



CEA-84-2009 (O&M)

-1-

201

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

-:-

CEA-84-2009 (O&M)

Reserved on :- 07.01.2025

Date of Pronouncement:28.01.2025

Commissioner of Central Excise,
Commissionerate Rohtak

....Appellant

VERSUS

M/s Jindal Stainless Ltd.

....Respondent

**CORAM : HON'BLE MR. JUSTICE ARUN PALLI
HON'BLE MRS. JUSTICE SUDEEPTI SHARMA**

Present: Mr. Sunish Bindlish, Advocate and
Mr. Viney Kumar, Advocate for the appellant.

Mr. Ankit Awal, Advocate for the respondent.

-:-

SUDEEPTI SHARMA, J.

1. The present appeal is preferred by the Commissioner of Central Excise, Commissionerate, Rohtak, under Section 35(G) of the Central Excise Act, 1944, against the order dated 21.08.2008 passed by the learned Customs, Excise & Service Tax Appellate Tribunal, New Delhi.

2. The brief facts of the case as per the Order-in-Original and the relevant portion of the findings are reproduced as under:-

“ M/s Jindal Strips Ltd., Delhi Road, Hisar (hereinafter referred to as the Party) are engaged in the manufacture of goods such as Slabs, Blooms, Ingots, HR Strips/Coils of Stainless Steel etc. falling under Chapter 72 of the Central Excise Tariff Act, 1985 and are registered with the Central Excise vide Registration Number

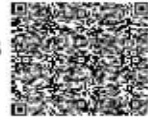


CEA-84-2009 (O&M)

-2-

AABCJ1969MXM001. The party are availing the Modvat/CENVAT Credit facility of duty paid on input/raw materials and Capital Goods. The party have installed a captive power plant for generation of electricity using fuel namely, R.O., R.F.O, H.P.S. and L.D.O. on which they are taking Modvat/CENVAT credit under Rule 57A and 57B of the Central Excise Rules, 1944, Rule 2 and 3 of CENVAT Credit (No.2) Rules, 2001 and Rule 2 and 3 of CENVAT Credit Rule, 2002.

2. Acting on an intelligence that the said party were clearing some part of electricity generated by their Captive Power Plan to Electricity Board the Haryana State (HSEB) ((now Dakshin Haryana Bijli Vitran Nigam Ltd. (DHBVNL)) an enquiry was conducted by the officers of Central Excise. The party produced the permission letter Memo No.210/DB- 33 (3)85/Jindal Strips/Hisar dt 1-10-90 the Secretary, Technical Section, HSEB, Panchkula (Haryana) for parallel operation of their Captive Power Plan with HSEB, Power Grid. On scrutiny of the Permission Letter it was observed by the Central Excise officers that as per Clause 0II of the Permission Letter, the Captive Power Plant was synchronized with the HSEB Power Grid on 11KV. Further as per the agreement the party provided Export/Import Meters on 11KV bus for recording power injected by their Captive Power Plant to the HSEB system and power draws from HSEB system respectively. The party had been clearing some part of the power generated by their Captive Power Plant to HSEB



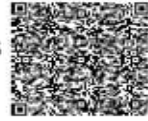
CEA-84-2009 (O&M)

-3-

and not reversing the proportionate Modvat/CENVAT credit taken on the fuel which was consumed by them for the generation of electricity exported to HSEB.

3. *The SDO (DHBVNL), HSEB (the AEE"OP" S/D, Model Town (DHBVNL) Hisar submitted the statement of power purchased/sold in respect of M/s Jindal Strips Ltd., Hisar for the period 1991-92 to 2003-04 (upto June, 2003). The AEE "OP" S/D, Model Town, Hisar further clarified vide letter dt. 30-07-03 that the power purchased by the HSEB now Nigam, i.e. the power ejected by M/s Jindal Strips Ltd., Hisar in their system, was measured by the export meter and the Nigam had not been making any cash payment for the units purchased by Nigam from M/s Jindal Strips Ltd., Hisar. However, the units cleared/injected by M/s Jindal Strips Ltd., Hisar in their system were adjusted in the monthly electricity bills at the same rate at which Nigam sold to M/s Jindal Strips Ltd., Hisar after deducting 10% of the total cleared units/injected by M/s Jindal Strips Ltd. Hisar in their system.*

