BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 22.09.2025

CORAM:

THE HONOURABLE Ms.JUSTICE P.T.ASHA

Rev.Aplw(MD).No.11 of 2024
in W.P(MD).No.28508 of 2022

M/s.Dhanalakshmi Srinivasan Sugars Private Limited
rep., by its Executive Directorate
N.Chinnappan
Udumbian Village, Veppanthattai Taluk,
Perambalur 621212. ... Petitioner

-vs-

1.Commissioner of GST & Central Excise
No.1, Williams Road, Cantaonment
Tiruchirappalli 620001.

2.Commissioner of Central Excise and Service Tax
No.1, Williams Road, Cantonment,
Tiruchirappalli 620001. ... Respondents

Prayer: Review Application is filed under Order 47 Rule 1 r/w Section 114 of the Code of Civil Procedure to review the order passed by this Court dated 28.06.2023 in W.P(MD).No.28508 of 2022.

For Petitioner : Mr.R.Sivaraman

For Respondents : Mr.R.Gowrishankar
Senior Standing Counsel

ORDER

The above Review Application is filed seeking to review the order passed by this Court dated 28.06.2023 on the ground that the order which is the subject matter of the review had been passed on the representation of the respondents that the issue involved in the case of M/s.EID Parry (India) Limited (hereinafter referred to EID Parry) in Order-In-Original No.08/COMMR/CE/2023 was similar to the issue involved in the instant case and that the said appeal filed by the EID Parry had been held in favour of the EID Parry and the CENVAT Credit availed by them in respect of the machineries that they had used in the co-generation/captive power plant is held to be in order.

2. Both parties had earlier argued the writ petition at length and after hearing both sides when the parties had orally submitted that in a similar case, the first respondent had set aside the show cause notice this Court had passed the order dated 28.06.2023. The review applicant would submit that in the order

under review this Court has failed to deal with the review application order that the call book procedure adopted by the first respondent under the circular dated 14.12.1995 of the CBEC was not in conformity with Section 37B of the Central Excise Act. Further, the fresh disallowance of Rs.12,52,625/- under Rule 14 of the CENVAT Credit Rules, 2004, read with Section 11A(1) of the Central Excise Act 1944 on the ground that the review applicant has not submitted the User Test Certificate.

3. Mr.R.Gowrishankar, learned Senior Standing Counsel, appearing on behalf of the Revenue had justified the necessity for the production of the User Test Certificate by stating that no prejudice would be caused to the petitioner if it is so provided. Before proceeding to consider the challenge to the show cause notices and the review now filed, it is necessary to set forth the facts briefly and parties are referred to as petitioner and respondents respectively.

4. The instant writ petition has been filed to quash the Show Cause notice dated 08.12.2010 in C.No.V/Ch.17/15/62/2010-Cx.Adj. issued by the Commissioner of Central Excise and Service Tax with respect to the plant of the

petitioner herein at Udumbian Village, Perambalur. The Revenue had observed that the co-generation power plant is a turn-key project like power plants which are not excisable goods. The show cause notice has been issued on the ground that as electricity is an exempted product applying the terms of rule 6(4) of the CENVAT Credit Rules 2004, the petitioner is not entitled to CENVAT Credit and the petitioner have been asked to show cause as to why:

> i) the CENVAT credit already availed on the capital goods used in the co-generation plant for the various periods should not be demanded from them under Rule 14 of the CENVAT Credit Rule 2004;
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> ii) why interest at the appropriate rate should not be collected from them; and
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> iii) why penalty should not be imposed on them under Rule 15 of the CENVAT Credit Rule. They were called upon to make their written submission along with the documents in support thereof.

5. It is necessary to briefly touch upon the facts which have preceeded the issue of the show cause notice subject matter of this writ petition/review petition.

