BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : **25.07.2024**
Pronounced on : **03.04.2025**

CORAM:

THE HON'BLE MR. JUSTICE **R.SURESH KUMAR**
AND
THE HON'BLE MR.JUSTICE **G.ARUL MURUGAN**

W.A.(MD).Nos.557 to 568 of 2024
in Rev.Appln.(MD).Nos.139 to 150 of 2023
in W.P.(MD).Nos.6895 to 6906 of 2022
and W.M.P.(MD).Nos.4190, 4191, 4192, 4195, 4196, 4197, 4198, 4200, 4201, 4202, 4203, 4199, 4193, 4207, 4208, 4211, 4212, 4215, 4216, 4219, 4220, 4224 and 4225 of 2024

1. The Commissioner of CGST & Central Excise
   No.1, Williams Road, Cantonment,
   Trichy, Tamil Nadu - 600 001.

2. The Deputy Commissioner of Central Excise & Service Tax
   Central Excise & Service Tax 2 Division,
   No.1, Williams Road, Cantonment,
   Trichy, Tamil Nadu - 600 001.

3. The Assistant Commissioner of Central Excise & Service Tax
   Central Excise & Service Tax 2 Division,
   No.1, Williams Road, Cantonment,
   Trichy, Tamil Nadu - 600 001.

4. The Superintendent of Central Excise & Service Tax,
   Central Excise Range,
   Oppillatha Amman Kovil Street,
   Ariyalur, Tamil Nadu .... Appellants in all the writ appeals

Vs.

1. Kothari Sugars and Chemicals Ltd.,
Represented by its Company Secretary,
Mr.R.Prakash, having an office at No.115,
Kothari Buildings, Mahatma Gandhi Road,
Nungambakkam,
Chennai - 600 034. ... Respondent in all the writ appeals

Common Prayer : Writ Appeals filed under Clause 15 of the Letters Patent to set aside the order passed in Rev.Appln.(MD).No.139 to 150 of 2023 dated 10.10.2023 in W.P.(MD).No.6895 to 6906 of 2022 dated 28.06.2023.

For Appellants : Mr.N.Dilipkumar in all the writ appeals

For Respondent : Mr.Joseph Kodianthara, Senior Counsel
for Mr.B.Vikram Veerasamy
in all the writ appeals

COMMON JUDGMENT

R.SURESH KUMAR, J.

Since the issue raised in all these writ appeals arise out of the common order passed in Rev.Appln.(MD).Nos.139 to 150 of 2023 in W.P.(MD).Nos.6895 to 6906 of 2022 by the writ court, these writ appeals were heard together and are disposed of by this common order.

2. The respondent Kothari Sugars and Chemicals Ltd., is a manufacturer of sugar and molasses falling under Chapter sub-heading

1701-1190, 1703-1000 of the Central Excise Tariff Act 1985. The respondent has availed CENVAT Credit for the capital goods used in establishing a captive power plant of the respondent and the said availing of Cenvat Credit, according to the Revenue was wrongly availed by the respondent / assessee, thereby show cause notices were issued covering from the period 2008 to 2015 on various dates.

3. The first show cause notice is dated 16.06.2009 for the period between February 2008 and January 2009 and the remaining show cause notices were issued in the year 2010, 2011, 2012, 2013, 2014 and 2015 and the last show cause notice is dated 09.11.2015 for the period from October 2014 to March 2015.

4. These show cause notices, in fact were under challenge in a batch of writ petition in W.P.(MD).Nos.6895 to 6906 of 2022 filed by the respondent / assessee.

5. Before the writ court, arguments on merits even though were submitted, at one point of time, i.e., on 28.06.2023, it was submitted on

behalf of the assessee / writ petitioner that the show cause notices have been issued asking the petitioner to show cause why CENVAT Credit availed on capital goods used in co-generation plant should not be demanded under the relevant provisions together with interest and penalty and the said issue since has already formed the subject matter of the order passed by the office of the Commissioner of CGST and the Central Excise in order-in-original dated 31.03.2023 relates to yet another similarly placed sugar factory with co-generation plant called M/s. EID Parry India Ltd., Pugalur and the said order has become final, on the same line, the issue raised in the batch of writ petitions could be decided.

6. When this representation had been made on behalf of the writ petitioner, the learned counsel appearing for the Revenue before the writ court in fact had stated that, this representation can directly be made before the officer concerned.

7. Recording these submissions made by the learned counsel appearing for both sides, the learned writ court disposed the said batch of writ petitions by order, dated 28.06.2023 giving a direction that on behalf of

the petitioner, they shall appear before the Commissioner of CGST and Central Excise, i.e., the first respondent in the writ petitions on 12.07.2023 at about 11.30 a.m and the first respondent therein shall follow the order, dated 31.03.2023, passed order-in-original in respect of M/s.EID Parry (India) Ltd., allowing the CENVAT Credit in respect of the machineries that the writ petitioner used in their co-generation captive power plant and such an order shall be passed within a period of two weeks from the date of appearance.

8. The learned Judge also recorded that, the writ petitioner's counsel had in fact conceded that in respect of two cases, i.e., in W.P.(MD).Nos. 6896 and 6903 of 2023, they were not pressing the arguments with reference to the input credit since they have already made the payments. Except these two aspects, the learned writ court has allowed all those writ petitions with the aforesaid directions by the order, dated 28.06.2023.

9. Pursuant to the said order passed by the writ court, dated 28.06.2023, the writ petitioner approached the officer concerned as directed by the writ court. However, during the hearing, the Revenue, i.e., the first

respondent in the writ petitions insisted upon the petitioner to produce the User Test Certificate, in short (UTC), as in the earlier case in respect of M/s.EID Parry (India) Ltd., the officer concerned had passed orders on behalf of the Revenue only on the basis of User Test Certificate, therefore, the User Test Certificate shall also be filed by the present writ petitioner.

