

2010-TIOL-624-CESTAT-DEL-LB

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO.1**

S.No.	Appeal No.	Appellant	Respondent
1.	E/1036/2008	VANDANA GLOBAL LTD	CCE, RAIPUR
2.	E/4990/2004	CCE, Meerut	Kisan Sahakar
3.	E/5006/2004	Kisan Sahakari	CCE, Meerut
4 - 5	E/4536 & 4537/04	Khanna Paper Mills	CCE, Jalandhar
6.	E/633/2007- Kol	Vikram P Ltd	CCE, Bhubaneswar
7.	E/01/2008- Kol	CCE, Bhubaneswar	Vikram P Ltd
8.	E/1513/2008	CCE, Raipur	D S Sponge Pvt Ltd
9.	E/1514/2008	CCE, Raipur	Salasar Sponge & Power Ltd
10.	E/1515/2008	CCE, Raipur	Nav Durga Fuel Pvt Ltd
11.	E/1516/2008	CCE, Raipur	Anjani Steel Pvt Ltd
12.	E/1517/2008	CCE, Raipur	Prakash Industries
13.	E/1518/2008	CCE, Raipur	Sidhi Vinayak Sponge Iron P Ltd
14.	E/1519/2008	CCE, Raipur	Maa Shakambari Steel Pvt Ltd
15.	E/1520/2008	CCE, Raipur	Shree Shyam ispat India Pvt Ltd
16.	E/382/2009	CCE, Raipur	Orissa Concrete & Allied Inds
17.	E/968/2009	CCE, Raipur	Topworth Steel & Power Pvt Ltd
18.	E/1829/2009	Vikram Cement	CCE, Indore
19 - 21	E/2015 - 2017/09	DSM Ltd	CCE, Meerut
22.	E/2248/2009	Hira Power & Steel Ltd	CCE, Raipur

Date of Decision: 30.4.2010

Appellants Rep by: Shri V Lakshmi Kumaran, Adv. sl. nos.1,4,5,18'
Shri L P Asthana, Adv. sl nos. 8, 15 & 17, Shri Kartik Kurmy, Adv. sl nos. 6,7'
Shri M P Singh, Adv. sl no.16, Shri Alok Arora, Adv. sl no.19,21'
Shri Balbir Singh, Adv. sl no.22, Shri P K Sahu, Adv. (Appeal No.E/1754/09- not under reference) None for sl nos.2 & 3

Respondent Rep by: Shri B K Singh, Jt, CDR

CORAM: R M S Khandeparkar, President
Chittaranjan Satapathy, Member(T)
Ashok Jindal, Member(J)

Central Excise – CENVAT Credit – Whether the term 'capital goods' can include plant, structures embedded to earth? - Whether the goods like angles, joists, beam, channels, bars, flats which go into fabrication of such structures can be treated as 'inputs' in relation to their final products as inputs for capital goods, or none of the above - Whether the credit can be allowed in respect of goods like angles, joists, beam, channels, bars, flats which go into fabrication of such structures and plant? – Larger Bench answers reference in favour of Revenue by holding that Explanation 2 to Rule 2(I) of CENVAT Credit Rules, 2004 is clarificatory in nature and has retrospective effect

Reference to Larger Bench to answer the following questions:

- (a) Whether the term "capital goods" can include plant, structures embedded to earth?
- (b) Whether the goods like angles, joists, beam, channels, bars, flats which go into fabrication of such structures can be treated as 'inputs' in relation to their final products as inputs for capital goods, or none of the above?
- (c) Whether the credit can be allowed in respect of goods like angles, joists, beam, channels, bars, flats which go into fabrication of such structures and plant?

Larger Bench answers reference as follows:

(a) The term "capital goods" has been defined in the *CENVAT Credit Rules*, which in turn have been framed under the rule making powers conferred under Section 37(2) of the Act. The said Section refers to credit of duty paid on goods used in, or in relation to the manufacture of excisable goods. Hence, 'capital goods' defined in the *CENVAT Credit Rules* in the context of providing credit of duty paid, have to be excisable goods. Whether a particular plant or structure embedded to earth can be considered as excisable goods or not has to be determined in the light of the decisions of the Hon'ble Supreme Court on the issue, which is no longer res integra.

(b) Goods like cement and steel items used for laying 'foundation' and for building 'supporting structures' cannot be treated either as inputs for capital goods or as inputs in relation to the final products and therefore, no credit of duty paid on the same can be allowed under the *CENVAT Credit Rules* for the impugned period.

Case laws referred:

Vandana Global Ltd. vs. CCE, Raipur [2008-TIOL-2327-CESTAT-DEL](#)

Bhushan Steel and Strips Ltd. vs. Commissioner [2007-TIOL-2306-CESTAT-MUM](#)

Appeal No. E/633/2007 relating to M/s. Vikram P. Ltd. vs. CCE [2008-TIOL-2325-CESTAT-KOL](#)

Mahindra & Mahindra vs. CCE [2005-TIOL-1215-CESTAT-DEL-LB](#)

Mahalaxmi Glass Works Ltd. vs. CCE [1999 (113) EL T 558]

United Phosphorous Ltd. vs. CCE [2002 (150) EL T 650]

CCE vs. HEG Ltd. [2003-TIOL-215-CESTAT-DEL](#)

Bellary Steel & Alloys Ltd. vs. CCE [2005-TIOL-290-CESTAT-BANG](#)

Telco vs. Union of India [1998 (1) BLJR 727 in Civil Writ Jurisdiction Case No.200/1990]

Star Paper Mills vs. CCE [1999 (107) ELT 241]

Tata Iron and Steel Company vs. CCE [2000 (117) ELT 669]

Madras Aluminium Company Ltd. vs. CCE [2002-TIOL-309-CESTAT-MAD](#)

CCE, Meerut vs. Gangeshwar Ltd. [2000 (115) ELT 653]

Nava Bharat Ferro Alloys Ltd. vs. CCE [2004-TIOL-817-CESTAT-BANG](#)

Hindustan Sanitaryware Industries vs. CCE [2001 (47) RL T 837]

Lloyds Metals & Engineers Ltd. vs. CCE [2002 (50) RLT 109]

Lloyds Steel Industries Ltd. vs. CCE [2004 (64) RLT 732]

CCE vs. Zenith Papers [2002 (146) ELT 518 (P&H)]

Sirpur Paper Mills Ltd. vs. CCE [2003 (159) EL T 7 (AP)]

Shri Ramakrishna Steel Industries Ltd. vs. CCE [1996 (82) EL T 575 (Tri-LB)]

CCE vs. Gujarat Ambuja Cement Ltd. [2008-TIOL-683-HC-HP-CX](#)

CCE vs. Madras Aluminium Ltd. [2008-TIOL-80-HC-MAD-CX](#)

Oswal Steels vs. CCE [2006 (193) ELT 403 (P&H)]

CCE vs. India Glycols Ltd. [2008-TIOL-415-HC-UTTRANCHAL-CX](#)

