

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.04.2017

DELIVERED ON : 10.07.2017

Coram

The Honourable Mr.Justice RAJIV SHAKDHER
and
The Honourable Mr.Justice R.SURESH KUMAR

Civil Miscellaneous Appeal Nos.3814 of 2011
and 2695 and 2696 of 2012 &

MP.Nos.1 & 1 of 2012, 1 of 2011

M/s.ThiruArooran Sugars
Thirumandakudi,
Papanasam Taluk,
Thanjavur District - 612 301

.... Appellant in C.M.A.No.3814 of 2011

M/s.Dalmia Cements (Bharat) Ltd.
Dalmiapuram,
Tiruchirapalli 621 651

.... Appellant in C.M.A.Nos.2695 & 2696/2011

Vs

1. Customs, Excise and Service tax Appellate Tribunal,
Shastri Bhavan Annex,
No.26, Haddows Road,
Chennai - 600 006.

.... 1st Respondent in C.M.A.No.3814 of 2011

2. The Commissioner of Central Excise,
No.1, Williams Road, Cantonment,
Tiruchirapalli

.... 2nd Respondent in C.M.A.Nos.3814 of 2011 &
Respondents in CMA. 2695 & 2696 of 2012

Prayer : Appeals filed under Section 35G of the Central Excise
Act, 1944 against the orders dated 30.09.2011 and 14.06.2012
made in Final Order Nos.1119 of 2011 and 687 & 688 2012 of on

the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellants : Mr.J.Shankarraman
for M/s.Mohammed Shaffiq

For Respondents : Ms.R.Hemalatha

C O M M O N J U D G M E N T

(Judgment of the Court was delivered by RAJIV SHAKDHER,J.)

1. These are three (3) appeals, which assail the order of the Customs, Excise and Service Tax Appellate Tribunal (in short, Tribunal).

1.1. C.M.A.No.3814 of 2011 is directed against the judgment and order dated 30.09.2011, passed by the Tribunal, while C.M.A.Nos.2695 and 2696 of 2012 are directed against the common order, dated 14.06.2012.

2. The Tribunal, by a cryptic order, has allowed the appeals of the Revenue and restored the Order-in-Original dated 18.08.2009, by following its own judgment, delivered by a Larger Bench, in the matter of Vandana Global Limited V. Commissioner of Central Excise 2010 (253) E.L.T. 440. The judgment, rendered in: Vandana Global Limited V. Commissioner of Central Excise favours the Revenue.

3. We were informed by the counsels for the parties that a challenge has been laid to the decision of the Tribunal rendered in: Vandana clothing Limited V. Commissioner of Central Excise, and that it is pending consideration before the concerned Court, i.e., the Chhattisgarh High Court.

4. These appeals were admitted by this Court on different dates. C.M.A.No.3814 of 2011 was admitted on 22.12.2011, when, the following substantial question of law was framed for consideration by this Court:

"Whether the order of the learned Tribunal inasmuch as it gives effect to the notification No.16/09 prior to 7.7.2009, overlooking the fact that the same is made expressly effective only from the aforesaid date?"

4.1. Whereas, C.M.A.Nos.2695 and 2696 of 2012 were admitted on 06.09.2012, when, the following substantial questions of law were framed for consideration by this Court:

"1. Whether the order of the Tribunal is right in law inasmuch as it gives effect to the notification No.16/09 prior to 7.7.2009, overlooking the fact that the same is made expressly effective

only from the aforesaid date?

2. Whether the order of the tribunal placing reliance on Vandana Global to disallow the claim of CENVAT on M.S.Plates, M.S.Angles and M.S.Joint is unsustainable in view of the fact that it has lost its value as a precedent in view of the contrary view expressed by the Supreme Court in CENTRAL EXCISE, JAIPUR vs. M/s.RAJASTHAN SPINNING & WEAVING MILLS LTD.?

3. Whether the Tribunal is right in disallowing credit on M.S.Plates, M.S.Joint and M.S.Angles on the ground that they do not qualify as capital goods inasmuch as it is contrary to the decision of the Supreme Court in CENTRAL EXCISE, JAIPUR vs. M/s.RAJASTHAN SPINNING & WEAVING MILLS LTD.?

4. Whether M.S.Angles, M.S.Joint and beams which are used for construction of foundation and supporting structure would qualify as Capital Goods?"

5. As would be evident from the above, the first question of law is common to all three (3) appeals.

5.1. In so far as the other questions of law are concerned, they arise for consideration, in all three appeals and, therefore, we would be passing a common order.

6. We may also note that the counsels have submitted that the issues, which arise for consideration are identical in all the three (3) cases. The only difference being, with regard to the nature of components/accessories and/or inputs, used by the appellants.

6.1. For the sake of convenience, we will be referring to the appellants in all the three (3) matters by their respective names. Appellant in C.M.A.No.3814 of 2011, i.e., Thiru Arooran Sugars, will be referred to as hereafter as "TAS", while, appellant in both C.M.A.Nos.2695 and 2696 of 2012, which is Dalmia Cements (Bharat) Limited, would be referred to as "DCBL".

7. Briefly, the facts obtaining in each of these cases are set out hereafter.

C.M.A.No.3814 of 2011:

7.1. TAS, apparently, at the relevant point in time, was in the business of manufacturing Sugar, Molasses, Rectified Spirit, Extra Neutral Alcohol, Ethanol, Denatured Ethyl Alcohol and Fusel oil. The first four products were non-excisable, while the last three are dutiable.

7.2. Over a period of time, TAS had been availing Cenvat Credit, vis-a-vis capital goods, used in its factory. The Cenvat Credit earned by TAS was used by it for payment of duty on clearance of excisable goods from its factory unit.

7.3. It appears that the verification of particulars was carried out by the officials of the Revenue, which revealed that TAS had availed of Cenvat Credit, during the period, spanning between, February, 2008 and March, 2008, vis-a-vis HR plates, MS

channels and MS Joints, which, in turn, were used as "supporting structurals" to keep in position distillation machinery and evaporator (hereinafter referred to as "structurals").

7.4. The Revenue, being of the view that the Cenvat Credit availed of qua aforementioned structurals, being not in order, served a show cause notice dated 25.02.2009, on TAS. The allegation in the show cause notice, qua TAS was that the structurals, which fell under Chapter 72 were not covered by the definition of capital goods, as provided in Rule 2 of the Cenvat Credit Rules, 2002 (in short, the '2002 Rules'). According to the Revenue, Cenvat Credit was only available, vis-a-vis goods falling in Chapter 82, 84, 85, 90 and heading 68.05 or 68.04. Since, the structurals came within the ambit of Chapter 72, Cenvat Credit, according to the Revenue, was wrongly availed of by TAS.

7.5. Furthermore, it was also alleged that the structurals could neither be termed as components, spares and/or accessories of the goods, falling in chapters referred to above nor, were they pollution control equipment. In addition thereto, it was alleged that the subject structurals could also not be considered as inputs for manufacture of capital goods.

7.6. In this regard, reference was made to Rule 2a (A) of the 2004 rules. Accordingly, TAS was asked to respond as to why ineligible Cenvat Credit, amounting to Rs.1,01,929/-, should not be demanded from it under Section 11 A of the Central Excise Act (in short "1944 Act").