10. Aggrieved over this demand made on behalf of the Revenue seeking the production of the User Test Certificate by the assessee / writ petitioner, the assessee had filed a batch of Review Applications in Rev.Appln.(MD).Nos.139 to 150 of 2023 seeking to review the order passed by the writ court dated 28.06.2023.

11. Those Review Applications had been heard by the writ court, where it is not only the issue as to whether the UTC was required to be produced as a mandatory one or not but also the learned writ court since had heard the matter in full on merits submitted by both sides, had decided the matter on merits. By thus, the Review Applications as well as the Writ Petitions in toto were allowed by the order, dated 10.10.2023. That is the order impugned in this batch of writ appeals, as aggrieved over the said

order of the writ court, dated 10.10.2023, the Revenue has preferred these Intra Court Appeals. That is how these appeals have come up for hearing and disposal.

12. The learned standing counsel Mr.N.Dilipkumar appearing for the Revenue / appellant has made submissions stating that, 12 number of show cause notices had been issued from the year 2008 to 2015. At that time, the same issue was pending against the very same writ petitioner / assessee before the Hon'ble Supreme Court in its own matter, all the show cause notices issued by the Revenue were kept under the Call book. In fact, the respondent herein / assessee by letter, dated 05.12.2012, requested the transfer of the show cause notices to the call book as the earlier case was pending before the Hon'ble Supreme Court. It is inconsonance with the departmental procedures as per the Board's Circular dated 10.03.2017 the show cause notices had been transferred and kept in the Call book.

13. When the said issue was pending before the Hon'ble Supreme Court, the Revenue at a later point of time had decided to withdraw the appeals against the Kothari Sugars in terms of the low monetary value as per

the National Litigation Policy and thus, the SLPs in C.A.No.2039-2040 of 2011 were withdrawn on low monetary limit. Therefore all the show cause notices which have been kept under call book have been taken out from the Call book for adjudication.

14. Only at that juncture, according to the learned counsel appearing for the Revenue, those 12 writ petitions were filed and while orders were passed on those writ petitions on 28.06.2023, the writ petitioners were directed to appear before the Adjudicating Authority on 12.07.2023 and also directed the Department to follow the order-in-original in the case of M/s.EID Parry (India) Ltd., Pugalur, where the Adjudicating Authority had in fact allowed the CENVAT Credit on the machinery that was used in the co-generation / captive power plant based on the user Test certified by the Chartered Engineer.

15. The learned counsel for the Revenue has further submitted that, since the Department had initiated adjudicating proceedings in respect of M/s.EID Parry (India) Ltd., based on the law having been declared by the Hon'ble Supreme Court in the decision in Commissioner of C.Ex.,

Coimbatore v. Jawahat Mills Ltd., reported in 2001 (132) E.L.T.3 (S.C.) and Commr. of C.Ex., Jaipur v. Rajasthan Spinning & Weaving Mills Ltd., reported in 2010 (255) E.L.T.481 (S.C.) and had allowed the proceedings in respect of M/s.EID Parry (India) Ltd., to have the benefit of CENVAT Credit only on the basis of the user test for which the necessary certification had been produced by the M/s.EID Parry (India) Ltd. Therefore since the present assessee / writ petitioner, namely Kothari Sugars also is similarly placed, in order to complete the adjudication as directed by the Court, by order, dated 28.06.2023, the Adjudicating Authority required the assessee to produce the User Test Certificate (UTC).

16. Therefore it cannot be stated that, it was an after thought or new invention or only now demanded on behalf of the Revenue to file the User Test Certificate and therefore the very Review Applications filed by the writ petitioner ought not to have been entertained by the writ court , however, the learned writ court having entertained the Review Applications in fact had allowed the same by allowing the writ petitions also not only on the point of User Test Certificate but also on merits including the delay. Hence such an order passed by the learned writ court through the order impugned

in a batch of Review Applications dated 10.10.2023 is erroneous. Hence the learned standing counsel Mr.N.Dilipkumar appearing for the Revenue would seek indulgence of this Court against the order impugned.

17. On the other hand, Mr.Joseph Kodianthara, learned Senior counsel assisted by Mr.B.Vikram Veerasamy, learned counsel appearing for the respondent / assessee would contend that, both in the Jawahar Mills case as well as in the Rajasthan Spinning and Weaving Mills case it has not been decided by the Hon'ble Supreme Court that, the User Test Certificate is a mandatory one or as a pre-requisite one before starting with the adjudication process or completing the same. If at all there has been any doubt over the usage of such capital machineries in the co-gen plant or the captive plant, then only the question of production of certificate would arise. However here in the case in hand, according to the learned Senior counsel appearing for the Assessee, no such doubt has arisen and it is not the case of the Revenue even emanating from the show cause notice that, there has been a doubt over the utility or usage of these machineries as capital goods for the purpose of availing the CENVAT Credit. When that being so, the sudden insistment on the part of the Revenue at the time of adjudication process to

produce the User Test Certificate is an after thought and a new invention, therefore it cannot be imposed on the Assessee / Respondent herein, he contended.

18. The learned Senior counsel would also submit that, insofar as the reason assigned by the Revenue for issuing the show cause notices is that, the assessee has availed the CENVAT Credit wrongly for the capital goods used in the co-gen plant from where the end project would be the electricity which is exempted from excise duty. When that being so, as per the provisions of the CENVAT Rules, CENVAT Credit cannot be availed by the assessee. However, that issue was already concluded or given up against the own case of the assessee, as the matter though has gone up to the Hon'ble Supreme Court, ultimately it has been withdrawn. Therefore the only reason cited in the show cause notice since has gone out or exhausted, the question of testing as to whether the assessee has used those capital goods or not does not arise, hence, such an insistment of User Test Certificate is an unwarranted demand and superfluous one as it is not a mandated one even according to the two decisions mainly relied upon by the Revenue and therefore the learned Senior Counsel appearing for the

Assessee / Respondent would contend that, such an insistment of User Test Certificate by the Adjudicating Authority before deciding the claim of the assessee to avail the CENVAT Credit was unjustifiable.

