

(2020) 02 GUJ CK 0079
In the Gujarat High Court
Case No : R/Tax Appeal No. 53, 709 Of 2016

Commissioner Of Central Excise And Service Tax, Bhavnagar	APPELLANT
Vs	
M/S.Pipavav Shipyard Limited (100 Percent EOU)	RESPONDENT

Date of Decision : 14-02-2020

Acts Referred:

Cenvat Credit Rules, 2004 — Rule 2(1), 2(a), 2(a)(A), 2(a)(A)(i), 2(a)(A)(iii), 2(k), 2(m), 3, 3(1), 3(4), 5, 6(1), 6(2), 6(3), 6(4), 6(4)(2), 6(6), 6(6)(v), 7, 9, 14, 15
Central Excise Rules, 1944 — Rule 57A, 57Q
Service Tax Rules, 1994 — Rule 2(d), 4A
Central Excise Rules, 2002 — Rule 12AA
Additional Duties of Excise (Textile and Textile Articles) Act, 1978 — Section 3
Central Excise Act, 1944 — Section 2(d), 11AB
Customs Tariff Act, 1975 — Section 3, 3(5)
Value Added Tax Act, 2005 — Section 11

Citation : (2020) 02 GUJ CK 0079

Hon'ble Judges : J.B.Pardiwala, J; A.C. Rao, J

Bench : Division Bench

Advocate : Dhaval D Vyas, Mihir Joshi, Amrita M Thakore

Final Decision : Dismissed

Judgement

J.B.Pardiwala, J

1. Since the questions of law in both the appeals are common, those were heard analogously and are being disposed of by this common judgment and order.
2. For the sake of convenience, the Tax Appeal No.53 of 2016 is treated as the lead matter.
3. We are called upon to consider the following substantial questions of law:Â?
â??(a) Whether in the facts and on circumstances of the case, the Tribunal is justified in holding that fabrication of Goliath Crane, Jib Crane, Gantry

Crane, Electric Overhead Travelling (EOT) crane etc. which are embedded to earth can be treated as excisable goods within the meaning of Capital

Goods defined in Cenvat Credit Rules, 2004 and the Cenvat Credit availed of Inputs/Capital Goods like HR Plates, MS Flats, MS Coils, Wire Ropes,

Rail, Welding Electrode and services used for fabrication of these crane is admissible to the respondent? assessee?

(b) Whether invoices issued for distribution of Service Tax paid by office, other than one that of office of manufacturer or producer or provider of

output service as an Input Service Distributor for distribution of Service Tax, is eligible for Input Service Credit and Input Service credit can be availed

on such invoices?

(c) Whether Cenvat Credit of Input, Input Service or Capital Goods shown/declared in Monthly Return (ER2) filed before Central Excise officer (in?

charge over factory) is admissible and qualifies as Cenvat Credit for the output service provider when same is not shown/declared in ST3 Return to be

filed before the jurisdictional Service tax authorities considering that criteria to qualify the same for such credit are different for Manufacturer or

Output Service Provider?

(d) Whether Cenvat Credit of duty paid on Input/ Capital Goods and Service Tax paid on taxable services used for fabrication of Dry Dock which is a

concrete structure embedded to earth and immovable in nature is eligible as Cenvat Credit as per Cenvat Credit Rules, 2004?

4. The two additional questions of law framed in the connected tax appeal are as under:

(e) Whether the Tribunal is justified in accepting the photocopy of the invoices as an admissible evidence/record and remanding the proceeding

back to the adjudicating authority for considering the issue afresh?

(f) Whether cenvat credit of input, input service or capital goods declared in the monthly return (ER2) filed before Central Excise officer is admissible

and qualifies as cenvat credit for the output service provider when the same is not shown in ST3 return to be filed with the Service Tax authorities

considering that the criteria to qualify the same are different for manufacturer and output service provider?

5. The captioned tax appeals are preferred by the appellant ?" Commissioner of Central Excise and Service Tax, challenging the orders

in appeal dated 30th April, 2015 and 28th January, 2016 respectively passed by the Customs, Excise & Service Tax Appellate Tribunal [for short 'The CESTAT']. The Tax Appeal No.53 of 2016 pertains to the period being October â?" December, 2010 and January â?" February, 2011. On the other hand, the Tax Appeal No.709 of 2016 pertains to the period between February â?" September, 2010.

6. The facts in brief giving rise to the two captioned appeals are as under:Â?

6.1 The respondent herein viz.M/s. Pipavav Shipyard Limited is a 100% Export Oriented Unit [EOU] located at the Pipavav Port and owned by the

Reliance Defence and Engineering Limited [Earlier known as the 'Pipavav Shipyard Limited']. It is engaged in the business of manufacturing of ships

falling under Chapter 89 of the First Schedule to the Central Excise Tariff Act, 1985 and Chapter 89 of the First Schedule to the Customs Tariff Act,

1975. It is also engaged in the activity of providing ship repair, maintenance and management services.

6.2 For its manufacturing and ship repair services activity, the respondent was required to construct/ fabricate several cranes such as the Goliath

Crane, Jib Crane, Gantry Crane, Electric Overhead Travelling (EOT) Crane, etc. Such cranes are used for the purpose of heavy, medium and light

lifting and transporting of the constructed blocks or even lifting of the entire vessel. These cranes are used in the ship building and repairing. They are

huge in height and length and are required to be erected/ fabricated at the sight. They run on tracks fitted to the ground, in and around the Dry Dock.

6.3 The respondent had also to construct a Dry Dock, which is a rectangular deep basin dug into the shore of a water body, provided with removable

gate or enclosure on the side facing water, and which can be flooded to allow the ship or other watercraft to be floated in or out, and which can be

drained to allow a ship/watercraft or partially constructed vessel to come to rest on a dry platform where the construction, maintenance and/or repair

thereof can be undertaken.

6.4 For the purpose of constructing/fabricating the above referred cranes, the respondent had to purchase items such as the HR Plates, MS Flats, MS

Coils, Wire Ropes, Rail, Welding electrode and also availed of services. Likewise, for constructing the Dry Dock, the respondent purchased various

items such as steel items, cement etc. and availed of services. All the items

purchased and services availed were liable to excise duty and the service tax was accordingly paid. In such circumstances, the respondent filed its monthly returns in Form ER-2 claiming the Cenvat Credit on the inputs, capital goods and input services thus utilized. For the period between October & December 2010 and between January & February, 2011, the Cenvat Credit claimed is to the tune of Rs.3,22,21,011/- and Rs.4,47,04,633/- respectively and for the period between February & September, 2010, the Cenvat Credit claimed is to the tune of Rs.11,76,39,024/-.

6.5 The respondent was served with the show cause notices calling upon to show cause as to why the Cenvat Credit availed should not be recovered.

6.6 The operative part of the order in original dated 22nd August, 2012 relevant for the purpose of Tax Appeal No.53 of 2016 reads thus:-

:: ORDER ::

(i) I disallow the Cenvat Credit of Rs.7,69,25,644/- (Rupees Seven Crore Sixty Nine Lakh Twenty Five Thousand Six Hundred and Forty Four Only),

confirm the demand for same amount and order recovery under Rule 14 of Cenvat Credit Rules, 2004 read with erstwhile Section 11A of the Central

Excise Act, 1944 from M/s. Pipavav Shipyard Limited.

(ii) M/s. Pipavav Shipyard Limited are ordered to pay interest at applicable rate on the aforesaid amount of Cenvat Credit wrongly availed from the

date the same became payable till the date of payment, under Rule 14 of Cenvat Credit Rules, 2004 read with erstwhile Section 11AB of Central

Excise Act, 1944.

(iii) I impose penalty of Rs.7,69,25,644/- (Rupees Seven Crore Sixty Nine Lakh Twenty Five Thousand Six Hundred and Forty Four Only) on M/s.

Pipavav Shipyard Limited under Rule 15 of Cenvat Credit Rules, 2004.

This order is issued without prejudice to any other action that may be taken against the Noticee under the provisions of Central Excise Act, 1944 or

the rules framed there under or under the provisions of any other law for the time being in force.

6.7 The respondent being dissatisfied with the order in original passed by the Commissioner preferred appeal before the CESTAT.

6.8 The appeal preferred by the respondent came to be allowed. The operative

part of the order of CESTATE reads thus:Â?

16. In view of the above discussion, we find that the denial of CENVAT Credit alongwith interest and penalties cannot be sustained. Accordingly,

the impugned order is set aside. The appeal filed by the Appellant is allowed with consequential relief. The application filed by the Appellant for

extension of stay order is dismissed as infructuous.Â??