6. A dispute arose under the erstwhile Central Excise Rules of 1944 as to whether the petitioner is entitled to MODVAT Credit on Capital Goods used for the machineries and other items used in or in relation to the setting up of the Co-Generation Plant. Based on certain information, the officers of the Divisional Preventive Unit, Thanjavur, conducted an investigation wherein it is the Department's stand that the petitioner had take CENVAT credit of the duty paid on the machineries/components and other accessories used in the setting up of the cogeneration plant which is in violation of Rule 2(a)(A) 1 of the CENVAT Credit Rules, 2004 as the subject cogeneration plant will not be covered under the term 'capital goods' and will at best be a turnkey project which does not come under the purview of Rule 2(a)(A) 1 of the CENVAT Credit Rules, 2004. The Department failed to realize that the identical issues were held in favour of similar persons by the Hon'ble CESTAT, Chennai Bench in the case of M/s Kothari Sugars against which the Appeal filed by the Department was also dismissed by a Division Bench of this Hon'ble Court by its judgment dated 24.07.2008 reported in 2009 (239) ELT 237 (Mad.). The proposition upheld by the Court of Law is that input services credit is in connection with the setting up

of a plant and therefore shall be activities in relation the business which would be eligible for credit as per the CENVAT Credit Rules, 2004.

7. Challenging the said order, the respondent had filed a Special Leave Petition before the Hon'ble Supreme Court which was later admitted and converted into Civil Appeals Nos.2039 and 2040 of 2011. The respondents had conceded that they had not challenged the orders passed in final order no.75/2005 (which was the show cause notices for the period September 1997 to February 1998). They had contended that they had not challenged the orders in view of the fact that the 2nd proviso to Rule 57 R2 had been omitted on 31.08.1996 even prior to the demand being raised. They had also contended that the decision against filing the appeals had been taken in the light of the decision of the Tribunal made in the case of ***M/s. HEG Ltd. Vs. C.C.E.*** reported in ***2004 (177) ELT 605(T)*** confirmed on 30.09.2010 by the Division Bench of the Chhattisgarh High Court reported in ***2010 (260) E.L.T. 386 (Chhattisgarh) - Commissioner of CUS. & C.EX., Chhattisgarh***. In this case, the Bench had held that CENVAT Credit cannot be denied to the assessee therein on the ground that the electricity generated from the Captive Power Plant was being wheeled out to the sister

concern of the petitioner therein (HEG limited) and also on the ground that the assessee was not claiming CENVAT credit on the inputs used for the generation of electricity in the captive power plant. Ultimately, the respondents had withdrawn the appeals filed by them against the petitioner herein before the Hon-ble Apex Court. By reason of the above, the issue raised in these earlier show cause notices, viz., that the electricity generated was not being fully utilized captively and therefore, the petitioners were not entitled to claim CENVAT credit was held against the respondent.

8. The petitioner would submit that thereafter the show cause notice which is impugned in the above writ petition came to be issued. These show cause notices were premised on the basis that the capital goods were being utilized for generating electricity which by itself was an exempted commodity and therefore the petitioners were not entitled to CENVAT Credit.

9. The petitioner had challenged the show cause notice on the ground that by reason of the order passed in the earlier show cause notice, this issue had attained finality and the respondents cannot revive the same once again. The

petitioner has also challenged the impugned notice on the ground of delay by stating that after the issue of the show cause notice spread over the period June 2009 to March 2015 no action to date has been taken to date and therefore relying upon the provisions of Section 11 A(11) the time limit for adjudicating on the show cause notice had long expired and on this ground also the show cause notice deserves to be quashed.

10. When the writ petition had come up for admission the learned Standing Counsel for the respondents had taken time to revert with instructions and the matter had come up on several dates when both parties had made their submissions ultimately on 28.06.2023, the learned standing counsel for the respondents had come forward with the submission that the matter involved in the case of EID Parry is the very same issue involved in the present case where the Commissioner had held in favour of EID Parry. Therefore ultimately by consent, the order came to be passed.

11. However, when the petitioner had appeared before the first respondent, they were asked to produce the User Test Certificate. The bone of contention in

the review between the parties is on the ground that the production of the User Test Certificate was not made known on 28.06.2023 and therefore the order passed on consent has to be reviewed and the writ petition allowed. Before touching upon the arguments of the petitioner, it would be appropriate to first extract the arguments made by the counsel for the respondents regarding the demand for the user Certificate and the validity and relevance of the Show Cause Notice.