4. *Shri Arun Goel, Vice President of the Party in his voluntary statement dated 24- 07-2003 under Section 14 of the Central Excise Act, 1944 stated that he was working as Incharge of Electricity Maintenance and admitted that the power cleared/injected by their Captive Power Plant to HSEB system was measured by Export Meter. On 21-8-03 he submitted the data sheet for fuel consumption in Captive Power Plant for the period from April, 2001 to March, 2003*



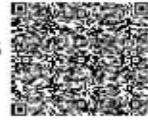
CEA-84-2009 (O&M)

-4-

and he further stated that the fuel consumption report in respect of Captive Power Plant before April, 2001 was not available with him.

5. *Shri R.K. Gupta, General Manager (Excise) of the Party in his voluntary statement dated 24-07-2003 under Section 14 of the Central Excise Act, stated that they were using F.O., R.F.O. and L.D.O. for generation of power and after 1-3-03 the L.D.O. was not used and also stated that they were taking Modvat/CENVAT Credit on fuel for generation of power used in their Captive Power Plant for generation of power. On 28-07-2003 he stated that the power cleared/injected in HSEB system was adjusted in the Monthly Electricity Bill. On 21-8-03 he stated that they were taking CENVAT credit on fuel used for generation of power and for other purpose in the factory. He further stated that the price of the fuel used in the generation of the electricity might be taken on average basis as they were making oil consumption report as total oil used and not item wise.*

6. *Vide their letter dt. 9-10-03 the Party submitted the total fuel received in their factory and Modvat/CENVAT credit taken on the same for the period Jan., 99 to June, 03. In his further voluntary written statement dated 21-10-2003 Shri R.K. Gupta admitted that they were taking Modvat/CENVAT credit on the entire fuel used in their Captive Power Plant for generation of electricity. It is characteristic of the Electricity that Electricity cannot be stored and also the Electricity once cleared cannot be brought back.*



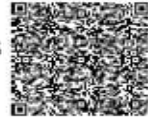
CEA-84-2009 (O&M)

-5-

7. *As per the provisions of Rule 57B of the Central Excise Rule, 1944, 57AA of the Central Excise (2nd amendment) Rules, 2000 and Rule 2(f) of CENVAT Credit (No.2) Rules, 2001 and Rule 2(g) of the Cenvat Credit Rule, 2002, a manufacturer of the final product shall be allowed to take the credit of the specified duty paid on inputs used for generation of electricity or steam used for manufacture of final product or any purpose, within the factory of production. However, on scrutiny of the records of the Party it was revealed that they have been clearing/injecting some portion of the electricity generated by their Captive Power Plant to HSEB and thereby contravened the provisions of the aforesaid Rules by not using electricity generated by using inputs for the specified purpose on which the party had taken Modvat/Cenvat credit. As such fuel used for generation of electricity and the electricity diverted/cleared outside the factory is not covered under the purview of eligible inputs defined under Rule 57A of Central Excise Rules, 1944, Rule 57AB of Central Excise (2nd amendment) Rules, 2000 and Rule 2 of CENVAT Credit Rules, 2001 and 2002 applicable during the relevant period and as such credit taken and utilized on fuel used for the purpose other than the specified is recoverable.*

8. *It was observed that:*

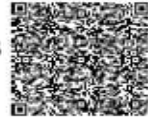
(i) the party had contravened the provision of Rule 57A, 57B of Central Excise Rules 1944, 57AB, 57AA of Central Excise (2nd amendment) Rules, 2000 and Rule 2 and 3 of the CENVAT



Credit Rules, 2001 and 2002 and thereby availed inadmissible Modvat/CENVAT credit to the tune of Rs. 4,22,06,993/- for the period Jan., 1999 to June, 2003 on fuels used for generation of electricity cleared to HSEB (now DHBVNL) and the same was recoverable from them.