CCE vs. Prism Cement Ltd. [2006 (199) ELT 777 (MP)]

Grasim Cement [2008 (223) ELT 583 (Raj)]

CCE, Jalandhar vs. Pioneer Agro Extracts Ltd [2008 (230) ELT 597 (P&H)]

Aditya Cement vs. Union of India [2008-TIOL-483-HC-RAJ-ST](#)

Vikram Cement vs. CCE, Indore [2009-TIOL-1959-CESTAT-DEL](#)

J.K. Cotton, Spinning and Weaving Mills vs. Sales Tax Officer [2002-TIOL-116-SC-CT](#)

Maruti Suzuki Ltd. vs. CCE [2009-TIOL-94-SC-CX](#)

CCE vs. Solaris Chemtech Ltd. [2007-TIOL-135-SC-CX](#)

UOI vs. Hindustan Zinc Ltd. [2007-TIOL-798-HC-RAJ-CX](#)

Hindustan Zinc vs. DC Cent. Exc. [2008 (230) ELT 38 (Raj.)]

CCE vs. Daya Sugar [2005 (192) ELT 656]

Kisan Co-operative Sugar Factory vs. CCE [2007-TIOL-909-CESTAT-DEL](#)

CCE vs. Modern Steels Ltd. [2007 (219) ELT 423]

Commissioner vs. D.S.M. Ltd. [2003 (162) ELT 987]

Malvika Steel Limited vs. CCE [1998 (97) ELT 530]

Nava Bharat Ferro Alloys vs. CCE [2004-TIOL-817-CESTAT-BANG](#)

CCE Indore vs. L.G. Hotline CPT Ltd [2004 (176) ELT 443]

Binani Cement vs. CCE [2003 (160) ELT 163]

Jaypee Bela Plant vs. CCE [2003 (161) ELT 422]

CCE vs. Narmada Sugar [2003 (155) ELT 362]

CCE vs. Indian Aluminium Company [1988 (38) ELT 369]

J.K. Synthetics Ltd. vs. CCE, Jaipur [1996 (88) ELT 785]

K.P. Verghese [2002-TIOL-128-SC-IT](#)

Sold Trustee Loksikshan Trust [(1976 TLR Page I)]

CIT vs. Mahindra & Mahindra [1983 (4) SCC 392]

MISC ORDER NOS.296/2010-EX (BR)

Per : Chittaranjan Satapathy:

SCOPE OF THE REFERENCE

In the case of *Vandana Global Ltd. Vs. CCE, Raipur - 2008 (230) ELT 169 =* ([2008-TIOL-2327-CESTAT-DEL](#)), the Division Bench hearing the matter recorded the following prima facie view:-

"In the present case, we, prima facia, find that the steel items like angles, joists, beams, channels, bars, flats, etc. are used in the construction work; the resultant structures are permanently embedded to the earth; they cannot be considered as part of the machinery/equipment; they do not qualify to be called as goods; as they cannot be treated as goods; they can not be considered as capital goods. We find that credit has

been taken on the same goods on some occasions as capital goods and on other occasions as inputs. These items, prima facie, can not be considered as inputs in relation to the final products namely, sponge iron ingots, billets manufactured by them. Therefore, prima facie, we are of the view that the credit' availed by the appellant may not be admissible."

2. However, the said Bench found that the Tribunal in the case of *Bhushan Steel and Strips Ltd. v. Commissioner - 2008 (223) ELT 517 (Tribunal) = (2007-TIOL-2306-CESTAT-MUM)*, had taken the following contrary view:-

"6.1 It is not the case of Department that the Appellants have taken credit on entire quantity of cement and steel used in factory as dispute relates to credit taken on that much quantity of cement and steel which has been used for providing foundation of machines, structures, tunnels, trenches, cellars and factory building essential for steel rolling mills.

6.2 The issue in dispute also can be looked from different angle. As per Explanation 2 to Rule 2(g) of CCR, 2002 "inputs" includes goods used in the manufacture of capital goods which are further used in the factory of the manufacture. Various plants have been installed for manufacture of CR/GP coils/sheets and tubes such as cold rolling mill, pickling line tube mill, DG sets annealing line, EOT cranes, chimney, storage tanks, pollution control / effluent treatment units, utilities like air, steam gas, water etc. Therefore, the disputed items are in the nature of components to the said plants as without the columns, beams, cellars, trenches, tunnels, roofing etc. the plant cannot exist and hence, are components of plant. Therefore, invoking Explanation 2 to Rule 2(g) of CCR, credit on cement and steel in any case is admissible.

6.3 In the light of the above, we hold that credit on the disputed cement and steel used for factory building including tunnels, trenches, cellars etc. is admissible.

7.1 The Commissioner denies credit on GPCC Core/ Trap Sheet, Blendster holding them to be roofing material installed overhead as well as the slides of the factory sheds/bays. He holds that the said item neither are components nor spares nor accessories of capital goods.

7.3 The claim of Ld. DR that Roofing material may not be a technical requirement as civil work was going on during plant visit gets negated from the fact, as seen, that since civil work in the extension area had started, the manufacturing activity abutting thereto was suspended till completion of such civil work. In a nutshell, a manufacturing line near civil work was suspended, and the manufacturing activity in other side of the shed, which has closed covered area was going on. This is because it is technically essential to provide protective cover in and around the mill area to protect it from exposure to environment.

7.4 In the light of above discussions, we hold that credit on roofing materials is admissible to the Appellants."

3. Accordingly, the Bench hearing the case of Vandana Global Ltd. (supra), has referred the following questions which are now before this Larger Bench:-

(a) Whether the term "capital goods" can include plant, structures embedded to earth?

(b) Whether the goods like angles, joists, beam, channels, bars, flats which go into fabrication of such structures can be treated as 'inputs' in relation to their final products as inputs for capital goods, or none of the above?

(c) Whether the credit can be allowed in respect of goods like angles, joists, beam, channels, bars, flats which go into fabrication of such structures and plant?

4. Following the original reference in the case of Vandana Global Ltd. (supra), a number of other cases have also been referred to the Larger Bench. Thus, we have 22 appeals listed before us. While the reference in Vandana Global Ltd. (supra) deals with steel items such as angles, joists, beams, channels, bars, flats etc, the reference received from the Kolkata Bench in *Appeal No. E/633/2007 relating to M/s. Vikram P. Ltd. Vs. CCE*, = [\(2008-TIOL-2325-CESTAT-KOL\)](#) Bhubaneswar deals with cement (Chapter 26) and tor rods (Chapter 72) used in installation/ initial setting up of production machinery. Of the 22 appeals under reference to us, 10 have been filed by the appellant-assessee whereas 12 have been filed by the Department. We have heard both sides at length for three days from 16.2.2010 to 18.2.2010.

