

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04.02.2020
Pronounced on : 13.02.2020

CORAM

THE HONOURABLE DR.JUSTICE VINEET KOTHARI
AND
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

C.M.A.Nos.762 and 763 of 2015
and

C.M.P.No.2638 of 2018

The Commissioner of Central Excise, Salem
O/o. The Commissioner of Customs and Central Excise,
No.1, Foulk's Compound, Anna Medu,
Salem - 636 001. ... Appellant in both the CMAs/
Respondent

Vs.

M/s. JSW Steel Ltd.,
M/s. JSW Power Ltd.,
Pottaneri, Mecheri - 636 453. ... Respondent in both the CMAs/
Appellant

Appeals filed under Section 35G of the Central Excise Act, 1944, praying to set aside the Final Order No.40322-40323 of 2014, dated 23.05.2014 passed by the Hon'ble CESTAT, Chennai and to uphold the Order-in-Original No.7/07 (C.No.V/72/15/89/2006-Cx/Adj) dated 03.10.2007 passed by the Commissioner of Central Excise, Salem.

For Appellant : Mr.V.Sundareswaran
Senior Standing Counsel
in both the CMAs

For Respondent : Mr.R.Parthasarathy
for Mr.Lakshmi Kumaran
in both the CMAs

COMMON JUDGMENT

R.SURESH KUMAR, J.

These two Appeals have been filed under Section 35G of the Central Excise Act, 1944 (in short "the Act") against the common order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (in short "CESTAT"), by order dated 23.05.2014.

2.The case of the Assessee Company viz., Southern Iron and Steel Company Limited (in short "SISCOL") is that, it is an integrated Steel Plant having facilities for the production of iron, steel rod/pellets etc. The plant of the SISCOL was started in the year 1996 and it was already having a 'Captive Power Plant' (in short "CPP") of 7.5 MW for generation of electricity.

3.The SISCOL, in order to expand its production capacity of the final product viz., iron and steel rod, apart from its CPP of 7.5 MW capacity already available with it, required additional power of 60 MW, therefore, they decided to set up another CPP.

4.At that time since the SISCOL was sick and also was under Restructuring Scheme under CDR (Corporate Debt Restructuring) and also was declared as a sick company by the BIFR (Board for Industrial and Financial Reconstruction), it had entered into an agreement with JSW Power Limited (JSWPL).

5.An agreement to that effect was entered into between SISCOL and JSWPL, as per which, SISCOL leased out a portion of its land to the extent of 50.14 acres to JSWPL where 2 x 30 = 60 MW CPP had to be established by JSWPL. As per the said lease deed dated 17.01.2005, a nominal lease amount of Rs.10,000/- per annum was fixed. Pursuant to the lease agreement, the land entrusted by SISCOL to JSWPL was in turn pledged by the JSWPL with UTI Bank Limited to raise funds to the tune of Rs.62 Crores. Since the entire cost of CPP project was roughly about Rs.95 Crores, the balance cost to the extent of Rs.28 Crores was invested by SISCOL in the form of shares in JSWPL.

6.Accordingly, the JSWPL using the funds it generated, as stated above, set up the CPP 2 x 30 MWs in the land leased out by SISCOL in its factory premises.

7.While setting up the CPP, the capital goods were ordered to be purchased and accordingly, on the capital goods purchased by raising invoice in the name of JSWPL - Consignee SISCOL, the Assessee availed CENVAT Credit. After having completed the CPP, it was commissioned in the year 2008. In the meanwhile, during the CDR proceedings, the SISCOL was merged with the JSW Steel Limited (JSWSL) with effect from 01.04.2007 as per the order dated 22.02.2008 of the High Court of Bombay.

8.In the meanwhile, the JSWPL as well as JSWSL got merged with effect from 01.04.2005, of course pursuant to the order of the High Court dated 14.11.2005. On 31.08.2006 even before that

60 MW Power Plant i.e., CPP was fully set up, the SISCOL terminated the lease agreement with JSWPL and took over the CPP. The loan taken from UTI was also taken over by SISCOL on 31.08.2006.

9. Even though the land to the extent of 50.14 acres was leased out by SISCOL for setting up the CPP, the ground plan of the factory of the SISCOL was never amended or modified and the said lease of land, which was given to JSWPL, was only to raise funds for establishing the CPP to get power fully generated from CPP for the manufacturing process of SISCOL. Therefore, the leased out land, where the CPP was established, also continued to be part of the factory premises of SISCOL.

10. As per the provisions of the CENVAT Credit Rules, 2004 (CENVAT Rules), CENVAT credit had to be taken in two installments of 50% each spread over for two financial years.