6.9 On the first substantial question of law as suggested by the Revenue, the Tribunal recorded the following findings:Â?

14. The Adjudicating authority denied CENVAT Credit on capital goods, being inadmissible used in immovable property come into existence. We find

that the Tribunal in the case of Commissioner of Central Excise Vs. JSW Ispat Steel Ltd. 2013Â?TIOLÂ?1758Â?CESTATEÂ? Mum observed that

merely because various machineries and equipments, appliances and parts have been assembled at site to set up the Oxygen plant and such plant

being an immovable property, it will be preposterous to deny the CENVAT Credit on these individual machineries/equipments/appliances. The Hon'ble

Andhra Pradesh High Court in the case of Commissioner of Central Excise VisakhapatnamÂ?II Vs. Sai Sahmita Storages (P) Ltd. 2011 (270) ELT

33 (A.P.) held that storage and ware housing service could not have been rendered without creating a ware house and consequently the credit of

TMT bars used for construction of ware house would be admissible. Similarly, in the present case, the Appellant is unable to render the repair/refit

service without the crane in Dry Dock and which can be treated as capital goods. The case law relied upon by the learned Authorized Representative

is in context of excisability of goods, and the Tribunal already considered in earlier decision.

6.10 On the second substantial question of law, the Tribunal recorded the following findings:Â?

15. There is a denial of CENVAT credit availed on input service on the ground that credit was taken on the strength of invoices issued by the

Appellants head office at Mumbai as ISD (Input Service Distributor). It is observed by the Adjudicating authority that the head office address was

not mentioned in the LOP issued by the DGFT. We find that there is no dispute that the head office is registered as ISD with the Service Tax

authorities. As per CENVAT Credit Rules, the Appellants are eligible to avail the

credit on the invoices issued by the ISD. There is no reason to deny the credit on the ground that the address of the ISD was not mentioned in the LOP.

6.11 On the third question of law, the Tribunal recorded the following findings:Â?

11. As revealed from the Adjudication order that input service credit was denied mainly on the basis that the input service credit availed on the input

services was shown in ERÂ?1 return instead of STÂ?3 returns. The relevant portion of the Adjudication order is reproduced below:Â?

â??12.2.5 In the instant case, the Noticee has shown the CENVAT Credit availed on input services in their ERÂ2 return indicating that those

services have been used by them in or in relation to manufacture of final products whether directly or indirectly. Had those services been used for

providing output services, the Noticee would have shown the CENVAT Credit of Service Tax paid on such input services in their respective STÂ3

returns. As already discussed, the criteria to qualify the services used as input service are different in case of Manufacturer and Output Service

Provider. Therefore, if the service received were qualified as input service for providing output service viz. Transport of Goods by Road or Ship

Management Service, the Noticee should have shown the same as CENVAT Credit in the relevant STÂ3 returns filed with the jurisdictional Service

Tax authorities.â??

12. CBEC vide Circular F.No.381/23/2010/862, dt.30.03.2000, clarified that cross utilization of credit of input and input service. A manufacturer who

is also providing a taxable service obtained registration from the Central Excise authority as well as Service Tax authority and required to file ERÂ1

and STÂ3 returns separately. In some cases, these returns are filed in different jurisdictions the CENVAT credit on input, capital goods and input

services which are used in manufacturing of goods or providing output service is available in a common pool and can be used for payment of excise

duty or service tax. Ultimately, the CENVAT Credit taken during the period shown in ERÂ1 or STÂ3 return could be same. It is clarified that if these

returns are being filed separately the Service Tax Commissioner, while undertaking service tax audit, the officers should verify the said return also for confirming the correctness of such credit.

13. The Larger Bench of the Tribunal in the case of Commissioner of Customs &

C.Ex., Meerut¹ Vs. Modi Rubber Ltd. 2000 (119) ELT 197

(Tri²LB), held that the declaration filed by the Assessee in terms of Rule 57Q of Central Excise Rules, 1944 is sufficient for the purpose of extending

credit on lubricants under Rule 57A of the said Rules. In the case of Commissioner of Central Excise, Coimbatore Vs. Lakshmi Technology &

Engineering Indus. Ltd. 2011 (23) STR 265 (Tri³ Chennai), the Tribunal held that the manufacturer entitled to use the credit from a common pool to

which different categories of specified excise duties, customs duty and service tax allowed to be taken as credit. Similarly, a provider of taxable

service is also entitled to take credit of specified excise duty, additional duty of customs and service tax in respect of input service and utilised credit

from these sources for the purpose of paying service. Rules permit taking of credit under a common pool and permit the use of the credit from

common pool for different purposes and there is no restriction placed to the effect that credit accounts should be maintained for use for manufacture

of excisable goods and for use for providing services. In the case of Commissioner of Central Excise, Salem Vs. Thangavel & Sons (P) Ltd. 2014 (7)

895 ⁴" CESTAT Chennai, the Tribunal held that the Respondents are not only the manufacturers of excisable goods, but also the provider of output

service and both the activities are carried out in the same premises. Respondents are eligible for availment of input credit, they can utilise the

CENVAT credit available with them either for payment of excise duty on the final products or for payment of service tax on the output services as

stipulated in sub⁵rule (4) of Rule 3 of CENVAT Credit Rules, 2004. The restriction on utilization of CENVAT Credit stipulated relates only for

specific type of duties i.e. education cess on excisable goods or payment of education cess on output service. There is no restriction for utilization of

common input credit availed on the inputs and also on input service for payment of excise duty or service tax. Hence, we do not find any reason to

deny the input service credit on the ground that it was shown in the ER⁶?1 return.

6.12 On the fourth question of law, the finding recorded by the Tribunal are as under:⁷

5. After hearing both the sides and on perusal of the records, we find that the Deputy Development Commissioner, Kandla Special Economic Zone, by

letter dt.04.04.2006, permitted the applicant for establishment of a new undertaking, under 100% EOU scheme for manufacturing of Ship Building, Ship Repairs/Refit. It was permitted on the condition that the Appellant shall export the entire production excluding reject and sales in the Domestic Tariff Area as per the provisions of EOU scheme, amongst others. By letter dt.08.01.2008, the Joint Development Commissioner, Kandla Special Economic Zone, authorised the Appellant for manufacturing further items namely, Ship, Vessels, Hulls, Offshore Structures includes FPSO, Rigs, Platforms etc. The jurisdictional Central Excise & Customs authority on 06.08.2007, granted permission to manufacture the goods and to render the services of repair within the private bonded Warehouse. The Appellants also executed a bond with Deputy Commissioner of Central Excise. They have obtained Central Excise registration under the Central Excise Rules on 06.09.2007 and also applied for registration as a service provider, which was granted on 08.02.2008.

6. The case of the Appellant is that Dry Dock is the heart of the shipyard used in ship building and repair service. The Hon'ble Supreme Court in the case of Scientific Engineering (P) Ltd. Vs. Commissioner of Income Tax, Andhra Pradesh, (1986) 1 SCC 1 observed that a Dry Dock since it fulfilled the function of a plant must be held to be plant. The every part of this Dry Dock plays an essential part with which, the operation is performed. In the case of Commissioner of Income Tax Vs. Anand Theatres, (2000) 5 SCC 393, the Hon'ble Supreme Court observed that Dry Dock a concrete dry structure can be held a plant because the whole Dock was used for carrying on the entire operation. In the instant case, the Appellant fabricates Dry Dock for manufacturing ships, excisable goods and to provide output service namely repair service, which is covered under the definition of Input Service under Rule 2(I) of CENVAT Credit Rules, 2004 as under:Â?

(A) ""input service"" means any service,Â?

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

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

the place of removal, and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of

output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal;â??

7. The definition of input service under Rule 2(l) of the Rules precisely covers any service used by a provider of taxable service for providing an

output service, any service used by a manufacturer in or in relation to manufacture of final product and inclusive part of the definition, services used in relation to setting up, modernization, renovation or repair of a factory, premises of a provider of output service or an office relating to such factory or

premises etc. The expression any service read with for providing an output service would cover wide encompass of the definition of input service. The

Hon'ble Supreme Court in the case of Indian Chamber of Commerce (AIR 1976 SC 348) observed that the expression for has to be interpreted as for

the purpose of. CBEC Circular No.120/01/2010ÂST, dated 19.01.2010, clarified that the definition of input service qua a manufacturer and provider of

output service. In our considered view, CENVAT Credit availed on input service, input and capital goods for setting up Dry Dock would be allowed

for providing output service namely repair/refit service. This is also covered in the inclusive part of the definition of input service. Hence, the finding of

the Adjudicating authority, is that the Appellant is exclusively engaged in the manufacture of exempted final product Shipsand CENVAT Credit on

input, capital goods is inadmissible, cannot be sustainable.

