CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL AHMEDABAD

REGIONAL BENCH, COURT NO. 2

EXCISE APPEAL NO. 10801 OF 2023

(Arising out of OIA No. VAD-EXCUS-002-APP-88-2023-24 Dated-14/06/2023 passed by Commissioner CGST & Central Excise (Appeals)-Vadodara)

POLYCHEM INDUSTRIES **Appellant**
C-387, 388, 389 Aargama, Chemical Industrial Estate
Behind Vilayat Industrial Estate Vagra, Bharuch,
Gujarat-392140

vs.

COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX-
CGST & CENTRAL EXCISE VADODARA II **Respondent**
GST Bhawan, Arkee Garba Ground, Nr. Telephone Exchange,
Subhanpura, Vadodara,
Gujarat-390023

Appearance:
Shri Manish Barot, Consultant for the Appellant
Shri Himanshu Nachane, Superintendent (AR) for the Respondent

CORAM:
HON'BLE Dr. AJAYA KRISHNA VISHVESHA, MEMBER (JUDICIAL)

<u>FINAL ORDER NO. 10463/2026</u>

Date of Hearing : 07/04/2026
Date of Decision : 27/07/2026

<u>Dr. AJAYA KRISHNA VISHVESHA</u>

This appeal is directed against the impugned order passed by the learned Commissioner (Appeals) Central Excise and GST Vadodara dated 14.06.2023 through which the learned Commissioner upheld the demand of Cenvat Credit of Rs. 32,84,099/- under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 37 (2) and Section 11A (4) of the Central Excise Act, 1944 and Section 174 of the CGST Act, 2017. The learned Commissioner also upheld the penalty of Rs. 32,84,099/- under Rule 15 (2) of the Cenvat Credit Rules, 2004 read with Section 37(2) and Section 11AC(1)(c) of the Central Excise Act, 1944 read with Section 174 of the CGST Act, 2017.

1.1 The facts of the case in brief are that during the course of audit of Service Tax records under EA-2000 it was observed by the department that the appellant has availed Cenvat Credit of Service Tax amounting to Rs. 32,84,099/- from January-2017 to June-2017 and the same has been transferred in TRAN-1 returns. It was further observed that the appellant has availed Service Tax Credit of Rs. 32,84,099/- on setting up services used for fabrication, erection of pipeline, welding, cutting, flange fixing and other services prior to commercial production which is not covered under the definition of Input Services "under Rule 2(l) of the Cenvat Credit Rules, 2004. The department was of the view that the services availed have no relation or nexus with the manufacturing of the finished goods and also w.e.f. 01.04.2011, vide Notification No. 03/2011 C.E. (NT) dated 01.03.2011, the phrases 'setting up' and 'activities relating to business' have been removed from the inclusive part of the definition and are not covered under the definition of 'input service' as provided under Rule 2(l) of the Cenvat Credit Rules, 2004.

1.2 In view of the above observations, a Show Cause Notice dated 08.01.2022 was issued to the appellant which was adjudicated by the Assistant Commissioner, CGST Division-7 Bharuch, Vadodara-II Commissionerate vide Order-in-Original dated 27.12.2022. He confirmed the recovery of Cenvat Credit amounting to Rs. 32,84,099/- from noticee under Rule 14 of the Cenvat Credit Rules, 2004 along with interest. He also imposed penalty of Rs. 32,84,099/- upon the appellant. Feeling aggrieved from the Order-in-Original dated 27.12.2022, the assessee preferred appeal before the learned Commissioner (Appeals) who upheld the order passed by the Adjudicating Authority and rejected the appeal. Feeling aggrieved from the impugned order dated 14.06.2023 passed by the learned Commissioner (Appeals), the present appeal has been preferred before this Tribunal.