11. However, the Revenue, in respect of the said CENVAT credit taken by the Assessee, JSWSL had issued two show cause notices, the first one is C.No.V/72/15/39/2006 - CX.ADJ (Sl.No.25/2006) dated 19.09.2006 and the second one is C.No.V/72/15/89/2006-CX.ADJ (Sl.No.28/2007) dated 16.04.2007. By virtue of these two show cause notices, the Revenue asked Assessee to show cause as to why the wrong availment of CENVAT credit should not be disallowed and also the short payment of Central Excise Duty should not be demanded and further interest proposed to be disallowed, should not be demanded and also why a penalty should not be imposed.

12. After due process of law, the Commissioner of Central Excise, Salem, vide Order-in-Original No.7/2007 (Commissioner) dated 03.10.2007 passed orders confirming the demand denying the availed CENVAT credit along with interest and also confirmed and demanded the amount which was utilised wrongly for payment of duty on the clearance of final product with interest and also imposed penalty under Rule 15(2) of the CENVAT Credit Rules, 2004 read with Section 11 AC of Central Excise Act, 1944 (Act) and further imposed penalty under Rule 26 of the Central Excise Rules, 2002 read with Rule 15 of CENVAT Credit Rules, 2004.

13. Aggrieved over the said Order-in-Original dated 03.10.2007, the Assessee filed Appeal before the CESTAT. The CESTAT on 05.11.2012 passed a split verdict, whereby, one Member of the CESTAT allowed the Appeal filed by the Assessee, however, another Member took a different view. Therefore, the point of difference in opinion in the following terms had been referred

to a Third Member of the Tribunal.

"POINT OF DIFFERENCE IN OPINION

56. In the facts and circumstances of the case,-

Whether it is proper to allow Cenvat Credit of excise duty paid on excisable capital goods paid for and used by JSWPL to be taken by SISCOIL from October 2005 onwards as held by Judicial Member?

Or

Whether it is proper to allow Cenvat Credit of excise duty paid on excisable capital goods paid for and used by JSWPL to be taken by SISCOIL from 31.08.2006 when the two companies got merged as held by Technical Member?"

14.A Third Member also, by his order dated 23.05.2014, concurred with the view of the Judicial Member, who decided to allow the Assessee's Appeal, thereby the majority order was passed on 23.05.2014 by the CESTAT allowing the Appeals filed by the Assessee by setting aside the Order-in-Original passed by the Revenue. Aggrieved over the said order of the CESTAT dated 23.05.2014, the instant Appeals have been preferred by the Revenue.

15. These appeals were admitted by a Coordinate Bench of this Court on 17.04.2015 on the following Substantial Questions of Law :

"(i) Whether the Tribunal was correct in holding that the availment of CENVAT credit by the respondent M/s.SISCOIL is correct, since all the three units, viz., M/s. JSWPL, M/s. JSWSL and M/s.SISCOIL have been merged at a later date, though at the time of receipt of capital goods, all the three units were separate entities and the goods were received and owned by M/s. JSWPL? and

(ii) Whether the Tribunal committed an error in not following the guidelines laid down by the Apex Court in 2010 (260) ELT 3, when the respondent had failed to comply with the mandatory conditions for availing CENVAT credit envisaged in CENVAT Credit Rules, 2004?"

16.Mr.V.Sundareswaran, learned counsel appearing for the Revenue/ Appellant before us in these Appeals, has made submissions stating that, on the basis of the intelligence gathered, the Revenue Officials visited M/s.SISCOIL on 10.02.2006

and verified the books of accounts maintained by them. After having thorough verification, the Revenue found that the CENVAT credit was wrongly claimed by SISCOL for the capital goods purchased for setting up the 2 x 30 MW CPP by JSWPL. In this context, the learned counsel would submit that, the SISCOL is a separate legal entity and JSWPL is also a separate entity. Pursuant to the lease deed entered into between the SISCOL and JSWPL, land of SISCOL to the extent of 50.14 acres was entrusted to JSWPL for setting up CPP, of course on the agreement to use the entire power to be generated by the CPP. In this regard, a lease amount of Rs.10,000/- was also fixed by SISCOL. Only in the earmarked land of 54.14 acres, by way of lease to JSWPL, it had established the CPP, for which, capital goods were purchased. Since the premises/office of JSWPL had been in the State of Karnataka and the capital goods for setting up CPP have to be brought in to the premises i.e., the land earmarked by SISCOL through the lease, while raising invoices, the JSWPL raised it in the name of JSWPL with Consignee SISCOL. The price for the said capital goods purchased by JSWPL had been paid or settled only by JSWPL and no payment had been made by SISCOL.