12. It is the case of Mr.R.Gowrishankar, learned Senior Standing Counsel appearing for the respondents/revenue that the User Test Report is relevant for considering the issue on hand only to arrive at a conclusion as to whether the machineries/components are being actually used in the captive power plant, since CENVAT Credit is applicable only in respect of those machineries that are being used in the co-generation power plant for generating electricity. That apart, it is his contention that the issue of a User Test Certificate has already been discussed and approved by the Hon’ble Supreme Court in the judgments reported 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.***

13. He would draw the attention of the Court to the judgment in **Jawahar Mills Ltd,** cited supra, wherein the Hon'ble Supreme Court had observed that "user will determine whether an item qualifies or not the requirement of clause 1A", namely, the explanation given to capital goods under Rule 57 Q of the Central Excise Rule 1944. He would also rely upon the judgment in ***Rajasthan Spinning & Weaving Mills,*** cited supra**,** wherein the Hon'ble Supreme Court had approved the User Test Certificate for arriving at a conclusion as to whether machinery would conform to the definition of capital goods in Rule 57 Q. It is also his contention that the case of EID Parry is factually similar to the case on hand and the petitioner therein has produced the User Test Certificate.

14. The learned counsel would further submit that once the UserTest certificate is produced, the orders would immediately be pronounced. He would argue that if the petitioner is confident about their eligibility for the CENVAT Credit, the submission of the User Test Certificate of a Chartered Engineer could be produced by them and their refusal gives rise to doubt about the usage of the disputed capital machineries/inputs in establishing the co-generation power plant.

It is his argument that the petitioner is entitled to CENVAT Credit only in respect of machineries/inputs that are actually put into use in the co-generation power plant. Once the petitioner is able to prove that the components are an integral plant of the co-generation power plant then the respondents would have no hesitation in allowing the CENVAT credit. He would submit that the electricity generated by itself is an exempted product and therefore the petitioner cannot seek CENVAT credit.

15. It is his contention that the demand for a User Test Certificate is not in variance with the directions of this Court on 28.06.2023. He would further submit that the impugned show cause notice has been issued only on account of the change in legal scenario which has taken place on account of the judgments in the Rajasthan Spinning & Weaving Mills and the Jawahar Mills Ltd. He would therefore submit that no exception can be taken in respect of the show cause notice. As and when the User Test Certificate is issued, the 1st respondent would follow the order passed in the case of EID Parry. He would also submit that the writ petition is by itself not maintainable as the petitioner's seek to challenge the show cause notice. The petitioner without showing cause has directly moved this

Court. He would submit that the orders relating to the earlier show cause notice is not applicable to the facts of the present show cause.

16. Per contra, the learned counsel appearing on behalf of the petitioner would submit that the contention of the respondents that the show cause notice has been issued on account of the changed legal scenario on account of the above-referred judgments of the Hon'ble Supreme Court is without any basis, since the judgment in ***Jawahar Mills Ltd*** had been pronounced as early as in the year 2001, during the pendency of the earlier proceedings before the Hon'ble Supreme Court. As regards the judgment in the ***Rajasthan Spinning & Weaving Mills,*** the same has been passed only in the year 2010. Therefore, the contention of the petitioner that there is a changed legal scenario does not hold water.

17. He would submit that the earlier show cause notice had been issued on the ground that the electricity generated was not being utilized for the petitioner's own use but that it was being sold to the Electricity Board. The matter had been challenged by the revenue right up to the Hon'ble Supreme Court where ultimately, they had given up their claim. In the appeal that has been filed before

the Hon'ble Supreme Court in C.A.Nos.2039 and 2940 of 2011, they had given up their claim in view of the deletion of the second proviso to Rule 57 R(2) of the Central Excise Rules, 1944 prior to period of demand. The impugned show cause notices now issued in respect of the very same machineries/capital goods albeit on a different ground is not maintainable.