7.7. Furthermore, demand with regard to interest under Section 11AB of the 1944 Act and penalty under Rule 15 of the 2004 Rules, was also made. TAS was given a period of 30 days to respond to the show cause notice.

8. It appears, thereafter, TAS furnished a reply dated 18.03.2009, wherein, it took the following stand on facts.

"i) The stated items are used to strengthen and position sugar vessels and operating columns without which manufacturing machines cannot be positioned and the vessels cannot function and hence they are fully integrated into the machinery;

ii) Mere mention of the word structures does not mean Cenvat credit would not be admissible as such structures is part and parcel of the machinery itself. The items are not structural items used in civil constructions. The fact of usage of inputs is primary evidence in admissibility of Cenvat credit and in this regard, the stated materials fully justify the claim of eligible items for Cenvat.

iii) The sugar boiling vessels, juice and steam, vapour flow pipelines and evaporator columns cannot work without supporting structures. The sugar machinery being very heavy in nature cannot be kept in operating condition unless they are held in position

by use of angles, beams and channels.

iv) And without support structures like ladder, platforms etc., the operating personnel cannot move around and control and regulate the process. The stated items are also not civil structures. Therefore, denial of Cenvat credit would amount to non appreciation of ground level facts."

9. The Adjudicating Authority, after granting a personal hearing to the representative of the TAS, came to the conclusion, that the demand raised via the aforementioned show cause notice, had to be confirmed. An order, to that effect, was passed by the Adjudicating Authority, which is, dated 18.08.2009.

10. Aggrieved by the aforementioned order, TAS preferred an appeal to the Commissioner of Customs and Central Excise (Appeals) [in short 'Commissioner (Appeals)']. The Commissioner (Appeals) allowed the appeal preferred by TAS vide order dated 29.06.2010. In passing the order, the Commissioner (appeals) relied upon the judgments, passed by the Tribunal.

11. This time around the Revenue was aggrieved and, therefore, an appeal was preferred with the Tribunal. The Tribunal, via a cryptic judgment reversed the order of the Commissioner (Appeals) by relying upon its own judgment, rendered by a Larger Bench, in Vandana Global Limited.

12. It is, in these circumstances that TAS has preferred an appeal with this Court.
C.M.A.Nos.2695 and 2696 of 2012:

13. DCBL, which is the appellant in the aforementioned appeals, is in the business of manufacturing of Cement and Clinker, falling under Chapter Heading 2523.29 and 2523.90 of the Central Excise Tariff Act, 1985, (in short, "CETA"). DCBL, it appears, during the relevant period, was in the process of expanding its Cement Plant, located within the factory premises, situate in Dalmiapuram. DCBL, evidently, was desirous of creating additional manufacturing capacity, equivalent 3800 TPD. Towards this end, DCBL, had endeavoured to purchase plant and machinery, equipment and components from different suppliers and, accordingly, installed/erected them in the subject cement plant. In addition thereto, as a part of its expansion plan, DCBL also established a captive power plant within its factory premises for production of electricity to be used for manufacture of cement.

13.1. To give effect to the aforesaid purpose, DCBL had to construct foundations which required use of cement and steel. Furthermore, DCBL also used MS Plates, MS Angles and MS Channels. Since, there were duty paid inputs, DCBL availed of Cenvat Credit, qua not only cement and steel, but also vis-a-vis the aforementioned structurals.

13.2. This was found fault with by the Revenue and,

accordingly, six (6) show cause notices (SCNs) were issued for various purposes. The, broad, details of these SCNs are as follows:

S. No .	Show Cause NOtice No. and Date	Period Covered	Cenvat	ED Cess	Total
1.	C.No.V/Ch25/15/47/2005-Cx Adj dt.21.09.2005	April 2004 to July 2005	1,02,55,982/-	1,53,005/-	1,04,08,987/-
2	C.No.V/Ch25/15/47/2005-Cx Adj dt.10.05.2006	August 2005 to November 2005	90,33,020/-	1,72,610/-	92,05,630/-
3	C.No.V/Ch25/15/47/2005-Cx Adj dt.09.10.2006	December 2005 to February 2006	14,82,717/-	29,463/-	15,12,180/-
4	C.No.V/Ch25/37/47/2005-Cx Adj dt.06.08.2005	September 2004 to March 2005	6,68,935/-	47,242/-	67,37,177/-
5	C.No.V/Ch37/15/47/2005-Cx Adj dt.08.04.2006	April 2005 to September 2005	82,58,701/-	82,083/-	83,40,784/-
6	C.No.V/Ch37/15/47/2005-Cx Adj dt.10.10.2006	October 2005 to April 2006	1,40,18,739/-	1,90,118/-	1,42,08,857/-

13.3. After giving due opportunity to file a reply and accord a personal hearing, the Adjudicating Authority, i.e., the Commissioner of Central Excise (in short Commissioner), vide two (2) separate orders of even date i.e., 04.09.2007, confirmed the demands raised in the SCNs.

13.4. Aggrieved by the same, DCBL preferred appeals to the Tribunal.

13.5. The Tribunal, as indicated right at the outset, via a common order dated 14.06.2012, allowed the appeals of the Revenue, based on its own decision rendered in the matter of: Vandana Global Limited. Furthermore, reference was also made to the judgment of this Court in the case of: Saraswathi Sugar Mills V. Commissioner of Central Excise, Delhi 2011 (270) E.L.T. 465 (SC).

13.6. To be noted, while the demand for duty and interest was confirmed, the demand for penalty was set aside.

13.7. DCBL, being aggrieved, has preferred the captioned appeals.

14. The issues which arise for consideration in all the

three (3) appeals, according to us, are common.

14.1. The first issue that requires consideration is: whether the structurals, cement, iron and steel, which are used in constructing foundations, would fall within the ambit and scope of Rule 2(a)(A)(iii), read with Rule 2(a)(A)(i) of the 2004 Rules. In other words, whether they could be treated as components, spares and/or accessories of the capital goods, referred to in Rule 2(a)(A)(i) of the 2004 Rules. In the alternative, it is submitted by both the Assessee, i.e., TAS and DCBL, that the said structurals, cement, and iron and steel, would fall within the definition of Rule 2(k), read with Explanation 2 of the 2004 Rules; which, therefore, is the other issue, that is, required to be considered by us.

14.2. In addition to the aforesaid, and in support of their arguments, both parties have relied upon Notification dated 16/2009, dated 07.07.2009, whereby, Explanation 2 to Rule 2(k) of the 2004 Rules stood amended.

15. In the context of the aforesaid issues, submissions were advanced on behalf of TAS and DCBL by Mr.J.Shankarraman, while on behalf of the Revenue, arguments were put forth by Ms.Hemalatha.

16. The submission of Mr.Shankarraman, in brief, was that, the structurals that were used to support the plant and machinery, which, in turn, was used in the manufacture of the final product, were, components and/or accessories of capital goods, and would, therefore fall within the ambit of Rule 2(a)(A)(iii) of the 2004 Rules.