17.The learned counsel would also submit that, the entire capital goods purchased and utilised by JSWPL were used in the CPP only, which is not the factory of the SISCOL, who claimed to be the manufacturer of the final product i.e., steel and iron rod etc. Therefore, it become clear that, those capital goods since had been used in the CPP of JSWPL and not at the factory of the SISCOL, the SISCOL was not entitled to take any CENVAT credit. These factors, according to the learned counsel, had been unearthed only subsequently based on the intelligence input received by the Revenue and thereafter, only on verifying the books of accounts of the SISCOL, the Revenue found that the SISCOL taken the CENVAT credit wrongly without the entitlement, therefore, it triggered the Revenue to issue show cause notices on two dates seeking show cause from the Assessee on various heads as has been stated therein.

18.The learned counsel for the Revenue, having relied upon Rule 2(a)(1) of CENVAT Credit Rules, would emphatically submit that, if at all the capital goods are not used in the factory of the manufacturer/Assessee of the final product, the Assessee is not entitled to CENVAT credit. He would also submit that, by virtue of the insertion of Rule 2 (a)(1A) from 01.04.2011, the capital goods used outside the factory of the manufacturer of the final product for generation of electricity or for pumping of water for captive use within the factory premises alone would be entitled to take the credit.

19. By relying upon these provisions of CENVAT Credit Rules, the learned counsel for the Revenue would urge that, since the CPP is located in the land leased out and earmarked by SISCOOL to and in favour of JSWPL, which is not form part of the factory of the SISCOOL, who is the manufacturer of final product, the capital goods cannot be said to be used in the factory of the manufacturer of final product within the meaning of Rule 2(a) (1). Like that, under Rule 2(a) (1A) also it cannot be said that, the capital goods had been used outside the factory of the manufacturer of the final product for generation of electricity, as the SISCOOL did not have any such place of generation of electricity outside its factory as the CPP was set up by JSWPL only. Therefore, under both limbs of the aforesaid Rule, the SISCOOL was not entitled to any CENVAT credit, therefore, the said wrong availment of CENVAT credit by SISCOOL had to be disallowed or reversed and that is the reason why after thorough enquiry and investigation, show cause notices were issued and after following the formalities, Order-in-Original were passed, however, the same had not been considered in proper perspective within the meaning and ambit of the relevant Rule of the CENVAT Credit Rules by the CESTAT, therefore, the order of the CESTAT is liable to be interfered with, the learned counsel for the Revenue contended.

20. Per contra, Mr. R. Parthasarathy, learned counsel appearing for the Assessee made submissions stating that, though the land of 54 acres had been earmarked by way of lease by SISCOOL to JSWPL, the factory premises i.e., the factory campus of SISCOOL has never been changed. Moreover, in the year 2005 itself, the group company of JSWPL had decided to take over the SISCOOL and pursuant to the said decision only, the JSWPL was entrusted by the SISCOOL to set up the CPP and that is the reason why 54 acres of land was earmarked by way of lease by SISCOOL for a nominal amount of Rs.10,000/- per year. The learned counsel would further submit that, though a decision was taken for the merger of SISCOOL and JSW Steel Limited i.e., JSWSL earlier in the year 2005, the process went on for some time and ultimately by virtue of the order passed by the High Court of Bombay dated 22.02.2008, the SISCOOL and JSWSL of Jindal Group got merged with from 01.04.2007. In the meanwhile, JSWPL also got merged with JSWSL with effect from 01.04.2005 as per the order of the High Court dated 14.11.2005. By explaining these factors, the learned counsel for the Assessee would submit that, even at the time of entering into a lease between SISCOOL and JSWPL, for all practical purposes, there had been a take over of SISCOOL by Jindal Group i.e., JSWPL and that is the reason why the land earmarked by way of lease by SISCOOL was in turn pledged by JSWPL with UTI Bank Limited and raised funds to the extent of Rs.62 Crores and the balance cost of the project i.e. Rs.28 Crores was

invested by SISCOL at the shares of JSWPL. Therefore, the learned counsel would contend that, even before setting up the CPP, for the purpose of supplying the power in entirety to SISCOL in order to expand its manufacturing capacity to the maximum extent, there had been a coordination and unison of activities between the SISCOL and JSWPL and that is the reason why the CPP though was set up by JSWPL, was established only in the name of SISCOL for all practical purposes and that is the reason why when the capital goods were purchased, invoices were raised in the name of JSWPL Consignee SISCOL.

21.The learned counsel for the Assessee would also contend that, in the Second Annual Report of JSWPL Group under the head 'Directors Report' for the year ended 31st March 2005, the following has been stated.