SCOPE OF THE DISPUTE

5. It was pointed out to us in the course of hearing that the disputes of the kind which gave rise to the present reference before this Larger Bench have ended with the amendment to Explanation 2 to Rule 2(k) of the CENVAT Credit Rules, 2004 with effect from 7.7.2009. Before the amendment, the said Explanation 2 read as follows:-

"Explanation 2:- Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer;"

The said Explanation 2 was amended by [Notification No. 16/2009-CE\(NT\) dated 7.7.2009](#) and after the amendment it reads as under:-

"Explanation 2:- Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer but shall not include cement, angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated Bar (TMT) and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods"

The learned Advocates appearing for the appellants confirm that the items in dispute are now specifically excluded from the definition of input under Explanation 2 with effect from 7.7.2009 in view of the specific amendment. They have, of course, argued that this amendment does not have retrospective effect.

6. The reference to the aforesaid amendment to Explanation 2 has been included by us here as the same helps to clarify the precise scope of the dispute. We find that the amendment excludes cement, angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated Bar (TMT) and other items used for:-

- (i) construction of factory shed, building; or
- (ii) laying of foundation; or
- (iii) making of structures for support of capital goods.

Two relevant questions arise for consideration for the past period:-

- (i) Were such items which now stand excluded from the definition of input could be considered as input under the legal provisions in force before the amendment of 7.7.2009?

(ii) Can the amendment of 7.7.2009 be considered to be retrospective?

LEGAL PROVISIONS

7. Before taking up the arguments advanced on behalf of both sides, for clarity sake we first examine the legal provisions relevant in the context of this reference. Section 3 of the Central Excise Act, 1944 authorizes levy and collection of excise duty. Sub-section (1) thereof reads as under:-

SECTION 3. Duties specified in the first Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 to be levied -

(1) There shall be levied and collected in such manner as may be prescribed, -

(a) a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods (excluding goods produced or manufactured in special economic zones) which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986)"

(b) XXXX XXXXX XXXXX XXXX

From the above, it is clear that Section 3 of the Act levies a duty of excise on excisable goods and such excise duty has been given a name as CENVAT, The expression 'excisable goods' has been defined under Section 2(d) of the Act as follows:-

(d) "excisable goods" means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salt:

8. The CENVAT Credit Rules, 2004, have been made by the Central Government in exercise of the powers conferred by Section 37 of the Central Excise Act 1944 and Section 94 of the Finance Act, 1994. The enabling provisions under Section 37(2) allow the Central Government to make rules, inter alia, for the following:-

"(xvii) provide for the credit of duty paid or deemed to have been paid on the goods used in, or in relation to the manufacture of excisable goods"

9. The definitions of "capital goods" and "input" have changed from time to time. Shri M.P. Singh, learned counsel appearing for M/s. Orissa Concrete & Allied Industries has submitted a compilation of the definitions of capital goods and input in the CENVAT Credit Rules as applicable from time to time in the form of a Table which has been verified by the Department. The latest definitions of "capital goods" and "input" with effect from 10.9.2004 are reproduced below from the said Table showing the portion amended with effect from 7.7.2009 in italics (bold):-

Period	Rules in Force	Capital Goods	Inputs
From 10.9.2004 onwards	CENVAT Credit Rules, 2004 w.e.f. 10.9.2004	"capital goods" means -(A) the following goods, namely:- (i) all goods falling	"input" means - (i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as

		<p>under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No. 68.02 and sub-heading No. 6801.10 of the First Schedule to the Excise Tariff Act;</p> <p>(ii) pollution control equipment</p> <p>(iii) components, spares and accessories of the goods specified at (i) and (ii);</p> <p>(iv) moulds and dies, jigs and fixtures;-</p> <p>(v) refractories and refractory materials;</p> <p>(vi) tubes and pipes and fittings thereof; and</p> <p>(vii) storage tank</p> <p>used-</p> <p>(1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or</p> <p>(2) for providing output service;</p> <p>(B) Motor vehicle registered in the name of provider</p>	<p>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 in or in relation to manufacture of final products or for any other purpose, within the factory of production.</p> <p>(ii) all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service;</p> <p>Explanation 1 - The light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.</p> <p>Explanation 2 - Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer but shall not include cement, angles,</p>
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		of output service for providing taxable service as specified in sub-clauses (f), (n), (o), (zr), (zpz), (zzt) and (zzw) of clause (105) of section 65 of the Finance Act.	channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated Bar (TMT) and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods. [Portion in italics (bold) inserted with effect from 7.7.2009]
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ARGUMENTS ON BEHALF OF THE APPELLANT / RESPONDENT ASSESSEES

10. Shri V. Lakshmikumaran, learned counsel appearing on behalf of some of the assesseees argues that structural supports should be considered as parts of the capital goods. He states that the definition of capital goods under the CENVAT Credit Rules includes goods falling under Chapters 82, 84, 85 and 90 as well as specified goods such as pollution control equipment storage tanks etc. and the only condition laid down in the definition is that these should be used in the factory of the manufacturer of the final products. He states that the definition of capital goods does not stipulate that the same should be in movable condition and there is no bar to avail credit if a plant and machinery item is embedded to earth. The capital goods cannot be made functional unless structural support is provided and such machineries are erected and installed in the factory.

11. He further argues that structures becoming part of a plant are used in relation to manufacture of final product. He cites the decision of the Larger Bench of the Tribunal in the case of *Mahindra & Mahindra Vs. CCE, - 2005 (190) ELT 305 (Tri. - LB) = (2005-TIOL-1215-CESTAT-DEL-LB)* which has held that structures before they are embedded in earth are dutiable in the movable condition. According to him, supporting structurals should be treated as integral parts of the capital goods.

12. He also argues that capital goods becoming immovable property is irrelevant. The only requirement is that capital goods should be used for manufacture of excisable goods in the factory. It is also his argument that the phrase 'capital goods' should be read together and understood as it has been defined without breaking the same into two words namely 'capital' and 'goods'. He also cites the following decisions in support of his arguments:-

(i) *Mahalaxmi Glass Works Ltd. Vs. CCE - 1999 (113) EL T 558*

(ii) *United Phosphorous Ltd. Vs. CCE - 2002 (150) EL T 650*

(iii) *CCE Vs. HEG Ltd. - 2004 (177) EL T 605 = (2003-TIOL-215-CESTAT-DEL)*

(iv) *Bellary Steel & Alloys Ltd. Vs. CCE - 2005 (180) EL T 92 = (2005-TIOL-290-CESTAT-BANG)*

12. He submits that apart from the rule making power under Section 37(2)(xvii) of the Act, the Government has general rule making power under sub-section (1) of Section 37 as has been held in the case of Telco Vs. Union of India - 1998 (1) BLJR 727 in Civil Writ Jurisdiction Case No.200/1990 . According to him, this judgement of the Hon'ble Patna High Court makes it amply clear that the Government has power to grant benefit and restrict the same keeping the fiscal and social objectives. Therefore, the provisions of Section 37(2)(xvii) need not necessarily cover capital goods.