19. The learned Senior counsel also would submit that, not only on the basis of the User Test Certificate but also on the basis of merits, arguments were advanced by both sides in the writ court in the Review Applications, where the point of delay also had been raised on behalf of the assessee and on merits as well on the point of delay, the learned writ court has considered the issue at length and ultimately concluded that on merits as well as on the ground of delay, the show cause notices which were originally impugned before the writ court under the writ petitions would not be sustained and therefore, the learned writ court has allowed the Review Applications filed by the Assessee, by thus, allowed the writ petitions also through the order impugned. Hence, the learned Senior counsel would contend that, absolutely there has been no scope for interference against the order impugned by this Court and hence, the learned Senior counsel seeks indulgence of this Court to dismiss all these writ appeals.

20. We have considered the rival submissions made by the learned counsel appearing for both sides and have perused the materials placed before this Court.

21. The issue in fact has emanated from the issuance of show cause notices starting from 2008 till 2015.

22. If we look at the show cause notices initially issued against the assessee on 16.06.2009, inter alia it states as follows :

> "2. The assessee have set-up a co-generation plant in their factory premises. Part of the electricity generated is captively consumed and the balance quantity is being sold to TNEB. Electricity is an exempted product. During the course of audit of the records and accounts maintained by the assessees, it was noticed that they had availed Cenvat Credit to the tune of Rs. 3,20,880/- on capital goods used in Co-generation plant as detailed below:

Sl.No	Name of the Supplier	Invoive No. & date	Basic Excise Duty	ECess	SHE. CESS	Total	RG-23C Part-II Sl.No.
1.	Krishnaveni Carbon Brush	324/ 16.10.2008	325	7	3	335	348/31.10.08 & 0/01.04.09
2.	TEE CEE Enterprises	E101/ 15/09/2008	11059	222	110	11391	349/31.10.08 & 0/01.04.09

Sl.No	Name of the Supplier	Invoive No. & date	Basic Excise Duty	ECess	SHE. CESS	Total	RG-23C Part-II Sl.No.
3.	K-Life Industries	2284/ 19/03/2008	2625	53	26	2704	62/30/05/08 & & 0/01/04/09
4.	Yokogawa India Ltd.,	794/ 24/10/2008	1876	37	19	1932	385/26.11.08 & 0/01/04/09
5.	Yokogawa India Ltd.,	795/ 24/10/2008	257208	5145	2572	264925	386/26.11.08 & 0/01/04/09
6.	Yokogawa India Ltd.,	797/ 24/10/2008	34916	697	348	35961	386/26.11.08 & 0/01/04/09
7.	Dynamic Gasket	2139/ 23/01/09	30	1	0	31	472/31.01.09 & 0/01/04/09
8.	Shanthi Gears Ltd.,	C/10805506/ 02/09/09	3496	70	35	3601	320/03/10/08 &0/01/04/09

...

...

...

6. Whereas it appears that the assessee had availed cenvat credit on capital goods used in the co-generation plant which generates electricity, an exempted product to the tune of Rs. 3,20,880/- during the period from February, 2008 to January, 2009, which is ineligible under the provision of Rule 6(1) of COR

...

...

...

7. Now, therefore, M/ Kothari Sugars and Chemicals Ltd., Kattur are required to show cause to the Deputy Commissioner of Central Excise, Central Excise || Division, No.1 Williams Road, Cantonment, Trichy -01 with in 30 days from the receipt of this notice,an to why;

1. the cenvat credit Rs.3,20,880/- (Rupees Three lakhs twenty thousand eight hundred and eighty only) (BED Rs.3,11,535/- Ed. Cess Rs.6,231/-and SHE.Cess Rs.3,114/-) availed on capital goods used in co-generation plant during the period from February, 2008 to January, 2009 should not be demanded under Rule 14 of CCR read with proviso to section 11A(1) of the Central Excise Act, 1944 as ineligible credit;

ii. interest at appropriate rate on the above said amount should not be collected under Rule 14 of CCR read with section 11AB of the Central Excise Act, 1944 from the date of availment of such ineligible credit to till the date of either reversal or recovery;

iii. penalty should not be imposed on them under Rule 15 CCR read with section 11AC of the Central Excise Act, 1944."

23. The next show cause notice is dated 24.02.2010, where inter alia the Revenue has stated the following :

"3. In terms of Rule 6(4) of CENVAT Credit Rules 2004, "No CENVAT credit shall be allowed

on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services other than the final products which are exempted from the whole of Excise duty leviable thereon under any Notification where exemption is granted based upon the value or quantity of clearances made in a financial year."

4. The assessee have used the above Capital Goods in the co-generation plant installed in their factory premises for the manufacture of Electricity which is an exempted product.

...

...

...