"Unit III (Expansion)

Jindal South West (JSW) Group has recently taken over Southern Iron & Steel Company Limited (SISCOL) Pottaneri, near Salem. SISCOL's current capacity is 300,000 tons per annum and as per the CDR scheme approved by their lenders, SISCOL is doubling its capacity to 600,000 tons per annum. SISCOL also proposes to set up a coke oven plant with capacity of 400,000 tons per annum. The power requirement of SISCOL is 30 MW and is expected to go up to 60 MW after expansion. SISCOL had approached JPL for setting up a power plant of 2X30 MW capacity at their premises to meet their power requirements and JPL has taken up this project and work is in progress."

22.The learned counsel for the Assessee would also contend that, these aspects have been thoroughly taken into account and considered by the CESTAT and ultimately by relying upon the decision of the Hon'ble Apex Court in the matter of Vikram Cement Vs. Commissioner of Central Excise, Indore [2006 (197) E.L.T. 145 (S.C.)] and also the earlier case of the Tribunal itself in the case of Hindalco Industries Limited Vs. CCE, Allahabad, [2012 (27) STR 401 (Tri.-Del.)], the CESTAT has taken the majority view that, merely because the power plant is situated outside the factory premises, CENVAT credit of capital goods used for setting up of power plant cannot be denied as the electricity is captively consumed with the factory of SISCOL.

23.We have considered the aforementioned submissions made by the respective learned counsel for the parties and we have given our anxious consideration to the materials placed before this Court.

24. Though initially SISCOIL and JSWPL were different entities, at one point of time, somewhere in 2005 they seem to have come to an understanding, by thus, with the plan of taking over the SISCOIL by the Jindal Group where the JSWPL is also a part, the JSWPL came forward to establish a CPP for the purpose of complete supply of electricity to be generated in the said CPP to SISCOIL for enhancing its manufacturing capacity. A portion of the land to the extent of 50.14 acres was leased out to JSWPL only for a nominal amount of Rs.10,000/- per annum by way of lease deed dated 17.01.2005. Pursuant to which, the JSWPL mortgaged the said land with UTI Bank limited to raise the fund to the tune of Rs.62 Crores for the purpose of setting up the CPP. That apart, another sum of Rs.28 Crores was invested by SISCOIL in the form of shares in the JSWPL, the total cost of the CPP itself is around Rs.95 Crores, therefore, the entire cost or 90% of the cost of the CPP was generated by JSWPL only from the source of SISCOIL.

25. In this context, the case of the Assessee is that, since the SISCOIL decided to expand its production capacity, for which they wanted to set up a CPP to meet the power requirement of 60 MW, the aforementioned arrangement was made between the SISCOIL and JSWPL, as at that time the SISCOIL was sick and was under Restructuring Scheme under CDR and also was declared as a sick Industry by BIFR.

26. Pursuant to the said leased out of the land for setting up CPP, the JSW Power Limited i.e., JSWPL in its request letter dated 06.01.2005 itself, addressed to the Deputy Chief Inspector of Factories, Salem, made the following request:

"Sub: Construction of 2 x 30 MW CPP at SISCOIL plant site.

Dear Sir,

JSW Power Limited (JPL) is a JSW Group Company, having its registered office at 5-A, G.Deshmukh Marg, Mumbai - 400 026. JPL with mutual interest with Southern Iron And Steel Company Limited (SISCOIL), Pottaneri/M Kalipatti villages, Mettur Taluk, Salem District, Tamil Nadu, which has recently been taken over by JSW group is proposing to install 2 x 30 MW Captive Power Plant (one is coal based and the other one is Coke Oven waste gas recovery boiler) inside the SISCOIL premises to meet the present and future power requirements of SISCOIL.

This is for your kind information please.

Thanking you

Yours faithfully
for JSW Power Limited"

27. On 25.04.2005, the SISCOL has given a Certificate towards supply of approximately 6000 Cu.M. of water per day for their 2 x 30 MW Captive Power Plant, which is a full fledged CPP for SISCOL. The content of the said Certificate dated 25.04.2005 is quoted below:

"TO WHOMSOEVER IT MAY CONCERN

M/s.JSW power Ltd., a Company incorporated under the Companies Act, 1956, and having its Registered Office at Post Box No.9, Village and P.O. Toranagallu, Karnataka-583 123 has approached Southern Iron and Steel Company Limited (A Company incorporate under the Companies Act, 1956 and Mettur Taluk District, Salem, Tamil Nadu) for supply of approx. 6000 Cu.M. of water per day for their 2 x 30 MW Captive Power Plant.