6.13 So far as the RulesÂ?6(6) of the CENVAT Credit Rules, 2004 is concerned, the Tribunal recorded the following findings:Â?

8. The learned Authorised Representative contended that there is no requirement of furnishing the bond by an EOU and it does not cover under Rule

6(6) of the Rules. CBEC by Circular No.928/18/2010ÂCX, dt.28.06.2010, clarified that a 100% EOU are required to export the goods under bond in

terms of customs and excise notifications. CBEC by Circular No.120/01/2010ÂST, dates 19.01.2010, in the context of the problems faced by the

exporter for availing of refund of excess credit, observed that the major reason

causing delay in granting refund as well as rejecting the claim is that as per the wordings of the notification, refund is permitted of duty/tax if only such input/output services which are either used in the manufacture of export goods or used in providing the output services exported. As against this, the phrases used in the CENVAT Credit Rules, permitted credit on service used whether directly or indirectly, in or in relation to the manufacture of final product or for providing output service. The field formation tend to take the view that for eligibility of refund, the nexus between input or input services and the final product/services has to be closer and more direct than that is required for taking credit. It has been clarified that the input services should be directly used in the output service exported. As regards the extent of the nexus between the input/output services and export goods/services, it must be borne in mind that the purpose is to refund the credit that has already taken by them. There cannot be different yardsticks for establishing the nexus between taking of the credit and for refund of credit. Even if different phrases are used under different rules of CENVAT Credit Rules, they have to be read in a harmonious manner.

9. The learned Advocate relied upon the decision of Hon'ble Karnataka High Court in the case of Commissioner of Customs, Bangalore Vs. ANZ

International 2009 (233) ELT 40 (Kar.) where the appeal of the Revenue was dismissed. It has been held that a 100% EOU is entitled to take

CENVAT credit on the duty of the inputs procured indigenously and when they are not in a position to utilize the same, they are entitled for the benefit

of refund under Rule 5 of the Rules. In the present case, the Appellant stated that they have claimed the refund for the unutilized credit under Rule 5

of the said Rules. This decision of Hon'ble High Court was upheld by Hon'ble Supreme Court as reported in 2009 (234) ELT A 16 (SC).

The relevant portion of the decision of Hon'ble Karnataka High Court in the case of ANZ International is reproduced below:Â?

â??3. With reference to the above said grounds urged in this appeal, we have carefully examined the same to find out as to whether the aforesaid

substantial question of law would arise or not for our consideration in this Appeal. The CESTAT, having regard to the undisputed fact that the

respondent is 100% Export Oriented Unit (for short EOU) in respect of which, benefit of CENVAT Credit Rules, 2004 is available for the inputs

which will be used for manufactured goods of 100% export. Therefore, the Tribunal has applied Rule 6(6) and recorded the reasons stating that there

is a provision of exporting the goods under bond. In the case of 100% EOUs, the input can be imported free of duty and they can obtain indigenously

also free of duty. When duty is paid on the inputs, then the appellants are entitled for the CENVAT credit facility under the Rules Cenvat Credit

Rules. There is nothing in the Rules which prohibits 100% EOUs availing Cenvat Credit. Rule 5 of the said Rules provides for refund of Cenvat credit

availed by the exporter where they do not utilize the goods as inputs for manufacture of 100% export. The case on hand is the precise case wherein

the respondent has availed the Cenvat credit facility. They were not in a position to utilize the credit, they applied for refund of the Cenvat credit

availed by them. The reason is that all their products were exported and there was no domestic clearance. Therefore, in terms of Rule 5 of the Rules,

they are rightly entitled for the refund of the duty paid to the department. The learned counsel for the appellant has pointed out that in the case of

Sterlite Optical Technologies Ltd. Vs. CCE, Aurangabad â?" 2006 (201) ELT 428 (Tri.ÂMumbai), wherein it is held that letter of undertaking

accepted in lieu of bond for export even though finished goods were exempted, refund of Cenvat credit on inputs and packing materials are admissible

in terms of Rule 5 of the Rules. Therefore, the Tribunal has held that 100% EOU is entitled to take Cenvat credit on the duty of the inputs procured

indigenously and when they were not in a position to utilize the same, they are entitled for the benefit of the refund under Rule 5 of the Rules.

Therefore, the orders impugned in the Appeal before the CESTAT held to be bad in law and the same were set aside. Therefore, we do not find that

no substantial question of law does arise in this Appeal for out consideration to answer the same in favour of the Revenue. Accordingly, the appeal is

devoid of merits and therefore, it must fail and is dismissed.â??

10. In the case of Commissioner of Central Excise Vs. M/s. Drish Shoes Ltd. 2010 (254) ELT 417 (H.P.), the Hon'ble Himachal Pradesh High Court

observed that the Rule 6(6) of CENVAT Credit Rules, 2004 applies both to exempted as well as dutiable goods as term used in later is excisable

goods and not dutiable goods. In that case, the question of law was whether an assessee exclusively manufacturing wholly exempted goods

(chargeable to Nil rate of duty) is eligible to avail CENVAT Credit of duty paid on the inputs and input services under Rule 6(1) of CENVAT Credit

Rules, 2004 used in the manufacture of such exempted goods even if such goods are exported. In that case, the Respondent was engaged in the

manufacture of finished leather and it had exported the manufactured leather. The Hon'ble High Court held that an assessee manufacturing the goods

chargeable to Nil rate of duty is eligible to avail CENVAT Credit paid on the inputs under the exception clause contained in Rule 6(6) of the said

Rules, used in the manufacture of such goods, if the goods were exported. In view of the above discussion, the contention of the learned Authorized

Representative for the Revenue is that there is no requirement of furnishing of Bond by 100% EOU, is not admissible.â??

SUBMISSIONS ON BEHALF OF THE APPELLANTS:â??

7. On the first substantial question of law, the submissions of Mr. Dhaval Vyas, the learned standing counsel appearing for the appellants are under:â??

7.1 The Capital goods is defined as; Capital Goods means â?? (A) following namely:â?? (i) to (viii). The word goods followed by comma, and followed

by the word namely, which indicates that the goods mentioned after the term namely are the specific instances which would fall as the capital goods

under the definition. The definition as such is exhaustive.

7.2 The cranes stand alone may be the Capital Goods under Rule 2(a) of the Rules, 2004. However, the cranes in the case on hand are rooted and

embedded in the RCC Structure (of the Dry Dock) and as such forms part of the functions performed at the Dry Dock. A Dry Dock by its multiâ??

functional capacity fulfills the function of a plant.

7.3 The cranes are fabricated by assembling materials at the factory of the respondent. The respondent has sought to avail credit on the materials

(input) and services (input services) received for assembling/ fabricating the crane. Capital Goods should meet the twin requirements (i) has to be

Goods, and (ii) has to be specified in subâ??rule (A) (i) to (viii).

7.4 The term â??Goodsâ?? has not been defined under the Rules, however, the term Goods has been explained by the Supreme Court in the judgment

reported in 1995 (75) ELT 17 (SC) and 2000 (120) ELT 273 SC, in context of the CEA, 1944. Having regard to the weight and volume of the cranes

and the process employed at its erection and installation for rendering it

functional indicates that it is an immovable property which cannot be shifted without first dismantling it and the description of the term 'goods' provided in the Excise Act.

7.5 The cranes are not 'goods' and therefore cannot be Capital Goods as defined under the Rules. The materials used for fabricating the cranes

therefore cannot be inputs [u/r.2(k)] or spares or components or accessory U/r.2(a) used for fabricating Capital Goods of the Rules, 2004.

7.6 The services received for the fabrication of the Cranes at the factory are not directly or indirectly an integral part in connection with the manufacture of the final products or clearance of the final products.

7.7 The contention that such inputs have been exclusively used in the manufacture of ship and therefore, the respondent is not eligible to avail the

Cenvat Credit has been upheld by the CESTAT, and would equally apply for availing of the credit on input services.