(ii) The Party had suppressed these facts from Department that they were clearing/injecting the part of electricity generated by the Captive Power Plan (by using fuel on which Modvat/CENVAT credit had been taken and utilized) to HSEB. This fact of clearance of electricity to HSEB came to light only after the records were scrutinized by the Central Excise Officer which was detected after going through the discrete inquiry and verification of documents which were not submitted by the Party to the Deptt. It appeared that this act of omission and commission of the Party tantmounted to suppression of facts from the Department and the provisions of Rule 571(1) (ii) of Central Excise Rules, 1944, Rule 57AH (2) of Central Excise (2nd amendment) Rules, 2000 and proviso to Section 11A (1) of Central Excise Act, 1944, were attracted wherein period of five years is invoke-able against the party.

(iii) Shri R.K. Gupta, General Manager (Excise) Incharge of Central Excise matter of the Company dealing with day to day affairs of the Party was expected to inform this fact of using fuel in the generation of the electricity being exported to HSEB



CEA-84-2009 (O&M)

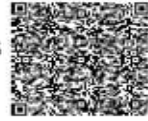
-7-

(now DHBVNL) and to reverse the Modvat/ CENVAT Credit taken on that portion of fuel.. He had failed in his duty and rather intentionally did not take action as stated above with intent to evade Central Excise duty by way of taking inadmissible Modvat/CENVAT credit. He, thus, appeared liable to penal action under Rule 209A of the Central Excise Rules, 1944 and Rule 13 of CENVAT Credit Rules.”

3. The show cause notice was issued to the respondent and they filed reply to the same.

4. After considering the reply and after giving personal hearing the learned Commissioner held as under:-

“13. From the above the following undisputed facts have emerged. The Party have installed a captive power plant for generation of electricity and they are using F.O., R.F.O., H.P.S. and L.D.O. as fuel in the D.G. sets installed for this purpose and are availing Modvat/Cenvat credit on F.O., R.F.O., H.P.S. and L.D.O. They have entered into an agreement dated 1.10.90 with Haryana State Electricity Board (HSEB) for parallel operation of the Captive Power Plant by virtue of which their plant was synchronized with the HSEB Power Grid. They cleared some part of the power generated by their Captive Power Plant to HSEB. The party was also using the power supplied by the HSEB on payment. The power exported to HSEB from their plant was adjusted in the bill raised by HSEB after deducting 10% wheeling charges.



14. The allegations made by the department are that Modvat/CENVAT Credit availed on the fuels used in the generation of electricity, cleared by the party to HSEB is liable to be disallowed and recoverable from the party. At the first instance I discuss the admissibility of Cenvat/modvat credit availed by the party on F.O., R.F.O., H.P.S. and L.D.O. used in the generation of electricity. The definition of inputs given under Rule 2(f) of the CENVAT Credit (No.2) Rules, 2001 and 2002 and Rule 2(g) of CENVAT Credit Rules, 2004 is as under:

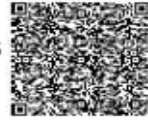
"inputs" means all goods, except high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared alongwith the final products, goods used as paints, or as packing material, or as fuel, or for generation of electricity or steam used for manufacture of final products or for any other purpose, within the factory of production.

Explanation 1: The high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.



Explanation 2: Inputs includes goods used in the manufacture of capital goods which are further used in the factory of the manufacture."

15. From the definition of the Inputs, it is evident that Modvat/Cenvat credit is admissible on the inputs/goods which are used for generation of electricity, used for manufacture of final products within the factory of production. Thus there are two conditions/legs for allowing Modvat/ Cenvat Credit on the inputs/goods for the generation of electricity i.e. (1) inputs/goods should be used for the generation of electricity; and (ii) such electricity should be used for the manufacture of final products within the factory of production. I observe that the said party have fulfilled the first condition/leg because they have used the inputs/goods on which they have taken Modvat/Cenvat Credit for the generation of electricity. But they have failed to fulfill the second condition/leg because they have not used electricity so generated and exported to HSEB for the manufacture of their final products or for any other purpose within their factory of production. The department in the show cause notice has not disputed the admissibility of Cenvat/modvat credit on F.O., R.F.O., H.P.S. and L.D.O. used in the generation of electricity. Therefore, the contentions of the party regarding admissibility of Cenvat/modvat credit are insignificant. The only dispute is in respect of the amount of Cenvat/modvat credit availed on the inputs used in the generation of electricity exported to