7. Now, therefore, M/s. Kothari Sugars & Chemicals Ltd., Kattur are required to show cause to the Deputy/Assistant Commissioner of Central Excise, Central Excise & Service Tax II Division, No.1, Williams Road, Cantonment, Trichy - 620001 within 30 days from the receipt of this notice as to why:

i) the CENVAT Credit of Rs. 198669/- (Rupees One lakhs ninety eight thousand six hundred and sixty nine only) (BED: Rs. 192891/-; Edu. Cess Rs.3852/-; and S.Edu.Cess: Rs. 1926/-) availed on

Capital Goods used in Co-generation plant during the period from April 2009 to December 2009 should not be demanded from them under Rule 14 of the CENVAT Credit Rules 2004 read with Sec. 11A(1) of. Central Excise Act 1944 as ineligible credit;"

24. Almost similar reasons or similar text has been mentioned in all such show cause notices from 2008 to 2015.

25. If we look at the show cause notices issued by the Revenue, we can find that the stand of the Revenue is that, the assessee has set up a co-generation plant in their factory premises, part of the Electricity generated is captively consumed and the balance quantity is being sold to TNEB, i.e., Tamil Nadu Electricity Board, presently, TANGEDCO and the electricity is an exempted product and during the audit it was noticed that they had availed CENVAT Credit on capital goods used in co-generation plant and what are all the machineries, i,e., capital goods which were used or installed in the co-generation plant also had been enumerated as eight items were mentioned in the notice dated 16.06.2009 and it appears that, the assessee

had availed CENVAT Credit on the capital goods used in the co-generation plant which generates electricity, it is an exempted product and therefore show cause notice now had been issued as to why the CENVAT Credit availed on capital goods used in co-generation plant during the period should not be demanded under Rule 14 of CCR r/w proviso to Section 11(A)(1) of the Central Excise Act, 1944.

26. In the notice dated 24.02.2010 as extracted herein above, the Revenue has stated that, the assessee has used the above capital goods in the co-generation plant installed in their factory premises for the manufacture of electricity which is an exempted product.

27. Therefore from the content of the show cause notices, we can easily ascertain that, it is the definite case on the part of the Revenue that, the assesee has used the capital goods or machineries in the co-generation plant which generates the electricity which is the main product. Electricity being an exempted product, the assessee is not entailed to avail the CENVAT Credit, however the assessee since has availed the CENVAT

Credit, it become necessitated to recover the said amount availed by them and therefore show cause notices have been issued.

28. Nowhere it is stated or asserted by the Revenue in the show cause notices that, the assessee has claimed to have used machineries, capital goods in the co-generation plant or captive unit in the factory premises but no certification to that effect has been filed by the assessee and therefore in order to ascertain or assess such usage of capital goods in the cogent plant of the assessee, either inspection has to be undertaken or a User Test Certificate issued by the Chartered Engineer to be produced. Unless these Certification are produced to the satisfaction of the Revenue, the CENVAT Credit availed by the assessee cannot be accepted and therefore such availment of CENVAT Credit wrongly could be recovered from the assessee, to that extent a show cause notice is issued, could have been the show cause notice issued by the Revenue, had there been the definite stand of the Revenue that, the claim made by the assessee to have used or utilised the capital goods is not supported by any evidences.

29. When that was not the stand of the Revenue and no where it has raised any doubt over the utility or usages of these capital goods in the cogent plant of the assessee and the only reason for which the series of show cause notices were issued by the Revenue was that, the co-generation plant generates electricity which is an exempted product, therefore CENVAT Credit cannot be availed, the Revenue at no stretch of imagination at a later date can change their stand by insisting upon the User Test Certificate which is an after thought as a new demand which has not been form part of the original show cause notices.

30. It is a settled legal proposition that, the Revenue cannot improve their case beyond what has been shown in their show cause notices. Umpteen number of decisions have been rendered that, the Revenue must confine with the content of the show cause notice, as the show cause notice is the basis, based on which only adjudication process has to go on and to be decided.

31. To substantiate the aforestated principle, though number of citations could be relied upon, the following two decisions can be usefully referred to :

(i) CCE v. Shital International reported in (2011) 1 SCC 109, wherein the Hon'ble Supreme Court has held as follows :

> "19. As regards the process of electrifying polish, now pressed into service by the Revenue, it is trite law that unless the foundation of the case is laid in the show- cause notice, the revenue cannot be permitted to build up a new case against the assessee. (See:Commissioner of Customs, Mumbai Vs. Toyo Engineering India Ltd, Commissioner of Central Excise, Nagpur Vs. Ballarpur Industries Ltd and Commissioner of Central Excise, Bhubaneshwar-I Vs. Champdany Industries Limited). Admittedly, in the instant case, no such objection was raised by the adjudicating authority in the show cause notice dated 22nd June 2001 relating to the assessment year 1988-89 to 2000-01. However, in the show cause notice dated 12th December 2000, the process of electrifying polish finds a brief mention. Therefore, in light of the settled legal position, the plea of the learned

counsel for the Revenue in that behalf cannot be entertained as the revenue cannot be allowed to raise a fresh plea, which has not been raised in the Show Cause notice nor can it be allowed to take contradictory stands in relation to the same assessee."

(ii) Techno Prints v. Chhattisgarh Textbook Corporation and Ors., reported in MANU/SC/0230/2025, it has been held as follows :

"32. We may put it in a slightly different way. Take for instance, the show cause notice in the present case is the final order of blacklisting. The final order in any case cannot travel beyond the show cause notice. Therefore, we take the show cause notice as the final order. Whether it makes out a case for blacklisting? This should be the test to determine whether it is a genuine case to blacklist a contractor or visit him with any other penalty like forfeiture of EMD, recovery of damages etc. We say so because once an order of blacklisting is passed the same would put an end to the business of the person concerned. It is a drastic step. Once the final order blacklisting the Contractor is passed then the Contractor is left with no other option but

> to go to the High Court invoking writ jurisdiction Under Article 226 of the Constitution and challenge the same. If he succeeds before the Single Judge then it is well and good otherwise he may have to prefer a writ appeal or LPA as the case may be. This again would lead to unnecessary litigation in the High Courts. The endeavour should be to curtail the litigation and not to overburden the High Courts with litigations of the present type more particularly when the law by and large is very well settled and there is no further scope of any debate."