M/s JSW is setting up aforesaid 2 x 30 MW Captive Power Plant exclusively for the captive consumption of Southern Iron And Steel Company limited.

As this is going to be full fledged captive power plant for Southern Iron and Steel Company Limited, M/s Southern Iron And Steel Company Ltd have agreed to supply the required water to M/s JSW Power Ltd. at the mutually agreed rates from their existing water availability.

for SOUTHERN IRON AND STEEL COMPANY LTD."

28. Accordingly, the work of setting up of CPP for 60 MW started, where, in order to set up the power plant, capital goods were purchased and while placing the purchase orders, on the specific request, invoices were raised in the name of JSWPL - Consignee SISCOL. Since the SISCOL is already running the manufacturing unit/factory for manufacturing the final product of steel and iron rod, it has taken the CENVAT credit for those capital goods purchased and utilised or used at the CPP. Though the said CENVAT credit was allowed initially, subsequently the Revenue decided to reverse it on the ground that, the SISCOL was not entitled to take the CENVAT credit as the capital goods were not used in the factory premises of SISCOL, accordingly, the show cause notices were issued and ultimately it ended in Order-in-Original dated 03.10.2007 whereby the amount of CENVAT credit taken by SISCOL was demanded and also the excise duty was demanded besides imposing penalty.

29.The main contention of the Revenue as projected by Mr.V.Sundareswaran, learned counsel for the Revenue, for denying such CENVAT credit to SISCOL is, because of the condition imposed under the CENVAT Credit Rules under the explanation clause to the word "capital goods". In this regard, the learned counsel for the Revenue since has heavily relied upon the relevant definition clause i.e., Rule 2(a) (1) and (1A), the same is quoted below:

"2.Definitions

In these rules, unless the context otherwise requires,-

(a) "capital goods" means,-

(A) The following goods, namely:-

(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, [heading 6805, grinding wheels and the like, and parts thereof falling under [heading 6804 and wagons of sub-heading 860692]] of the First Schedule to the Excise Tariff Act;

(ii) pollution control equipment;

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

(iv) moulds and dies, jigs fixtures;

(v) refractories and refractory materials;

(vi) tubes and pipes and fittings thereof; [xxx]

(vii) [storage tank; and]

[(viii) motor vehicles other than those falling under tariff headings 8702, 8703, 8704, 8711 and their chassis [but including dumpers and tippers],]

used -

(1) in the factory of the manufacturer of the final products, [xxx]; or

[(1A) outside the factory of the manufacturer of the final products for generation of electricity [or for pumping of water] for captive use within the factory; or]"

30.The learned counsel for the Revenue laid emphasis that, the first condition under the above quoted Rule is that, the capital goods must have been used in the factory of the manufacturer of the final product and in this case, according to him, the capital goods were not used in the factory of the manufacturer of the final product viz., SISCOL as it was used

only at the CPP set up by JSWPL, therefore, SISCOL did not have any right to take CENVAT credit. The second emphatic submission on the part of the Revenue counsel is that, if the capital goods are used at outside the factory of the manufacturer of the final product, for generation of electricity for captive use within the factory, the CENVAT credit is allowable to SISCOL, however here in the case in hand, according to him, no such use was made outside the factory of the manufacturer of the final product for generation of electricity, as the CPP, according to the Revenue, is a separate unit of the different entity viz., JSWPL. Therefore, on both counts, the eligibility, as fixed above, under the relevant Rule, since has not been fulfilled by the SISCOL, it did not have any right to claim CENVAT credit, therefore, such a claim made by SISCOL cannot be treated as a lawful claim and therefore, it is liable to be reversed, he contended.

31. In this context, we would point out that, first of all, the CPP was set up only within the factory premises of SISCOL as the land leased out by SISCOL and the factory premises of SISCOL are one and the same or inseparable. This aspect has been demonstrated before this Court by the learned counsel for the Assessee, by providing the Map of the SISCOL Steel Plant, which includes the leased out area to JSWPL to set up the CPP. As per the Certificate issued by SISCOL, 6000 Cu.M. of water everyday was supplied by SISCOL to the CPP and before the CPP in fact was completed, the lease was terminated and the CPP unit was taken over by SISCOL. There is no prohibition in CENVAT Rules against lease of part of land. The leased portion continues to remain in the ownership of SISCOL.

32. During that point of time, though the merger process was undertaken between SISCOL and JSWPL (Jindal Group), it has been materialised only after the order passed by the Bombay High Court on 22.02.2008 thereby the merger took place with effect from 01.04.2007.

