

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDI GARH

1. C. E. A. No. 21 of 2016 (O&M)
DATE OF DECISION: 09.05.2017

M/s Maruti Suzuki India Limited Appellant
versus
Commissioner, Central Excise Commissionerate, Delhi -III
..... Respondent

2. C. E. A. No. 22 of 2016 (O&M)

M/s Maruti Suzuki India Limited Appellant
versus
Commissioner, Central Excise Commissionerate, Delhi -III
..... Respondent

3. C. E. A. No. 43 of 2016 (O&M)

Commissioner of Central Excise, Delhi -III Appellant
versus
M/s Maruti Suzuki India Ltd. Respondent

4. C. E. A. No. 46 of 2016 (O&M)

Commissioner of Central Excise, Delhi -III Appellant
versus
M/s Maruti Suzuki India Ltd. Respondent

CORAM: - HON'BLE MR. JUSTICE S. J. VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE ANUPINDER SINGH GREWAL

Present: Mr. Amar Partap Singh, Advocate,
for the appellant in CEA Nos. 23 and 22 of 2016,
and for the respondent in CEA Nos. 43 and 46 of 2016

Mr. Amit Goyal, Advocate for the appellant in CEA Nos. 43 and 46 of 2016 and for the respondent in CEA Nos. 21 and 22 of 2016

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S. J. VAZIFDAR, CHIEF JUSTICE:

These appeals are filed under section 35G of the Central Excise Act, 1944, against a common order dated 30.09.2015 passed by the Customs, Excise and Service Tax Appellate Tribunal.

They arise out of two show cause notices. CEA Nos. 21 and 22 of 2016 are filed by the assessee in so far as the Tribunal upheld the Department's demand for the reversal of the proportionate CENVAT credit for the normal period in respect of each of the show cause notices. The Tribunal, however, did not uphold the demand for the extended period as well as the levy of penalty. CEA Nos. 43 and 46 of 2016, also under section 35G of the Act, are filed by the Department against the order of the Tribunal in so far as the Tribunal has not permitted the reversal of the proportionate CENVAT credit for the extended period as well as the levy of penalty in respect of both the show cause notices. It is convenient, therefore, to dispose of all the appeals by this common order and judgment.

We will refer to the facts from CEA No. 21 of 2016.

2. According to the assessee, the following substantial questions of law arise: -

"i. Whether in facts & circumstances of the present case the Hon'ble Appellate Tribunal is correct in passing Final Order

No. A/53153/2015-EX[DB] dated 30.09.2015, when the entire case is covered in favour of the Appellant based on the above submissions?

- ii. Whether the impugned order is sustainable in light of the fact that the judgment (Maruti Suzuki (supra) reported at 2009 (240) ELT 641 (SC) relied upon by the Hon'ble Appellate Tribunal is no longer good law?
- iii. Whether in facts & circumstances of the present case the Hon'ble Appellate Tribunal is correct in confirming denial of Cenvat credit proportionate to service tax paid on the procurement of LPG used in generation of electricity wheeled outside to Joint Ventures/Vendors?
- iv. Whether in facts & circumstances of the present case the Hon'ble Appellate Tribunal is correct in confirming demand of Rs. 2,20,23,582/- in respect of both the units (Rs. 74,64,840/- pertaining to Gurgaon Unit and Rs. 1,45,58,742/- pertaining to Manesar Unit), when the entire case is covered in favour of the Appellant based on the above submissions?
- v. Whether in facts & circumstances of the present case the Hon'ble Appellate Tribunal is correct in disallowing Cenvat credit of Rs. 2,20,23,582/- in respect of both the units

(Rs. 74, 64, 840/- pertaining to Gurgaon Unit and Rs. 1, 45, 58, 742/- pertaining to Manesar Unit), as per the prevailing law?

- vi. Whether in facts & circumstances of the present case the Hon'ble Appellate Tribunal is correct in disallowing Cenvat credit of service tax paid on transportation of LPG, to the Appellant, when the said services are used in relation to the manufacturing of final product of the Appellant?"

The answer to question (iii) would answer the other questions. The appeals are, therefore, admitted on the substantial question of law raised in paragraph 114 (iii) in CEA-21-2016. The answer to this question will involve a consideration of and include an answer to the other questions.