8. On the second substantial question of law, the submissions of Mr. Vyas are as under:Â?

8.1 The Rule 2(m) defines the Input Service Distributer as, an office of the manufacturer or producer of the final products or provider of output

service, which receives invoices issued under rule 4A of the Service Tax Rules, 1994 towards the purchases of input services and issues invoices, bill

or challans for the purposes of distributing the credit of service tax paid on the said services of such manufacturer.

8.2 The credit has been availed by the respondent on the basis of the invoices of their corporate office at Mumbai, which is not the office as per the

'Letter of Permission' dated 04.04.2006 issued by the Development Commissioner, Kandla Special Economic Zone. The credit is availed on the

basis of invoices issued by the office which is not the office as per the LOP and 4A of the Service Tax Rules, 1994.

9. On the third substantial question of law, the submissions of Mr. Vyas are as under:Â?

9.1 The respondent had filed 3 ER 2 returns before the jurisdictional excise authorities inter alia, availing credit against the input, input services and

capital goods received for the manufacturing of a Ship, chargeable with NIL duty and therefore, are Exempted Goods U/r.2(d) of the Rules, 2004.

9.2 The CESTAT has held 'we agree with the submission of the Ld. Authorized

Representative to the extent that the inputs exclusively used in the manufacture of ship, the appellants are not eligible to avail Cenvat Credit. The aforesaid finding binds the respondent (not challenged by the respondent).

9.3 The cross utilization of the credit from the common pool as held by the CESTAT can be resorted provided the credit can be availed on such materials and services. The bar for availing the credit under the rules cannot be circumvented by resorting to cross utilization, as a credit can be cross utilized only if the credit can be availed under the Rules.

9.4 Upon verification of the records, it has been noticed by the Tribunal that the respondent had filed ST-3 returns and had availed credit against the inputs, input credits and capital goods received towards providing taxable services. The respondent is not entitled to the credit inputs, input credits and capital goods received towards the manufacturing of the exempted goods by resorting to cross utilization as the same would frustrate the Rule.

9.5 Rule 6(1) of the Rules, 2004 provides that "No Cenvat Credit shall be allowed on Capital Goods which are used exclusively in manufacturing of exempted goods except in the circumstances mentioned in sub-rule 2. Rule 6(4) of the Rules, 2004 provides that the Cenvat Credit shall not be allowed on such quantity of input or input services which is used in manufacturing of the exempted goods.

9.6 The respondent, therefore, cannot avail the credit on the inputs, input credits and capital goods which according to the respondent had been received and used for the manufacturing a ship.

10. On the fourth substantial question of law, the submissions of Mr. Vyas are as under:

10.1 A manufacturer or producer of final products or a provider of taxable service is allowed to take credit of (i) any input or capital goods received in the factory or manufacture of final product or premises of the provider of output service, and (ii) any input service received by the manufacturer of final product or by the provider of output service used in or in relation to the manufacture of final product.

10.2 The respondent has availed credit of duty paid on (i) inputs, (ii) capital goods and (iii) input services received for fabricating the Dry Dock in the

ER 2 Returns filed with the jurisdictional Excise Authorities.

10.3 The Dry Dock is a RCC Structure basin that can be flooded to allow a load/ Vessel to be floated in, then drained to allow that load/ Vessel to

come to rest on a dry platform. Similarly, a Vessel can be constructed/ built on a dry platform in the RCC Structure basin, which upon its built can be

floated out by flooding the basin.

10.4 The Capital Goods is defined as; Capital Goods means " (A) following namely: (i) to (viii). The word goods followed by comma, which is

followed by the word namely, which indicates that the goods mentioned after the term namely are specific instances, which would fall as capital goods

under the definition. The definition as such is exhaustive.

10.5 The word 'Dry Dock' has not been defined as the Capital Goods under the Rules. A 'Plant', unlike the erstwhile rule, has not been included in the

definition of Capital Goods under the Rules, 2004. The Dry dock cannot be read as a spare or accessory of a cranes to qualify as the Capital Goods.

Therefore, credit cannot be availed citing the Dry Dock as the Capital Goods.

10.6 The respondent seeks to avail the credit of the tax paid for the materials i.e. angles, steel materials, etc. received by respondent for fabricating a

RCC Dry Dock, citing the same as inputs.

10.7 The Rules, 2004 defined inputs to mean, all goods used in or in relation to the manufacture of final products whether directly or indirectly and

whether contained in the final product or not.

10.8 The respondent contends that RCC Dry Dock would be akin to a plant. It has also been contended that the materials utilized for fabricating the

Dry Dock are inputs, and therefore, the respondent can avail the credit under Rule 3.

10.9 The term Goods has not been defined under the Rules. The Supreme Court has explained the term Goods in context of the CEA, 1944 after

taking into consideration the judgments rendered in the case of Mittal Engineering Works (P) Ltd., Quality Steel Tubes (P) Ltd., and Sirpur Paper

Mills Ltd., (Para 19). The Dry Dock is therefore not Goods and therefore, cannot be termed as an input.

10.10 The respondent contends that the cement and steel which are used in manufacturing/ fabricating the RCC Dry Dock would be inputs u/r 2(k)

and therefore, credit of the tax is available.

10.11 The materials received by the manufacturer are used in or in relation to the manufacture of final products for availing credit under the rules. The

context of the term 'used in or in relation to the manufacture of final products whether directly or indirectly' in Rule 2(k) should be construed as

the material for laying foundation or fabrication/ construction of Dry Dock. It cannot be directly or indirectly said to be an integral part in connection

with the manufacture of the final product. The subtle distinction between 'input used as a integral part in connection with manufacture of final product'

and 'a material used in or in relation to the fabrication/ construction of a Dry Dock (which is not a final product)' requires to be noted.

10.12 The cement and steel are always used as building materials and are always used in construction or may be used for the purpose of filling in

holes, and therefore, it is not eligible inputs for the purpose of availment of the Cenvat credit. Building materials used as raw materials for construction

of 'plant' cannot be said to be used as plant in the manufacture of goods.

10.13 Therefore, the credit of tax on materials used for fabricating of a dry dock cannot be availed as a credit on input received in a factory of

manufacture of the final product.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS:Â?

11. Mr. Mihir Joshi, the learned senior counsel assisted by Ms. Amrita M. Thakore appearing for the respondents vehemently submitted that no error

not to speak of any error of law could be said to have been committed by the Tribunal in passing the impugned orders.

12. The principal argument of Mr. Joshi is that it is virtually impossible to manufacture or repair the ship without the cranes referred to in the earlier

part of this judgment. The submission is that the HR plate, MS Flats, MS Coils, Wire Ropes, Rail, Welding Electrode, which are used in the fabrication

of cranes, are integral part of the manufacturing process of the Ships and without these equipments or goods, it is not possible to manufacture ships.

According to Mr. Joshi, the HR plats, MS Flats, MS Coils, Wire Ropes, Rail, Welding Electrode used in the fabrication of cranes, which are used for

manufacturing ships, are goods used 'in relation to the manufacture of final products whether directly or indirectly and/or whether contained in the

final= product or not.' According to Mr. Joshi, they are 'inputs' and the respondent is eligible to claim the CENVATE Credit on such goods.

13. Mr. Joshi in support of the aforesaid submission has placed reliance on the following case law:Â?

(a) CCE Vs. Solaris Chemtech Ltd. 2007 (214) ELT 481 (SC) (ParaÂ? 8)

(b) Ramala Sahkari Chini Mills Vs. CCE, 2010 (14) SCC 744 (Para 10Â?17) read with Ramala Sahkari Chini Mills Vs. CCE, 2016 (7) SCC 585

(c) CCE Vs. Parth Poly Woven, 2012 (25) STR 4 (Guj) (Para 16Â?19)

(d) CCE Vs. Inductotherm 2014 (36) STR 994 (Guj) (Para 12Â?23)

(e) CCE Vs. Dynamic Industries 2014 (307) ELT 15 (Guj) (Para 6Â?10)

(f) Principal Commissioner Vs. Essar Oil Ltd., (2016) 41 STR 389

(g) Coca Cola Vs. CCE 2009 (242) ELT 168 (Bom) (Para 23Â?39)

(h) CCE Vs. Ultratech 2010 (20) STR 577 (Bom) (Para 27Â?37)

(i) Deepak Fertilizers Vs. CCE 2013 (32) STR 532 (Bom) (Para 5)

14. On the second question of law, the submission of Mr. Joshi is that there is no provision creating any bar against the head office of a company from

distributing the credit of service tax paid on the services purchased to its various other units. The Mundra office, being the head office of the company

which owns several units, receives the invoices issued under the Service Tax Rules, 1994 towards the purchase of the input services and issues

invoice, bill or challan for the purposes of distributing the credit of service tax paid on the said services to its various manufacturing units.