32. That apart, there has been a comparison between two cases, i.e., the case of M/s.EID Parry (India) Ltd., and the present assessee, namely Kothari Sugars and Chemicals Ltd.,

33. Insofar as the M/s.EID Parry (India) Ltd., there has been a show cause notice dated 07.05.2008. When this M/s.EID Parry (India) Ltd., case was adjudicated, the Adjudicating Authority by order-in-original dated 31.03.2023 has exhaustively discussed the issue and decided the issue in favour of M/s.EID Parry (India) Ltd.,

34. In the said order of M/s.EID Parry (India) Ltd., dated 31.03.2023, the Adjudicating Authority has given the following findings :

> "12. I find that the Show cause notice alleges that any components, spares and accessories used in the said Captive Power Plant do not fall under the definition of capital goods as per Rule 2(a)(A)(i) of CENVAT credit Rules, 2004 in view of the fact that the turnkey projects are not excisable goods as they are not 'goods' conforming to the description of any machinery which fall under the chapter numbers mentioned in the definition of capital goods. In this regard, I have gone through the definition of Capital Goods, which clearly states that the goods mentioned under Rule 2(a)(A) ibid are to be used in the factory of the manufacture of the final products. It is immaterial whether they are erected/installed in a plant, they will fall under the definition and eligible for CENVAT credit. Thus, to fall under the scope of the definition of Capital Goods (as applicable to the case on hand)-1) They should fall under the Chapter Heading mentioned under Rule 2(a)(A)(i) ibid; 2)It should be Pollution Control Equipments;

3)Components, Spares and accessories of the above said goods/equipment.

13. The moot question in respect of captive power plant remained legally disputed because of the doubtful nature of tax liability on capital power plants and the consequential credit eligibility in respect of goods used as inputs for the assembly or the manufacture of such captive power plants. The second issue involved is in case of any inputs that are used for the manufacture of electricity whether credit availed on such inputs is legal or otherwise in view of electricity reportedly being non-excisable goods and even otherwise a part of electricity so produced is being wheeled out instead of being used in the manufacture of final product by the factory.

All these disputes are legally settled by the Hon'ble Apex Court after prolonged legal deliberation at lower forum and as such, I am constrained to see the issue involved here in with regard to settled legal precedents.

14. In this case on hand, the issue involved is

a) Whether the credit availed in respect of machineries, components and other accessories

used towards setting up of a captive power plant is eligible or not?

b) Whether the credit on inputs or services used towards setting up of a captive power plant is eligible or not?

...

...

...

16. I have perused the subsequent version of Cenvat Credit Rules, 2004 which was in force during the disputed period and noticed that there has not been any paradigm shift in the legislative intention to prohibit credit with regard to capital goods. On the other hand, the definition for capital goods is much more liberal under Cenvat Credit Rules, 2004. In the case of CCE Vs. Rajasthan Spinning and Weaving Mills Ltd. - 2010(255) ELT 481 (SC), the Hon ble Apex Court further reiterated the principles laid down by the Apex Court in the case of Jawahar Mills cited above in interpreting the definition of capital goods to determine its credit eligibility. This settled legal provision has been followed up by various lower juridical and Appellate forums subsequently. In the absence of any change in legislative intention,

I am duty bound to decide the issue on hand on the basis of legal interpretation given by the Hon'ble Apex Court in the above cited cases and hence disregard the clarification issued by the Board in the above cited circular as irrelevant for the subject matter inasmuch as there is no question of excisability of capital power plant disputed herein but only the eligibility of credit on goods used in establishing the captive power plants within the frame work of Cenvat Credit Rules, 2004. Further there is no dispute in the subject notice with regard to the status of Captive Power Plant falling within the parameter of Plant and Equipments.

17. I find that the goods falling under Chapters mentioned under Rule 2(a)(A)(i) ibid would be eligible for credit unless it is proved that they were not used in the factory of manufacture by the assessee in the instant case. Similarly, if it is in the nature of Pollution Control Equipment also it is extendable. In respect of the goods which neither fall under Rule 2(a)(A)(i) & Rule 2(a)(A)(ii) ibid it has to be examined whether they are covered under Rule 2(a)(A)(iii) ibid. The Apex Court in the ease of Commissioner of Central Excise, Jaipur vs. Rajasthan Spinning & Weaving Mills

Ltd. reported in 2010 (255) ELT 481 (SC) has allowed the credit in respect of steel plates and M.S. Channels, used in the fabrication of chimney in the case of Commnr. of Central Excise, Jaipur vs. M/S. Rajasthan Spinn. & Weaving... on 9 July, 2010 by applying the user test. The relevant portion of the order is reproduced below

...

...

...

21. It has to be determine as to whether the aforementioned materials/components/services form integral part of the Captive Power Plant and further whether the aforementioned materials/components/services satisfy the user test propounded by the Hon'ble Supreme Court in the case of M/s. Rajasthan Spinning & Weaving Mills Ltd. in order to ascertain the usage of impugned goods, the jurisdictional Assistant Commissioner of GST and central Excise, vas directed to cause factual verification so as to determine as to whether the aforementioned materials/components satisfy the 'user test and fall under the ambit of capital goods or otherwise.

USER-TEST VERIFICATION REPORT

22. In the jurisdictional range officer's verification report dated 31.03.2023, it is submitted as under. "It is submitted by the Jurisdictional superintendent of GST and central Excise that the goods have been verified and the same were installed and visually inspected with reference to the description of goods/components. Details pertaining to each of the said goods like description of the goods, sample invoices, photos and Chartered Engineer Certificate were obtained from the assessee. Physical verification of the goods installed was conducted in presence of Chartered Engineer, vis-a-vis the description of the goods and the use thereof. On inspection, it is observed that each of the said goods/components form integral part of the power plant and the same are essential for the efficient functioning of the power plant. Hence, the impugned goods satisfy the "User Test". The Certificate issued by chartered Engineer ELBI/CHE/2223/1223 dated 27.03.2023 is forwarded by the Range officer."