3. The material facts are not in dispute. The assessee carries on business of the manufacture of motor vehicles and parts thereof, which fall under chapter 87 of the First Schedule to the Central Excise Tariff Act, 1985, at its two units in the State of Haryana. Central excise duty is payable on the final products. The assessee avails the CENVAT credit of the excise duty paid on the inputs and capital goods under the CENVAT Credit Rules, 2004.

The assessee also avails the CENVAT credit of the service tax paid on the various input services received and utilised by it for the manufacture of the final products. The assessee has an in-house captive power plant within the unit. The assessee's power requirements are met by the electricity

generated by this plant. Liquefied Natural Gas (LNG), an important raw material for the generation of power, is procured by the assessee through the pipeline from the Gas Authority of India Limited (GAIL). GAIL pays the service tax for the transport of gas through the pipeline and raises taxable invoices on the assessee including in respect of the service tax. The assessee while discharging the invoices also pays the service tax and, accordingly, avails CENVAT credit in respect thereof. A part of the electricity generated in the power plant is used by the assessee in the process involving the manufacture of its products. It was not disputed before us that LNG is a raw material for the generation of electricity and that the assessee is entitled to CENVAT credit in respect thereof to the extent it relates to the electricity used by it for the manufacture of its final products provided the other requirements are met.

4. The electricity generated in excess of the assessee's requirement is, however, sold by it to third parties including its joint ventures/vendors and such parties sell the products manufactured by them to the assessee which are used by the assessee for the manufacture of its final products. The question is whether the assessee is entitled to CENVAT credit in respect of the LNG used by it to produce electricity sold to the third parties.

We have answered the question in the negative – in favour of the Revenue but have held that the assessee is not liable either for the extended period or for penalty. All the appeals are accordingly dismissed.

5. During the internal audit of the assessee's factory premises for the year 2008-09 conducted by the Audit Branch of the Central Excise Commissionerate from 09.11.2009 to 14.12.2009, the Department raised objections to the assessee having availed CENVAT credit. The objections were communicated to the assessee who replied to the same. Two show cause notices were issued – one dated 01.03.2011 for the period February, 2006 to December, 2010, and the other dated 18.01.2012 for the period January, 2011 to November, 2011, proposing to reverse credit of Rs. 3,45,92,453/- in respect of both the units. In the show cause notices, it was alleged that the assessee wrongly availed the credit of the service tax on transport of gas (LNG); that as a part of the electricity produced was sold to joint ventures and sister concerns, the credit of duty paid on the inputs used for generation of electricity wheeled out of the assessee's factory is not available and that the assessee had suppressed various facts with an intent to avail credit wrongly and had thereby evaded the payment of duty. Accordingly, it was held that the assessee was liable to have the proportionate credit reversed and was also liable for penalty.

The Commissioner, Central Excise confirmed the demand referred to in both the show cause notices including for the extended period and also the imposition of penalty. The appellant filed two appeals before the Tribunal which were disposed of by the orders impugned in these appeals.

6. The main question, therefore, is whether the assessee is bound to reverse the proportionate credit of service tax attributable to the generation of electricity sold

by it to third parties. Even assuming that this question is answered against the assessee, two further questions arise. The first is whether the demand raised by the Department for the extended period is maintainable. The second is whether the assessee is liable for penalty.

7. CEA No.21 of 2016, as we mentioned, challenges the Tribunal's order in so far as it upheld the reversal of the proportionate CENVAT credit availed by the assessee. CEA No.22 of 2016 is similar to CEA No.21 of 2016 except that it is in respect of the other show cause notice. CEA No.43 is filed by the Department in so far as the Tribunal did not uphold the reversal of the CENVAT credit for the extended period and set aside the penalty. CEA No.46 of 2016 is similar to CEA No.43 of 2016 except that it is in respect of the other show cause notice.

8. Rules 2(k) and (l) of the CENVAT Credit Rules, 2004, read as under: -

"RULE 2. Definitions. - In these rules, unless the context otherwise requires, -

....