16.1. Learned counsel further submitted that the stand of the Revenue that because the structurals did not fall in the Chapters referred to in Rule 2(a)(A)(i), and therefore, they were not eligible components and/or accessories was flawed, as that was not the requirement of Rule 2(a)(A)(iii) of the 2004 Rules. In other words, the submission was that, despite the fact that structurals fell within the ambit and scope of Chapter 72 would not, by itself, disentitle them from being treated as components and/or accessories of goods, falling in chapters 82,84,85,90 and heading No.68.05 and 68.04 of the first schedule to the CETA.

16.2. In support of this submission, learned counsel relied upon the contents of circular No.276/110/96-TRU, dated 02.12.1996.

16.3. Notably, this submission was also advanced by Mr.Shankarraman, qua cement and iron and steel as well, which was used in constructing foundations to support plant and machinery involved in the manufacture of cement. Furthermore, learned counsel submitted that the structurals and/or cement and iron and steel would, alternatively, fall within the ambit and scope of Rule 2(k), read with, Explanation 2 to the 2004 Rules.

16.4. In addition thereto, Mr.Shankarraman submitted that

the fact that structurals and cement, as also, iron and steel were always understood as being embedded in the definition of "input" as provided in Rule 2(k) of the 2004 Rules, is demonstrable by the fact that vide Notification dated 07.07.2009, an exclusion was sought to be made qua the aforementioned items, albeit, prospectively. That, Notification dated 07.07.2009 would operate prospectively was sought to be established by Mr.Shankarraman, by referring to its contents. According to the learned counsel, a bare perusal of the said Notification would show that the amendment in Rule 2 (k) was brought into force from the date of its publication in the official gazette and not retrospectively.

16.5. In support of his submissions, learned counsel relied upon the following judgments:

- (i) CCE V. Rajasthan Spinning and Weaving Mills 2010 (255) ELT 481 SC
- (ii) CCE V. India Cements Ltd. 2012 (285) ELT 341 (Mad)
- (iii) CCE V. India Cements Ltd. 2014 (310) ELT 636 (Mad)
- (iv) CCE V. India Cements Ltd. 2014 (321) ELT 209 (Mad)
- (v) Dalmia Cements (Bharat) Ltd. V. CCE 2016 (341) ELT 102 (Mad)
- (vi) Thiru Arooran Sugars V. CCE 2015 TIOL 1734 -HC-Mad.
- (vii)Mundra Ports & Special Economic Zone Ltd. V. CCE & Cus 2015 (39) STR 726 (Guj.)

17. As against this, Ms.Hemalatha relied upon the orders of the Authorities below and, in particular, adopted the line of reasoning taken in the orders-in-original.

17.1. Learned counsel submitted that since, the structurals came within the ambit and scope of Chapter 72, they could not be considered as components or accessories of capital goods, which fell under different Chapters, as could be seen on a bare perusal of Rule 2(a)(A)(iii) of the 2004 Rules. The argument being that, unless the components and accessories fall within the same Chapter, as the capital goods, the Assesseees were not entitled to avail of Cenvat Credit qua them.

17.2. Learned counsel submitted that the argument that the structurals, which were used to support and position plant and machinery would fall within the definition of "input" provided in Rule 2 (k) was based on the user test principle enunciated in the case of CCE V. Rajasthan Spinning and Weaving Mills 2010 (255) ELT 481 SC. It was contended that Rajasthan Spinning and Weaving Mills' case, in turn, relied upon the judgment rendered in Commissioner of Central Excise, Coimbatore & Ors. V. Jawahar Mills Ltd. & Ors. 2001 (132) ELT 3 (S.C.).

17.3. In both cases, according to Ms.Hemalatha, the user test principle was applied in the facts and circumstances peculiar to those cases. Learned counsel submitted that user test could not be applied to the matters at hand. The judgments of various Courts relied upon by the Assesseees, which included

the judgments delivered in TAS and DCBL's own cases had applied the user test without advertg to the facts and circumstances, obtaining in those cases.

17.4. Furthermore, learned counsel submitted that the Notification dated 07.07.2009 (in short, the '2009 notification') was clarificatory in nature and, therefore, by logical sequitur, retrospective, as was evident upon a bare perusal of the extract of the Finance Minister's speech, delivered in that behalf.

17.5. It was submitted that this aspect of the matter was appreciated by a Larger Bench of the Tribunal in the decision rendered in Vandana Global Limited case.

17.6. Learned counsel also contended that the Notification was merely declaratory of the intent of the Legislation and, therefore, should be treated as one which clarified the meaning of the word 'input', obtaining in Rule 2 (k), as, if, the exclusion of structurals and cement, as also, iron and steel was always intended.

17.7. In support of this submission, reliance was placed on the judgment of the Supreme Court in the matter of: Commissioner of Income Tax V. Gold Coin Health Food Pvt. Limited (2008) 304 ITR 308 (SC). It was also sought to be contended by the learned counsel that, since, the amendment made vide the 2009 Notification was brought about in the explanatory part of Rule 2 (k), i.e., in Explanation 2, this would be yet another indicator that the amendment was retrospective in nature.

17.8. For this purpose, learned counsel relied upon the judgment of the Division Bench of the Karnataka High Court in the matter of: Deputy Commissioner of Commercial Taxes V. Bellary Steels & Alloys Ltd. [2008] 11 VST 361 (Karn). Furthermore, learned counsel contended that the decision applicable to the facts of this case was the judgment of the Supreme Court rendered in: Saraswathi Sugars V. Commissioner of Central Excise, Delhi 2011 (270) ELT 465 (SC).

17.9. Learned counsel further submitted that though this judgment was delivered in the context of Rule 57Q of the Central Excise Rules, 1944 (in short, the '1944 Rules'), the provisions being pari materia, the judgment rendered in the said case would be applicable to the instant matters as well.

Reasons:

18. We have heard learned counsel for the parties and perused the record.

19. The facts in the three (3) appeals, are not in dispute. All three matters pertain to a period, prior to 07.07.2009. Therefore, apart from the fact that we have been called upon to decide as to whether the 2009 Notification would have retrospective effect, we are also called upon to rule on as to whether or not structurals and cement, as also, iron and steel would fall within the scope and ambit of Rule 2(a)(A)(iii) and

Rule 2 (k) of the 2004 Rules. Therefore, in order to decide upon these issues, we may, in the first instance, set out the relevant extract of the said Rules:

"Rule 2. Definitions. -

In these rules, unless the context otherwise requires,-

(a) "capital goods" means:-

(A) the following goods, namely:-

all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No. 68.05 grinding

(i) wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Excise Tariff Act;

(ii)

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

(iv)

(v)

(vi)

(vi i)

20. Pertinently, in the context of the argument advanced on behalf of the TAS and DCBL, which is that, in order to come within the ambit of the word, 'component or accessory', the structurals, Cement, as also Iron and Steel, need not fall within the same chapter, as the capital goods, one would have to look at the clarificatory circular dated 02.12.1996 (in short, the 1996 circular), issued by the Government of India, Ministry of Finance. Though the clarification was issued in the context of Rule 57Q of the 1944 Rules, the clarification given therein, in our opinion, would also apply to the provisions of rule 2(a) (A)(iii) as well, for the reason, that Rule 57Q of the 1944 Rules is pari materia with Rule 2(a) (A) of the 2004 Rules.