HSEB as the same has not been used in the manufacture of final product within the factory of production as required under the second leg of the definition of inputs under Rule 2(f)/2(g) of the Rules, ibid. The party in their reply have stressed that they have been exporting power to HSEB to remove the fluctuations and other short coming in the power generated by their D.G. Sets since the same cannot be used as it is and they are receiving back equal quantity of power from HSEB. However, as per the conditions of the agreement between the HSEB and the party the contentions raised by the party did not appear to be correct. No such clause appear in the agreement. On the contrary as per clause XIV of the agreement "the power generated and pumped into the HSEB grid from the captive generating unit will be accounted for during the billing month". From this clause it is clear that the party has been exporting power to HSEB and the same was being adjusted in their electricity bill. The fact is further clarified from the letter of AEE 'OP' S/D M. Town (DHBVNL), Hisar enclosed as Annexure-3 to the show cause notice wherein the AEE has termed the power injected by the party in their system as power purchased by the Nigam. From the above it is established that the party was selling a part of the power generated in their power plant to HSEB and the cost of this power was deducted from their monthly bill as per the agreement. Therefore, the party have not used such electricity generated by them in the manufacture of their final product but have sold the same to HSEB and hence the Cenvat/modvat credit availed



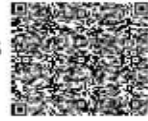
CEA-84-2009 (O&M)

-11-

on the inputs used in the generation of such electricity is inadmissible under Rules 57A, 57B of Central Excise Rules, 1944, 57AB, 57AA of Central Excise (2nd amendment) Rules, 2000 and Rule 2 and 3 of the CENVAT Credit Rules, 2001, 2002 and 2004.

16. In their reply the party have submitted the circumstances under which they had not make arrangements for clearance of electricity generated by them in their captive power plant to HSEB as the electricity produced by them was not usable by them. The feasibility report of TCE has been submitted by them in support of their contention. They have tried to establish that they export the electricity generated by them to HSEB and receive the same back in usable condition but this plea of the party also does not hold good since they are not exporting whole of the electricity so generated but only a part of the same. Further as per the statement given by HSEB regarding month wise/ year wise report it is evident that all the power generated by Captive Power Plant of M/s JSL, Hisar is not exported/cleared to the HSEB Grid. But the arrangement of synchronization is such that only the excess power is being injected/cleared out to HSEB Grid from their factory.

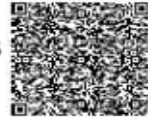
17. Another contention raised by the party is that since no facts were suppressed from the Departmental authorities as has been alleged in the Show Cause Notice so extended period of limitation is not invokable. The facts of captive generation of electricity by the party were in the knowledge of the department since the audit has visited



CEA-84-2009 (O&M)

-12-

them and they were availing the credit of duty paid on D.G. Sets. They further contended that the departmental authorities had vide letter dt.15.11.2000 specifically asked them to furnish information about agreement entered into with the State Electricity Board and they submitted the various details. I have gone through the documents produced by the party in support of this contention raised by them. I observe that the audit of their record was conducted and from the availment of Cenvat/modvat credit on the duty paid on the D.G. Sets it should have been in the knowledge of the department that the party was engaged in the captive generation of electricity but the party has not produced any documentary evidence to suggest that the existence of their agreement with the HSEB was in the knowledge of department. They have also not been able to produce any evidence to prove that they had supplied the information asked for the department vide letter dt.15.11.2000. Therefore, I observe that the party's contentions are not tenable and they have suppressed all these facts from the Department and did not inform any communication to the Department that they were clearing/injecting electricity generated by them in their captive power plant to the Grid of HSEB. It is established that this act of omission and commission of the party tantamount to suppression of facts from the Department with the intention to evade payment of duty by wrongly availing Modvat/Cenvat credit on the fuel used in the generation of electricity



CEA-84-2009 (O&M)

-13-

which was exported to HSEB (now DHBVNL) and therefore, longer period of five years has been correctly invoked in this case.