(k) "input" means-

- (i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other

purpose, within the factory of production;

- (ii) all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service;

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

Explanation 2. - Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer;

(1) "input service" means any service, -

- (i) used by a provider of taxable service for providing an output service, or
- (ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal,

[and includes services used in relation to] setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, [procurement of inputs], [activities relating to business], such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, [inward transportation of inputs] or capital goods and outward transportation upto the place of removal;"

9. Mr. Amit Goyal, the learned counsel appearing on behalf of the respondent-Revenue, relied strongly upon the judgment of the Supreme Court in the assessee's case reported in 2009(240) E.L.T. 641 (S.C.) - Maruti Suzuki Ltd. vs. Commissioner of Central Excise, Delhi-III. He submitted that the judgment concludes the matter in favour of the Revenue. In

our view, it does not as the issue before us was neither raised before nor dealt with by the Supreme Court.

The issue in that case was whether the Department was right in reversing the proportionate CENVAT credit to the extent of the power wheeled out by the assessee to its sister units/vendors/joint ventures. As noted in the judgment itself, the Supreme Court basically construed the word "input" as defined in rule 2(g) of CENVAT Credit Rules, 2002. It was noted in that case that the assessee claimed CENVAT credit on inputs in accordance with the 2002 Rules. The assessee had installed three gas turbines in its factory for generation of electricity. From January, 2003, the assessee used naphtha as fuel to run the gas turbines and availed CENVAT credit on such naphtha. The assessee also used diesel generation sets (DG) for generating electricity with the use of diesel for which it did not avail any credit. At the factory, the assessee had a common distribution point for electricity generated in turbines as well as the DG sets and the entire electricity generated in the turbines and DG sets was distributed through a common distribution point. About 13% of the electricity generated in the factory was distributed to the assessee's joint ventures, vendors, etc. The joint ventures, vendors, etc. to whom the electricity was wheeled out, in turn, manufactured the final products. The Supreme Court held: -

"19. The question which still remains to be answered is: whether an assessee would be entitled to claim CENVAT credit in cases where it sells electricity outside the factory to the joint ventures, vendors or gives it to the grid for distribution? In the case of Collector of Central Excise v. Rajasthan State Chemical Works reported in 1991 (55) E.L.T. 444 (S.C.) the test laid down by this Court is whether the process and the use are integrally connected. As

stated above, electricity generation is more of a process having its own economics. Applying the said test, we hold that when the electricity generation is a captive arrangement and the requirement is for carrying out the manufacturing activity, the electricity generation also forms part of the manufacturing activity and the "input" used in that electricity generation is an input used in the manufacture of final product. However, to the extent the excess electricity is cleared to the grid for distribution or to the joint ventures, vendors, and that too for a price (sale) the "process and the use test" fails. In such a case, the nexus between the process and the use gets disconnected. In such a case, it cannot be said that electricity generated is "used in or in relation to the manufacture of final product, within the factory". Therefore, to the extent of the clearance of excess electricity outside the factory to the joint ventures, vendors, grid, etc. would not be admissible for CENVAT credit as such wheeled out electricity, cleared for a price, would not fall within the definition of "input" in Rule 2(g) of the CENVAT Credit Rules, 2002. This view is also expressed in para 9 of the judgment of this Court in the case of Collector of Central Excise v. Solaris Chemtech Limited - 2007 (214) E.L.T. 481 (S.C.). Further, our view is supported by the observations of this Court in the case of Vikram Cement v. Commr. of Central Excise, Indore - 2006 (194) E.L.T. 3 (S.C.) which is quoted below: -

"It appears to us on a plain reading of the clause that the phrase 'within the factory of production' means only such generation of electricity or steam which is used within the factory would qualify as an immediate product. The utilisation of inputs in the generation of steam or electricity not being qualified by the phrase 'within the factory of production' could be outside the factory. Therefore, whatever goes into generation of electricity or steam which is used within the factory would be an input for the purposes of obtaining credit on the duty payable thereon."