20.1. Therefore, for the sake of convenience, the relevant extract of Rule 57Q and the 1996 circular are extracted hereafter:

Rule 57Q

Rule 57Q. Applicability - (1) The provisions of this section shall apply to finished excisable goods of the description specified in the Annexure below (hereinafter referred to as the "final products") for the purpose of allowing credit of specified duty paid on the capital goods used by the manufacturer in his

factory and for utilising the credit so allowed towards payment of duty of excise leviable on the final products, or as the case may be, on such capital goods, if such capital goods have been permitted to be cleared under rule 57S, subject to the provisions of this section and the conditions and restrictions as the Central Government may specify in this behalf:

Provided that credit of specified duty in respect of any capital goods produced or manufactured -

(a) in a free trade zone and used for the manufacture of final products in any other place in India; or

(b) by a hundred per cent export-oriented undertaking or by a unit in an Electronic Hardware Technology Park or by a unit in Software Technology Parks and used for the manufacture of final products in any place in India,

shall be restricted to the extent of duty which is equal to the additional duty leviable on like goods under section 3 of the Customs Tariff Act, 1975 (51 of 1975) equivalent to the duty of excise paid on such capital goods.

Explanation - For the purposes of this section, -

(1) "capital goods" means -

(a) machines, machinery, plant, equipment, apparatus, tools or appliances used for producing or processing of any goods or for bringing about any change in any substance for the manufacture of final products;

(b) components, spare parts and accessories of the aforesaid machines, machinery, plant, equipment, apparatus, tools or appliances used for aforesaid purpose; and

(c) moulds and dies, generating sets and weigh-bridges used in the factory of the manufacturer.

(d) following goods falling within the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) and used in the factory of the manufacturer -

(i) all goods falling under heading Nos.84.02, 84.05, 84.06, 84.11, 84.12, 84.16, 84.17, 84.19, 84.23, 84.25 to 84.28, 84.80, 85.05, 83.35, 90.11, 90.12, 90.13, 90.16, 90.17 and 90.24 to 90.31;

(ii) auxiliary plants falling under heading No.84.04 for use with boilers of heading No.84.02;

(iii) I.C. engines (other than engines of motor vehicle) falling under heading No.84.07 or 84.08;

(iv) compressors (other than of a kind used for refrigerating and air conditioning applications) falling under heading No.84.14;

(v) electric generating sets (of output exceeding 75KVA) falling under heading No.85.02;

(vi) transformers (of power handling capacity exceeding 75 KVA) falling under heading No.85.04;

(vii) Goods (other than for medical use) of heading No.90.22;

(viii) goods (other than of a kind used for refrigerating and air conditioning applications) falling under heading Nos.84.81 and 90.32;

(ix) components, spares and accessories of the goods specified against item (i) to (viii) above;

(x) refractories falling within Chapter 69;

(e) goods specified in the Table in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No.68/89-Customs, dated the 1st March, 1989, and used in the factory of manufacturer.

(2) "specified duty" means duty of excise or the additional duty under section 3 of the Customs Tariff Act, 1975 (51 of 1975).

(2) Notwithstanding anything contained in the sub-rule (1), no credit of the specified duty paid on capital goods (other than those capital goods in respect of which credit of duty was allowable under any other rule or notification prior to the 16th day of March, 1995) shall be allowed if such capital goods

were received in the factory before the 16th day of March, 1995."

1996 Circular:

"Subject:Availment of Modvat credit on components, spares and accessories under Rule 57Q of the Central Excise Rules, 1944.

Rules 57Q of the Central Excise Rules, 1944 allows credit of duty paid on capital goods used by the manufacturer of Specified goods. Capital goods eligible for credit have been defined in Explanation (1) annexed to Rule 57Q. Clause (a) to (c) of the said explanation cover specified capital goods falling under Chapter 82, 84, 85 and 90 and clause (d) covers components, spares and accessories of the said capital goods.

2. It has been brought to the notice of the Board that clause (d) of Explanation (1) is being interpreted by some of the field officers covering only such components, spares and accessories which would fall under Chapter shown under clauses (a) to (c) and credit is allowed only on those components, spares and accessories which are covered under the said chapters.

3. The matter has been examined. With effect from 23.7.1996, capital goods eligible for credit under rule 57Q have been specified either by their classification or by their description. Clause (a) to (c) of Explanation (1) of the said rule cover capital goods by their classification whereas clause (d) covers goods by their description viz. components, spares and accessories of the said capital goods. It may be noted that there is a separate entry for components, spares and accessories and no reference has been made about their classification. As such, scope of this entry is not restricted only to the components, spares and accessories falling under Chapters 82, 84, 85 or 90 but covers all components, spares and accessories of the specified goods irrespective in rule 57Q (i.e. prior to 23.7.1996) when credit was available on components, spares and accessories of the specified capital goods irrespective of their classification.

4. Accordingly, it is clarified that all parts, components, accessories, which are to be used with capital goods of clauses (a) to (c) of Explanation (1)

of rule 57Q and classifiable under any Chapter heading are eligible for availment of Modvat credit."

(Emphasis is ours)

21. A perusal of the aforesaid extracts would show that the Revenue in the context of Rule 57Q was of the view that certain capital goods were made eligible for grant of Modvat Credit, based on classification, while components and spares of such capital goods were granted the same benefit based on description. For capital goods to be eligible for Modvat Credit, they had to fall within the ambit of the Chapters indicated in the Rule. This was so, as their eligibility to avail Modvat Credit was based on classification. In so far as components, spares and accessories were concerned, their eligibility for grant of Credit was pivoted on description, there being no reference to any Chapters. Therefore, components, spares and accessories of capital goods, which fell within the specified chapters were also entitled to Modvat Credit.

22. Quite clearly, therefore, the argument of Ms.Hemalatha that because components, spares and accessories, fall in chapter 72, they cannot be treated as capital goods within the meaning of Rule 2(a)(A) of the 2004 Rules on a parity of reasoning, cannot be accepted. According to us, as long as the components, spares and accessories, pertain to capital goods falling in Rule 2(a)(A)(i), i.e., Chapter 82,84,85,90 and Heading No.68.05 and 68.04 of the first schedule to CETA, they would have to be treated as capital goods and would, hence, be eligible for Cenvat credit.

23. Besides the aforesaid, let us advert to the view taken in various judgements on this very issue from time to time. A Division Bench of this Court, in the matter of: Commissioner of C.Ex., Tiruchirapalli V. India Cements Ltd., 2012 (285) E.L.T. 341 (Mad), was called upon to decide as to whether structural steel items, viz., Rebar Coils, CTD Bars, TOR Steel and, Cement used for civil construction activity, used as building material, could be treated as capital goods, eligible for credit, in terms of Rule 57Q.