15. On the third substantial question of law, it is submitted by Mr. Joshi that the Tribunal is justified in taking the view that the input service credit

cannot be denied on the ground that it is shown in the ERÂ?1 return instead of the STÂ?3 returns since the cross utilization of credit of input and input

service is permissible and the Cenvat Credit on input, capital goods and input services used in the manufacturing of the goods or providing output

service is available in a common pool and the Cenvat Credit taken during the period shown in ERÂ?1 or STÂ?3 return would be the same.

16. On the fourth question of law, it is submitted that in the case of Scientific Engineering House Vs. CIT; 1986 (1) SCC 1 1in ParagraphÂ? 12, the

Supreme Court has held that the Dry Dock is a plant. It is not possible to manufacture the ships without the Dry Dock. It is submitted that the items

such as cement, steel, etc., used in constructing/ fabricating a Dry Dock, are used â??in relation to the manufacture of final products whether directly

or indirectly and whether contained in the final product or not? and are therefore "inputs" within the meaning of the said word as defined in Rule

2(k) of the Rules 2004. In such circumstances, the CENVAT Credit of the excise duty paid on the same cannot be denied.

17. So far as the two questions formulated in the Tax Appeal No.709 of 2016 are concerned, the submission of Mr. Joshi is that although the credit

was availed on the basis of photocopies of the invoices yet the respondent made themselves clear in the reply to the show-cause notice that the

originals had later been collected for the purpose of verification and those were verified and the genuineness of the receipt of the goods also came to

be verified.

In the last, Mr. Joshi submitted that the contention canvassed on behalf of the appellant that no Cenvat Credit could be allowed to the respondent in

respect of the inputs, capital goods and inputs service used to fabricate cranes and Dry Dock as the final products of the respondent are exempt from

duty is without any merit.

18. In such circumstances referred to above, Mr. Joshi prays that there being no merit in the appeals preferred by the appellant, those be dismissed

and the order passed by the Tribunal be affirmed.

ANALYSIS:

19. Before advertng to the rival submissions canvassed by either side, we must look into few provisions of law:

20. The relevant provisions of the CENVAT Credit Rules, 2004 as this stood at the relevant point of time are as under:

Rule 2(a) "capital goods" means:

(A) the following goods, namely:

(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No. 68.05 grinding wheels and the like, and parts thereof falling

under heading 6804 of the First Schedule to the Excise Tariff Act;

(ii) pollution control equipment;

(iii) components, spares and accessories of the goods specified at (i) and (ii);

(iv) moulds and dies, jigs and fixtures;

(v) refractories and refractory materials;

(vi) tubes and pipes and fittings thereof; and

(vii) storage tank, used?

(1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or

(2) for providing output service;

(B) motor vehicle registered in the name of provider of output service for providing taxable service as specified in sub-clauses (f), (n), (o),

(zr), (zzp), (zzt) and (zzw) of clause (105) of section 65 of the Finance Act;

Rule 2(k) "input" means?

i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as 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;

(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;

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.

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;

Rule 2(l) "input service" means any service,?

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

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

the place of removal, and includes services used in relation to setting up,

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

Rule 2(m) "input service distributor" means an office of the manufacturer or producer of final products or provider of output service, which receives invoices issued under rule 4A of the Service Tax Rules, 1994 towards purchases of input services and issues invoice, bill or, as the case may be, challan for the purposes of distributing the credit of service tax paid on the said services to such manufacturer or producer or provider, as the case may be;

Rule 3. CENVAT credit. Â?

(1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of Â?

(i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act;

(ii) the duty of excise specified in the Second Schedule to the Excise Tariff Act, leviable under the Excise Act;

(iii) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978);

(iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(v) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001);

(vi) the Education Cess on excisable goods leviable under section 91 read with section 93 of the Finance (No.2) Act, 2004 (23 of 2004);

(via) the Secondary and Higher Education Cess on excisable goods leviable under section 136 read with section 138 of the Finance Act, 2007 (22 of 2007);

(vii) the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v)

(vi) and (via);

(viii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, Provided that a provider of taxable service shall not be

eligible to take credit of such additional duty;

(ix) the additional duty of excise leviable under section 157 of the Finance Act, 2003 (32 of 2003);

(x) the service tax leviable under section 66 of the Finance Act;

(xi) the service tax leviable under section 66A of the Finance Act; [Instead wef 18.4.2006 by S.71 r/w. Eighth Schedule of Finance Act, 2011].

(xii) the Education Cess on taxable services leviable under section 91 read with section 95 of the Finance (No.2) Act, 2004 (23 of 2004); and

(xiii) the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of

2007); and

(xiv) the additional duty of excise leviable under section 85 of Finance Act, 2005 (18 of 2005)

Provided that the CENVAT credit shall be allowed to be taken of the amount equal to central excise duty paid on the capital goods at the time of

debonding of the unit in terms of the para 8 of notification No. 22/2003-Central Excise, published in the Gazette of India, part II, Section 3, sub-section

(i), vide number G.S.R. 265(E), dated, the 31st March, 2003. paid on

(i) any input or capital goods received in the factory of manufacture of final product or premises of the provider of output service on or after the 10th

day of September, 2004; and

(ii) any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004,

including the said duties, or tax, or cess paid on any input or input service, as the case may be, used in the manufacture of intermediate products, by a

worker availing the benefit of exemption specified in the notification of the Government of India in the Ministry of Finance (Department of

Revenue), No. 214/86-Central Excise, dated the 25th March, 1986, published in the Gazette of India vide number G.S.R. 547 (E), dated the 25th

March, 1986, and received by the manufacturer for use in, or in relation to, the manufacture of final product, on or after the 10th day of September, 2004.

Explanation.Â For the removal of doubts it is clarified that the manufacturer of the final products and the provider of output service shall be allowed

CENVAT credit of additional duty leviable under section 3 of the Customs Tariff Act on goods falling under heading 9801 of the First Schedule to the

Customs Tariff Act.

(2) â?|..

(3) â?|..

(4) â?|..

(5) â?|..

(5A) â?|..

(5B) â?|..

(5C) â?|..

(6) â?|..

(7) â?|..

Rule 7. Manner of distribution of credit by input service distributor. Â?

The input service distributor may distribute the CENVAT credit in respect of the service tax paid on the input service to its manufacturing units or

units providing output service, subject to the following condition, namely:Â?

(a) the credit distributed against a document referred to in rule 9 does not exceed the amount of service tax paid thereon; or

(b) credit of service tax attributable to service use in a unit exclusively engaged in manufacture of exempted goods or providing of exempted services

shall not be distributed.

Rule 9. Documents and accounts.Â?

(1) The CENVAT credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the

basis of any of the following documents, namely :Â?

(a) an invoice issued byÂ?

(i) a manufacturer for clearance of Â?

(I) inputs or capital goods from his factory or depot or from the premises of the consignment agent of the said manufacturer or from any other

premises from where the goods are sold by or on behalf of the said manufacturer;

(II) inputs or capital goods as such;

(ii) an importer;

(iii) an importer from his depot or from the premises of the consignment agent of the said importer if the said depot or the premises, as the case may

be, is registered in terms of the provisions of Central Excise Rules, 2002;

(iv) a first stage dealer or a second stage dealer, as the case may be, in terms of the provisions of Central Excise Rules, 2002; or

(b) a supplementary invoice, issued by a manufacturer or importer of inputs or capital goods in terms of the provisions of Central Excise Rules, 2002

from his factory or depot or from the premises of the consignment agent of the said manufacturer or importer or from any other premises from where

the goods are sold by, or on behalf of, the said manufacturer or importer, in case additional amount of excise duties or additional duty leviable under

section 3 of the Customs Tariff Act, has been paid, except where the additional amount of duty became recoverable from the manufacturer or

importer of inputs or capital goods on account of any non-levy or short-levy by reason of fraud, collusion or any wilful misstatement or suppression

of facts or contravention of any provisions of the Excise Act, or of the Customs Act, 1962 (52 of 1962) or the rules made there under with intent to

evade payment of duty.

