHP is given on the drawing bearing no…

In case of any construction amongst these parts/sections of the Bidding Documents, the owner should be contracted for clarification. Also where there are discrepancies in the text and drawings, the data given in the text is to be followed. All the equipment and facilities are to be supplied by the successful bidder within the estimated time period. All equipment / system shall be designed, fabricated and selected as per relevant necessary international standards and up to date engineering practices and necessary inspections / test certificates shall be submitted alongwith equipment supply to certify the quality and genuineness of critical components and capacity and other technical parameters of the equipment / systems…"

From the above, it appears that the purpose of setting up of the CHP is to load the coal into the railway wagons in an automated manner after the coal is crushed into the desired size. It is not in dispute that the services used by the appellant is for modernisation of the coal loading process. The definition of input service specifically include services received by a manufacturer for modernisation of a factory. We have also perused the decision of the Tribunal in the case of **Pepsico India Holdings (P) Ltd** (supra) relied upon by the appellant. The Tribunal has observed that without setting up of the factory, there cannot be any manufacture and the mere fact that the words 'setting up of factory" has not been retained in the definition of input services post 01.04.2011, the same will not mean that the benefit of credit has been taken away by the legislature. The relevant portion of the decision is reproduced below:-

"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:

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

7. We thus find that services used for setting up of the factory even after 01.04.2011 would be eligible for credit. The Ld. Commissioner has allowed credit on certain invoices assuming the same to be pure services and disallowed the credit on remaining portion by considering the same to be in the nature of civil portion. We find that this Tribunal has been consistently applying the user test to decide the credit eligibility as laid down by the Hon'ble Supreme Court. The Tribunal in **B S Sponge Pvt Ltd vs. CCE, Raipur (Final Order no. 50231/2019 dated 08.02.2019)** while considering the "user test principle" as laid down by the Supreme Court observed as follows:-

"5. After hearing both the parties and keeping in view the various Orders at each stage of this litigation and the case law as relied upon by the appellant, I am of the opinion that the issue has been dealt by various adjudicating authorities and it has now been clearly settled that structures like Ms angle, Ms channels, Ms joists, chequered plates or similar steel structures used in fabrication of supporting structures if are merely the civil structures for supporting the machines/ apparatus used in manufacture of final product stands excluded from the definition of capital goods.But if such structures satisfies the "user test" principle as appreciated by Hon'ble Apex Court in Rajasthan Spinning & Weaving Mills Ltd. (supra) case, all these structural items are as good as spare parts of the capital goods as mentioned in Clause 3 of Section 2(a) of Cenvat Credit Rules, 2004 and thus are eligible inputs/ capital goods for availing credit.The final product in the present case is the sponge iron for which the kiln, burning chamber, conveyor gallery, fabrication of walkways of platform, staircases, shed, etc. are the essential machineries. As per appellant, none of these machinery can put to use unless and until the impugned structure is there to support the said machinery as the machinery cannot be held suspended in the air. Thus, these structures are not merely the structural support to these machines but very much become the integral part of these machines manufacturing the final product.

> *The perusal of earlier Order-in-Original reflects that the Department had initially observed that, all the machines in sponge iron plant can become operational or can function only when the design and layout parameters are met. Such design and layout parameters specify the location, height, angle of inclination of the machines and alignment with other related machinery so that the desired result are obtained from the machinery. The kiln, cooler, hopper or material handling system in a sponge of iron plant cannot be suspended in air. Only the structural support for all these machines can facilitate the desired location, height, angle of inclination of the machine. In the absence of the structural support neither the machine can be installed nor it can function nor it can be aligned with other related machinery to produce desired results."…*

8. We also find that the user test principles have also been recently followed by the Hon'ble Madras High Court in the case of **The Ramco Cements Limited**(in Order dated 11.10.2017) wherein the Hon'ble High Court followed its earlier decision dated 10.07.2017 in ThiruArooran Sugars vs. CESTAT, Chennai. While placing reliance on the Hon'ble Supreme Court's decision in Jawahar Mills Limited's case, the High Court reiterated the legal position to hold that steel and cements used for the purpose of construction of plant comprising of concrete foundations, concrete silos for storing raw materials, clinker and cement, heater tower structure, etc cannot be said to have been used for civil construction but for the construction which are absolutely necessary for establishing a manufacturing unit. Further, the Hon'ble Chhattisgarh High Court in the case of **CCE vs. Vimla Infrastructure India (P) Ltd** (Supra), while taking note of various other High Court decisions, has ruled that the assessee is entitled to avail credit on construction of railway siding which is used for providing cargo handling services during the period covered under the amended Cenvat Credit Rules post 01.04.2011.

In view of the decisions of the various High Courts and the Tribunal wherein the user test principle has consistently been followed, we are of the view that Cenvat availed by the appellant for setting up

of CHP, which is used for evacuation of coal by rapid loading process, cannot be legally denied.

9. Further, the said CHP has been set up with the view to 'modernise the coal loading process in the mines' also satisfies the definition of input service. Moreover, since the credit has been allowed by the Department on certain invoices raised by the Contractor, the Department has in-principle found the service to be eligible for credit. We also agree with the submission made by the appellant that the mode of valuation adopted by the Contractor to discharge service tax on 40% of the contract value is in accordance with law contained in Service Tax Valuation Rules and cannot be disputed while deciding credit eligibility at the appellant's end. When service tax has been levied only on 40% of the total value, it essentially means that service tax has been paid only on the service portion.

10. In view of the reasons stated above, the impugned demand order cannot be sustained and hence, the same is set aside. The appeal is thus allowed with consequential relief as per law.

(Pronounced in the open court on **07.10.2021**)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/
(Raju)
Member (Technical)

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