2. The learned Counsel for the appellant submitted that the services availed for 'setting up' of the factory is covered under the main part of the definition of 'input service' and unless it is specifically included under the

exclusive part of the definition, the appellant is entitled to Cenvat Credit on the input services used. The learned Counsel for the appellant supported his argument with the law laid down by Hon'ble Chhattisgarh High Court in the case of **M/s. Vimal Infrastructure India Pvt Ltd** reported in 2018 (03) LCX 0014. The learned Counsel for the appellant also supported his argument by the order passed by CESTAT Hyderabad in **Pepsico India Holdings (Pvt) Ltd** in Service Tax Appeal No. 30122 of 2018.

2.1 The learned Counsel for the appellant also submitted that **Tata Steel Limited** vs. **Commissioner of CGST & Central Excise** reported at 2025 (12) LCX 0256, CESTAT Kolkata has held that the appellant is entitled to take Cenvat Credit on the services which have been used by them for setting up of its factory post 01.04.2011 and in these terms, the impugned order is set aside and appeal is allowed with consequential relief if any.

2.2 The learned Counsel for the appellant also cited the law laid down in **NU-Vista Limited** vs. **Commissioner of Service Tax** reported at 2025 (03) LCX 0572 in which it has been held by the CESTAT Kolkata that regarding the demand of Service Tax of Rs. 57,68,603/-, we observe that this amount has been confirmed in the impugned order by denying the Cenvat Credit availed by the appellant on the input services used for setting up of cement plant on the ground that the words ' setting up' have been removed from the definition of 'input service' w.e.f. 01.04.2011. However, we find that the appellant has not availed credit in respect of civil works undertaken by them for setting up of the plant. They have only availed the credit in respect of services such as banking and other financial services, management, maintenance and repair services, rent-a-cab services, GTA services, legal consultancy services, erection, commissioning and installation services, etc. which are all 'input services' in terms of Rule 2(l) of the Cenvat Credit Rules, 2004. Thus, we find that the appellant is eligible to avail Cenvat Credit in respect of the above mentioned services. The Tribunal allowed the appeal and set aside the demand.

2.3 The learned Counsel for the appellant also submitted that extended period has been wrongly invoked by the Revenue and the demand is time barred as there is no suppression and wilful mis-statement on the part of the appellant. He has supported his argument by the law laid down in Jamshedpur Continuous Annealing and Processing Company Pvt Ltd vs. Commissioner reported in 2025 (10) LCX388 in which it was held that so far as the main issue about eligibility of Cenvat Credit for the Service Tax paid by the service providers in respect of setting up of a unit, the issue is no more *res-integra*. It has also been held that the issue as to whether the Cenvat is eligible or not has been contentious issue going up to various Tribunals and High Courts wherein the interpretation of the assessee has been found to be correct. In such a situation, the issue is that of interpretation, rather than any intentional evasion of Service Tax by the appellant. Therefore, we find that the Revenue has not made out any case whatsoever on account of suppression on the part of the appellant. We set aside the confirmed demand for the extended period on account of time bar. The appeal stands allowed both on merits and on account of limitation. The appellant would be eligible for consequential relief if any as per law.

3. The learned AR reiterated the impugned order passed by the learned Commissioner and submitted that in the Order-in-Original, it has been stated by the Adjudicating Authority that the noticee admits that they have availed the Cenvat Credit on the services viz. fabrication, erection of pipelines, welding, cutting, flange fixing for setting up the factory before commencement of commercial production. The said services were not covered either in the inclusive or exclusive part of the definition of 'input service' of Cenvat Credit Rules even before or after 01.04.2011. These were included in the main part of the definition of "input service" in as much as these were related to the

manufacture of the final product because without setting up of the factory, it was not possible to manufacture the final product.

3.1 The learned AR has also submitted that the Adjudicating Authority has stated in his order that prior to 01.04.2011, the phrase "and includes services used in relation to setting up, renovation or repair of a factory", was specifically mentioned. However, after 01.04.2011, it was substituted with words "and includes services used in relation to modernization, renovation or repairs of a factory". In view of this fact, the intention of the government was very clear that the Cenvat Credit on setting up of the factory, prior to the commencement of the commercial production, would not be allowed to the assessee. Hence, the contention of the noticee that "the change in definition of the input service after 01.04.2011 is not impactable to them", is not sustainable.