20. To sum up, we hold that the definition of "input" brings within its fold, inputs used for generation of electricity or steam, provided such electricity or steam is used within the factory of production for manufacture of final products or for any other purpose. The important point to be noted is that, in the present case, excess electricity has been cleared by the assessee at the agreed rate from time to time in favour of its joint ventures, vendors, etc. for a price and has also cleared such electricity in

favour of the grid for distribution. To that extent, in our view, the assessee was not entitled to CENVAT credit. In short, assessee is entitled to credit on the eligible inputs utilised in the generation of electricity to the extent to which they are using the produced electricity within their factory (for captive consumption). They are not entitled to CENVAT credit to the extent of the excess electricity cleared at the contractual rates in favour of joint ventures, vendors, etc., which is sold at a price.

21. Before concluding, it may be clarified that on account of repeated amendments in the CENVAT Credit Rules, huge litigation in the country stands generated. In the circumstances, we are of the view that penalty is not leviable on the appellant/assessee, particularly when in large number of other cases, on account of conflict of views expressed by the various Tribunals/High Court, the assesseees have also succeeded. Hence, although M/s Maruti Suzuki Ltd. (the appellant) has failed in their civil appeals the Department will not impose penalty." (Emphasis supplied)

Paragraph 21 of the judgment would be relevant while considering the question as to whether penalty ought to be imposed or not.

The Supreme Court essentially dealt with the definition of the term "input" in rule 2(g) of the 2002 Rules and not with the term "input service" even in the 2002 Rules. That, to our mind, makes a significant difference in so far as the present case is concerned. The ratio of the judgment cannot apply to the definition of 'input service' in the 2004 Rules. One of the contentions raised was that once naphtha came to be used in the generation of electricity (in the case before us, it is LNG instead of naphtha) which was partly used for captive consumption and partly in other units of the appellant, it was not open to the Department to deny credit on the ground that a part of the electricity was cleared outside the factory to the joint ventures/vendors, etc. It was submitted that a manufacturer of a final product was allowed

to take credit of specified duty paid on any input received and there was no condition attached to it and that, therefore, it was not open to the Department to deny credit on the ground that a part of the electricity stood cleared outside the factory to the assessee's joint ventures. The contentions were rejected essentially in view of the words "within the factory of production" as is evident from the other paragraphs that we quoted. Rule 2(k) of the 2004 Rules which defines the term "input" also concludes with the words "within the factory of production". We are, however, concerned here not with the definition of "input" in Rule 2(k) but with the definition of "input service" in Rule 2(l) of the 2004 Rules. Rule 2(l) does not contain the words "within the factory of production". The judgment of the Supreme Court, therefore, is of no assistance in dealing with the contentions raised in the case before us. We must answer the question independently.

10. Before we do so, it is necessary to consider Mr. Amar Partap Singh's contention on behalf of the appellant/assessee that the judgment was overruled by a larger Bench of the Supreme Court. The contention is not well founded.

A Coordinate Bench of the Supreme Court in *Ramala Sahkari Chini Mills Ltd. vs. Commissioner of C. Ex., Meerut-I*, 2010(260) E.L.T. 321 (S.C.) opined that the interpretation of the Supreme Court in the aforesaid judgment requires consideration by a larger Bench. The matter was accordingly placed before a larger Bench. Before referring to the order of the larger Bench, it would be necessary to refer to paragraphs 12 and 16 of the referral order which read as under: -

"12. The effect of the afore-mentioned decision is that in order to fall within the ambit of the term "inputs" within the meaning of Rule 2(g) of the 2002 Rules, the goods must be (i) used in or in relation to the manufacture of the final product, whether directly and indirectly, and whether the said goods are contained in the final product or not, (ii) covered within the six categories of goods enumerated in Rule 2(g) and (iii) used within the factory of production. We are constrained to observe that while the subject goods must qualify the first and third parts of the definition, viz. the specific part and location of use, as enumerated in the said judgment, but to confine the goods only to the inclusive part of the definition that is to the six categories of goods mentioned therein may fall foul of the definition of the word "inputs" in Rule 2(g) of the said Rules. Prima facie, we are of the view that the legislature did not intend to restrict the definition of "inputs" to only those six categories.

....

16. Thus, as already stated above, having regard to the language of Rule 2(g) of the 2002 Rules, and the analysis of the aforementioned decisions, it appears that by employing the phrase "and includes", legislature did not intend to impart a restricted meaning to the definition of "inputs" and therefore, the interpretation of the said term in Maruti Suzuki Limited (supra), may require reconsideration by a Larger Bench."

