

(2022) 11 OHC CK 0184
In the Orissa High Court
Case No : OTAPL No. 1 Of 2007

Principal Commissioner Of GST And Central Excise,
Bhubaneswar Commissionerate, Bhubaneswar

APPELLANT

Vs

M/s Neelachal Ispat Nigam Ltd

RESPONDENT

Date of Decision : 22-11-2022

Acts Referred:

Central Excise Act, 1944 — Section 2(e)
Central Excise Rules, 1944 — Rule 12, 13, 57AA, 57AH, 57D, 57Q, 173Q, 174
Cenvat Credit Rules, 2001 — Rule 2

Citation : (2022) 11 OHC CK 0184

Hon'ble Judges : Dr. S. Muralidhar, CJ;M.S. Raman, J

Bench : Division Bench

Advocate : Choudhury Satyajit Mishra, R. Raghavan, J. Mohanty

Final Decision : Dismissed

Judgement

Dr. S. Muralidhar, CJ.

1. The present appeal by the Commissioner of Central Excise, Customs and Service Tax, Bhubaneswar is against an order dated 4th September, 2006 passed by the Customs, Excise & Services Tax Appellate Tribunal (CESTAT), Kolkata in Appeal No.EDM-10/03 allowing the appeal of the Respondent-Assessee and reversing the Order-in-Original dated 26th September, 2002 passed by the Commissioner, Central Excise & Customs, Bhubaneswar-I. At the outset, it must be noticed that the Respondent-Assessee originally was M/s. Konark Met Coke Ltd. (KMCL) which was subsequently substituted by M/s. Neelachal Ispat Nigam Ltd. (NINL). The further development was that NINL has since been taken over by M/s. Tata Steel Long Products Limited.

2. The original Appellant was the Commissioner of Central Excise, Customs & Service Tax and by virtue of the amendment has been substituted by the Principal Commissioner of GST and Central Excise, Bhubaneswar Commissionerate.

3. While admitting the present appeal on 7th May, 2021 the following questions were framed for consideration:

"(i) Whether CENVAT Credit can be allowed to an assessee on capital goods used in the factory (Power Plant of KMCL) meant for another company/assessee (NINL) for manufacture of final products which are different and distinct i.e. KMCL manufactures 'Coke' and NINL manufactures 'Steel' as the final product?

(ii) Whether under Rule 57AA of the Central Excise Rules, 1944 or Rule 2 of CENVAT Credit Rules, 2001, the capital goods used in the power plant of KMCL is Cenvatable when the final products (Power) is non excisable?

(iii) KMCL having consciously established the Captive Power Plant within the premises of another company (NINL) which requires 75% of power, whether CENVAT Credit can be allowed on capital goods for the captive power plant when it is not exclusively used in the manufacture of Coke, that too when the coke oven plant is situated at a different place?

(iv) Whether the Captive Power Plant of KMCL, consciously installed centrally within the premises of NINL to meet 75% of NINL's power, satisfies the definition of factory under Section 2(e) of the Central Excise Act, 1944?"

4. The background facts are that KMCL set up a Metallurgical Coke Plant along with a Captive Power Plant (CPP) for its own consumption as well as for sale of power to NINL. KMCL applied for registration on 12th January, 1998 under Rule 174 of the Central Excise Rules, 1944 (CE Rules) for setting up a Coke Oven Plant to manufacture excisable goods. It procured various capital goods defined under Rule 57Q of the CE Rules on payment of duty and filed a declaration under Rule 57D. The capital goods received were also entered in RG-23-C Part-I. KMCL availed credit on the capital goods as well as the inputs.

5. According to the Appellant, while applying for registration, a ground plan of the Coke Oven Plant and CPP was submitted. This showed that the CPP was situated within the premises of NINL, which was a different company. The Range Superintendent deleted the CPP from the ground plan. The contention of KMCL was that the ground plan had to be modified since the two plants, i.e., the CPP and the Coke Oven Plant were two sections of the same manufacturing unit and that the electricity was essential for carrying out the manufacturing activity. According to the Department, 75% of the power generated was meant for NINL.