35. The Adjudicating Authority in the case of M/s.EID Parry (India) Ltd., has stated that the User Test theory propounded by the Hon'ble Supreme Court in the case of Rajasthan Spinning and Weaving Mills Ltd., (*cited supra*) to satisfy that the materials, components have been used in the captive power plant was applied and therefore the Adjudicating Authority before whom infact, the Jurisdiction Range Officer had filed Verification Report dated 31.03.2023 after conducting the verification and inspection by the Chartered Engineer and thereafter, has allowed the case of the M/s.EID Parry (India) Ltd.,

36. Therefore the counsel appearing for the Revenue in the present case has argued that, no doubt the assessee herein, i.e., Kothari Sugars may be entitled to get the benefit of availing the CENVAT Credit for the capital goods which they installed and used in the co-generation power plant provided only on the basis of the case of M/s.EID Parry (India) Ltd., which was allowed by the Adjudicating Authority, if so, whether the same treatment can be meted out by the present assessee, if it is asked. The same can be availed by the present assessee in the similar fashion as has been adopted in the case of M/s.EID Parry (India) Ltd., i.e., on satisfaction of the

User Test Certificate or User Test Theory. In support of this contention, the learned Standing counsel relied upon the said two decisions, namely Jawahar Mills Ltd., case and Rajasthan Spinning and Weaving Mills Ltd.,case cited supra.

37. This issue in fact has been considered by the learned writ court in the order impugned, where the learned writ court has discussed the import of the two decisions, namely Jawahar Mills Ltd., case and Rajasthan Spinning and Weaving Mills Ltd., case and has decided as follows :

> "23. The show cause notices which are the subject matter of these writ petitions have been issued between the period 2009 to 2015 on the ground that the machineries/components which are used in the cogeneration plant is being used for generating electricity which is an exempted commodity and therefore the petitioners are not entitled to CENVAT Credit. This conclusion has been arrived at by applying the provisions of Rule 6(4) of the CENVAT Credit Rules 2004 which states that CENVAT Credit cannot be allowed on capital goods which are used exclusively in the manufacture of exempted goods other than the

final products which are exempted from whole of duty of Excise duty leviable. Therefore, it is clearly seen that the respondents whose earlier show cause notices have reached finality are attempting to raise a new issue which was not pleaded earlier. Their demand for User Test Certificates based on the judgements of the Hon'ble Supreme Court in the Jawahar Mills Ltd and the Rajasthan Spinning & Weaving Mills is also not maintainable for the simple reason that at no point in time either in the earlier show cause notices or in the show cause notices now impugned has the respondents raised a doubt that all the components in respect of which CENVAT Credit has been availed are not being put to use in the co-generation plant. This stand has been taken up for the first time only when the petitioner had appeared before the 1st respondent after the order of this Court dated 28.06.2023. Further the show cause notice clearly states that the components are being used to generate electricity which is an exempted good; therefore is clear that the respondents had no doubt that the equipments were being put to use for generating electricity.

24. The demand for the User Test Certificate is on the basis that the Hon'ble Supreme Court has given its stamp of approval to the production of the User Test Certificate in its judgements in the Jawahar Mills Ltd and the Rajasthan Spinning & Weaving Mills which have been referred earlier. Therefore, it is necessary to consider the dicta laid down in the above two cases.

25. In the case of Jawahar Mills Ltd, the Hon'ble Supreme Court was considering the issue of availing MODVAT Credit in respect of certain items by the manufacturers treating them as capital goods in terms of rules 57 Q of the Central Excise Rules 1944. The controversy in that case was as to whether these items would come within the ambit of capital goods as set out in Rule 57-Q. The learned Judges had observed that the definition of capital goods is wide and capital goods could be machines, machinery, plants, equipment and apparatus tools or appliances which are used for producing or processing any goods or for bringing about any change in any substances for manufacturing of the final products qualifying for availing a MODVAT Credit. In the said case, the Hon'ble Supreme Court had observed that at no

point in time before the authorities had the revenue raised a case that the items do not satisfy the requirements of capital goods within the meaning of the Rule 57-Q, on the ground of User Test and it was only before the Hon'ble Supreme Court that the same has been urged. Therefore, the learned Judges had refused to remand the matter for fresh decision. The learned Judges had simply given its concurrence to an argument advanced by the learned Additional Solicitor General that the user of a particular component would determine whether or not it qualifies the requirement of clause 1A of the definition of capital goods as given in the explanation to Section 57-Q of the Central Excise Rules. This is only a reference in the passing. In fact, a reading of the said judgement nowhere indicates that the Hon'ble Supreme Court had directed the production of a User Test Certificate.

26. This Judgement has been followed by the Supreme Court once again in the case of Rajasthan Spinning & Weaving Mills which is the other judgement on the basis of which the respondents seek to justify their demand for a User Test Certificate. In the case of Rajasthan Spinning &

Weaving Mills the issue was whether the steel plates and M.S channels used for the fabrication of the chimney in a diesel generating shed would qualify to be termed as capital goods and thereby entitled to MODVAT Credit. Ultimately, the Hon'ble Supreme Court had held that the steel plates and M.S channels fall within the definition of capital goods and therefore the petitioner was entitled to avail MODVAT Credit. In the said case the Hon'ble Supreme Court had applied the "User Test" to come to the conclusion that the steel plates and M.S channels are used for the fabrication of the chimney and would therefore fall within the purview of Serial No.5 of table attached to Rule 57Q of the Central Excise Rules, 1944. These judgments have not set a precedent that a User Test Certificate is mandatory. On the contrary, in the case of Jawahar Mills Ltd, the Hon'ble Supreme Court had observed that the plea of User Test had not been raised earlier by the respondent/ revenue and therefore, they had become disentitled to raise the plea. In the case of Rajasthan Spinning & Weaving Mills, the User Test has been used in the context of coming to the conclusion as to whether the steel plates and M.S

Channel are being used for the fabrication of chimney."