13. He also argues that credit is available even if parts have become integral parts of immovable structure. In this connection he cites the following decisions:-

(i) *Star Paper Mills Vs. CCE - 1999 (107) ELT 241*

(ii) *Tata Iron and Steel Company Vs. CCE - 2000 (117) ELT 669*

(iii) *Madras Aluminium Company Ltd. vs. CCE 2001 (136) EL T 182 = ([2002-TIOL-309-CESTAT-MAD](#))*

(iv) *CCE, Meerut Vs. Gangeshwar Ltd. - 2000 (115) ELT 653.*

(v) *Nava Bharat Ferro Alloys Ltd. Vs. CCE - 2004 (61) RLT 68 = ([2004-TIOL-817-CESTAT-BANG](#))*

(vi) *Hindustan Sanitaryware Industries Vs. CCE - 2001 (47) RL T 837*

(vii) *Lloyds Metals & Engineers Ltd. Vs. CCE - 2002 (50) RLT 109*

(viii) *Lloyds Steel Industries Ltd. Vs. CCE -. 2004 (64) RLT 732*

14. He also advances an alternative argument that steel satisfies the criteria of inputs used in or in relation to the manufacture of dutiable final products. For this proposition, he relies on the following decisions:-

(i) *CCE Vs. Zenith Papers - 2002 (146) ELT 518 (P&H)*

(ii) *Sirpur Paper Mills Ltd. Vs. CCE - 2003 (159) ELT 7 (AP)*

(iii) *Shri Ramakrishna Steel Industries Ltd. Vs. CCE - 1996 (82) EL T 575 (Tri-LB)*

15. He argues at length that the amendment made to definition of inputs under Rule 2(k) recently vide Notification No. 16/2009 will not apply for the earlier period. He also states that the amendment shows that for the earlier period credit was available for items like steel, cement etc. For these two propositions, he relies on the following decisions:-

(i) *CCE Vs. Gujarat Ambuja Cement Ltd. - 2008 (230) ELT 221 (H.P.) = ([2008-TIOL-683-HC-HP-CX](#))*

(ii) *CCE Vs. Madras Aluminum Ltd. - 2008 (226) ELT 342 (Mad.) = ([2008-TIOL-80-HC-MAD-CX](#))*

(iii) *Oswal Steel Vs. CCE - 2006 (193) ELT 403 (P&H)*

(iv) *CCE Vs. Zenith Papers - 2002 (146) ELT 518 (P&H)*

(v) *CCE Vs. India Glycols Ltd. - 2008 (229) ELT 516 (Utt)* = ([2008-TIOL-415-HC-UTTRANCHAL-CX](#))

(vi) *CCE Vs. Prism Cement Ltd. - 2006 (199) ELT 777 (MP)*

(vii) *Grasim Cement reported in 2008 (223) ELT 583 (Raj).*

(viii) *CCE, Jalandhar Vs. Pioneer Agro Extracts Ltd. - 2008 (230) ELT 597 (P&H)*

He also refers to provisions of Section 5A(2A) which provides for clarifying the scope of any Notification within one year from the issue of the Notification.

16. Shri L.P. Asthana, learned counsel appearing for some of the assessee states that the claim for credit is not for building material or for building factory shed but only for supporting structures and foundation. He says that he adopts the arguments of learned counsel of Shri V. Lakshmikumaran and states that Explanation 2 to Rule 2(k) does not restrict credit to such structures. He further states that whether the intermediates are excisable or not is not relevant and credit can be allowed for indirect use.

17. Shri Kartik Kurmy, learned counsel appearing for some of the assessee states that in respect of one appeal, the claim for credit is in respect of cement and TMT bars for laying foundation whereas in respect of two other appeals, the claim is for credit on structurals. He argues that Rule 2 itself opens with the phrase 'unless the context otherwise requires' and hence the phrase 'capital goods' should be given its original and natural meaning. According to the dictionary meaning, the capital goods means especially machinery, plant etc. used in producing commodities. The CENVAT scheme is to eliminate cascading effect of tax and hence in the context of the scheme, the credit on goods used for laying foundation and for structurals should be allowed. He states that as far as capital goods are concerned there is no functional test attached nor there is any condition that capital goods must participate in the manufacture. From the definition, it can be seen that capital goods includes not only components, spares and accessories, parts specified under Chapters 82, 84, 85 and 90 but also components, spares, accessories falling under any other Chapter. He argues that the inclusion of accessories widens the scope of capital goods and the same allows credit on the impugned goods. He also refers to the Hon'ble Finance Minister's speech while presenting the Finance Bill, 2000 - 2001 where it was stated that the proposal was to expand and rationalize the scope of MODVAT scheme. He also refers to the 2009 amendment and states that this amendment itself indicates that prior to the date of amendment, credit was permissible in respect of the impugned goods.

18. Shri Alok Arora, learned counsel appearing for some of the assessee states that the structurals are used as parts and accessory to the machineries and plant. He also states that during April 1995 to March 1997 plant was covered in the definition of capital goods. He cites the decision of the Hon'ble Rajasthan High Court in the case of *Aditya Cement Vs Union of India - 2008 (221) ELT 362 (Raj.)* = ([2008-TIOL-483-HC-RAJ-ST](#)) in support of his claim.

19. Shri P.K. Sahu, learned counsel, appearing for the assessee in appeal No. E/1754/09 which is not under reference, states that the CENVAT Rules do not require one to one correspondence in utilization. He states that under the present scheme goods and services have been combined for grant of credit. According to him, our country is moving towards a scheme of combined goods and services taxation regime under which goods and services should be treated equivalently. The same structurals under dispute are inputs for installation of plant and machinery and can be included in the value of installation service and credit of the service tax paid on such service can be availed. He argues that while interpreting the CENVAT credit provisions credit should be given in

respect of anything which contributes to value addition. He also states that the 2009 Amendment itself indicates that the credit on the impugned goods was available for the past period.

20. Shri M.P. Singh, learned counsel appearing for the respondent-assessee states that the impugned goods relating to his case are not embedded to earth and they stand on a different footing as components. He says that in his case such components are necessary to manufacture capital goods and credit of duty paid on such components should have been allowed. He also states that the referral order does not specify the facts.

SUBMISSIONS MADE ON BEHALF OF THE DEPARTMENT

21. Shri B.K. Singh, learned Jt. CDR appearing for the Department states that the issues framed by the referral Bench are not very clear and hence the issues require to be reframed as under:-

(a) Whether the term "capital goods" can include plant, structures embedded to earth?

(b) Whether the goods like angles, joists, beam, channels, bars, flats which go into fabrication of embedded structures can be treated as 'inputs' for capital goods?

(c) Whether the goods like angles, joists, beam, channels, bars, flats which go into fabrication of embedded structures can be treated as 'inputs' in relation to their final products ?

(d) Whether the credit can be allowed in respect of goods like angles, joists, beam, channels, bars, flats which go into fabrication of such structures and plant embedded to earth?