18. He would further submit that till their appearance before the 1st respondent pursuant to orders of this Court at no point in time has the respondents raised the issue of the User Test Certificate and have never entertained doubt that the capital goods have not been used for generating electricity. This appears to be an attempt to over-reach the orders passed by this Court on 28.06.2023. He would further contend that the show cause notices by themselves are time-barred. Under Section 11A(11) of the Central Excise Rules, the adjudication should take place within a period of 3 years or latest within a period of 5 years of the issue of the show cause notice. In the case on hand to date no adjudication has taken place. It is also his contention that the judgments in the Jawahar Mills Ltd and the Rajasthan Spinning & Weaving Mills would have no relevance to the case on hand, as there was no doubt raised at any point of time by the respondents that the

components in respect of which CENVAT Credit was sought for was not actually used in the co-generation plant.

19. Heard the counsels on either side.

20. The records would show that earlier show cause notice had been issued by the respondents denying CENVAT Credit to the petitioner on the ground that the electricity that was generated was not being used captively but was being sold outside to the Tamil Nadu Electricity Board and therefore they are not entitled to a CENVAT Credit. This issue has attaining finality with the orders passed against the 1st respondent right up to the Hon'ble Supreme Court where the respondents had withdrawn the appeal, C.A.Nos.2039 to 2040 of 2011.

21. The show cause notice which is the subject matter of this writ petition had been issued in the year 2010 on the ground that the machineries/components which are used in the cogeneration plant is being used for generating electricity which is an exempted commodity and therefore the petitioners are not entitled to CENVAT Credit. This conclusion has been arrived at by applying the provisions

of Rule 6(4) of the CENVAT Credit Rules 2004 which states that CENVAT Credit cannot be allowed on capital goods which are used exclusively in the manufacture of exempted goods other than the final products which are exempted from whole of duty of Excise duty leviable. Therefore, it is clearly seen that the respondents whose earlier show cause notice has reached finality are attempting to raise a new issue which was not pleaded earlier. Their demand for User Test Certificates based on the judgements of the Hon'ble Supreme Court in the ***Jawahar Mills Ltd*** and the ***Rajasthan Spinning & Weaving Mills*** is also not maintainable for the simple reason that at no point in time either in the earlier show cause notice or in the show cause notice now impugned has the respondents raised a doubt that all the components in respect of which CENVAT Credit has been availed are not being put to use in the co-generation plant. This stand has been taken up for the first time only when the petitioner had appeared before the 1st respondent after the order of this Court dated 28.06.2023. Further the show cause notice clearly states that the components are being used to generate electricity which is an exempted good; therefore is clear that the respondents had no doubt that the equipments were being put to use for generating electricity.

22. The demand for the User Test Certificate is on the basis that the Hon'ble Supreme Court has given its stamp of approval to the production of the User Test Certificate in its judgements in the ***Jawahar Mills Ltd*** and the ***Rajasthan Spinning & Weaving Mills*** which have been referred earlier. Therefore, it is necessary to consider the dicta laid down in the above two cases.

23. In the case of ***Jawahar Mills Ltd,*** the Hon'ble Supreme Court was considering the issue of availing MODVAT Credit in respect of certain items by the manufacturers treating them as capital goods in terms of rules 57 Q of the Central Excise Rules 1944. The controversy in that case was as to whether these items would come within the ambit of capital goods as set out in Rule 57-Q. The learned Judges had observed that the definition of capital goods is wide and capital goods could be machines, machinery, plants, equipment and apparatus tools or appliances which are used for producing or processing any goods or for bringing about any change in any substances for manufacturing of the final products qualifying for availing a MODVAT Credit. In the said case, the Hon'ble Supreme Court had observed that at no point in time before the authorities had the revenue raised a case that the items do not satisfy the requirements of capital

goods within the meaning of the Rule 57-Q, on the ground of User Test and it was only before the Hon'ble Supreme Court that the same has been urged. Therefore, the learned Judges had refused to remand the matter for fresh decision. The learned Judges had simply given its concurrence to an argument advanced by the learned Additional Solicitor General that the user of a particular component would determine whether or not it qualifies the requirement of clause 1A of the definition of capital goods as given in the explanation to Section 57-Q of the Central Excise Rules. This is only a reference in the passing. In fact, a reading of the said judgement nowhere indicates that the Hon’ble Supreme Court had directed the production of a User Test Certificate.