* * * *

25. As regard the quantum of good/fuel used in the generation of electricity which was exported/cleared to the HSEB and amount of Rs.4,22,06,993/- involved in such goods/fuel (ad detailed in the Show Cause Notice) in respect of show cause notice dt.30.12.2003, Rs.70,74,874/- in respect show cause notice dt.28.6.2004, Rs.78,06,003/- in respect of show cause notice dt.28.12.2004, and Rs.87,20,836/- in respect of show cause notice dt.27.6.2005, I find that the party have not disputed the same either in the reply to the SCN or at the time of personal hearing.

* * * *

29. In view of the above discussions and findings and have regard to the facts and circumstances of the case I pass the following order:

(I) I disallow Modvat/CENVAT Credit amounting Rs.4,22,06,993/- (Rupees Four Crores Twenty-Two Lacs Six Thousand Nine Hundred and Ninety-Three only for the period Jan. 99 to June 03 and order for recovery of the same from the said party under Rule 571(1)(11) of Central Excise Rules, 1944, Rule 57AH (2) of the Central Excise (2nd amendment) Rules, 2000 and Rule 12 of CENVAT Credit Rules, 2001 and 2002 read with proviso to Section 11A (1) of Central Excise Act, 1944, by invoking extended period of five years as proposed in show cause notice dt. 30.12.2003.



CEA-84-2009 (O&M)

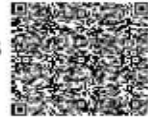
-14-

(II) I disallow CENVAT Credit amounting to Rs.70,74,874/- (Rupees Seventy Lacs Seventy Four Thousand Eight Hundred and Seventy four only) and Rs. 78,06,003/- (Rupees Seventy Eight Lacs Six Thousand and Three only) and order for recovery of the same from the said party under Rule 12 of the Cenvat Credit Rules, 2002 as proposed in the show Cause notice dt. 28.06.2004 and 28.12.2004 respectively.

(111) I disallow CENVAT Credit amounting to Rs.87,20,836/- (Rupees Eighty Seven Lacs Twenty Thousand Eight Hundred and Thirty Six only) and order for recovery of the same from the said party under Rule 12 of the Cenvat Credit Rules, 2002 and Rule 14 of the Cenvat Credit Rules, 2004 as proposed in the show cause notice dt.27.06.2005.

(IV) I impose a penalty of Rs.4,22,06,993/- (Rupees Four Crores Twenty Two Lacs Six Thousand Nine Hundred and Ninety- Three only) upon the party under Rule 571(4) of Central Excise Rule, 1944, Rule 57AH (2) of Central Excise (2nd amendment) Rules, 2000 and Rule 13 (2) of CENVAT Credit Rules, 2001 and 2002 read with Section 11AC of the Central Excise Act, 1944 respect of show notice dt.30.12.2003.

(V) I Am also Impose penalty Rs.5,00,000/- (Rupees Five Lacs only) upon the party under Rule 1730 (1) (bb) Rules, 1944 of for Central Excise the aforesaid violation of Rules in respect of show cause notice dt.30.12.2003.

**CEA-84-2009 (O&M)****-15-**

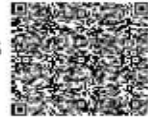
(VI) I also order for recovery of interest on Rs.6,58,08,706/- (Rs.4,22,06,993/- Rs.7074874/- + Rs.7806003/-+ Rs.8720836/-) (at the applicable/ appropriate rate of interest from time to time) from the said party under Rule 571 (5) of Central Excise Rules, 1944, Rule 57AH (1) of Central Excise (2nd amendment) rules, 2000 and Rule 12 of the CENVAT Credit Rules, 2001 and 2002 and Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AB of the Central Excise Act, 1944.

(VII) I also impose a penalty Rs.1.50 Crores (Rupees One Crore Fifty Lacs) upon the party under Rule 13 of the Cenvat Credit Rules, 2001 and 2002 and Rule 15 of the Cenvat Credit Rules, 2004 for the aforesaid violation of Rules in respect of show cause notices dt. 28.06.2004 and 27.06.2005.