6. On completion of the project, KMCL entered the duty paying documents in respect of the capital goods received up to 31st March, 2001 in the RG-23-C Part-II register. The accumulated credit as of that date was to the tune of Rs.16,43,75,008. On 9th April, 2001 KMCL filed with the Range Superintendent the necessary data showing the earning and availing of the said credit.

7. The Commissioner, Central Excise & Customs, Bhubaneswar issued a Show Cause Notice (SCN) dated 1st April, 2002 to the KMCL for contravention of the Rule 57AA and Rule 2 of the CE Rules and CENVAT Credit Rules (CC Rules), 2001

respectively for having availed the credit of duty paid on capital goods and inputs during the period of March and July, 2001. According to the Department, to be eligible for availment of MODVAT/CENVAT Credit, the inputs and capital goods should be:

"(i) received in the factory of manufacture of final product;

(ii) used in the factory of manufacture of the final products in or in relation to manufacture of the said final product."

8. According to the Department, even if the CPP of KMCL were to be situated inside the factory of NINL and satisfied the criteria laid down by the Central Board of Excise & Customs (CBEC) to constitute as part of the same factory, no MODVAT/CENVAT credit would still be available since the Power Plant was designed predominately to cater to the requirements, not of KMCL, but of NINL. It must be mentioned here that according to the Department, 75% of the power generated in the CPP was meant for NINL. Thus, it was contented by the Department that the entire power and steam generated in the CPP was not being used in the manufacture of final products of KMCL but in the manufacture of final products of NINL, which was a different factory and, therefore, such CENVAT/Credit could not be availed of.

9. The Department contended that the CC Rules specifically mentioned that capital goods and inputs for the purposes of the said Rules should be used in or in relation to the manufacture of final products within the factory of production. Use of the capital goods or inputs outside the factory of manufacture of final products and/or any use not in or in relation to the manufacture of the final products would render the said inputs/capital goods ineligible for the purposes of availment of CENVAT Credits. Accordingly, on 26th September, 2002 the Commissioner, Central Excise & Customs passed an adjudication order disallowing the above CENVAT Credit and imposing penalty of Rs.1 Lakh on KMCL under Rule 173Q of the CE Rules and Rule 13 of the CC Rules.

10. KMCL then filed an appeal before the CESTAT being Appeal No.EDM-10 of 2003. The CESTAT, by the impugned order held as under:

"(a) That Coke Oven Plant and Power Plant of KMCL located at different cities i.e. not inside the premises of Coke Oven Plant cannot be denied especially when land has subsequently been transferred to KMCL. The Commissioner did not disentitle the capital goods credit on the duty paid on capital goods brought to set up the Power Plant. So long as the Power Plant is used, to generate electricity, to manufacture the goods in the appellant's Coke Oven Plant, which is not disputed, capital goods credit would be eligible.

(b) That the power generated, in the power plant of KMCL is meant for use by NINL would not disentitle the credit, since power cannot be stored. It has to be rolled out and gainfully utilized Rolling out of Power is a technological necessity.

(c) That the credit eligibility on inputs, which was not pressed by the Learned

Advocate before us, therefore we arrive at no findings as regards the eligibility of credit on inputs, i.e. goods other than capital goods and would allow this appeal, granting the capital goods credit and holding that the input credit not pressed.”

11. Mr. Choudhury Satyajit Mishra, learned Senior Standing Counsel appearing for the Appellant made the following submissions:

(i) The twin conditions are to be cumulatively fulfilled in terms of Rule 57A of the CE Rules read with Rule 2 of the CC Rules in order that the capital goods are cenvatable and not satisfied in the present case.

(ii) The CESTAT had failed to appreciate the fact that while issuing registration certificate under Rule 174 of the CE Rules to KMCL, the Power Plant portion was excluded from the approved ground plan. KMCL and NINL were two separate public limited companies with independent legal identities. The Power Plant located inside the factory premises of NINL, which was a separate premises altogether, could not be included in the ground plan of KMCL. Therefore, the installation of a Captive Power Plant inside the premises of NINL did not satisfy the definition of 'Factory' under Section 2(e) of the CE Act. The premises of KMCL and that of NINL were two disjoint premises. One had the Coke Oven Plant and the other was the Power Plant. The Power Plant was surrounded completely by the registered premises of NINL.