23.1. The Division Bench, in the aforementioned case, applying the test laid out by the Supreme Court in: Commissioner of Central Excise V. Jawahar Mills Ltd., 2001 (132) ELT 3 and in Commissioner of Central Excise, Jaipur V. Rajasthan Spinning & Weaving Mills 2010 (255) ELT 481, held that the aforesaid items will fall within the scope and ambit of the definition of 'capital goods', set out in Rule 57Q. The observations made by the court in paragraph 7 and 8, being apposite, for the sake of convenience, are extracted hereafter:

"7. As far as the Crane with accessories and Loader are concerned, there cannot be any difficulty in

holding that they will come within the items of machinery or equipment used for production or processing of any goods for the manufacture of final products. As has been held by the Apex Court in Jawahar Mills Limited's case, the Rule makes it explicitly clear that the order of the Tribunal in dismissing the appeal preferred by the Revenue in respect of these two items and remitting the matter for fresh consideration in regard of the Bulldozer requires no consideration. As far as the other items, namely, Rebar Coils, CTD Bars, TOR Steel and Cement are concerned, as to whether they are capital goods or not, the Tribunal having regard to the law laid down by the Apex Court in Jawahar Mills's case, has liberally construed the above Rule and factually found that these are the items, which are used for the purpose of construction of the plant comprising of concrete foundations, concrete silos for storing raw materials, clinker and cement, pre-heater tower structure, load centres etc. Having regard to the above factual findings, the Tribunal had found that these items are not used for civil construction, but for the construction, which are absolutely necessary for establishing a manufacturing unit for cement.

8. The question as to how Rule 57Q should be interpreted came up recently before the Apex Court in the judgment reported in 2010 (255) E.L.T. 481 (Commissioner of Central Excise, Jaipur v. Rajasthan Spinning & Weaving Mills Ltd.). In paragraphs 12 and 13, while applying the "user test" and following the Jawahar Mills's case, the Apex court has held that even though steel plates and M.S.Channels used in the fabrication of chimney would fall within the ambit of "capital goods".

(Emphasis is ours)

24. A similar question came up for consideration, once again, in another case, i.e., CCE, Tiruchirapalli V. India Cements Ltd. 2014 (305) ELT 558 (Mad.). In this matter, a Division Bench of this Court was called upon to answer the following question of law:

"Whether the Tribunal is correct in holding that, structural steel items viz., M.S.Plates, Angles, Channels and HR Sheets used for civil construction activity, are capital goods eligible for credit in terms of Rule 57Q as it stood at the relevant time? "

24.1. The Division Bench answered the question of law in favour of the Assessee. While doing so, the Division Bench

distinguished the judgment of the Supreme Court in *Saraswathi Sugar Mills V. Commissioner of Central Excise, Delhi* 2011 (270) E.L.T. 465 (SC). and, instead, relied upon the judgment of the Supreme Court in *CCE V. Rajasthan Spinning and Weaving Mills* 2010 (255) ELT 481 SC and, while doing so, made the following observations:

"10. As far as the reliance placed by the Revenue on the decision reported in 2011(270) E.L.T.465 (SC) (*Saraswati Sugar Mills V. Commissioner of C.Ex., Delhi-III*) is concerned, we do not think that the said decision would be of any assistance to the Revenue, considering the factual finding by the Tribunal therein in the decided case that the machineries purchased by the assessee were machineries themselves. Thus, after referring to the decision reported in 2010 (255) E.L.T.481 (*Commissioner of Central Excise Jaipur V. Rajasthan Spinning & Weaving Mills Ltd.*), the Apex Court held that in view of the findings rendered by the Tribunal that the machineries were complete and having regard to the meaning of the expression "components/parts", with reference to the particular industry in question, the Apex Court rejected the appeal filed by the assessee.

11. Thus going by the factual finding, which are distinguishable from the facts found by the Authorities below in the case on hand, we have no hesitation in rejecting the Revenue's appeal, thereby confirming the order of the Tribunal.

12. Learned standing counsel appearing for the Revenue pointed out that the Tribunal had merely passed a cryptic order by referring to the earlier decisions. We do not think that this would in any manner prejudice the case of the Revenue, given the fact that on the identical set of facts, the assessee's own case was considered by this Court and by following the decision reported in 2010 (255) E.L.T.481 (*Commissioner of Central Excise Jaipur V. Rajasthan Spinning & Weaving Mills Ltd.*), the Revenue's appeal was also rejected. In the circumstances, this Civil Miscellaneous Appeal is dismissed. No costs. Consequently, C.M.P. No.16107 of 2005 is also dismissed.

(Emphasis is ours)

25. To be noted, cases pertaining to the very same Assessee, i.e., *India Cement Ltd.*, came up for hearing in this Court on two other occasions. The decisions rendered were reported as

follows:

- (i) CCE V. India Cements Ltd. 2014 (310) ELT 636 (Mad)
- (ii) India Cements Ltd. V. CESTAT, Chennai 2015 (321) ELT 209 (Mad.)

25.1. The case, which is reported as: CCE V. India Cements Ltd., 2014 (310) ELT 636 (Mad), required the Court to decide the following question of law:

"Whether the Tribunal is correct in holding that structural steel items viz., M.S.Plates, Angles, Channels and HR Sheets used for civil construction activity, are capital goods eligible for credit in terms of Rule 57Q as it stood at the relevant time?"

25.2. In the other case, which is titled as: India Cements Ltd. V. CESTAT, Chennai 2015 (321) ELT 209 (Mad.), the Court was called upon to rule on the following questions of law:

"1. Whether in the facts and circumstances of the case, the Appellate Tribunal was justified in denying cenvat credit on MS Rod Sheets, M.S.Chennel, M.S.Plates, Flats etc. used in the fabrication of fly ash hooper, fly ash bin, fly ash handling system & kiln brick laying work to bold refractories? and

2. Whether the decision of the Larger Bench in M/s.Vandana Global Ltd. and others vs. Commissioner of Central Excise, 2010 (253) ELT 440 (LB) can be said to have laid the correct principle of law and whether the Appellate Tribunal was justified in dismissing the appeal?"

25.3. To be noted, the aforementioned case required application of the 2004 Rules.

26. Pertinently, in both cases, the Assessee, i.e., India Cements Ltd. succeeded. Therefore, quite clearly, separate Division Benches of this Court have repeatedly held that Saraswathi Sugar Mill's case is not applicable in coming to the conclusion whether or not structurals, cement, as also, iron and steel are capital goods, within the meaning of Rule 57Q or, even within the meaning of Rule 2(a)(A) of the 2004 Rules.

27. Similarly, in so far as TAS is concerned, in its own case, which is reported as: Thiru Arooran Sugars V. Customs, Excise and Service Tax Appellate Tribunal and another 2015-TIOL-1734-HC-Mad-Cx, a Division Bench of this Court, was, called upon to decide the following question of law:

"Whether the order of the learned Tribunal inasmuch as it gives effect to the notification No.16/09 prior to 7.7.2009 overlooking the fact that the same is made expressly effective only from the aforesaid date?"

28. The Division Bench allowed the appeal and, set aside the order of the Tribunal. In effect, the Court held that the 2009 Notification would not come in the way of TAS, in that case, in claiming that the structurals, which were purchased and utilised for keeping in position the plant and machinery could be treated as inputs, within the meaning of Rule 2 (k) of the 2004 Rules, for the period prior to its issuance, i.e., 07.07.2009.

29. Therefore, besides anything else, what clearly comes to fore is that the various Division Bench of this Court have consistently ruled in favour of different Assesseees in holding that structurals, which are used to keep in position plant and machinery and, cement, as also, iron and steel, which are used to erect foundations, which, in turn, hold the plant and machinery could, not only be treated as 'capital goods', but could also be treated as 'inputs'.