3.2 The learned AR submitted that the impugned order has been passed by the learned Commissioner in accordance with Rule 3(l) of the Cenvat Credit Rules, 2004, therefore, the impugned order may be upheld and the appeal may be rejected.

4. I have heard the learned Counsel for the appellant and the learned AR for the department and perused the records.

4.1 The issue to be decided by the Tribunal is whether the appellant is eligible for Cenvat Credit on setting up services used for fabrication, erection of pipelines, welding, cutting, flange fixing and other services prior to commencement of commercial production in terms of Rule 2(l) of Cenvat Credit Rules, 2004?

4.2 Admitted facts of this case are that the appellant has availed Service Tax credit of Rs. 32,82,099/-, on setting up services used for fabrication, erection of pipeline, welding, cutting, flange fixing and other services prior to commercial production in the factory. The learned Adjudicating Authority and the learned Commissioner arrived at the conclusion that the above mentioned 'setting up services' are not covered under the definition of 'input services' under Rule 2(l) of the Cenvat Credit Rules, 2004. The above mentioned Authorities were also of the view that the services availed have no relation or nexus with the manufacturing of the finished goods and also w.e.f. 01.04.2011 vide Notification No. 03/2011 C.E. (NT) dated 01.03.2011 the phrases setting up' and 'activities relating to business' have been removed from the inclusive part of the definition and are not covered under the definition of 'input service' as provided under Rule 2 (l) of the Cenvat Credit Rules, 2004. The stand of the appellant is that the services availed for 'setting up' of the factory is covered under the main part of the definition of 'input services' and unless it is specifically excluded under the exclusion part of the definition, the appellant is entitled to Cenvat Credit on the 'input services' used.

4.3 To appreciate the issue involved in correct perfective, it will be proper to examine the definition of the phrase 'input services' provided under Rule 2 (l) of the Cenvat Credit Rules, 2004. The definition of the phrase "input service" is being reproduced below for ready reference.

> *"2(l) "input service" means*
> *(ii) any service used by a provider of output service for providing an output service; or*
>
> *(iii) any service used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal, and includes services used in relation to 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, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal: but excludes*

(A) service portion in the execution of a works contract and construction services including service listed under clause (b) of section 66E of the Finance Act (hereinafter referred as specified services) in so far as they are used for-

(a) Construction or execution of works contract of a building or a civil structure or a part thereof, or

(b) laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified services; or:

4.4 From the perusal of the definition of the phrase 'input service' as mentioned above, it is clear that the definition excludes "services portion" in construction services in so far as they are used for construction of a building or a civil structure or a part thereof. In the present case, the services under dispute are fabrication, erection of pipelines, welding, cutting, flange fixing and other services. Therefore, the question is whether these services are excluded from the definition of 'input services' in terms of Rule 2(l) of the Cenvat Credit Rules, 2004.

4.5 In **Commissioner of Central Excise, Raipur** vs. **Vimla Infrastructure Pvt Ltd** reported at 2018 (03) LCX 14, Hon'ble Chhattisgarh High Court has held as follows:-

"9. The respondent was issued show cause notice by the Commissioner on the ground that it has wrongly availed and utilized Cenvat credit and inadmissible Input Service Tax in Central Excise duty paid on Inputs and Capital Goods which have been used for construction of Railway Siding as the goods which were neither the Input Service nor the inputs and Capital Goods for providing Cargo Handing Services. The Commissioner eventually concluded that the company provide many logistic services viz., Cargo Handling Services" without the facility of private Railway Siding Hence, it become essential for them to set/construct their own private Railway Siding to facilitate smooth loading, unloading of materials like Coal, Iron Ore, Manganese Ore, Bauxite etc. Hence, "inputs" and "input services" used in setting up the Railway Private Siding, which is "Handling Services" eligible for credit under the Rules, 2004. This view of the Commissioner has been affirmed by the Tribunal.