38. We are in complete agreement with the discussion made and conclusion reached by the learned writ court insofar as the applicability of the two decisions on the case in hand.

39. In fact, in CCE v. Jawahar Mills Ltd., case reported in (2001) 6 SCC 274, the relevant para, i.e., para 6 of the order reads thus :

"The contention of learned Additional Solicitor General that the aforesaid decision and other decisions referred by the Tribunal in the impugned order were cases involving sales tax and income tax and, therefore, the Tribunal should not have relied on those decisions is without any substance because the real question is that of the principle laid down by a decision. In view of the liberal language of the provision, Mr. Rohtagi fairly and very rightly did not seriously dispute that if any of the items enumerated in explanation 1(a) is used for any purpose mentioned therein for the

manufacture of final products, it would satisfy the test of `Capital goods'. The main contention of Mr. Rohtagi, however, is that the question whether an item falls within the definition of `Capital goods' would depend upon the user it is put to. The submission is that parts of the items in respect whereof availing of Modvat credit has been allowed by the Tribunal could not be treated as 'Capital goods' as the manufacturer could not establish that the entire item was used in the manufacture of final product. To illustrate his point, Mr. Rohtagi submitted that part of a cable may go into the machine used by the manufacturer and, thus, may qualify the requirement of clause 1(a) and, at the same time, another part of the cable which is used only for lights and fans would not so qualify. We have no difficulty in accepting the contention of the learned Additional Solicitor General that, under these circumstances, user will determine whether an item qualifies or not the requirement of clause 1(a). However, in the present cases this aspect has no relevance. It was not the case of the revenue at any stage before the authorities that an item does not satisfy the requirement of `Capital goods' within the meaning

of the Rule on the ground of its user as it now sought to be urged by the learned counsel. The case of the revenue has all through been that the items in question per se are not `Capital goods' within the meaning of the expression as defined in Explanation 1(a). In respect of the cables of which Mr. Rohtagi gave example, the stand of the revenue before the Tribunal was that the cables per se cannot be treated as `Capital goods'. The stand of the revenue was not as has been projected now by Mr. Rohtagi. In this view, the question of directing remand of these matters for fresh decision by the Tribunal does not arise. On the facts and circumstances of these cases, therefore, the stand that the items in question are not used for manufacture of final product cannot be accepted for the reasons aforestated."

40. Even in Jawahar Mills Ltd., case, this kind of User Test Principle by requiring a User Test Certificate as a mandatory one before the Adjudication has not been propounded. What is the case of the Revenue right from the beginning is the matter. As the case of the Revenue should emanate from the show cause notice, where what was the stand that has

been taken by the Revenue, that shall be taken into account. The case of the Revenue all through has been whether the goods utilised or used by the assessee are the capital goods or not and if they are capital goods, whether the assessee would be entitled to avail the CENVAT Credit or not are the only question to be answered by the Adjudicating Authority in every such case.

41. Therefore based on the facts that has been emanated from the show cause notice, which are the basic content of the Revenue, if we apply the principle of Jawahar Mills Ltd., case that would not advance the case of the Revenue, instead that would advance the case of the assessee.

42. Almost is the similar situation, if we apply the principle of Rajasthan Spinning and Weaving Mills Ltd., case also.

43. It was in fact, relied upon by the learned Standing counsel appearing for the Revenue about an order passed by the Adjudicating Authority in similar case pertains to Dhanalakshmi Sugars Pvt., Ltd., where

also such an issue had come up, where the learned counsel relied upon paragraph 21 and 34(b) which reads thus :

> "21. It has to be determined as to whether the aforementioned materials / components / services form integral part of the Captive Power Plant and further whether the aforementioned materials / components / services satisfy the user test propounded by the Hon'ble Supreme Court as in the case of M/s.Rajasthan Spinning & Weaving Mills Ltd. In order to ascertain the usage of impugned goods, the jurisdictional Assistant Commissioner of GST and Central Excise, was directed to cause factual verification so as to determine as to whether the aforementioned materials/components satisfy the 'user test' and fall under the ambit of capital goods or otherwise.
>
> ...
>
> ...
>
> ...
>
> 34.(b). I disallow the CENVAT credit on Items, where no proof is rendered by the assessee that item was used as goods specified in Rule2(a)(A)(i)&(ii) of CCR, 2004 as indicated in Table B (out

of materials listed in Annexure-I of Chartered Engineer Certificate)."

44. By citing this order, the learned Standing counsel has submitted that, whether those materials, i.e., capital goods or machineries have been used or utilised in the captive plant or co-gent plant by any assessee, that has to be tested to the satisfaction of the Adjudicating Authority, then only the assessee would be allowed to avail the CENVAT Credit. If such a satisfaction is not made by the assessee concerned to the Adjudicating Authority, the availment of the CENVAT Credit shall be treated as a wrong availment as without using or utilising such a capital goods, such a availment of CENVAT Credit should not have been availed and therefore on that ground adjudication can be decided, he contended.

45. We are not impressed with the said arguments advanced by the learned Standing counsel appearing for the Revenue, for the simple reason that, as we stated in the earlier paragraphs of this order, it is a settled proposition that, the case of the Revenue should only emanate from the show cause notice. Here in the case in hand, the first show cause notice was

given on16.06.2009 and a copy of which have been filed before this Court in the typed set of documents by the Revenue.