(iii) The power or electricity produced by KMCL was not an excisable commodity, therefore, CENVAT Credit of duty paid on the capital goods and inputs used in the power plant was not admissible in terms of Rule 57AH of the CE Rules read with Rule 12 of the CC Rules. 75% of the power generated in the Captive Power Plant was in fact used by NINL and not KMCL.

“The power generated should have been meant for manufacture of excisable goods inside the factory premises but in the instant case, the power has been sold to other unit. The unit could not fulfil the conditions of Rule 57AA of Central Excise Rules, 1944/ Rule 2 of the CENVAT Credit Rule, 2001.”

12. Mr. Mishra, learned Senior Standing Counsel for the Appellant, also drew attention to the following finding in the order of the Commissioner:

“From the above, it is evident that the “Power Plant” of KMCL is running with the help of blast furnace gas generated as a by-product in another separate registered factory i.e. NINL. In view of this, there is no inter-linkage of processes between the Power Plant and the final products to be manufactured in the Coke Oven Plant of KMCL. Accordingly, even in the context of the above guidelines of CBEC relied upon by KMCL, the Power Plant which is situated in a separate premises away from the factory premises of KMCL manufacturing the final products, cannot constitute part of the same factory, i.e. KMCL. Even otherwise, going by the definition of the factory as quoted in Para 3.1 above, the Power Plant of KMCL which is not situated either inside the premises of KMCL or in the precincts thereof, does not qualify to be part of the factory of KMCL.”

It was submitted that the CESTAT assigned no reason to discard the above finding.

13. Countering the above submissions, Mr. R. Raghavan, learned counsel appearing for the Respondent supported the order of the CESTAT and submitted as under:

(i) Under Scheme of Amalgamation Sanctioned by this Court in COPET No.26 of 2004 by order dated 5th November 2004, KMCL was amalgamated with NINL with effect from 8th December, 2004. Going by the definition of 'Factory' under Section 2(e) of the CE Act read with the guidelines of the CBEC, it could not be said that the Coke Oven Plant and the CPP were located in different locations. The land on which the Power Plant was situated was subsequently transferred to KMCL and, therefore, it could not be said to be different premises.

(ii) So long as the Power Plant was used to generate electricity to manufacture the goods in the Appellant's Coke Oven Plant, capital goods credit would still be available.

(iii) Merely because 75% of the power generated in the Captive Power Plant of KMCL is sold to NINL, would not disentitle KMCL to CENVAT credit. Power cannot be stored and has to be rolled out and gainfully utilized. Rolling out of power was a technological necessity. The relief was granted by CESTAT only in relation to capital goods credit and not to input credit since the latter was not pressed.

14. It was further submitted by Mr. Raghavan, learned counsel for the Respondent, that initially NINL was promoted by MMTC Limited, a Government of India undertaking along with the Government of Odisha for setting up an Integrated Iron & Steel Plant at Duburi on the basis of a single feasibility report. In order to meet the institutional norms pertaining to Promoters' contribution and for arranging the required funds, the Promoters decided to bifurcate NINL into two units. One unit was to be KMCL which would manufacture Blast Furnace Coke for exclusive use by NINL. The idea was to make the industrial unit an Integrated Conventional Iron and Steel Plant. Thus, NINL and KMCL were to be inter-dependent both technologically and operationally. Both the plants were to be inter-linked and inseparable. The manufacturing activity in the Coke Oven Plant could not be conceived without power supply from the Power Plant.

15. Although the Coke Oven complex and CPP were in different locations, they belonged to the same factory and satisfied the requirement that "the said goods are to be used in the factory of the manufacturer of final products". The only restriction for availing credit under the CENVAT Scheme was that the capital goods were not to be exclusively used for manufacture of exempted products. In the present case, the manufactured goods for which the registration certificate has been issued are dutiable final products. Accordingly, CENVAT Credit was admissible on the capital goods. Further, there was no restriction under the CENVAT Scheme that after Captive use of power, the surplus power cannot be supplied to any other party. The power/electricity was not a final product of KMCL

and was used directly in the manufacture of excisable goods in the Coke Oven Plant. Both units constituted one factory where excisable goods were manufactured. Therefore, the excisability of power/electricity was not at all relevant or determinative for resolving the dispute.