33. Even before setting up of CPP, the permission was sought for by JSWPL on 06.01.2005 from Deputy Chief Inspector of Factories, Salem, where also the JSWPL claimed that, the SISCOL has been recently taken over by JSWPL Group which was proposing to install 2 x 30 MW CPP. The content of the said request letter of JSWPL had already been quoted herein above. It is also to be noted that, almost the entire cost of the CPP was generated by JSWPL only from the source of SISCOL i.e., by pledging the land of SISCOL Rs.62 Crores was generated and SISCOL itself invested Rs.28 Crores by way of shares in JSWPL. The only handicap seems to have been with the SISCOL at that point of time that it

became sick and was under CDR and was also declared as Sick Company by BIFR.

34. Therefore, only in order to generate funds and execute the work of CPP, the same was taken over by JSWPL and even before it was completed the lease was cancelled and the CPP was taken over back fully by SISCO. Thereafter, the proper merger was effected between SISCO and Jindal Group which includes JSWSL and JSWPL from 01.04.2007.

35. These factors had been taken into account by the CESTAT. Though initially there was a conflict of opinion between two Members of CESTAT, ultimately by the majority view of 2:1, the CESTAT decided the issue in favour of the Assessee.

36. The First Judicial Member, who took the view in favour of the Assessee before the CESTAT in his order, has given the following finding:

"26. On a bare reading of the said rule, the CENVAT credit is available on receipt of the inputs in the factory of the manufacturer or in the premises of provider of output service. As per Rule 4(b) of the CENVAT Credit Rules, it is also a condition that the goods shall be in possession of the manufacturer of the final products. So in the factual matrix of the case, it is to be seen that whether the capital goods were installed in the factory of M/s. SISCO and are being used by them and they are having the possession of the same or not. In the case of Steel Authority of India Ltd. Vs Commissioner of Central Excise, Bhubaneswar-II reported in 2007 (219) E.L.T. 960 (Tri.-Del.) wherein the facts of the case are that M/s. SAIL has a steel plant at Rourkela. That plant was having a 'CPP' also. In 1999, the steel mills received a rotor for use in its captive power plant and took MODVAT (Capital goods) Credit. Subsequently, in 2001, the 'CPP' was spun off as a separate identity (subsidiary). In the subsidiary, M/s. SAIL continued to have 98% shareholding and remaining 2% went to National Thermal Power Corporation ('NTPC' - in short). In those set of facts, it was argued by the learned counsel for the appellants that the deal was executed for business of restructuring with intent to strengthening M/s. SAIL's core business activity and it was not a case of sale as normally understood. It is also the contention of the learned Counsel that in this case corporate veil was required to be lifted so as to arrive at the reality of the transaction and

reach appropriate conclusion. Therefore, in that case, this Tribunal has relied on the judgment of the Hon'ble Supreme Court in the case of State of Uttar Pradesh v. V.Renusagar Power Co. and others reported in 1988 (4) SCC 59 for lifting of corporate veil. It is being explained that the case of Renusagar Power Co., was one where a dedicated power generation plant was set up to support the aluminium manufacturing activity of M/s.Hindustan Aluminium Corpn. Ltd. (M/s.Hindalco - in short) and after going into all the relevant aspects, the Hon'ble Supreme Court ruled that since the power plant was set up and run as a dedicated power plant for the manufacturing factory, the power generated by the power plant should be treated as power generated from M/s.Hindalco's own source of generation. This conclusion was reached by the Hon'ble Supreme Court after lifting the corporate veil and finding that the power plant (utility) was created and existed solely to support the aluminium company. Thereafter, this Tribunal came to the conclusion that mere location of the capital goods outside the factory premises is no ground for denying the credit."

37.The Third Member, before whom the conflict was referred to in his Judgment, having taken into consideration of all those factors, has held as follows:

"68.1 On perusal of the lease agreement, it is seen that the Lessor (SISCOL) requested to the Lessee (JSWPL) to set up a power plant in the premises of the Lessor (SISCOL) to take care of the power generation of the Lessor to which Lessee has agreed. The lease of the immovable property is determined for a limited period conditionally on the happenings of some events. The tenure of the lease agreement depends upon the happenings of the future events. In the instant case, it is a conditional transfer of the property with an interest created on a transfer of the property and dependent upon the fulfillment of the condition. Thus, it is clearly evident that M/s.SISCOL had provided their land to M/s.JSWPL with a condition to set up a power plant and the electricity generated would be consumed in manufacturing activities of M/s.SISCOL.