46. The show cause notice dated 16.06.2009 having been perused, the relevant portions have already been extracted herein above, where it is the definite case of the Revenue that, the assessee had set up a co-generation plant in their factory premises. During the course of audit of the records and accounts maintained by the assessee, it was noticed that they have availed CENVAT Credit on capital goods used in co-generation plant as detailed below. By stating this, eight items have been mentioned as capital goods, which had been used in co-generation plant.

47. After setting out the same, the Revenue has further stated in paragraph 5 of the show cause notice that, it appears that the assessee had availed CENVAT Credit on capital goods used in the co-generation plant which generates electricity an exempted product.

48. Nowhere in the show notice it has been stated by the Revenue that, the assessee has claimed to have used the capital goods and availed

CENVAT Credit, however, in order to satisfy the Revenue that those capital goods were really used in the captive plant or the co-gent plant necessary documents or certification including the User Test Certificate shall be produced.

49. There was no such assertion mentioned in any of the show cause notices which were challenged before the writ court. Therefore it is not the case at all of the Revenue that there had been a doubt in the minds of the Revenue as to whether the assessee has used or utilised the capital goods or not.

50. The only reason for issuing these show cause notices by the Revenue is that, in the co-generation plant capital goods were used, for which CENVAT Credit was availed, however the co-generation plant generates electricity, which is an exempted product. Being the exempted product, the assessee since could not get or avail the CENVAT Credit and that basis only or on that premises only, the show cause notices since have been issued and in any of the show cause notices, other than this reason, no other reasons have been given doubting the usage of the very capital goods

of the assessee, that case cannot be improved or modified by the Revenue at a later point of time when it comes for adjudication before the court of law.

51. Therefore merely because in respect of some other assessees, such a User Test Certificate was sought for or produced voluntarily or the User Test Theory has been adopted by the Adjudicating Authority, in each and every case, such an User Test Theory need not be adopted, as that kind of proposition has not been propounded in those two cases, i.e., in Jawahar Mills Ltd., case and Rajasthan Spinning and Weaving Mills Ltd., case. cited supra.

52. The law that has emanated from all these decisions after having gone through the factual matrix of these cases and the materials placed before this Court that, if the Revenue doubts the usage and utility of the capital goods for the purpose of claiming or availing the CENVAT Credit, certainly the Revenue would be at liberty to seek for such proof including the User Test Certificate issued by the Chartered Engineer by adopting the theory of User Test Theory. But at the same time, if it is not the case of the Revenue, doubting over the utility or usage of the capital goods itself and if

show cause notice is issued for any other reasons like the reason of captive plant or co-generation plant, generates electricity which is an exempted product, therefore CENVAT Credit cannot be availed, for such reasons if show cause notice is issued, where if adjudication is taken place, the pre-requisite demand and insistence of User Test Certificate or adoption of User Test Theory is totally unwarranted and therefore in the case in hand, since it is not the case of the Revenue as culled out from the show cause notices that, the capital goods have not been used at the time of installation of the co-gent plant or the captive plant in the factory premises of the assessee, the Revenue cannot insist upon a User Test Certificate issued by the Chartered Engineer by adopting the User Test Theory.

53. Therefore we do not have any hesitation to hold that, apart from the reason that has been given by the learned Judge, for the reasons and discussions herein above made by us, the show cause notices which were under challenge before the writ court cannot be adjudicated merely on the ground that the User Test Certificate has not been produced by the assessee.

54. Insofar as the delay is concerned, since at the request of the assessee in the year 2012, the show cause notices have been transferred to call book as the own case of the assessee was pending at that time before the Hon'ble Supreme Court which has subsequently been withdrawn by the Revenue by virtue of Low Tax Effect and thereafter if they decided to take back the show cause notices from the call book and to adjudicate, such a decision cannot be found fault with. Therefore it cannot be stated that, the show cause notices are lapsed by virtue of the limitation as has been held by the learned Judge. Therefore to that extent, the reasoning given by the learned Judge is not agreeable and hence that reason cannot be sustained in our legal scrutiny.

55. However, that would not *ipso facto* render the show cause notices valid for further adjudication, because, the show cause notices has got self-defect in view of the only reason cited by the Revenue for issuing such show cause notice as if that the plant generate electricity which is a totally exempted product and therefore for that reasons since the show cause notice have been issued and the adjudication is not going to be conducted by the Revenue on that reason and if it is for the other reason of adopting the User

Test Theory it cannot be accepted, as we have held above, the show cause notices for any other reason cannot be proceeded further for adjudication.

56. Hence for all these reasons, we are of the considered view that, the order impugned in these appeals cannot be assailed successfully by the Revenue.

57. Resultantly, all these writ appeals are failed, therefore they are liable to be dismissed. As a result of which, all these writ appeals are dismissed. However, there is no order as to costs. Consequently, connected miscellaneous petitions are closed.

(R.S.K., J.) (G.A.M., J.)
03.04.2025

Index : Yes

Speaking Order : Yes

Neutral Citation : Yes

tsvn

To

1. The Commissioner of CGST & Central Excise
   No.1, Williams Road, Cantonment,
   Trichy, Tamil Nadu - 600 001.

2. The Deputy Commissioner of Central Excise & Service Tax
   Central Excise & Service Tax 2 Division,
   No.1, Williams Road, Cantonment,
   Trichy, Tamil Nadu - 600 001.

3. The Assistant Commissioner of Central Excise & Service Tax
   Central Excise & Service Tax 2 Division,
   No.1, Williams Road, Cantonment,
   Trichy, Tamil Nadu - 600 001.

4. The Superintendent of Central Excise & Service Tax,
   Central Excise Range,
   Oppillatha Ammn Kovil Street,
   Ariyalur, Tamil Nadu

R.SURESH KUMAR, J.
AND
G.ARUL MURUGAN, J.

tsvn

Common Judgment in
W.A.(MD).Nos.557 to 568 of 2024

03.04.2025