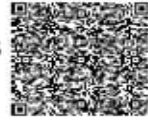
(VIII) I impose Penalty of Rs.5,00,000/- (Rupees Five Lacs only) on Shri R.K. Gupta, General Manager of the Company under Rule 209A of the Central Excise Rules, 13(1) of CENVAT Credit Rules, 2001 and 2002.

5. The respondent challenged the above referred to Order-in-Original dated 30.11.2005 passed by the Commissioner of Central Excise, Rohtak by filing an appeal before the Customs, Excise and Service Tax Appellate Tribunal, New Delhi and the same was allowed by the learned Tribunal.

6. Hence the present appeal.



7. Learned counsel for the appellant contends that :-
- a) The findings of the Tribunal are factually incorrect and the relevant clauses of the agreement and evidence relied upon by adjudicating authority has not been dealt with or considered
 - b) The findings of the learned Tribunal that respondent received the same quantity of electricity which was cleared to HSEB is also factually incorrect and contrary to the facts on record. The details of record of electricity supplied by the respondent to HSEB and received by the respondent from HSEB was the relied upon documents to the impugned show cause notice, which clearly showed that the quantity of electricity received and supplied by the respondent are different.
 - c) The case of the department is that the electricity generated in captive plant was not used in or relation to manufacture of final products within the factory of production and rather sold to HSEB. As per explanation introduced in notification number 4/94 dated 01.03.1994 inputs used as fuel were entitled to Modvat credit, provided such fuels are either utilised directly or indirectly for generating electricity, as an intermediary product, and is integrally connected with several operations, which result in emergence of the final product, however, in the instant case, fuels used in the captive plant for generating electricity, which was sold to Haryana State Electricity Board was not at all connected with the operations leading to emergence of the final product.



8. *Per contra*, learned counsel for the respondent contends that they were exporting power to HSEB to remove fluctuations and other shortcomings in the power generated by their DG sets since the same cannot be used as it is and they were receiving back equal quantity of power from HSEB. Therefore, they are entitled to CENVAT Credit availed on fuel used in generation of electricity.

9. We have heard learned counsel for the parties and perused the whole record of the case.

10. Relevant portion of the impugned order dated 21.08.2008 passed by the learned Tribunal is reproduced as under:-

“5. We find that the appellants availed credit in respect of inputs in generation of electricity. The appellants entered into an agreement with the State Electricity Board termed as Wheeling Agreement by which the appellants were permitted to clear the electricity generated in the captive power plant and simultaneously to receive equal quantity of electricity from the electricity board. The fact that the appellant received same quantity of electricity which were cleared to the electricity board is not in dispute. This agreement was made as the electricity generated in the captive power plant is fluctuating type and as such power cannot be used in the Arch Furnace, Strip Mill and Grooming Mill. The agreement with the electricity board was to maintain uniform frequency of electricity. In these situation as the inputs used in generation of electricity which was cleared to the State Electricity Board and the same quantity was received back from the electricity board and used in the manufacture of excisable goods



cleared on payment of duty we find that the demand on the ground that the inputs were used in generation of electricity which was cleared outside the factory of production is not sustainable. Therefore, appeals are allowed.”

11. A perusal of the above shows that the dispute in the present case is that the electricity generated in captive plant was not used in or relation to manufacture of final products within the factory of production but was sold to HSEB whereas learned Tribunal did not decide this dispute and held that there is no dispute with regard to the appellant receiving same quantity of electricity which was cleared to the Electricity Board, therefore, the issue in dispute was never decided by the learned Tribunal.
12. During the course of arguments both the counsel for the parties agreed that the matter be remanded back to the learned Tribunal to decide the above referred to issue in dispute.
13. In view of the above, the matter is remanded back to the learned Tribunal to decide the dispute as referred to above in para 11 of this judgment.
14. Disposed of accordingly.
15. Pending applications, if any, also stand disposed of.

(ARUN PALLI)
JUDGE

(SUDEEPTI SHARMA)
JUDGE

January 28, 2025
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Whether speaking/non-speaking : Speaking
Whether reportable : Yes