Explanation. For removal of doubts, it is clarified that supplementary invoice shall also include challan or any other similar document evidencing

payment of additional amount of additional duty leviable under section 3 of the Customs Tariff Act; or

(c) a bill of entry; or

(d) a certificate issued by an appraiser of customs in respect of goods imported through a Foreign Post Office; or

(e) a challan evidencing payment of service tax by the person liable to pay service tax under sub-clauses (iii), (iv), (v) and (vii) of clause (d) of sub-

rule (1) of rule (2) of the Service Tax Rules, 1994; or

(f) an invoice, a bill or challan issued by a provider of input service on or after

the 10th day of, September, 2004; or

(g) an invoice, bill or challan issued by an input service distributor under rule 4A of the Service Tax Rules, 1994.

Provided that the credit of additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975) shall not

be allowed if the invoice or the supplementary invoice, as the case may be, bears an indication to the effect that no credit of the said additional duty

shall be admissible;

(2) No CENVAT credit under sub-rule(1) shall be taken unless all the particulars as prescribed under the Central Excise Rules, 2002 or the Service

Tax Rules, 1994, as the case may be, are contained in the said document:

Provided that if the said document does not contain all the particulars but contains the details of duty or service tax payable, description of the goods or

taxable service, assessable value, Central Excise or Service tax Registration number of the person issuing the invoice, as the case may be, name and

address of the factory or warehouse or premises of first or second stage dealers or provider of taxable service, and the Deputy Commissioner of

Central Excise or the Assistant Commissioner of Central Excise, as the case may be, is satisfied that the goods or services covered by the said

document have been received and accounted for in the books of the account of the receiver, he may allow the CENVAT credit;

(3) Omitted

(4) The CENVAT credit in respect of input or capital goods purchased from a first stage dealer or second stage dealer shall be allowed only if such

first stage dealer or second stage dealer, as the case may be, has maintained records indicating the fact that the input or capital goods was supplied

from the stock on which duty was paid by the producer of such input or capital goods and only an amount of such duty on pro rata basis has been

indicated in the invoice issued by him.

(5) The manufacturer of final products or the provider of output service shall maintain proper records for the receipt, disposal, consumption and

inventory of the input and capital goods in which the relevant information regarding the value, duty paid, CENVAT credit taken and utilized, the person

from whom the input or capital goods have been procured is recorded and the burden of proof regarding the admissibility of the CENVAT credit shall

lie upon the manufacturer or provider of output service taking such credit.

(6) The manufacturer of final products or the provider of output service shall maintain proper records for the receipt and consumption of the input

services in which the relevant information regarding the value, tax paid, CENVAT credit taken and utilized, the person from whom the input service

has been procured is recorded and the burden of proof regarding the admissibility of the CENVAT credit shall lie upon the manufacturer or provider

of output service taking such credit.

(7) The manufacturer of final products shall submit within ten days from the close of each month to the Superintendent of Central Excise, a monthly

return in the form specified, by notification, by the Board:

Provided that where a manufacturer is availing exemption under a notification based on the value or quantity of clearances in a financial year, he shall

file a quarterly return in the form specified, by notification, by the Board within twenty days after the close of the quarter to which the return relates.

(8) A first stage dealer or a second stage dealer, as the case may be, shall submit within fifteen days from the close of each quarter of a year to the

Superintendent of Central Excise, a return in the form specified, by notification, by the Board.

(9) The provider of output service availing CENVAT credit, shall submit a half yearly return in form specified, by notification, by the Board to the

Superintendent of Central Excise, by the end of the month following the particular quarter or half year.

(10) The input service distributor, shall furnish a half yearly return in such form as may be specified, by notification, by the Board, giving the details of

credit received and distributed during the said half year to the jurisdictional Superintendent of Central Excise, not later than the last day of the month

following the half year period.

(11) The provider of output service, availing CENVAT credit referred to in sub-rule (9) or the input service distributor referred to in sub-rule (10),

as the case may be, may submit a revised return to correct a mistake or omission within a period of sixty days from the date of submission of the

return under sub-rule (9) or sub-rule (10), as the case may be.

21. Question No.1: Whether, in the facts and circumstances of the case, the Tribunal is justified in holding that fabrication of Goliath Crane, Jib

Crane, Gantry Crane, Electric Overhead Travelling (EOT) Crane, etc., which are embedded to earth can be treated as excisable goods within the

meaning of Capital Goods defined in Cenvat Credit Rules, 2004 and the Cenvat Credit availed of Inputs/ Capital Goods like HR Plates, MS Flats, MS

Coils, Wire Ropes, Rail, Welding Electrode and service used for fabrication of these cranes is admissible to the respondent " assessee?

22. Rule 3 of the Cenvat Credit Rules, 2004 allows a manufacturer of the final product or a provider of taxable services to take cenvat credit of duty

of excise paid on any input or capital goods received in the factory or premises and service tax paid on any input services received by the

manufacturer of final product or provider of output services.

23 Rule 3 of the Cenvat Credit Rules, 2004 allows cenvat credit to be taken on the excise duty paid on any input or capital goods received by the

manufacturer or output service provider.

24. Rule 2(k) of the Cenvat Credit Rules, 2004 defines the term "input". The said definition uses the words "used in or in relation to the

manufacture of final products whether directly or indirectly and whether contained in the final product or not". These words are extremely wide and

include not only the goods such as the raw materials used directly in the final product but also the goods which are used "in relation to the

manufacture of final products whether directly or indirectly" which include all goods without which the manufacture of the final product would not be

possible. The following judgments in regard to the wide definition of "input" and wide meaning of the words "whether directly or indirectly, in

or in relation to the manufacture of final products" are relevant:

(a) CCE Vs. Solaris Chemtech Ltd. 2007 (214) ELT 481 (SC) (Para 8)

(b) Ramala Sahkari Chini Mills Vs. CCE, 2010 (14) SCC 744 (Para 10) read with Ramala Sahkari Chini Mills Vs. CCE, 2016 (7) SCC 585

(c) CCE Vs. Parth Poly Woven, 2012 (25) STR 4 (Guj) (Para 18)

(d) Deepak Fertilizers Vs. CCE 2013 (32) STR 532 (Bom) (Para 5)

25. Mr. Joshi is right in submitting that it is impossible to manufacture or repair ships without the aforementioned cranes. Therefore, the HR Plates,

MS Flats, MS Coils, Wire Ropes, Rail, Welding Electrode, which are used in the fabrication of cranes, are an integral part of the manufacturing

process of ships and without these goods, it is not possible to manufacture ships.

26. Therefore, the HR Plates, MS Flats, MS Coils, Wire Ropes, Rail, Welding Electrode used in the fabrication of cranes which are used for

manufacturing ships, are goods used "in relation to the manufacture of final products whether directly or indirectly and whether contained in the

final product or not". In light of this, they are "inputs" and the respondent is eligible to claim the Cenvat Credit on such goods.

27. The definition of "inputs" as contained in Rule 2(k) of the Cenvat Credit Rules, 2004 does not provide that the goods used "in relation to

the manufacture of final products whether directly or indirectly and whether contained in the final product or not" must not be "embedded to the

earth" or that they must not be part of immovable property. No other provision of the Cenvat Credit Rules, 2004 restricts the eligibility for claiming

cenvat credit on inputs to exclude those goods/inputs which become "embedded to the earth" or those which may be considered immovable

property, and no other provision denies credit of duty on any inputs/goods on the ground that they are "embedded to the earth" or are considered

to be immovable property. So long as the inputs are "used in or in relation to the manufacture of final products whether directly or indirectly and

whether contained in the final product or not", the cenvat credit can be claimed in respect of the excise duty paid on them.

28. In any view of the matter, the cranes fabricated from HR Plates, MS Flats, MS Coils, Wire Ropes, Rail, Welding Electrode cannot be considered

as "embedded to the earth" since they run on tracks fitted in and around the Dry Dock. Thus, they cannot be termed as immovable property.

Moreover, merely because they may have to be dismantled to be shifted out of the respondent's premises does not make them immovable property.

[See: CCE Vs. Solid & Correct Engineering, 2010 (252) ELT 481 (Para 15)]

29. It is difficult to take the view as suggested that the HR Plates, MS Flats, MS Coils, Wire Ropes, Rail, Welding Electrode used in

constructing/fabricating cranes are not excisable goods, particularly when the excise duty was paid on them and the cenvat credit is sought of the

same.

30. Rule 2(a) of the Cenvat Credit Rules, 2004 defines "capital goods" to inter alia mean goods falling under Chapter 84 of the First Schedule to

the Central Excise Tariff Act, 1985 and also the components, spares and accessories of the goods falling under Chapter 84.