29.1. Having regard to this position, there is no good reason for us to take a different view, especially, as the Revenue has not laid a challenge to any of these judgments.

30. An argument was advanced by Ms.Hemalatha, to which we have made a reference hereinabove, that there was no discussion in the aforementioned judgments of various Division Benches, with regard to the facts obtaining therein.

30.1. Keeping in mind this submission, we would like to dilate on the scope and ambit of Rule 2(k) of the 2004 Rules, having already dealt with the argument advanced by the learned counsel for the Revenue qua Rule 2(a)(A)(iii) of the 2004 Rules.

31. A close reading of the definition of 'input' in Rule 2k (i) would show that it includes all goods (except light diesel oil, high speed diesel oil and motor spirit, which are commonly known as petrol), which are "used in" or "in relation to manufacture of final products", (whether directly or indirectly, whether contained in the final product or not), albeit, within the factory of production. Explanation 2 only states that 'input' includes goods used in the manufacture of capital goods, which are further used in the factory of the manufacturer.

31.1. A close reading of the main provision with Explanation 2 would show that 'inputs' are not only goods, which are used in the manufacture of final products, but also those which are "used in" or in relation to the manufacture of the final products, and this relationship could be either direct or indirect without being weighed down by the fact that they are not included in the final product. Their inclusion or exclusion from the final product, evidently, is not material, as long as the said exercise takes place within factory precincts, used for the purposes of production.

31.2. The scope of the word 'input' has been further clarified in Explanation 2 to include goods, which are used in the manufacture of capital goods, which, in turn, are used in the factory of the manufacturer.

31.3. In other words, any goods, which have any relationship with the manufacture of final products, whether directly or indirectly, irrespective of whether they are contained or not contained in the final product would be an 'input'.

31.4. Therefore, plant and machinery, which, even according to the Revenue, are capital goods, within the meaning of Rule 2 (a) (A) of the 2004 Rules, as they fall in the Chapters referred to in sub-clause (i) of the very same Rule, would, in our view, take within its sway 'inputs', which come within the ambit and scope of Rule 2(k) read with Explanation 2; the only limiting condition being that these inputs should be used within the factory of the manufacturer.

31.5. Therefore, according to us, structurals, cement, as also, iron and steel, which are used to erect foundations, would come within the definition of 'input' as they form part of the capital goods, which, in turn, are used in the manufacture of final product. The manner in which the Revenue seeks to read the provisions of Explanation 2 is flawed for the reason that the said Explanation cannot restrict the scope and ambit of the main provision, i.e., Rule 2k(i). Explanation 2 cannot be read in a manner that it constricts, the scope and ambit of the main provision, i.e., Rule 2k(i).

31.. To our minds, if, there was any ambiguity, the same stands clarified with the issuance of the 2009 Notification. As correctly argued on behalf of the TAS and DCBL, the Notification does not indicate that it is either declaratory or retrospective.

32. Ms.Hemalatha, as noticed by us above, relied upon two (2) judgments, to contend that the amendment to Explanation 2 to Rule 2(k) should be read as clarificatory. The first judgment, relied upon by the learned counsel, has been rendered in the matter of : Commissioner of Income Tax V. Gold Coin Health Food Pvt. Limited (2008) 304 ITR 308 (SC). The second judgment is that of the Division Bench of the Karnatka High Court in : Deputy Commissioner of Commercial Taxes V. Bellary Steels & Alloys Ltd. [2008] 11 VST 361 (Karn).

32.1. According to us, both judgments are distinguishable on facts. In Commissioner of Income Tax V. Gold Coin Health Food Pvt. Limited, the Court came to the conclusion that the amendment made by Finance Act, 2002, with effect from 01.04.2003, in Explanation 4 to Section 271(1)(c) (iii) of the Income Tax Act, 1961 (in short the '1961 Act') was declaratory and hence, retrospective in nature, by relying upon the overarching definition of the term "income", provided in Section 2(24) of the very same Act. The point at issue before the Court was whether the decision rendered by it in an earlier case, that is in: Virtual Soft Systems Ltd. V. Commissioner of Income Tax, Delhi 2007 (9) SCC 665, was correct.

32.2. In Virtual Soft System's case, the Supreme Court had come to the conclusion that no penalty could be levied, if, the

returned income showed a loss. The Court, however, in CIT V. Gold Coin Health Food Pvt. Limited, came to a different conclusion, based on its view that since, the definition of "income" as set out in Section 2(24) of the 1961 Act was inclusive in its construct, it would take within its sway, loss, i.e., "negative profit" as well. The Court went on to hold that the expression "profit and gains", used in Section 2(24) of the Act would refer to both positive profit, as well as negative profit or "minus income".

32.3. In this behalf, the Court relied upon its earlier judgment rendered in the matter of: CIT (Central) Delhi, v. Harparsad & Co. P. Ltd. 1975 (99) ITR 118.

32.3. To our minds, this case, is completely distinguishable from the facts arising in the instant case.

33. Similarly, in Bellary Steels & Alloys case, the Division Bench of the Karnataka High Court was called upon to, broadly, examine the effect of a notification, issued by the Revenue, whereby, an earlier exemption notification dated 28.08.1993 was sought to be explained. The notification dated 28.08.1993, which was issued in exercise of power under Section 8 A of the Karnataka Sales Tax Act, 1957, exempted tax payable under the said Act, in respect of goods manufactured and sold by a new industrial unit, located in zones specified in column 3 of the said notification, albeit, for a particular period. The said notification also exempted tax payable under the said Act by an industrial unit making investment for expansion or diversification or modernisation on or after 12.07.1993, qua units located in the zone, once again, specified in column 3 of the very same notification. The notification carried two Explanations i.e., Explanation (I) and Explanation (II). While Explanation (I) defined the meaning of the expression "tiny industrial unit", "small-scale Industrial Unit", "medium Scale industrial unit" or "large scale industrial unit" and "new industrial unit", Explanation (II) provided the method of quantification and extent of tax exemption under the notification. Clause (iii) to Explanation (II), which read as under, was sought to be substituted by a subsequent notification dated 11.10.1995. The unamended clause (iii) read as follows:

" (iii) tax exemption to an industrial unit undertaking investment in expansion/diversification / modernisation shall be available only to the additional capacity created by it out of such investment."

33.1. The amended clause (iii) elaborated on the method of quantification of tax exemption. Because the unamended clause (iii), which appeared in the earlier notification, was vague, the Assessing Authorities were adopting their own method, while granting relief. It is, in this background, the State Government took upon itself to issue the subsequent notification

dated 11.10.1995 in order to provide a method for quantifying tax exemption qua industrial units undertaking investment in expansion/diversification and modernisation.

33.2. Therefore, both under the earlier notification as well as the under the subsequent notification, the Assessee, who made investment by way of expansion/modernisation etc., continued to get the benefit of exemption. The only difference was, that, via the subsequent notification, a methodology was evolved, for quantifying the exemption. It is, in this context that the Court ruled that the subsequent notification dated 11.10.1995 was clarificatory in nature.