10. Reverting back to the definition and the nature of construction activity carried on by the respondent company for erecting the facility of Cargo Handling Services" it is to be kept in mind that the "Inputs have been used for *providing output services which is taxable, therefore, by erecting the Railway Siding, the respondent is providing a taxable service for providing an output service, therefore, it is entitled to avail credit under Rules, 2004.*

11. In taking the above view, we are fortified by the law laid down by the Division Bench of Andhra Pradesh High Court in the matter of Commissioner of Central Excise, Visakhapatnam-!! v. Sal Sahmita Storage (P) Limited, 2011 (270) E.L.T. 33 (A.P.); 2011 (23) S.T.R. 341 (A.P.), wherein it has been held, with reference to definition of Input in Rule 2(k) that all the goods used in relation to manufacture of final product or for any other purpose used by a provider of taxable service for providing output service are eligible for Cenvat credit.

12. Yet again, the Gujarat High Court in the matter of Mudra Ports & Special Economic Zone Limited v. CCE & Cus. -2015 (39) S.T.R. 726 (Guj.) has taken the same view by allowing Cenvat credit to the company who has constructed Jetty within the Port Area for providing Port Services to the Assessee Company.

13. For the above stated reasons, we answer the substantial question of law against the Revenue and in favour of the Assessee Company.

14. Consequently, the appeal fails and is hereby dismissed.”

4.6 In **Pepsico India Holdings Pvt Ltd** vs. **Commissioner of Central Tax,** Service Tax Appeal No. 30122 of 2018- CESTAT, Hyderabad held as follows:-

16. We find that the definition of 'Input service' prior to 1.4.2011 had two parts- a main part of the definition and an inclusive part of the definition. This inclusive part specifically included the services availed for setting up the factory. After 1.4.2011, it has three parts a main part, an inclusive part and an exclusive part. The services used for setting up the factory are neither in the inclusive part of the definition nor the exclusive part of the definition. Therefore, such services were neither specifically included nor were specifically excluded.

17. It takes us to the main part of the definition which must be examined. If it is wide enough to cover the services in question, CENVAT credit will be available, otherwise it will not be available. The main part includes "services used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal. The term manufacture is not defined in the Rules.

18. The definitions as per rule 2 of CCR 2004 reads as follows:

RULE 2. Definitions. (1) In these rules, unless the context otherwise requires,

(a)

(b)....

(l)

(2) The words and expressions used in these rules and not defined but defined in the Excise Act shall have the meanings respectively assigned to them in the Excise Act.

19. Since the term 'manufacture' is not defined in the Rules, the definition under the Central Excise Act, 1944 must be considered. Section 2(f) of the Central Excise Act defines 'manufacture' as follows:

2(f) manufacture" includes any process

i) Incidental or ancillary to the completion of manufactured product,

ii) which is specified in relation to any goods in the Section or Chapter notes of the Fourth Schedule as amounting to manufacture; or

iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers, including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer;

the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account.

20. Thus, the term 'manufacture' itself is very wide and includes anything incidental or ancillary to manufacture.

21. For a service to qualify as "Input service" under CENVAT Credit Rules, 2004 post 2011, the service in question need not be covered even by the very wide definition of manufacture under section 2(f) of the Central Excise Act. Any service which is used not only in manufacture but also 'in relation to' manufacture will also qualify as input service. The scope of input service is further enlarged with the expression whether directly or indirectly used in the definition of input service. Thus, there are:

a) Actual manufacture;

b) Processes incidental or ancillary to manufacture which are also manufacture;

c) Activities directly in relation to manufacture (i.e., in relation to 'a' and 'b' above);
d) Activities indirectly in relation to manufacture (i.e., in relation to 'a' and 'b' above);