31. Cranes fall under Chapter 84 (Tariff Item 8426 thereof) of the First Schedule to the Central Excise Tariff Act, 1985 and are therefore, capital

goods by virtue of Rule 2(a)(A)(i) of the Cenvat Credit Rules, 2004.

32. HR Plates, MS Flats, MS Coils, Wire Ropes, Rail, Welding Electrode are components of cranes since they are used in the fabrication of cranes.

These items are therefore capital goods by virtue of Rule 2(a) (A)(iii) of the Cenvat Credit Rules, 2004.

33. Thus, the aforesaid items (i.e. HR Plates, MS Flats, MS Coils, Wire Ropes, Rail, Welding Electrode) being capital goods, the cenvat credit of

excise duty paid thereon cannot be denied in view of Rule 3(1) read with Rule 2(a)(A) of the Cenvat Credit Rules, 2004.

34. The definition of "Capital Goods" as contained in Rule 2(a) of the Cenvat Credit Rules, 2004 does not provide that the capital goods must not

be "embedded to the earth" or that they must not be immovable property. No other provision of the Cenvat Credit Rules, 2004 restricts the

meaning of capital goods to exclude those "embedded to the earth" or those which may be considered immovable property, and no other provision

denies credit of duty on any capital goods on the ground that they are "embedded to the earth" or are considered to be immovable property.

35. Rule 2(a) of the Cenvat Credit Rules, 2004 also does not provide that the capital goods must be excisable goods. In any case, looking to the

definition of "excisable goods" as contained in Section 2(d) of the Central Excise Act, 1944 read with Chapter 84 (Tariff Item 8426) of the First

Schedule to the Central Excise Tariff Act, 1985 cranes are excisable goods. Moreover, it is absurd to suggest that HR Plates, MS Flats, MS Coils,

Wire Ropes, Rail, Welding Electrode used in constructing/ fabricating cranes are not excisable goods, particularly when excise duty was paid on them

and cenvat credit is sought of the same.

36. Rule 3 of the Cenvat Credit Rules, 2004 allows cenvat credit to be taken of service tax paid on any input service received by the manufacturer or

input service provider.

37. The "input services" are defined in Rule 2(I) of the Cenvat Credit Rules, 2004 inter alia to mean any service used by the manufacturer

whether directly or indirectly, in or in relation to the manufacture of final products. The definition of 'input services' is therefore very wide

since the aforesaid words in italics are extremely wide in nature and contemplate not just services used directly in the process of manufacture but also

services used indirectly for assisting the process of manufacture and if the manufacture cannot take place without such services, then that service

would fall within the meaning of 'in or in relation to the manufacture'. Therefore, 'input service' used in the fabrication of cranes which are

essential for the manufacture of ships would be covered by the wide definition of input services and hence, credit of service tax paid on such

services availed by the respondent must be allowed.

38. Moreover, the said definition of 'input services' is wide enough to cover even 'services used in relation to setting up, modernization,

renovation or repairs of a factory' as well as 'services used in relation to....

activities relating to business'. Therefore, services for setting up a factory and any activity relating to business are specifically included within the

definition. The Cranes being part of the factory of the respondent where the ships are manufactured and their fabrication being an activity relating to

respondent's business, services used for fabrication thereof would be covered within the meaning of 'input services'. Hence also, credit of

service tax paid on such services availed by the respondent must be allowed.

39. Question No.2: Whether invoices issued for distribution of Service Tax paid by office other than that of manufacturer or producer or provider of

output service as an Input Service Distributor for distribution of Service Tax is eligible for Input Service Credit and Input Service credit can be availed

on such invoices?

40. It is the case of the department that in the Letter of Permission (LOP) issued by the Development Commissioner, Kandla SEZ to the respondent.

It is the Ahmedabad office of the company which has been mentioned (subsequently changed to Amreli) and therefore, the respondent EOU is

managed by the company's office at Ahmedabad and not by the company's office at the head office at Mumbai. It is therefore, sought to be

contended that the Mumbai Office has no relation to the respondent EOU and cannot be an 'input service distributor' for the respondent EOU.

However, it is on the basis of the invoices distributed by the Mumbai office of the

company that the respondent EOU is availing of cenvat credit, which is alleged to be not permissible in view of the definition of input service distributor in Rule 2(m) of Cenvat Credit Rules, 2004 read with Rule 4A of Service Tax Rules, 1994.

41. The Rule 2(m) of the Cenvat Credit Rules, 2004 defines "input service distributor" to mean an office of the manufacturer or producer of final products or provider of output service which receives invoices issued under Service Tax Rules, 1994 towards purchases of input services and issues invoice, bill or challan for the purpose of distributing the credit of service tax paid on said services to such manufacturer or producer or provider, as the case may be. The Rule 7 provides that the input service distributor may distribute the cenvat credit in respect of service tax paid on input service to its manufacturing unit or units providing output service subject to conditions stated therein.

42. There is no provision which creates any bar against a head office of a company from distributing credit of service tax paid on services purchased to its various units. Ordinarily, it is only the head office of a company which would place the orders for availing services, receive invoices towards purchases of input services and then distribute the credit of service tax paid to the company's various other units. Nowhere in the Cenvat Credit Rules, 2004 it is provided that for an office of a company to be termed as "input service distributor", it must be mentioned in the LOP of the company's suit.

43. Indisputably, the respondent EOU belongs to the company. Indisputably, the Mumbai office is the head office of the company. In fact, the Mumbai office of the company is registered as the Input Service Distributor with the service tax authorities. It is therefore obvious that the Mumbai office, being the head office of the company, which owns several units, receives invoices issued under the Service Tax Rules, 1994 towards the purchases of input services and issues invoice, bill or challan for the purpose of distributing the credit of service tax paid on said services to its various manufacturing units. There is no illegality in this whatsoever.

44. Question No.3: Whether Cenvat Credit of Input, Input Service or Capital Goods shown/ declared in Monthly Return (ER-2) filed before Central Excise Officer (in-charge of the factory) is admissible and qualifies as Cenvat

Credit for the output service provider when same is not shown/

declared in STÂ3 Return to be filed before jurisdictional Service Tax authorities considering that criteria to qualify the same for such credit are

different for manufacturer or Output Service Provider?

45. The case of the appellant is that the cenvat credit sought to be availed was reflected in the respondent's Monthly Return (ERÂ2) filed before the

Central Excise Officer but not in the respondent's STÂ3 Return to be filed before the jurisdictional Service Tax authorities. It is therefore contended

that such credit should not be allowed to the respondent as an output service provider, since the criteria to qualify for cenvat credit are purportedly

different for a manufacturer and for an output service provider.

46. First, it may be noted that, contrary to what the appellant seeks to contend, the provisions governing the cenvat credit on excise duty paid on inputs

or capital goods and on service tax paid on input services are contained only in the Cenvat Credit Rules, 2004 and the service tax law does not contain

separate provisions for availing cenvat credit. Likewise, whether a person is a manufacturer or a service provider or both, any cenvat credit, whether

in respect of excise duty or on service tax paid, is to be availed only under and in terms of the Cenvat Credit Rules, 2004.

47. The Rule 3 of the Cenvat Credit Rules, 2004 allows a manufacturer of the final product or a provider of taxable services to take cenvat credit of

duty of excise paid on any input or capital goods received in the factory or premises and the service tax paid on any input services received by the

manufacturer of final product or provider of output services. The said Rule 3 does not contain different criteria to qualify for cenvat credit for a

manufacturer and for an output service provider. No other provision of the Cenvat Credit Rules, 2004 prescribes different criteria to qualify for cenvat

credit for a manufacturer and for an output service provider. Moreover, the Cenvat Credit Rules, 2004 do not provide that cenvat credit can be

disallowed if it is not reflected for STÂ3 Return to be filed before the jurisdictional Service Tax authorities.

48. As is held by the CESTAT, the input service credit cannot be denied on the ground that it is shown in the ERÂ1 return instead of the STÂ3

returns since the cross utilization of credit of input and input service is permissible and cenvat credit on input, capital goods and input services used in

the manufacturing goods or providing output service is available in common pool and cenvat credit taken during the period shown in ERÂ1 or STÂ3

return would be the same and there is no restriction on utilization of the common input credit.

49. Question No.4:Â Whether the Cenvat Credit of duty paid on Input/ Capital Goods and Service Tax paid on taxable services used for fabrication of

Dry Dock which is a concrete structure embedded to earth and immovable in nature eligible as Cenvat Credit as per Cenvat Credit Rules, 2004?