24. This Judgement has been followed by the Supreme Court once again in the case of ***Rajasthan Spinning & Weaving Mills*** which is the other judgement on the basis of which the respondents seek to justify their demand for a User Test Certificate. In the case of ***Rajasthan Spinning & Weaving Mills*** the issue was whether the steel plates and M.S channels used for the fabrication of the chimney in a diesel generating shed would qualify to be termed as capital goods and thereby entitled to MODVAT Credit. Ultimately, the Hon’ble Supreme Court had

held that the steel plates and M.S channels fall within the definition of capital goods and therefore the petitioner was entitled to avail MODVAT Credit. In the said case the Hon'ble Supreme Court had applied the "User Test" to come to the conclusion that the steel plates and M.S channels are used for the fabrication of the chimney and would therefore fall within the purview of Serial No.5 of table attached to Rule 57Q of the Central Excise Rules, 1944. These judgments have not set a precedent that a User Test Certificate is mandatory. On the contrary, in the case of ***Jawahar Mills Ltd,*** the Hon'ble Supreme Court had observed that the plea of User Test had not been raised earlier by the respondent/ revenue and therefore, they had become disentitled to raise the plea. In the case of ***Rajasthan Spinning & Weaving Mills,*** the User Test has been used in the context of coming to the conclusion as to whether the steel plates and M.S Channel are being used for the fabrication of chimney.

25. In the case of EID Parry, the show cause notice issued has itself specifically called upon EID Parry to show cause as to how they had availed the CENVAT Credit of various capital goods, components, spare and input services apart from claiming interest and penalty. Therefore, the very show cause notices

that had been issued required EID Parry to show usage of the components in the co-generation plant whereas in the case of on hand, the show cause notices earlier issued was to show cause as to why CENVAT Credit claim availed should not be recovered since the electricity that has been generated was not being Captively used and was sold out. In the show cause notices which are the subject matter of instant writ petitions, they have been asked to show cause as to why the CENVAT Credit given to them should not be denied since the electricity that was being generated is an exempted product.

26. The show cause notice as already submitted has been issued in the year 2010 and nearly 12 years have lapsed since the issue of the show cause notice. In fact, the respondents have not moved a little finger till the writ petition was filed by the writ petitioner to adjudicate on this Show Cause Notice. Sub Section 11 of Section 11A of the Central Excise Act would read as follows:-

> *"(11) The Central Excise Officer shall determine the amount of duty of excise under Sub-section(10) -*
>
> *(a) Within six months from the date of notice where it is possible to do so, in respect of cases falling under sub-section (1);*

(b) within [two years] from the date of notice, where it is possible to do so, in respect of cases failing under sub-section (4)."

27. Therefore, in respect of the show cause notice subject matter of the writ petition, the period for adjudications came to an end much earlier. Therefore, in the light of the above discussion and on the ground of delay the show cause notice cannot be sustained. The issue of producing a User Test Certificate not having been demanded in the impugned Show Cause Notice and the order dated 28.06.2023 having been passed on the joint submissions of the counsel where once again there was no reference to the User Test Certificate, the Review petition has to be allowed and the question of CENVAT Credit having reached finality, and as the impugned Show Cause Notice is issued on a new ground with reference to the subsequent periods of the writ petition has to be allowed. The contention that the writ filed challenging a show cause notice is not maintainable cannot be countenanced on the ground that the very basis of the show cause notice is only to revive the earlier demand of the respondents on a new ground and further by reason of the provisions of Section 11A(11) of the Central Excise Act, the time for taking further action on the show cause notices has long expired.

Therefore, the Writ Petition/Review Petition is allowed and the show cause notice subject matter of the writ petition is quashed.

28. The learned counsel for the writ petitioner/review petitioner would submit that they are not pressing their argument with reference to the input credit since they have already made the payments. The Review petition and consequently the writ petition is allowed.

22.09.2025

NCC : Yes/No
Index : Yes/No
Rmk

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