34. As would be obvious, this judgment will also have no application, in view of the fact that while in the instant case, the benefit is taken away by excluding structurals, cement also iron and steel etc. from the meaning ascribed to the term "input" in Rule 2(k), by amending Explanation 2, in Bellary Steels & Alloys case, the circumstance with which the Court was confronted, were quite different.

35. A bare reading of the 2009 Notification reveals that it brings about an amendment in Explanation 2, by specifically excluding from its ambit, inter alia, the structurals and cement etc. Furthermore, the intrinsic evidence contained in the Notification, points in the direction that it is neither clarificatory nor retrospective in its impact; a fact which is brought to fore upon a bare perusal of the same. The 2009 Notification in no uncertain terms states that it shall come into force from the date of its publication in the official gazette. Clearly, if, the intention was to clarify or give it retrospective effect, it would have been brought into force from a date anterior to the date of publication of the Notification.

35.1. For the sake of convenience, the relevant part of the Notification is extracted hereafter:

".....1. (1) These rules may be called the CENVAT Credit (Amendment) Rules, 2009.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the CENVAT Credit Rules, 2004 (hereinafter referred to as the said rules), in rule 2, in clause (k), in Explanation 2, after the words "factory of the manufacturer", the following shall be inserted, namely:-

"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"

Notification No.16/2009 - Central Excise (N.T.) New Delhi, the 7th July, 2009 .

(Emphasis is ours)

36. A plain reading of the relevant parts of the Notification, which have been emphasised by us, would bring forth the point which we have sought to articulate herein above, that is, intrinsic evidence points in the direction that the notification is not retrospective.

36.1. If, that be the conclusion, certainly, the submission advanced on behalf of TAS and DCBL has weight, which is that the Revenue, with effect from 07.07.2009, has sought to, in a sense, nullify the impact of the judgments of this Court in the decisions referred to above, by amending Explanation 2 appended to Rule 2(k). Thus, clearly, the amendment, in our opinion, can only operate prospectively.

37. A similar conclusion was reached by the Gujarat High Court in the matter of: *Mundra Ports & Special Economic Zone Ltd. V. CCE & Cus 2015 (39) STR 726 (Guj.)*. The Division Bench of the Gujarat High Court in *Mundra's* case, disagreed with the view taken by the Tribunal in the case of: *Vandana Global Limited* that the 2009 Notification would have retrospective effect. Pertinently, the Tribunal in *Vandana Global Limited*, has based its view on the speech made by the, then, Finance Minister. As a matter of fact, that part of the speech of the Finance Minister, which dealt with the amendment, was also relied upon by Ms. Hemalatha. For the sake of convenience, the said part is extracted hereafter:

"H. Amendments in Central Excise Rules and Cenvat Credit Rules.

These changes to come into effect immediately unless specified otherwise:

1.....

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

....."

(Emphasis is ours)

38. Upon reading the extract from the speech of the Finance Minister, two aspects come to fore: First, that the changes/amendments brought about in Rule 2(k) were sought to be enforced immediately. Second, the amendment sought to clarify that 'inputs' will not include structurals, cement and other items referred to therein. In our view, first and foremost, the speech of the Finance Minister cannot control the meaning of the words used in the 2009 Notification. We have already indicated in our discussion above that the intrinsic evidence, points in

the direction that the amendment was prospective in nature. Furthermore, the speech, to our minds, uses a generic expression "to clarify", which, when read with the first part, which states that it would have effect "immediately", only fortifies our view that the amendment was configured to operate from the date of its publication and not retrospectively. Therefore, the extracted speech, by itself, in our opinion, would not help the cause of the Revenue.

39. As indicated above, in *Mundra's* case, the Gujarat High Court made observations in this behalf, which being relevant, are extracted hereafter:.

"8. Mr. Y.N. Ravani, learned counsel for the revenue has placed reliance on the decision of the Larger Bench of the Tribunal in *Vandana Global Limited v. Commissioner of Central Excise, Raipur*, 2010 (253) E.L.T 440. We have carefully gone through the decision of the Larger Bench of the Tribunal. We do not find that amendment made in Cenvet Credit Rules 2004 which came into force on 7.7.2009 was clarificatory amendment as there is nothing to suggest in the Amending Act that amendment made in Explanation 2 was clarificatory in nature. Wherever the legislature wants to clarify the provision, it clearly mentions intention in the notification itself and seeks to clarify existing provision. Even, if the new provision is added then it will be new amendment and cannot be treated to be clarification of particular thing or goods and/or input and as such, the amendment could operate only prospectively. In our opinion, the view taken by the Tribunal is based on conjectures and surmises as the Larger Bench of the Tribunal used the expression that intention behind amendment was to clarify. The coverage under the input from where this intention has been gathered by the Tribunal has not been mentioned in the judgment. There is no material to support that there was any legislative intent to clarify any existing provision. For the same reason, as mentioned above, the decision of the Apex Court in *Sangam Spinners Limited v. Union of India*, reported in (2011) 11 SCC 408 would not be applicable to the facts of the instant case."

(Emphasis is ours)

40. Now coming to the submission put forth by Ms. Hemalatha that the applicable judgment in this case would be *Saraswathi Sugar Mills* and not *Rajasthan Spinning & Weaving Mills*, to our minds, the two (2) judgments, as concluded by five separate Division Benches of this Court, operate in two different state of facts.

41. In *Saraswathi Sugar Mills* case, the Supreme Court was

called upon to decide as to whether, iron and steel, and structurals set up by the Assessee, which were used captively in the factory for installation of a sugar manufacturing plant could be classified as capital goods under Rule 57Q of the 1944 Rules, in order to enable the Assessee to claim benefit from excise duty under Notification dated 67/95-CE, dated 16.3.1995. The Notification provided for exemption from whole of excise duty qua those capital goods, which were defined in Rule 57Q of the 1944 Rules and were manufactured in a factory and used within the factory of production. It is, in this context, that the Assessee had sought to argue that iron and steel structures were components of the capital goods referred to in sub-rule (1) to (4) of Rule 57Q. The relevant parts of the notification No.65/95-CE, dated 16.3.1995, are extracted hereafter.

"In exercise of the powers conferred by sub-section (1) of Section 5A of the Central Excise Act, 1944... the Central Government being satisfied that it is necessary in the public interest so to do hereby exempts

(i) capital goods as defined in Rule 57Q of the Central Excise Rules 1944 manufactured in a factory and used within the factory of production;

(ii) ...

from the whole of the duty of excise leviable thereon which is specified in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986)."

41.1. The Court was, thus, clearly dealing with an exemption notification, and after applying a strict rule of construction, came to the conclusion that unless it is demonstrated that iron and steel structures, (which were claimed as component parts, within the meaning of sub-rule (5) of Rule 57Q), were essential in the manufacture of the sugar manufacturing unit or in the composition of the sugar manufacturing unit, they would not come within the ambit of the aforementioned exemption notification.

41.2. It is pertinent to note that during the course of argument, the Assessee had relied upon the 1996 circular, to which, we have made a reference above. The Supreme Court, as it clearly emerges upon a perusal of para 22 of the judgment, indicated that since, the circular was not produced before the Tribunal, it was justified in reaching a conclusion, which went against the interest of the Assessee, in that case. The Court, however, concluded by saying that since, they had ruled that the iron and steel structures were not components of machinery used in the installation of sugar manufacturing plant, the observation made, qua the 1996 circular would not come to the

assistance of the Assessee.