*22. All four of the above qualify as input service as per Rule 2(1) (ii) as applicable post 1.4.2011. Although setting up the factory is not manufacture in itself, it is an activity directly in relation to manufacture. Without setting up the factory, there cannot be any manufacture. Services used in setting up the factory are, therefore, unambiguously covered as 'input services' under Rule 2 (1) (ii) of the CENVAT Credit Rules, 2004 as they stood during the relevant period (post 1.4.2011). The mere fact that it is again not mentioned in the inclusive part of the definition makes no difference. Once it is covered in the main part of the definition of input service, unless it is specifically excluded under the exclusion part of the definition, the appellant is entitled to CENVAT credit on the input services used. This Bench has already taken this view in **Kellogs**. Similar views have been taken by the other Benches in the other cases mentioned above.*

23. In view of the above, the impugned orders denying CENVAT credit and ordering its recovery along with interest and imposing penalties cannot be sustained. The impugned orders are set aside and the appeals are allowed with consequential reliefs, if any."

4.7 In **Bharat Coal Limited** vs. **Commissioner of Central Excise and Service Tax, Ranchi, CESTAT Kolkata** has held as follows:-

"7. We thus find that services used for setting up of the factory even after 01.04.2011 would be eligible for credit. The Ld. Commissioner has allowed credit on certain invoices assuming the same to be pure services and disallowed the credit on remaining portion by considering the same to be in the nature of civil portion. We find that this Tribunal has been consistently applying the user test to decide the credit eligibility as laid down by the Hon'ble Supreme Court. The Tribunal in BS Sponge Pvt Ltd vs. CCE, Raipur (Final Order no. 50231/2019 dated 08.02.2019) while considering the "user test principle" as laid down by the Supreme Court observed as follows:-

"5. After hearing both the parties and keeping in view the various Orders at each stage of this litigation and the case law as relied upon by the appellant, I am of the opinion that the issue has been dealt by various adjudicating authorities and it has now been clearly settled that structures like Ms angle, MS channels. MA joists, chequered plates or similar steel structures used in fabrication of supporting structures if are merely the civil structures for supporting the machines/ apparatus used

in manufacture of final product stands excluded from the definition of capital goods. But if such structures satisfies the "user test principle as appreciated by Hon'ble Apex Court in Rajasthan Spinning & Weaving Mills Ltd. (supra) case all these structural items are as good as spare parts of the capital goods as mentioned in Clause 3 of Section 2(a) of Cenvat Credit Rules 2004 and thus are eligible inputs/capital goods for availing credit. The final product in the present case is the sponge iron for which the kiln, burning chamber, conveyor gallery, fabrication of walkways of platform, staircases, shed, etc. are the essential machineries. As per appellant, none of these machinery can out to use unless and until the impugned structure is there to support the said machinery as the machinery cannot be held suspended in the air. Thus, these structures are not merely the structural support to these machines but very much become the integral part of these machines manufacturing the final product.

The perusal of earlier Order-in-Original reflects that the Department had initially observed that, all the machines in sponge iron plant can become operational or can function only when the design and layout parameters are met. Such design and layout parameters specify the location, height, angle of inclination of the machines and alignment with other related machinery so that the desired result are obtained from the machinery. The kilo cooler hopper or material handling system in a sponge iron plant cannot be suspended in air. Only the structural support for all these machines can facilitate the desired location, height, angle of inclination of the machine. In the absence of the structural support neither the machine can be installed nor it can function nor it can be aligned with other related machinery to produce desired results."...

8. We also find that the user test principles have also been recently followed by the Hon'ble Madras High Court in the case of The Ramco Cements Limited(in Order dated 11.10.2017) wherein the Hon'ble High Court followed its earlier decision dated 10.07.2017 in Thiru Arooran Sugars vs. CESTAT, Chennai. While placing reliance on the Hon'ble Supreme Court's decision in Jawahar Mills Limited's case, the High Court reiterated the legal position to hold that steel and cement used for the purpose of construction of plant comprising of concrete foundations, concrete silos for storing raw materials, clinker and cement, heater tower structure, etc cannot be said to have been used for civil construction but for the construction which are absolutely necessary for establishing a manufacturing unit. Further, the Hon'ble Chhattisgarh High Court in the case of CCE vs. Vimla Infrastructure India (P) Ltd (Supra), while taking note of various other High Court decisions, has ruled that the assessee is entitled to avail credit on construction of railway siding which is used for *providing Cargo Handling Services during the period covered under the amended Cenvat Credit Rules post 01.04.2011.*

In view of the decisions of the various High Courts and the Tribunal wherein the user test principle has consistently been followed, we are of the view that Cenvat availed by the appellant for setting up of CHP, which is used for evacuation of coal by rapid loading process, cannot be legally denied.