11. It is clear that the opinion expressed in the order of reference was on a different aspect and was not on the aspect that falls for consideration before us or the aspect that was dealt with in paragraphs 19, 20 and 21 of the judgment in Maruti Suzuki's case, quoted earlier. The larger Bench comprising of three learned Judges disposed of the matter in Ramala Sahkari Chini Mills Ltd. vs. Commissioner of C. Ex., Meerut-I (supra) by the following order: -

"We have heard the learned counsels for the parties. We have also read and considered the order dated 29th November, 2010 of this Court referring the matters to a larger bench for a decision on the question as to whether the definition of the term "input" in Rule 2(g) of the CENVAT Credit Rules, 2002 is to be understood to include items beyond the six items mentioned specifically in Rule 2(g). The answer to the

question referred, according to us, is self-contained in the order of reference which has referred, inter alia, to a three judge bench decision of this Court in Regional Director, Employees' State Insurance Corporation vs. High Land Coffee Works of P.F.X. Saldanha and Sons & Anr. [(1991) 3 SCC 617]. There are other decisions of this Court by Coordinate Benches (three judge) on the issue which need not be adverted to specifically inasmuch as it has been clearly held in Regional Director, Employees' State Insurance Corporation (supra) that the word "include" in the statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension, and not with restriction. We answer the question referred to us in the above manner leaving it for the appropriate bench of this Court to decide on the factual parameters of the case(s) and the entitlement of the assessee(s) to CENVAT credit in the facts of each case."

The decision in Maruti Suzuki's case (supra) was overruled, therefore, only to the extent that it dealt with the ambit of the word "include" in rule 2(g). The Supreme Court did not overrule the judgment in Maruti Suzuki's case in its entirety. The observations in paragraphs 19 and 20 of the judgment of the Supreme Court, therefore, cannot be said to have been overruled.

12. We accordingly proceed to deal with the question on principle.

13. The case before us requires a consideration of rule 2(l)(ii) of the 2004 Rules. CENVAT credit is claimed in respect of the transport of LNG from GAIL to the assessee. "Input service" includes services used in relation to inward transport of inputs. The transportation of LNG by GAIL to the assessee is covered by the definition of input service as an item, provided however, it meets with the other requirements. The mere use of an input service does not include it within the ambit of the definition of "input service" in rule 2(l).

For a service to fall within the ambit of the definition of "input service" in rule 2(1)(ii), the service must be used by the manufacturer. The use of the service whether direct or indirect must be by the manufacturer/assessee, who claims the CENVAT credit. Further, the use by such manufacturer, i.e. the assessee, whether direct or indirect, must be in or in relation to the manufacture of the final product. Moreover, this final product must be of the manufacturer concerned i.e. the assessee. Further still, the clearance of such final product must be from the place of removal. The place of removal is the place in relation to the assessee. Thus, the service must be used by the manufacturer/assessee in or in relation to the manufacture of the assessee's final product and clearance of the final product from the place of removal.

14. The entire LNG that is transported and in respect of which service tax is paid is not used by the manufacturer i.e. the assessee in relation to the manufacture of the final product. A part of the LNG is used for the generation of electricity which is wheeled out to the assessee's vendors/joint ventures, etc. It is such electricity that we are concerned with. The final products of the assessee are the vehicles and not the electricity generated by the power plant. The power plant generates electricity all of which is not used by the assessee for the manufacture of the vehicles. A part of electricity generated is sold by the assessee to the third parties. Thus, although a part of the LNG which is transported to the assessee is used by the assessee, it is not used in or in relation to the manufacture of the assessee's final product, namely, vehicles but for generating electricity which

is not a final product. Moreover, such LNG is not used for the manufacture of a final product clearance whereof is from the place of removal.

15. It was contended that the electricity that was wheeled out was used by the third parties for the purpose of manufacturing components for the assessee and these components were used by the assessee for the manufacture of its final product. The assessee's case, therefore, is this. Service tax was paid in respect of inward transportation of LNG by GAIL through its pipeline to the assessee; the LNG was used for the production of electricity; the electricity was wheeled out to third parties; the third parties used the electricity to manufacture final products for sale to the assessee and the assessee used these final products purchased from the third parties in the manufacture of its final product. Accordingly, the input service that was originally routed to the assessee found its way back to the assessee. This, according to the appellant, constitutes indirect use of the LNG by it.