41.3. Therefore, to our minds, contrary to what Ms.Hemalatha has stated, the decision in the Saraswathi Sugar Mill's case would be distinguishable, as it dealt with an exemption notification.

42. On the other hand, Rajasthan Spinning and Weaving Mill's case, in our view, is the more opposite case, which can be applied to the matters at hand. The Court, in the said case was called upon to rule as to whether the Assessee in that case could avail of Modvat Credit in respect of steel plates and MS channels, i.e., structurals used in the fabrication of chimney, which, in turn, was used, as it appears, in the operation of the diesel generating set. The Court, while, appreciating the contours of Rule 57Q, made the following pertinent observations:

"9. The language of Rule 57Q is clear and unambiguous. It applies to the final products described in column (3) of the Table under the Rule as also to other goods, referred to as "capital goods", described in the corresponding entry in column (2) of the said Table, used in the factory of the manufacturer of final product. The parties are ad idem that diesel generating set falls under Chapter 85 under Heading No. 85.02, as described at serial No.3 of the afore-extracted Table. Similarly there is no dispute that chimney attached with the generating set is covered by the items described in serial No.5 thereof. However, the controversy centres around the question whether the steel plates and M.S. channels used in the fabrication of chimney would fall within the purview of serial No.5 of the Table below Rule 57Q.

10. Having examined the question in the light of the language employed in Rule 57Q and the case law on the point, we are of the opinion that the appeal is devoid of any merit.

11. In Jawahar Mills Ltd. (supra), heavily relied upon by the learned counsel for the assessee, the question which came up for consideration was whether the claim of MODVAT credit by some manufacturers in respect of certain items by treating them as capital goods in terms of Rule 57Q was in order. Some of the items under consideration were power cables, capacitors, control panels, cable distribution boards, air compressors, etc. The Court examined the question in the light of the definition of capital goods given in Explanation to Rule 57Q, which read as follows:

"capital goods" means--

(a) machines, machinery, plant, equipment, apparatus, tools or appliances used for producing or processing of any goods or for bringing about any change in any substance for the manufacture of final products;

(b) components, spare parts and accessories of the aforesaid machines, machinery, plant, equipment, apparatus, tools or appliances used for aforesaid purpose; and

(c) moulds and dies, generating sets and weighbridges used in the factory of the manufacturer.

12. Inter alia observing that capital goods can be machines, machinery, plant, equipment, apparatus, tools or appliances if any of these goods is used for producing or processing of any goods or for bringing about any change in the substance for the manufacture of final product, although this view was expressed in the light of the aforesaid definition of "capital goods" in the said Rule, which is not there in Rule 57Q, as applicable in the instant case, yet the "user test" evolved in the judgment, which is required to be satisfied to find out whether or not particular goods could be said to be capital goods, would apply on all fours to the facts of the present case, in fact, in para 6 of the said judgment, the court noted the stand of the learned Additional Solicitor General, appearing for the Revenue, to the effect that the question whether an item falls within the purview of "capital goods" would depend upon the user it is put to.

13. Applying the "user test" on the facts in hand, we have no hesitation in holding that the steel plates and M.S. channels, used in the fabrication of chimney would fall within the ambit of "capital goods" as contemplated in Rule 57Q. It is not the case of the Revenue that both these items are not required to be used in the fabrication of chimney, which is an integral part of the diesel generating set, particularly when the Pollution Control laws make it mandatory that all plants which emit effluents should be so equipped with apparatus which can reduce or get rid of the effluent gases. Therefore, any equipment used for the said purpose has to be treated as a accessory in items of Serial No.5 of the goods described in column (2) of the Table below Rule 57Q.

14. We are, therefore, of the opinion that the Tribunal was correct in law in holding that the assessee was entitled to avail of modvat credit in respect of the subject items viz. steel plates and M.S. Channels used in the fabrication of chimney for the diesel generating set, by treating these items as capital goods in terms of rule 57Q of the Rules."

43. As would be evident from the aforesaid extract, in Rajasthan Spinning & Weaving Mills Limited case, the Court relied upon the user test, enunciated, in its earlier judgment rendered in: Jawahar Mills Limited case. Clearly, the Court held that steel plates and MS Plates, i.e., structurals used in the fabrication of the chimney, which were an integral part of the diesel generating set would fall within the ambit and scope of definition of capital goods. The Court, went on to further hold that such equipment had to be treated as an accessory. As a matter of fact, in Saraswathi Sugar Mills case, the Court, while noticing the view taken in Rajasthan Spinning and Weaving Mills Limited said that as long as it could be shown that the item in issue was an integral part of the machinery, i.e., capital goods, it would fall in the definition of 'component' and thus, by logical extension, come within the ambit of 'capital goods'.

43.1. To be noted, Hon'ble Mr. Justice D.K. Jain, (as he then was), was party to both the judgments rendered by the Supreme Court i.e., Rajasthan Spinning and Weaving Mills Limited as well as Saraswathi Sugar Mills Limited case.

43.2. Therefore, quite clearly, the two judgements referred to above cannot be read in the manner, as the Revenue is seeking to read them, that is, at cross purposes. In our opinion, the ratio of the two judgments, is that, as long as it is shown that the "component" and/or "accessory" is an integral part the capital goods, (which, in turn, fall within the scope and ambit of the expression 'capital goods', referred to in Rule 2(a)(A) (i) of the 2004 Rules,) they would also qualify as capital goods.

44. In the facts of this case, we have to conclude that MS structurals, which support the plant and machinery, which are, in turn, used in the manufacture of sugar and molasses are an integral part of such plant and machinery. The Assessee has clearly demonstrated that structurals as well as foundations, which are erected by using steel and cement are integral part of the capital goods (i.e., plant and machinery), as they hold in position the plant and machinery, which manufactures the final product. Therefore, in our opinion, whether the "user test" is

applied, or the test that they are the integral part of the capital goods is applied, the Assessee, in these cases, should get the benefit of Cenvat Credit, as they fall within the scope and ambit of both Rule 2(a)(A) and 2k of the 2004 Rules.

45. For the foregoing reasons, we answer the questions, in all the three (3) appeals, which are set forth above, in favour of the Assessee and against the Revenue.

46. Accordingly, the captioned appeals are allowed and the impugned judgments of the Tribunal, in each of these appeals, are set aside. However, there shall be no order as to costs. Connected Mps stand closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

1.The Registrar,
The Customs,
Excise and Service Tax Appellate Tribunal,
Chennai.

2.The Commissioner of Central Excise,
No.1, Williams Road, Cantonment,
Tiruchirapalli.

+3cc to Mr.Mohammed Shaffiq, Advocate SR.No.48022,48023,48024

+2cc to Mrs.R.Hemalatha, Advocate SR.No.47870,47871

सत्यमेव जयते

Pre-Delivery Judgment in
C.M.A.Nos.3814 of 2011
and 2695 and 2696 of 2012

PA (CO)
GN(03/08/2017)

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