He states that though 'goods' has not been defined in the Act, 'excisable goods' has been defined. He distinguishes capital goods from inputs stating that capital goods are not used immediately in the process of production unlike raw materials or intermediate goods. Referring to the scheme of the Central Excise Act and the rules framed thereunder, he argues that capital goods in the context of Central Excise law must be taken to mean excisable capital goods. He also pleads that goods which are not excisable cannot be considered as capital goods for the purpose of excise law including *CENVAT Credit Rules*. His submission on the first issue is that those goods which are embedded to earth on which duty is not payable cannot be called as capital goods either under the Central Excise Rules or under the *CENVAT Credit Rules*.

22. He also distinguishes between intermediate goods and capital goods and states that intermediate goods get consumed or converted in the process of manufacture whereas capital goods do not get consumed nor undergo any change in the process of manufacture. Hence he contends that the claim of the assessee that capital goods should be considered as intermediate goods is not tenable.

23 He relies on the decision of the Tribunal in the case of *Vikram Cement Vs. CCE, Indore - 2009 (242) ELT 545 = (2009-TIOL-1959-CESTAT-DEL)* and *J.K. Cotton, Spinning and Weaving Mills Vs. Sales Tax Officer - 1997 (91) ELT 34 (SC) = (2002-TIOL-116-SC-CT)* and states that an input should be used in the process of manufacture of the final product or in a process which is integrally connected to the process of manufacture of final product. The structurals which are used for support of the machines or for erection of the plant do not take part in the process of manufacture of the final goods. The same cannot also be considered to be integrally connected to the process of manufacture of the final product.

According to him such structurals cannot be covered under the main definition of input under Rule 2(g) / Rule 2(k) of the CENVAT Credit Rules, 2002/2004.

24 He also relies on the decision of the Hon'ble Supreme Court in the case of *Maruti Suzuki Ltd. Vs. CCE - 2009 (240) ELT 641 (SC) = (2009-TIOL-94-SC-CX)* and states that according to this decision of the apex Court, the input should have nexus with the final product in or in relation to the process of manufacture. The structural used for supporting the capital goods do not have any such nexus with the process of manufacture. He further argues that to come under the Explanation 2, the inputs should be goods first, it should be used in the manufacture of capital goods and such capital goods should be used in the factory of the manufacturer. The claim of the assesseees that supporting structurals of capital goods should be considered as input is clearly not tenable as the capital goods are already manufactured prior to getting support from the structurals. What is needed to support the capital goods cannot be said to have been used in the manufacture of capital goods.

25. He states that there are five differences between capital goods and inputs which are enumerated below:-

	Capital Goods	Inputs
1.	Used for producing or processing of goods or an activity incidental thereto	Commodity which is processed by Capital Goods for being transformed into final products or used in
2.	Eligible for depreciation	Not eligible
3.	Staggered credit	On time credit
4.	Separate Account to be maintained for receipt and use of both products.	
5.	Installation required	No installation

26. According to the learned Jt. CDR if the input includes capital goods then there was no need to define capital goods separately. He further states that since the two terms have been defined in the statute, it cannot be said that commodities covered under one will be included in the other. In this connection he quotes para 29 of the Tribunal's decision in the case of *Vikram Cement (supra)*.

27. He further cites the decision of the Hon'ble Supreme Court in the case of *CCE Vs. Solaris Chemtech Ltd. - 2007 (214) ELT 481 (SC) = (2007-TIOL-135-SC-CX)* and states that considering the widest scope of inputs, the structures which are not connected with the process of manufacture cannot be held to be eligible for credit. Summing up, he states as follows:-

"(i) The structurals used in manufacture of goods which come into existence after being embedded to earth are neither inputs nor parts of capital goods as the goods which come into existence only after being embedded to earth are not goods and hence not capital goods.

"(ii) Such structurals are also not inputs of the final products as those are not integrally connected, directly or indirectly, with the process of manufacture of the final products,"

28. He also relies on the following decisions in support of his arguments:-

- (i) *UOI Vs Hindustan Zinc Ltd. - 2008 (225) ELT 183 (Raj.) = ([2007-TIOL-798-HC-RAJ-CX](#))*
- (ii) *Hindustan Zinc Vs DC Cent. Exc. - 2008 (230) ELT 38 (Raj.)*
- (iii) *CCE Vs Daya Sugar - 2005 (192) ELT 656*
- (iv) *Kisan Co-operative Sugar Factory Vs CCE - 2007 (212) ELT 541 = ([2007-TIOL-909-CESTAT-DEL](#))*
- (v) *CCE Vs Modern Steels Ltd. - 2007 (219) ELT 423*
- (vi) *Commissioner Vs D.S.M. Ltd. - 2003 (162) ELT 987*
- (vii) *Malvika Steel Limited Vs CCE - 1998 (97) ELT 530*
- (viii) *Nava Bharat Ferro Alloys Vs CCE - 2004 (174) ELT 375 = ([2004-TIOL-817-CESTAT-BANG](#))*
- (ix) *CCE Indore Vs L.G. Hotline CPT Ltd. - 2004 (176) ELT 443*
- (x) *Binani Cement Vs CCE - 2003 (160) ELT 163*
- (xi) *Jaypee Bela Plant Vs CCE - 2003 (161) ELT 422*
- (xii) *CCE Vs. Narmada Sugar - 2003 (155) ELT 362*

29. The learned Jt. CDR also argues that the amendment to the Explanation 2 made in the year 2009 should be considered only as clarificatory applying the decision of the Tribunal in the case of *CCE Vs Indian Aluminium Company - 1988 (38) ELT 369* . Finally, in respect of goods which go into fabrication of structures and plant embedded to earth, the learned Jt. CDR submits that such structures and plants embedded to earth being immovable are not goods and hence cannot be considered either as excisable goods or capital goods either under the Central Excise Rules or under the CENVAT Credit Rules.

FINDINGS

30. We have considered arguments from both sides, the cited decisions and the records of the case. We find that the aforesaid amending Notification No. 22/09-CE (NT) dated 7.9.2009 was issued as a part of the Budget proposals of the Finance Minister. The said notification along with other Budget notifications, the Finance (No.2) Bill, 2009 and the accompanying Memorandum explaining the provisions in the Finance (No. 2) Bill, 2009 (popularly known as the "Pink Book" because of its colour, which has remained the same over several decades) were laid on the Table of the Parliament. The said Pink Book contained the following Explanatory Memorandum at page 28:-

"H. AMENDMENT IN CENTRAL EXCISE RULES AND CENVAT CREDIT RULES.

* * * * *

2) An explanation is being inserted in Rule 2 of Cenvat Credit Rules, 2004 so as to clarify that 'inputs' shall not include cement, angles, channels, CTD or TMT bars and other items used for construction of shed, building or structure for support of capital goods.

* * * * *

The abovesaid Explanatory Memorandum placed before the Parliament makes it amply clear that the purpose of the amendment was clarificatory and that it sought to clarify that the expression input does not cover cement and steel items used for construction of shed., building or structure for support of capital goods.