16. As we mentioned earlier, the use of the input service must be by the manufacturer who claims the CENVAT credit i.e. the assessee. The use may be direct or indirect. It must, however, be used by the manufacturer concerned. It cannot be the use of another unless such use is for or on behalf of the assessee. The definition of "input service" in rule 2(1)(ii) expressly states that "input service" means any service used by the manufacturer i.e. the assessee whether directly or indirectly in or in relation to the manufacture of the final product and clearance of the final product from the

place of removal. Thus, the use of the input service must be by the manufacturer i.e. the assessee. The words "whether directly or indirectly" cannot be extended to the use of such input services by third parties in circumstances such as those in the present case. In this case, the input services (transport of LNG by GAIL to the assessee) constituted components of products sold by the assessee to the third parties (electricity) which the third parties used in their own right for the manufacture of their final products which in turn they sold to the assessee and the assessee used for the manufacture of its final product.

17. Moreover, the service of inward transportation of the LNG used by the assessee was not in relation to the manufacture of the final product or the clearance of the final product from the place of removal so far as it relates to the electricity that was wheeled out. The service of inward transportation of LNG would be an input service if that LNG was used in the production of electricity to the extent that the electricity was used by the assessee itself for manufacturing its final product. The electricity that was wheeled out to the third parties was, obviously, not used in the manufacture of the assessee's final product. Therefore on the definition of the words "input service" itself, the LNG, to the extent used for production of electricity wheeled out to third parties, was not an input and the service of inward transportation thereof was not an input service.

18. Even on facts, the appellant cannot succeed. There is nothing on record to establish that it was the electricity

wheeled out that was used by the third parties to manufacture the products used by the appellant in turn for the manufacture of its final product. Electricity like money would lose its identity once it is used with electricity obtained from other sources. The question of apportionment would, however, arise for instance if some nexus is established between the final product of the third party sold to the assessee and the electricity sold to it by the assessee. A case to this effect is not established.

19. The order of the Tribunal also records that the electricity is supplied by the appellant to the third parties for consideration. There is no link between the supply of electricity by the assessee to the third parties and the supply by the third parties of components of the assessee's final product. The third parties are not job workers. If the third parties were the assessee's job workers, it may have been a different thing altogether. The third parties are, admittedly, not the job workers but independent entities. These third parties are not agents of the assessee either. They were separate legal entities who purchased the electricity that was wheeled out from the assessee. The third parties were entitled to utilize the electricity in such manner as they desired without any restriction. Even assuming that the third parties were under an obligation to supply their products to the assessee, it would make no difference. They could have used that electricity or electricity from any other source for the manufacture of their final product.

20. The electricity wheeled out to the third parties, we will presume, is used by the third parties for the manufacture of products which, in turn, are used for the manufacture of the assessee's final product. However, electricity for the manufacture of the third parties' products cannot be said to be used either by the assessee or for the manufacture of the assessee's final product. As we held earlier, the use of the input service must be by and of the assessee. The third parties are bound to supply a part of their products to the assessee. There is, however, no material on record that establishes an obligation on the part of the third parties to supply the products to the assessee in consideration of the assessee selling the electricity to them.

21. Even the copy of one such agreement furnished across the bar does not support the assessee's case. Mr. Amar Partap Singh produced a copy of the Joint Venture Agreement dated 17.09.2007 between the assessee and one of its joint venture companies and relied upon clause 5.2 thereof which reads as under: -

"JOINT VENTURE AGREEMENT

.....

5.2 The sale of Products would be made first and foremost to MARUTI, SUZUKI and Associates. After the production requirements of MARUTI, SUZUKI, Associates, as the case may be, are fully met to their satisfaction, the Company may supply the Products to any other customer. The supply of the Products to any other customer including exports would be jointly and mutually discussed, evaluated and decided on case to case basis between the Parties."