68.2 An agreement should also be examined with actual state of affairs and its implementation from the records. In the present case, it may be seen from the documents and records that in 2004, M/s.SISCOL was declared as sick unit under SICA, 1985. CDR Cell report would show that SJG came forward for financing

the sick unit M/s.SISCOL, as finance acts as an engine of growth. It appears from the Show Cause Notices that M/s.JSWPL, one of the companies of SJG, have expertise in constructing and operating Power Plants and M/s.JSW Steel Ltd. another company of SJG, is one of the purchasers of the final product of M/s.SISCOL. It is recorded in the CDR Cell report that there was proposal of merger of M/s.SISCOL with SJG, which is corroborated by Director's report dt. 26.4.2005 of JSWPL balance sheet. It is mentioned in "Unit III Debentures Trust Deed" dated 22.9.2005 of M/s.JSWPL that with a view to finance its 2 x 30 MW plant at SISCOL, the company has approached the Debenture holders. JSWPL declared to TNEB by letter dated 6.1.2005 that Captive Power Plant is installed inside the SISCOL premises to meet the present and future power requirements of SISCOL. Further, TNEB approved as SISCOL Captive Power Plant located in the company's premises.

68.3 Rule 4(3) of CCR 2004 provides that the cenvat credit in respect of the capital goods shall be allowed to a manufacturer, even if the capital good are acquired by him on lease, hire purchase or loan agreement, from a financing company. Rule 4(3) has a wide amplitude in so far as it would cover the cases of various types of financial arrangements for availing credit on the capital goods. It is contemplated that under this sub-rule (3) of Rule 4 would cover the cases where the ownership of the capital goods does not vest in the manufacturer until the loan is repaid. There must be an agreement for the purpose of acquiring the capital goods. The Tribunal in the case of Iljin Automotive India Ltd. Vs CCE Chennai - 2004 (175) ELT 169 (Tri.-Chennai) observed that variations/unusual features in the agreement covering the lease arrangement were not relevant for determining the eligibility of credit. It is clear that title of the property is not relevant for availing cenvat credit on capital goods.

68.4 Taking into account of overall facts and circumstances of the case and records, it is clearly evident that even prior to 31.8.2006, it was a Captive Power Plant of M/s.SISCOL as approved by TNEB under the Electricity Act. SISCOL was a sick unit. They entered into lease agreement with M/s.JSWPL, a relationship had already been developed prior to October 2005, as evident from CDR Cell report, JSWPL

balance sheet etc., for financial accommodation to get loan from UTI Bank Ltd. for setting up C.P.P. and one of the considerations is that electricity would be supplied to M/s.SISCOL, which is an integral part of manufacturing activities of M/s.SISCOL."

38.The Vikram Cement case, which was followed by the Tribunal in Hindalco Industries Company (cited supra), has been relied upon by the Assessee side, which has also been considered by the CESTAT and the relevant portion of the order of the Third Member of the CESTAT in this regard is quoted below:

"64.3. In a recent decision, the Tribunal in the case of Hindalco Industries Ltd. Vs. CCE Allahabad - 2012 (27) STR 401 (Tri.- Del.), following the decision of Hon'ble Supreme Court in the case of Vikram Cement (supra), held that service tax availed on insurance policies concerning power plant situated at a different premises, exclusive supply of power by the main plant to the assessee-manufacturing unit, cenvat credit is admissible. The relevant portion of the said decision is reproduced below:-

"11. We have considered the rival contentions and perused the record. There is no dispute of fact between the parties. Undisputedly, Renusagar Power Plant is supplying the entire power production to the appellant company. Undisputedly, the insurance policies cover only loss to the plant and none of the employees.

12.From the above submissions made on behalf of the respective parties, it is obvious that the main dispute in this case whether or not Renusagar Power Plant is captive plant of appellant company. Captive plant has not been defined in the Act or Rules. However, by the terminology used, it obviously means power generation plant supply only to the parent company. "Captive generating plant is defined under Section 2(8) of Electricity Act, 2003 which reads:

"Captive generating plant" means a power plant set up by any person to generate electricity primarily for its own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association."

This definition also states that captive generating plant means a power plant set up by any person or company to generate electricity for his own use. In the instant case, there is no dispute between the parties because power generated by Renusagar Power

Plant was exclusively supplied to the appellant company, and, therefore, in our considered view, the power plant is captive power plant of the appellant. As such, the input service used in the power plant would entitle the appellant to claim Cenvat credit because power generated in the power plant is essential for the concerned final product. In our aforesaid view, we are supported by the judgment of Hon'ble Supreme Court in the matter of Vikram Cement v. C.C.E., Indore - 2006 (197) E.L.T. 145 (S.C.) wherein while dealing with the issue of eligibility of modvat/Cenvat credit on capital goods relating to captive mine, the Supreme Court held thus -

"5. As regards the Modvat/Cenvat credit on capital goods, if the mines are captive mines so that they constitute one integrated unit together with the concerned cement factory, Modvat/Cenvat credit on capital goods will be available to the assessee. On the other hand, if the mines are not captive mines but they supply to various other cement companies of different assesseees, Modvat/Cenvat credit on capital goods used in such mines will not be available to the concerned assessee under the appropriate Modvat/Cenvat Rules. The matters are remanded to the respective original authorities for decision only on the above issue."