9. Further, the said CHP has been set up with the view to modernize the coal loading process in the mines" also satisfies the definition of input service. Moreover, since the credit has been allowed by the Department on certain invoices raised by the Contractor, the Department has in-principle found the service to be eligible for credit. We also agree with the submission made by the appellant that the mode of valuation adopted by the Contractor to discharge service tax on 40% of the contract value is in accordance with law contained in Service Tax Valuation Rules and cannot be disputed while deciding credit eligibility at the appellant's end. When service tax has been levied only on 40% of the total value, it essentially means that service tax has been paid only on the service portion.

10. In view of the reasons stated above, the impugned demand order cannot be sustained and hence, the same is set aside. The appeal is thus allowed with consequential relief as per law."

4.8 In view of the law laid down in above decided cases, it is clear that the finding of the Adjudicating Authority and the learned Commissioner and conclusion arrived at by both of them is not sustainable. The Services in question come within the definition of the 'input service' in terms of Rule 2 (l) of Cenvat Credit Rules, 2004. Therefore, the Order-in-Original through which the Cenvat Credit of Rs. 32,84,099/- was ordered to be recovered under Rule 14 of the Cenvat Credit Rules, 2004 read with Rule 11A (4) of the Central Excise Act is liable to be set aside and it is held that credit of the services under contention are eligible credit in terms of the provisions of Cenvat Credit Rules, 2004 and have been rightly availed and utilized by the appellant.

4.9 The learned Commissioner has also observed in the impugned order that as the inadmissible Cenvat Credit were availed and utilized and the facts were suppressed from the department, it shows the wilful intention to evade the duty, therefore, extended period of limitation is rightly invoked in the present case and they are also liable to pay penalty under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944.

4.10 Regarding the above observations made by the learned Commissioner in the impugned order, it is pertinent to mention here that as per Central Excise Act, 1944 and the rules made thereunder, as prevalent at the material time, the appellants were neither required to give details of the nature of service / type of service on which they have availed the credit, nor they were required to give separate amount of credit availed by them in respect of separate services in the monthly returns. The fact is that the credit so availed was part of the total credit availed by them and was being duly reflected in the returns so filed, When there was no legal obligation on their part to do a particular act, non-observance of that procedure / act cannot be held to be violation of law. If the law does not requires certain information to be given by them then non-submission of the same by them cannot be held to be suppression or mis-statement, with an intent to evade the payment of duty, thus justifying the invocation of longer period of limitation. Thus, the appellant cannot be held guilty of suppression of fact or mis-statement with intent to evade the payment of duty.

4.11 Further, the Cenvat Credit availed and utilized by the appellant was admissible to him and it cannot be said that material facts have been suppressed by them from the department and any wilful intention on the part of the appellant to evade the duty cannot be inferred. Therefore, extended period of limitation could not have been invoked in the facts of the present case and they are not liable for any penalty under Rule 15(2) of the Cenvat Credit Rules, 2004.

4.12 In view of the above observations and discussion, I have come to the conclusion that the impugned order passed by the learned Commissioner and the Order-in-Original passed by the Adjudicating Authority are not sustainable and they are liable to be set aside and the appeal deserves to be allowed.

5. Consequently, the appeal is allowed and the impugned order is set aside.

(Order pronounced in the open Court on 27.07.2026)

(Dr. AJAYA KRISHNA VISHVESHA)
MEMBER (JUDICIAL)

Dharmi