Clause 5.2 does not make it compulsory for the third parties to supply all their goods to the assessee. After

meeting the production requirements of the assessee, the third parties were free to supply their products to any other customer. The assessee, in any event, has not produced any material that provides the nexus between the electricity supplied by it and the electricity utilized by the third parties for the production of the goods which were ultimately supplied to the assessee.

22. The assessee having sold the electricity to the third parties lost all control or rights in respect thereof. They supplied the electricity and were paid for the same. The assessee could not be said, therefore, to have used the same either directly or even indirectly. Even if the electricity was by chance used for the manufacture of the final product sold by the third parties to the assessee, it would make no difference for it cannot be said that the same was used by the assessee itself.

23. The judgment of a Division Bench of the Bombay High court in Coca Cola India Pvt. Ltd. Vs. Commissioner of Central Excise, Pune-III reported in 2009 (15) S.T.R. 657 is of no assistance. Before referring to paragraph 39 of the judgment, which was relied upon by Mr. Amar Partap Singh, the learned counsel appearing on behalf of the appellant, it is necessary to note the facts of that case. The appellant therein manufactured non alcoholic beverage bases also known as concentrate. The concentrate was sold under the respective brand names, such as, Coca Cola and Fanta to bottling companies who, in turn, sold the aerated beverages manufactured from the concentrate to distributors and the

distributors, in turn, sold the same to retailers from whom the consumers purchased the products. The advertisement and sales promotion activities including market research were undertaken and paid by the appellant. The appellant was the licensee. It is important to note that it was not disputed that the advertisement expenses incurred by the appellant formed part of the sale price of the concentrate on which duty had been paid. It was contended on behalf of the Revenue that the advertisement and marketing were not connected with the manufacture of the concentrate but with the sale of aerated water manufactured out of the concentrate by the bottler and not by the appellant. The Division Bench held that the advertisement of the soft drink enhanced the marketability of the concentrate. The Division Bench further observed that the Revenue had always been collecting excise duty on the full sale price charged by the concentrate manufacturer from the bottler and had never disputed that the advertisement of aerated water is an activity related to the manufacture and sale of concentrate and that the cost of advertisement is relatable to aerated water which forms a part of the value of the concentrate. It is important to note paragraphs 21 and 22 of the judgment which read as under: -

"21. That Advertisement of soft drink enhances the marketability of the Concentrate in our opinion is no longer res intergra as it has been recognized in the following judgments:

Pepsi Foods Ltd. vs. Collector - 1996 (82) ELT 33 (T) where the Supreme Court affirmed the view taken in Collector vs. Pepsi Foods Ltd. - 1997 (91) ELT 544 and in Pepsi Foods Limited Vs. CCE, 2003 (158) ILT 552 (SC) where the royalty paid by the bottler to the assessee was held to be includable in assessable value. The Respondents on this premise have always been collecting excise duty on

full sale price charged by concentrate manufacturer from the bottler. Revenue has never disputed that advertisement of aerated water is an activity related to manufacture and sale of concentrate and that cost of advertisement is relatable to aerated water which forms part of value of concentrate in the hands of concentrate manufacturer and hence should be included in the sale price of concentrate charged by the concentrate manufacturer. On the other hand, since advertisement of aerated water promoted marketability of concentrate, manufacturers of concentrate are subject to excise duty, in terms of principles laid down in Bombay Tyre International case, without excluding it from the sale price of concentrate charged by the concentrate manufacturer.

22. In Philips India Ltd vs. Commissioner of Customs and Excise [1997 (91) ELT 540] the Hon'ble Supreme Court held that where the cost of advertisements was borne half and half by the manufacturer and dealer, no deduction is permissible because the advertisement may benefit in equal degree, the manufacturer and dealer. The Hon'ble Court further held in that legitimate business consideration must be kept in mind in adjudicating such matters under Central Excise."