31. We also find that the "Budget Bulletin 2009" issued by the Directorate of Publicity and Public Relations of the Customs, Central Excise and Service Tax Department contained the following at Page 38:-

"3. Amendments in CENVAT Credit Rules, 2004:-

(i) An explanation has been inserted in Rule 2 of the Cenvat Credit Rules, 2004 so as to clarify that 'inputs' which are eligible for availing Cenvat credit shall not include cement, angles, channels, CTD or TMT bar and other items used for construction of shed, building or structure for support of capital goods, [[Notification No. 16/2009-CE\(NT\)](#) refers]."

32. We further find that the Joint Secretary (TRU-I) had issued a letter dated 6.7.2009 bearing DO F No. 334/13/2009-TRU to the Chief Commissioners and Commissioners which under the heading 'Important Legislative Amendments' stated as follows in page 5:-

"1.8 Important Legislative Amendments:-

* * * * *

(ix) Rule (2) of Cenvat Credit Rules, 2004 has been amended to clarify that 'input' should not include cement, angles, channels, CTD/TMT bars etc. used for construction of shed, building or structure for support of capital goods.

* * * * *

Though this letter was addressed to the senior officers of the Central Excise Department, the same was made available to the public as seen from the publicly accessible website of the Department at www.cbec.nic.in

33. The Excise Law Times while reporting the Budget changes in its 13.7.2009 issue (Vol. 238, Part - 2, page A34) also reproduces the Explanatory Note from the Pink Book placed before the Parliament follows -

"(2) An explanation is being inserted in Rule 2 of Cenvat Credit Rules, 2004 so as to clarify that 'inputs' shall not include cement, angles, channels CTD or TMT bars and other items used for construction of shed, building or structure for support of capital goods."

34. From the foregoing it is evident that the intention behind the 2009 amendment to Explanation 2 to Rule 2(k) was merely to clarify the coverage under the expression "input" used in the CENVAT Credit Rules, 2004. There was no indication whatsoever that the 2009 amendment was made to change the scope of the Rules or to introduce any new provision.

35. We find that a similar issue had come up earlier for decision in the case of *J.K. Synthetics Ltd. Vs. CCE, Jaipur- 1996 (88) ELT 785*, where the Tribunal considered whether the substituted explanation to Rule 57Q, was clarificatory or not and came to the following finding:-

"The above substituted Explanation to Rule 57Q is obviously clarificatory in nature as is evident from the Budget Speech of the Finance Minister while moving the Finance Bill, 1996 in pursuance of which the notification has been issued. The Finance Minister stated, therein, "The Modvat Scheme which provides for duty credit on inputs and capital goods has been liberalised considerably over the past few years. Still there are problems about the coverage of certain inputs and capital goods. I propose to clarify the scope of eligible capital goods by specifying the heading and sub-headings of the tariff relating to capital goods in the Modvat Rules". (emphasis added). Being thus, a clarificatory amendment to Rule 57Q, the substituted Explanation, in our view, can be retrospectively applied as per well-settled principles of interpretation of notifications. In this context, the judgments of the Supreme Court in the case of K.P. Verghese - [1981 (131) ITR 597] = [\(2002-TIOL-128-SC-IT\)](#), Sold Trustee Loksikshan Trust (1976 TLR Page I), CIT vs. Mahindra & Mahindra reported in 1983 (4) SCC 392 are also relevant wherein the Supreme Court. laid down that if an amendment was being brought forward by the Finance Minister, his speech justifying the amendment would be relevant as it would throw considerable light on the object and the purpose of the amendment and his speech would be a proper aid to a correct interpretation of the words in this amendment."

Applying the ratio of the aforesaid decision to this case, the clarificatory amendment made to Explanation 2 to Rule 2(k) in 2009 has to be held to be retrospectively applicable.

36. In any case, going by the Explanatory Memorandum presented to the Parliament along with the amending notification and the contemporaneous exposition of the amendment made available to the departmental officers and the public clearly go to show that the impugned goods namely cement and steel items used for construction of shed, building or structure for support of capital goods were never intended to be included by the rule making authority under the expression 'input' eligible for CENVAT Credit. Hence, the argument that the rule making authority had used the general rule making power under Section 37(1) of the Central Excise Act, 1944 to extend CENVAT credit in respect of the impugned items to carry out the general purpose of the Act must be dispelled. When it is clear from the Explanatory Memorandum etc. that the Government never intended to allow CENVAT credit on the impugned items, it cannot be argued that the Government had used its general powers under Section 37(1), in excess of the specific powers under Section 37(2)(xvii) to grant such credit for the earlier period prior to the amendment. We, therefore, have no hesitation in discarding such a proposition that powers under Section 37(1) was used to grant credit in respect of goods for which credit cannot be otherwise allowed under specific powers under Section 37(2)(xvii).

37. We also find that even though Section 3(1)(a) of the Act names the duty levied under the Act as CENVAT, it is only a duty of excise on goods produced or manufactured. It is not a tax of the nature of value added tax which is usually imposed on all goods and services supplied by an assessee. In the case of an assessee under VAT regime, credit of input tax paid on all goods and services bought for his business is normally allowed since he pays tax on all goods and services supplied by him. Even such assessee are not allowed to re-claim VAT on that proportion of goods and services which are obtained for non-business use. While in a VAT system all goods and services supplied by an assessee is taxed, in our tax system, we have excise duty on manufacture, service tax on services supplied and sales tax on sale of goods under different enactments. Moreover, in our system, all goods and services supplied by a business are not subjected to tax since there are goods and services which either (i) are not taxable having not been brought under the tax net or (ii) are eligible for full exemption. Under such a scenario, the Parliament has not authorized credit of input tax paid on all goods and services purchased by an assessee as all his output may not be taxable. Under the scheme of excise law, the power to grant credit of excise duty paid on goods by a manufacturer is

limited and is governed by the rule making power under Section 37(2)(xvia) which is reproduced below:-

"(xvia) provide for the credit of duty paid or deemed to have been paid on the goods used in, or in relation to the manufacture of excisable goods"

The *CENVAT Credit Rules, 2004* made by the rule making authority has to necessarily conform to the above rule making power under the main statute. The rules can only provide for credit of duty paid on the goods used in, or in relation to the manufacture of excisable goods. We find that the expression 'excisable goods' has been defined under Section 2(d) of the Act to mean goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise. It can be inferred from a combined reading of Section 37(1)(xvia) and Section 2(d) that the reference to credit of duty paid on the goods used can only mean a reference to excisable goods on which duty has been paid.