16. The above submissions have been considered. To begin with, the Court would like to refer to the definition of "Factory" under Section 2(e) of the CE Act which reads as under:

"Factory means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on."

17. This has to be read together with the relevant portion of the CBEC's Manual of Supplementary Instructions dated 1st September, 2001, which reads thus:

"Separate registration is required in respect of separate premises except in cases where two or more premises are actually part of the same factory (where processes are interlinked), but are segregated by public road, canal or railway line. The fact that the two premises are part of the same factory will be decided by the Commissioner of Central Excise based on factors, such as:

(a) Interlinked process- product manufactured/ produced in one premise are substantially in other premises for manufacture of final products.

(b) Large number of raw materials is common and received/ proposed to be received commonly for both/ all the premises.

(c) Common electric supplies.

(d) There is common labour/ work force.

(e) Common administration/ works management.

(f) Common Sales Tax registration and assessment.

(g) Common Income Tax assessment.

(h) Any other factor as may be indicative of inter linkage of the manufacturing process."

18. The above definition does not preclude the possibility of there being two or more premises which can be "segregated by public road, canal or railway line." How the two premises are to be considered to be part of the same factory by the Commissioner of the Central Excise has been set out in the above instructions of the CBEC. It only shows that as long as the two portions are integrally connected and inter-linked with the manufacturing process of excisable goods, it can be considered to be part of the same factory premises. In other words, merely because the Coke Oven Plant and the CPP may have been in two separate locations would not result in there being considered to be not part of the same

factory premises.

19. An important factor which has to be taken note of in this context is that an agreement was executed between the Government of Odisha and KMCL on 28th June, 2000 where under a land to an extent of 249.45 acres on which both the Coke Oven Plant as well as the CPP Plant were located had subsequently been transferred to KMCL.

20. As regards the selling of 75% of the power to NINL, there is indeed no restriction under the CENVAT Scheme that after captive use of power, the surplus power cannot be sold to any other party. The only restriction is that the capital goods are not to be exclusively used for manufacture of 'exempted products'. It is nobody's case that the final manufactured products of KMCL or that of NINL are 'exempted products'. In this context, it should be noticed that 'power/electricity' is not a final product. It is generated in the CPP of KMCL and is used in the manufacture of excisable goods in the Coke Oven Plant.

21. In Commissioner of Central Goods & S.T., Jaipur v. Shree Cement Ltd. 2018 (16) G.S.T.L. 196 (Raj), a similar question arose. There, one factory manufactured duplex board and the other paper. They were separately registered with the Central Excise Department. The question that arose was whether the excess electricity cleared by the Assessee in favour of its sister concern units would make it ineligible for CENVAT Credit. The Court answered the question in the negative. It was held that electricity generated by the CPP was being used for the sister concern which was part of the company itself and, therefore, would still constitute captive consumption of electricity. In other words, the Assessee was held to be eligible for the CENVAT Credit.

22. The question to be asked is only this: whether the power generated in the CPP of KMCL is used in the manufacture of the excisable goods by KMCL? If the answer to that question is in the affirmative, the mere fact that the surplus power may have been sold to NINL would not disentitle KMCL to the benefit of CENVAT Credit on capital goods. In that view of the matter, the questions framed by this Court are answered as under:

(i) Question No.(i) is answered in the affirmative, i.e., in favour of the Respondent and against the Appellant.

(ii) Question No.(ii) is answered by holding that the power generated in the CPP is not a final product and, therefore, this question does not arise in the facts and circumstances of the case.

In other words, with the electricity generated in the CPP being used in the manufacture of the final excisable product of KMCL, CENVAT Credit would be available to KMCL.

(iii) Question Nos.(iii) and (iv) are answered in favour of the Respondent and against the Appellant by holding that the Coke Oven Plant and the CPP have factually been shown to be part of the same factory premises and CENVAT Credit

can be allowed in the facts and circumstances of the case.

23. For the aforementioned reasons, the appeal is dismissed, but in the circumstances, with no order as to costs.

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