It is clear, therefore, that the cost of advertisement was factored into the price of the concentrate charged by the appellant i.e. manufacturer to the bottler. Advertising expenses were covered under the definition of "input service" in rule 2(1)(ii). It is in this context that paragraph 39 of the judgment relied upon by Mr. Amar Partap Singh is to be considered. Paragraph 39 reads as under: -

"39. The definition of input service which has been reproduced earlier, can be effectively divided into the following five categories, in so far as a manufacturer is concerned:

- (i) Any service used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products
- (ii) Any service used by the manufacturer whether directly or indirectly, in or in relation to clearance of final products from the place of removal

- (iii) Services used in relation to setting up, modernization, renovation or repairs of a factory, or an office relating to such factory,
- (iv) Services used in relation to advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs,
- (v) Services used in relation to activities relating to business and outward transportation upto the place of removal ;

Each limb of the definition of input service can be considered as an independent benefit or concession or exemption. If an assessee can satisfy any one of the limbs of the above benefit, exemption or concession, then credit of the input service would be available. This would be so even if the assessee does not satisfy other limb/limbs of the above definition. To illustrate, input services used in relation to setting up, modernization, renovation or repairs of a factory will be allowed as credit, even if they are assumed as not an activity relating to business as long as they are associated directly or indirectly in relation to manufacture of final products and transportation of final products upto the place of removal. This would follow from the observation of the Supreme Court in Kerala State Co-operative Marketing Federation Ltd. and Ors. Vs. Commissioner of Income-tax - 1998 (5) SCC 48, which is as under:

7. We may notice that the provision is introduced with a view to encouraging and promoting growth of co-operative sector in the economic life of the country and in pursuance of the declared policy of the Government. The correct way of reading the different heads of exemption enumerated in the section would be to treat each as a separate and distinct head of exemption. Whenever a question arises as to whether any particular category of an income of a co-operative society is exempt from tax what has to be seen is whether income fell within any of the several heads of exemption. If it fell within any one head of exemption, it would be free from tax notwithstanding that the conditions of another head of exemption are not satisfied and such income is not free from tax under that head of exemption. [Emphasis supplied]"

The judgment, therefore, is not relevant to the issue before us.

24. The judgment of a Division Bench of the Bombay High Court in Commissioner of C. Ex., Nagpur vs. Ultratech Cement Ltd., 2010 (260) E.L.T. 369 (Bom.) is also of no assistance in deciding the issue before us. The question there was whether the assessee was entitled to avail the CENVAT credit on outdoor 'catering services' provided in its factory for the employees as an input service credit. The question did not relate to the issue as to whether the goods in respect of which the service was availed could be said to have been manufactured. For the same reason, the judgment in Commissioner of C. Ex., Nagpur vs. Manikgarh Cement, 2010(20) S.T.R. 456 (Bom.), relied upon by the respondents, is not relevant. In that case, the question was whether the service tax credit on services of repair, maintenance and civil constructions used in the residential colony of the assessee was admissible.

25. The question of law is, therefore, answered in favour of the Revenue and against the assessee.

26. This brings us to CEA Nos.43 and 46 of 2016. The Tribunal held in favour of the assessee on the issue of penalty and on the issue as to whether the respondent was entitled to avail the extended period of limitation. The Tribunal held: -

"8. The Hon'ble Supreme Court observed in the appellants own case that in view of repeated amendments in Cenvat Credit Rules resulting in huge amount of litigation, no penalty can be imposed on the appellant. We find in the present case the proceedings have been initiated only after the decision by the Hon'ble Supreme Court in appellants case. This much has been stated in the notice as well as the impugned order. Hence, we find invoking extended period of demand alleging fraud and suppression etc on the part

of the appellant is not sustainable. Accordingly we hold that while the demand of reversal of proportionate credit is sustainable for the normal period the demand for extended period along with penalty is to be set aside. We order accordingly.

27. We are entirely in agreement with the Tribunal that there was no fraud or suppression on the part of the appellant. These are involved and complex questions of law. It is not the case of the Revenue that the appellant withheld any information for any mala fide reasons. We are, therefore, not inclined to interfere with the exercise of discretion by the Tribunal. A substantial question of law does not arise in these appeals.

28. All the four appeals are, therefore, dismissed.

(S. J. VAZIFDAR)
CHIEF JUSTICE

09.05.2017
parkash*

(ANUPINDER SINGH GREWAL)
JUDGE

Note: - (i) Whether non-speaking/reasoned: Reasoned (ii) Whether reportable : YES
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