38. We find from the *CENVAT Credit Rules* that the same allows credit of duty paid on (i) capital goods used in the factory of the manufacturer of the final products and (ii) inputs used in or in relation to the manufacture of final products. There are provisions in the *CENVAT Rules* which deny credit of duty paid on inputs and capital goods if the same are used for manufacture of exempted final products. The *CENVAT* scheme enables a manufacturer to take credit of duty paid on inputs and capital goods and utilize the same for paying duty on excisable goods manufactured by him which are called final products. If the scheme was to be limited to granting credit only on capital goods and inputs, it would be advantageous for a manufacturer to buy capital goods on payment of duty but it would be disadvantageous if he manufactured the capital goods himself by procuring inputs for the same (such as parts, components) on payment of duty as he would not be able to take credit of duty paid on such inputs because these are not inputs used for manufacturing the final products. It is clear that to obviate such a disadvantageous situation, the scope of 'input' has been extended to include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer. This provision has been made by way of inserting Explanation 2 to the definition of 'input' under Rule 2(k) of the *CENVAT Credit Rules*. Thus, we find that the scheme provides for credit of duty paid on:-

(i) capital goods used in the factory of the manufacturer of the final products,

(ii) inputs used in or in relation to the manufacture of final products, and

(iii) inputs used in the manufacture of capital goods which are further used in the factory of the manufacturer.

39. There are other details to the *CENVAT* scheme and we note that the definition of 'capital goods' primarily includes machinery items; components, spares and accessories of the same; and a few other things which have been specifically added such as pollution control equipment; moulds, dies etc.; refractories; tubes and pipes and fittings thereof; and storage tank. The moulds, dies, refractories, tubes and tank have been specifically added as they would not get classified and included as machinery items but the rule makers in their wisdom have specifically and additionally included these perhaps considering their functional utility to the manufacturing process. By specifically including these items, credit in respect of duty paid on such items has been allowed which would not otherwise get coverage under the term 'capital goods'. Secondly, credit of duty paid on inputs used in the manufacture of such specifically listed items has also been allowed. We, however, note that factory shed, building, foundation and structures (in the manufacture of which the impugned goods namely cement and steel items are used) have not been specifically listed under the definition of 'capital goods'.

40. Arguments have been advanced before us that credit of duty paid on the impugned goods namely cement and steel items which are used in laying foundation and / or making structures for support of capital goods should be allowed. Several alternative arguments have been advanced as follows:-

(i) The foundation and structural support should be held to be capital goods adopting the natural meaning of the phrase 'capital goods' and cement and steel items used for such foundation and structural support should be treated as input for capital goods.

(ii) The structural support should be treated as either part or as accessory of the machinery as without such support, the machinery cannot work and hence the impugned goods should be treated as inputs for such parts and accessories.

(iii) The impugned goods i.e. cement and steel items should be alternatively considered as inputs for the final product as these are used in relation to the manufacture of the same.

(iv) The fact that the impugned goods i.e. cement and steel items are used for laying of foundation or for making structural support which are non-dutiable being embedded to earth cannot be a reason for denying credit because there are a number of precedent decisions which allow credit even if intermediate goods are exempted.

(v) Since the value of the cement and steel items used for laying the foundation and building the structural support contributes to the value of the final product, credit of the duty paid on the same should be allowed. We examine below these arguments.

41. Keeping in view the scheme of the Act and the *CENVAT Credit Rules*, we are of the opinion that the phrases 'capital assets' and 'capital goods' cannot be held to be synonymous. The phrase capital goods has been defined in the *CENVAT Credit Rules* enumerating a number of goods. Obviously, the said definition of 'capital goods' has to be adopted while interpreting the rules for the purposes of granting and denying of credit. The phrase 'capital assets' has a wider meaning and it would certainly include capital goods and other assets such as immovable property in the form of building etc. Once this distinction is appreciated, it is easy to see that foundations and supporting structures embedded to earth may be categorized as capital assets but would not qualify to be capital goods in terms of the definition contained in the *CENVAT Credit Rules*. In fact, the definition states that 'capital goods' means "the following goods, namely after which a list of goods has been provided. Mainly all goods falling in the machinery chapters of the Tariff have been specified in the list as also components, spares and accessories of such goods, As stated above earlier in paragraph 39, a few additional items have also been specially included in the list such as pollution control equipment, moulds and dies, refractories, tubes and pipes, and storage tank. We find that the foundation and supporting structures are neither machinery items, nor components, spares and accessories of machineries, nor have they been listed for special inclusion in the definition. Some arguments have been advanced that the supporting structures should be considered as parts and accessories of the machinery. Parts (which include components parts and spare parts) and accessories have specific connotation in the context of the Customs and Excise Tariff Schedules in terms of which the supporting structures cannot be classified either as part or as accessory. A component part is required to complete a machinery and is, therefore, integral to its manufacture and function. A spare part is used to replace a worn out or damaged component part. An accessory either improves the efficiency / effectiveness of a machinery without changing its basic functions, or performs a secondary or subordinate function. For proper viewing, a television set may be required to be placed either on a table or on a TV stand / trolley or fixed on the wall. However, it cannot be anyone's case that the table, the TV stand, the TV trolley or the wall should be considered as a part or accessory of the television

set. Similarly, the foundation and the supporting structure for a machinery cannot be considered to be part of accessory of the machinery.

42. Additionally it has been argued on behalf of the Department that the capital goods have to be goods first and that the foundation and the supporting structures being embedded to earth are in the nature of immovable property and are not goods or excisable goods. Not only is the departmental contention well supported by a plethora of case laws, but even by the definition of 'capital goods' in the *CENVAT Credit* Rules which reads as "the following goods" supplemented with a list of goods that follows

43. Since the foundation and the supporting structures cannot be considered as capital goods, nor as parts or accessories of capital goods, nor the same have been specifically listed in the definition of capital goods (as tubes and pipes and storage tank etc. have been specifically listed), the question of treating cement and steel items as inputs for capital goods cannot arise, hence Explanation 2 to Rule 2(k) cannot be held to cover cement and steel items used for laying foundation and for building structural support even during the period prior to the 2009 amendment.

44. Another argument is that even the main definition of input under Rule 2(k) would include cement and steel items used for laying foundation and making supporting structures as the expression used thereunder is wide and includes everything "used in or in relation to the manufacture" of final products whether directly or indirectly. The argument is that cement and steel items so used are used in relation to the manufacture of final products. It has also been argued that at one time the definition of inputs excluded machines, machinery, plant, equipment, apparatus, tools, appliances used for producing or processing of any goods or for bringing about any change in any substance in or in relation to the manufacture of the final products and therefore, but for the exclusion, the expression inputs would have included machines etc. This argument appears to us to be clearly untenable. The exclusion provided earlier clearly appears to have been so provided by way of abundant caution to clarify that the inputs in any case would not include machinery and equipment. From such a clarificatory provision, it cannot be concluded that the expression 'input' would include cement and steel items used for laying foundation and making supporting structures. Moreover, if for a moment one has to agree with the contention that input included machinery etc. there would have been no need for providing a separate definition for capital goods and making a separate provision for allowing credit on capital goods. Such an argument cannot also be accepted as it would imply that capital goods would be included twice in the definition under Rule 2(a) with limited scope and with unlimited scope under Rule 2(k). Such a proposition appears to be totally absurd as the rule-makers cannot be seen to have provided two separate definitions to cover the same thing. There are also other rules in the *CENVAT Credit* Rules namely Rule 3, Rule 3(1), Rule 3(5), Rule 3 (5a), Rule 3 (5b), Rule 4(1), Rule 4(2), Rule 4(3), Rule 4(4), Rule, 5, Rule 6, Rule 9, Rule 15 which provide for different provisions for inputs and capital goods. It is very clear from these provisions that the rule making authority intended to deal with capital goods separately and inputs separately and the definition of input cannot be interpreted to include either the capital goods, or foundation and supporting structures for the same, as being argued by some of the Advocates.

