(2021) 10 CESTAT CK 0018

Customs, Excise And Service Tax Appellate Kolkata

Case No: Excise Appeal No. 77734 Of 2018

M/s Bharat Coking Coal Ltd		APPELLANT
	Vs	
Commr. Of Central Excise And S.Tax, Ranchi		RESPONDENT

Date of Decision: Oct. 7, 2021

Acts Referred:

- Cenvat Credit Rules, 2004 - Rule 2, 2(a), 2(l), 2(l)(ii)
- Service Tax (Determination of Value) Rules, 2006 - Rule 2A
- Central Excise Act, 1944 - Section 2(f)

Hon'ble Judges: P. K. Choudhary, J; Raju, Technical Member

Bench: Division Bench

Final Decision: Allowed

Judgement

1. 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 â€œPlanning, 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 â€˜SILOâ€™ 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 basisâ€.

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 â€˜input

serviceâ€™.

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 recipientâ€™s end when the valuation has not been disputed at service provider or

manufacturer/supplierâ€™s end:-

â€¢ CCE vs. MDS Switchgear 2008 (229) ELT 485 (SC)

â€¢ Sarvesh Refractories 2007 (218) ELT 488 (SC)

â€¢ CCE vs. Purity Flexpack Ltd vs. 2008 (223) ELT 361 (Guj)

â€¢ 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 â€˜input serviceâ€™ 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 â€œsetting up of factoryâ€ has been deleted from the definition of â€˜input serviceâ€™ w.e.f.

01.04.2011. He also relied on the decision of the Honâ€™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 Honâ€™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 Tribunalâ€™s decision in the case of B S Sponge Pvt Ltd vs. CCE, Final Order no. 50231/2019 dated 08.02.2019 wherein the

â€œuser test principleâ€, as laid down by Honâ€™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:-

â€¢ The Ramco Cements Ltd vs CCE (Madras High Court Order dated 11.10.2017 in Civil Misc Appeal no. 2629 of 2012)

â€¢ ShiruguppiÂ SugarÂ WorksÂ LtdÂ vs.Â CCEÂ 2019-TIOL-821-CESTAT-BANG

â€¢ Ultratech Cement Limited vs. CCE 2017-TIOL-2442-CESTAT-BANG

â€¢ 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 â€œsetting up of factoryâ€ 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:-

â€œIt 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 noâ€¦

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 / systemsâ€¦â€

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 â€˜setting up of factoryâ€ 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:-

â€œ15. The department wants to deny them the benefit of the CENVAT credit on the ground that â€˜services related to setting up of a

factoryâ€™ 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 â€˜input serviceâ€™ 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 â€œservices 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.â€ 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. â€"(1) In these rules, unless the context otherwise requires, (a)

(b)â€¦.

(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 â€˜manufactureâ€™ 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 â€˜manufactureâ€™ as follows:

2(f) â€œ manufactureâ€ 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 â€˜manufactureâ€™ itself is very wide and includes anything incidental or ancillary to manufacture.

21. For a service to qualify as â€˜input serviceâ€™ 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 â€˜in relation toâ€™ 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

â€˜aâ€™ and â€˜bâ€™ above);

d) Activities indirectly in relation to manufacture (i.e., in relation to â€˜aâ€™and â€˜bâ€™ 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 â€˜input servicesâ€™ 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.â€

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

Honâ€™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 â€œuser test principleâ€ as laid down by the Supreme Court observed as follows:-

â€œ5. 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 â€œuser testâ€ principle as appreciated by Honâ€™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.â€â€¦

8. We also find that the user test principles have also been recently followed by the Honâ€™ble Madras High Court in the case of The Ramco

Cements Limited(in Order dated 11.10.2017) wherein the Honâ€™ble High Court followed its earlier decision dated 10.07.2017 in ThiruArooran

Sugars vs. CESTAT, Chennai. While placing reliance on the Honâ€™ble Supreme Courtâ€™s decision in Jawahar Mills Limitedâ€™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 Honâ€™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 â€žmodernise 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)