13. In this case, since as discussed above, the Renusagar Power Plant is a captive power plant of the Appellant's manufacturing unit, the two have to be treated as one integrated unit and therefore, the Cenvat credit of service tax paid on insurance policy for the power plant would be admissible."

39. Therefore, the legal position is that, the ownership of the goods cannot be the criteria for denying the CENVAT credit assuming that the capital goods were purchased by JSWPL. However, the fact remains that, the capital goods were purchased in the name of JSWPL with Consignee SISCOL. Moreover, the take over process had already begun in 2005 itself well before the setting up of CPP pursuant to the lease of land given by SISCOL to JSWPL. Further, to be noted that, the majority of the fund for setting up of CPP generated by JSWPL was only from SISCOL as detailed above. The actual merger of Jindal Group and SISCOL came into effect from 01.04.2007 pursuant to the order of the Bombay High Court dated 22.02.2008. If we lift the corporate veil, as has been decided by the CESTAT and urged by the learned counsel for the Assessee, the reasonable conclusion would be that, the CPP was set up not for JSWPL or any other third party

or entity, but only for SISCOL. Since the final product of SISCOL is iron and steel rod etc. and for the purpose of production of such final product, the power to be generated from the CPP since was fully utilised, as per the provisions of CENVAT Credit Rules, the SISCOL can very well take the credit for the capital goods purchased and utilised at the factory premises of SISCOL where the CPP was established.

40. The factual matrix of this case, as has been discussed above, would give us an irresistible conclusion that, the place where the CPP was set up is part and parcel of the factory premises of SISCOL originally and it has never been separated as a separate unit or entity as the water was supplied by SISCOL to CPP and the power being generated by CPP would be fully supplied and would be utilised by the SISCOL alone. The major funds for setting up of CPP also was generated only from the sources of SISCOL. Even before setting up of CPP, permission was sought for by JSWPL from the Deputy Chief Inspector of Factories, Salem on the pretext that, the SISCOL was taken over by Jindal. Further, even under the condition of Rule 2(a)(1) and (1A) as quoted above, the capital goods purchased for the purpose of setting up CPP were fully used only in the factory premises of the SISCOL and therefore, the said contention of the Revenue by the learned counsel that, under definition Clause in Rule 2(a)(1) and (1A) of the CENVAT Credit Rules, the SISCOL was not entitled to take the CENVAT credit does not hold any water, therefore it is liable to be rejected.

41. Even if the CPP is located well away from the main factory of the manufacturer of final product, the capital goods purchased and utilised for such CPP even though not in the same factory premises, even then the manufacturer can take CENVAT credit. This has been explained and amplified by the subsequently amended Rule i.e., 2(a)(1A) of the CENVAT Credit Rules, 2004. Therefore, it has been explained or clarified in Rule (1A) which is in the aid of 2(a)(1).

42. In view of the said legal as well as factual position, as has been discussed above, we are of the considered view that, the case of the Revenue that the Assessee i.e., original SISCOL who got merged with JSW Steel Limited and JSW Power Limited, did not have the authority or right to take the CENVAT credit during the relevant point of time for the capital goods used in the CPP set up in the factory premises or vicinity of the SISCOL cannot be accepted, as such stand taken by the Revenue, is unsustainable.

43.For all these reasons, we have no hesitation to hold that the order of the CESTAT, which is impugned herein, is fully justifiable and sustainable, accordingly, it does not warrant any interference from this Court.

44.In fine, both the Civil Miscellaneous Appeals are deserved to be dismissed, accordingly are dismissed and the questions of law are answered in favour of the Assessee and against the Revenue. However, there shall be no orders as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

Sgl

To

- 1.The Customs, Excise and Service
Tax Appellate Tribunal, South Zonal Bench,
Chennai.
- 2.The Commissioner of Central Excise, Salem
O/o. The Commissioner of Customs and Central Excise,
No.1, Foulk's Compound, Anna Medu,
Salem - 636 001.

+1cc to Mr.Lakshmi kumaran, Advocate SR.11692

+1cc to Mr.V.Sundareswaran, Advocate SR.11694

C.M.A.Nos.762 and 763 of 2015

VG-II (CO)
CB(16/03/2020)

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