45. In this context we also endorse the decision of the Tribunal in the case of *Vikram Cement* (supra) which is as follows:-

"28. If one reads the decision of J.K. Cotton Spg. & Wvg. Mills Co. Ltd. case, it has been clearly held therein that the expression "in the manufacture of goods" should normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. Where any particular process is so integrally connected with the ultimate production of goods that, but for that process, manufacture or processing of goods would

be commercially inexpedient, goods required in that process would fall within the expression "in the manufacture of goods". This clearly disclose that the Apex Court in no uncertain term has ruled that of those goods which form part of the process carried out by the manufacturer for converting the raw material into finished goods would be the products used in the manufacture of the goods, In another words, if the product is not integrally connected with the process of the manufacture and which does not results in utilization of such product directly or indirectly into the manufacture of the finished product, then such a product cannot be said to be the input utilized for or in relation to manufacture of the final product. This is also evident from the definition of the term input as found in Rule 2(k). The definition clearly uses the word "used" and further clarity the same with the expression "in or in relation to" and further uses these expressions with reference to the term "manufacture of final products". The definition disclosing the expression like "used", "in or in relation to", "the manufacture of final products" would inevitably disclose, that the same refer to only those products which are used in or integrally connected with the process of actual manufacture of the final product and only such product could be entitled to be classified as the input in or in relation to the manufacture of final products, and not otherwise. When the legislature in its wisdom has specifically defined a term, no Court or Tribunal under the guise of interpretation thereof is empowered to expand the meaning of such term. If the contention on behalf of the appellants is accepted, it would virtually amount to expand the meaning of the term "input" beyond the scope prescribed under the definition clause in Rule 2(k) of the Cenvat Credit Rules, 2004.

29. It is also pertinent to note that the legislature in its wisdom has independently defined the expression capital goods under Rule 2(a) of the said rules. If the inputs were to include every product under the sun which is somehow related to the premises where the manufacturing process goes on, then there is no need to provide a definition of the term capital goods and, therefore, the acceptance of the contention on behalf of the appellants would render the definition of the term the capital goods to be redundant as well as the provisions relating to extending the benefit of Cenvat credit to the capital goods."

46. The argument that the impugned goods, i.e.. cement and steel items should be alternatively considered as inputs for the final product treating the same to have been used in relation to the manufacture of the final product cannot be accepted in view of the decision of the Hon'ble Supreme Court in the case of Maruti Suzuki (cited supra) which holds that input should have nexus with the final product in or in relation to the process of manufacture. As has been rightly argued by the learned Jt. CDR, cement and the steel items used for laying foundation and for building supporting structures for the capital goods do not have any nexus with the process of manufacture.

47. It has also been argued that the impugned goods which are used for laying foundation and building structural support should be granted credit ignoring the fact that at the intermediary stage non-excisable goods in the nature of immovable property attached to earth come into being. Reliance is placed on several decisions where credit has been allowed even though intermediate goods produced are exempt from payment of duty, in this connection we note that as the learned Jt. CDR has rightly submitted, the erstwhile Rules 57D and 57R of the Central Excise Rules, 1944 provided for non-denial of the credit if any intermediate product came into existence during the manufacture of final product Hence, credit can be allowed if intermediate goods emerge during the process of manufacture of the final product. The immovable capital assets in the form of foundations and structural supports embedded to earth cannot be considered as intermediate goods arising in the process of manufacture or the final product. The precedent decisions cited by the learned counsel do not advance the case of the appellants for obtaining credit of duty paid cement and steel items in question as the

foundation and structural support, built using such items cannot be considered as intermediate goods arising in the process of manufacture of the final product.

48. The argument that the value of cement and steel items used for laying the foundation and building structural support contributes to the value of the final product and therefore, credit of the duty paid on the same should be allowed does not appear to be legally tenable under the CENVAT credit scheme. As pointed out in paragraph 37, the excise duty levied under the Act has only been named as CENVAT but the same is on goods produced or manufactured and is not in the nature of a value added tax. It was also noted in the said paragraph that the statute authorizes grant of credit of duty paid on the goods used in or in relation to the manufacture of excisable goods, The credit is not allowed with reference to value addition. We also find that in the case of Maruti Suzuki (supra), the Hon'ble Supreme Court has referred to the integral connection with the ultimate product, the dependence test and the functional utility test in the context of deciding what is an eligible input. It also held in the said case in paragraph 14 as follows:-

"Packing material by itself would not suffice till it is proved that the item is used in the course of manufacture of final product, Mere fact that the item is a packing material whose value is included in the assessable value of the final product will not entitle the manufacturer to take credit."

As such, the argument advanced by the learned counsel Shri P.K. Sahu that the value of cement and steel items used for laying foundation and building supporting structural contributes to the value of final product and therefore the credit of duty paid on cement and steel items should be allowed cannot be accepted since these items are not used in the course of manufacture of the final product.

49. In the light of the foregoing findings, we answer the questions referred to the Larger Bench as follows:-

(a) The term "capital goods" has been defined in the CENVAT Credit Rules, which in turn have been framed under the rule making powers conferred under Section 37(2) of the Act. The said Section refers to credit of duty paid on goods used in, or in relation to the manufacture of excisable goods. Hence, 'capital goods' defined in the CENVAT Credit Rules in the context of providing credit of duty paid, have to be excisable goods. Whether a particular plant or structure embedded to earth can be considered as excisable goods or not has to be determined in the light of the decisions of the Hon'ble Supreme Court on the issue, which is no longer res integra.

(b) Goods like cement and steel items used for laying 'foundation' and for building 'supporting structures' cannot be treated either as inputs for capital goods or as inputs in relation to the final products and therefore, no credit of duty paid on the same can be allowed under the CENVAT Credit Rules for the impugned period.

50. In respect of one appeal under reference, the learned counsel has argued that the impugned steel items have been used not for building supporting structures but for fabricating parts of machinery. This argument has to be examined by the jurisdictional Bench in the light of the facts of that case.

51. In view of our opinion as above, we also hold that the view taken by the Division Bench in the case of Bhushan Steel and Strips Ltd. (supra) is not the correct view in law.

52. The individual appeals under reference are directed to be returned to the jurisdictional Benches for final hearing and disposal.

(Pronounced in open court on 30.4.2010.)

(Paras are numbered as per the original text: **Editor**)

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