50. The case of the appellant is similar to the case made in regard to the cranes. The appellant argues that the Dry Dock is a â??concrete structure

embedded to earthâ? and â??immovable in natureâ? and therefore, it is not permissible to allow cenvat credit of the excise duty paid on items such as

steel, cement, etc., purchased by the respondent for constructing/fabricating the Dry Dock and of service tax paid on services availed for the same.

51. The RuleÂ3 of the Cenvat Credit Rules, 2004 allows a manufacturer of the final product or by the provider of taxable services to take cenvat

service of duty of excise paid on any input or capital goods received in the factory or premises and service tax paid on any input services received by

the manufacturer of final product or provider of output services.

52. The Rule 2(k) of the Cenvat Credit Rules, 2004 defines â??inputâ? to inter alia mean goods â??used in or in relation to the manufacture of final

products whether directly or indirectly and whether contained in the final product or notâ?. As stated earlier, the aforesaid words quoted in italics have

time and again been construed by the Supreme Court and other courts to be of very wide import and to encompass all the goods whether directly or

indirectly used in the manufacturing process or before or after the manufacturing process or whether used in relation to the manufacturing process. So

long as the manufacturing process of the final product is not possible without such inputs, they fall within the wide meaning of these words.

53. The Dry Dock has been held and recognized to be a 'Plant' by the Supreme Court in the case of Scientific Engineering House (Supra).

54. This High Court, in the respondent's own case in the Tax Appeal No.563 of 2016 arising under the provisions of the Gujarat Value Added Tax

Act, 2003 has held, â??Following the law laid down by the Hon'ble Supreme Court in the case of Jawahar Mills Ltd. (Supra) and Rajasthan Spinning

and Weaving Mills Ltd. (Supra) to the facts of the case on hand and as cement, sand, steel, greet, concrete, etc., are required to be used in

manufacturing of â??Capital Goodsâ? viz. Dry Dock and Fit Out Berth, which is an integral part of the final product of the Dealer as without the Dry

Dock and Fit Out Berth, it is not possible for the Dealer to carry on his business which is of ship building/ manufacture and repairs of ship and that the

Dry Dock and Fit Out Berth are specialized in nature which are required to be constructed specially and specifically for the purpose of business of the

Dealer i.e. ship building/ manufacture and repairs of ship, applying the â??User Testâ? it is to be held that on purchase of cement, sand, steel, greet,

concrete, etc. which are used in Dry Dock and Fit Out Berth (Capital Goods), Dealer shall be entitled to Input Tax Credit. Any other interpretation

would defeat the object and purpose of granting Input Tax Credit and would defeat the grant of Input Tax Credit as per Section 11 of the VAT Act.

(Emphasis supplied)

55. Thus, it is now judicially recognized that it is not possible to manufacture ships without a Dry Dock. The function of a Dry Dock has been

explained in the narration of facts hereinÂabove, which would also make it evident that the Dry Dock is absolutely essential to the manufacturing

process of ships. As stated earlier, a Dry Dock is a basin where ship/ watercraft or partially constructed vessels can come to rest on a dry platform

where construction, maintenance and/or repair thereof can take place.

56. Therefore, the items such as cement, steel, etc., used in constructing/ fabricating a Dry Dock, are clearly items used â??in relation to the

manufacture of final products whether directly or indirectly and whether contained in the final product or notâ? and are therefore, â??inputsâ? within

the wide meaning of the said word as defined in the Rule 2(k) of the Cenvat Credit Rules, 2004 and therefore also, the Cenvat Credit of Excise Duty

paid on the same cannot be denied.

57. Question No.5 or (e):Â Whether the Tribunal is justified in accepting the photocopy of the invoices as an admissible evidence/ record and

remanding the proceeding back to the adjudicating authority for considering the issue afresh?

58. The CESTAT has observed that the Adjudicating Authority had held against the assessee on the basis of a report of the Superintendent which

was not disclosed to the assessee and hence, the matter was remanded so that the said report could be provided to the assessee before taking a

decision. The CESTAT directed the Adjudicating Authority to take appropriate decision afresh after providing the report and considering the

assessee's submission.

59. We also do not find any merit in the submission canvassed on behalf of the appellant that no Cenvat Credit can be allowed in favour of the

respondent in respect of the inputs, capital good and inputs service used to fabricate cranes and Dry Dock as the final product of the respondent is

exempted from duty.

60. We may clarify that in the aforesaid context, no question of law has been formulated. However, as the issue was raised, we are dealing with the

same.

Rule 6. Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services.Â?

(1) The CENVAT credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or for

provision of exempted services, except in the circumstances mentioned in subÂ? rule (2).

Provided that the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the

ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.

(2) â?|..

(3) â?|.. (3A)â?|..

(4) 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 exempt from the whole of the duty of excise leviable thereon under any notification where exemption

is granted based upon the value or quantity of clearances made in a financial year.

(5) â?|..

(6) The provisions of subÂ?rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are eitherÂ?

- (i) cleared to a unit in a special economic zone; or to a developer of a special economic zone for their authorized operations; or
- (ii) cleared to a hundred per cent. export-oriented undertaking; or
- (iii) cleared to a unit in an Electronic Hardware Technology Park or Software Technology Park; or
- (iv) supplied to the United Nations or an International Organization for their official use or supplied to projects funded by them, on which exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of Revenue) No.108/95-Central Excise, dated the 28th August, 1995, number G. S R. 602(E), dated the 28th August, 1995; or
- (v) cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002; or
- (vi) gold or silver falling within Chapter 71 of the said First Schedule, arising in the course of manufacture of copper or zinc by smelting; or.
- (vii) all goods which are exempt from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under sub-section (1) of section 3 of the said Customs Tariff Act when imported into India and are supplied,
 - (a) against International Competitive Bidding; or
 - (b) to a power project from which power supply has been tied up through tariff based competitive bidding; or
 - (c) to a power project awarded to a developer through tariff based competitive bidding, in terms of Notification No.12/2012-Central Excise, dated the 17th March, 2012;

61. First, it may be noted that the language used in Rule 6(1) is "used in the manufacture of exempted goods" as against the language used in the definition of "input" as contained in Rule 2(k) which contains the words "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 in the definition of "input service" as contained in Rule 2(l) which contains the words "whether directly or indirectly, in or in relation to the manufacture of final products". This provision applies only to inputs or input services which are used in the manufacture of exempted goods and not to the inputs or input services, which are used indirectly, in relation to the manufacture of final products. Rule 6(1) is not applicable to inputs, capital goods

and inputs service used to fabricate cranes and Dry Dock.

62. Likewise, Rule 6(4) speaks of disallowing the cenvat credit on capital goods used exclusively in the manufacture of exempted goods or in providing

exempted services. Therefore, this provision is not applicable when the capital goods are used for both exempted as well as dutiable goods/services.

63. Further, Rule 6(6)(v) provides that the provisions of sub-Rules (1) to (4) are not applicable in case the excisable goods removed without payment of duty are cleared for export under a bond.

64. The respondent is a 100% EOU which is required to clear its final product i.e. the ships for export under bond. The CBEC clarifies that while the

goods exempted from the payment of duty or chargeable to nil rate of duty have been disallowed to be exported under bond by way of an amendment

to the conditions for exporting under bond, 100% EOUs are required to export goods under bond, in terms of the customs and excise notifications and

hence exports from 100% EOUs have been specifically excluded from the purview of this amendment. The respondent's first vessel was exported in

November 2011 under bond as is evident from the shipping documents produced at Page 156A to 156F of the CESTAT paper book produced by

the respondent in the Tax Appeal No.709 of 2016. The Second last column of the table at Page 156E makes it evident that the vessel was exported

under bond. Thus, when it is mandatory for the respondent to export under bond, Rule 6(6)(v) is squarely applicable and hence the respondent is

exempt from the provisions of Rule 6(1) to 6(4).

See:

(a) *Repro India Vs. UOI* 2009 (235) ELT 614 (Bom) (Para 7-9)

(b) *CCE Vs. Drish Shoes* 2010 (254) ELT 417 (HP) (Para 11-20)

(c) *UOI Vs. Sharp Menthol* 2011 (270) ELT 212 (Bom) (Para 23-28)

(d) *CCE Vs. Jolly Board* 2017 (50) STR 131 (Bom) (Para 7-10)

(e) *CCE Vs. Same Duetz* 2017 (6) GSTL 453 (Mad) (Para 12-15)

65. In view of the aforesaid, we do not find any merit in both the appeals. Both the appeals are accordingly dismissed.