

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH**

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 587 of 2006

[Arising out of Order-in-Original No. 27-30/Commr/RP/2005 dated 30.11.2005 passed by the Commissioner of Central Excise, Rohtak]

M/s Jindal Stainless Ltd.
Delhi Road, Hisar - 125005

.....Appellant

VERSUS

**Commissioner of Central Excise, Goods &
Service Tax, Rohtak**
SCO No. 6, Sector-1, Rohtak, Haryana-124001

.....Respondent

APPEARANCE:

Shri B.L. Narasimhan, Shri Amar Pratap Singh and Shri Mahesh Singh,
Advocates for the Appellant

Shri Aniram Meena and Ms. Amita Gupta, Authorized Representatives for
the Respondent

CORAM: HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)

HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 60126/2026

DATE OF HEARING: 09.10.2025

DATE OF DECISION: 03.02.2026

P. ANJANI KUMAR:

Heard both sides and perused the records of the case.

2. The appellants, M/s Jindal Stainless Ltd, are manufacturers of slabs, blooms, ingots etc; in order to overcome the shortages of power and power outages, the appellants established a captive power plant with DG Sets to generate electricity; as the power

generated was unstable and unsuitable for direct use in the furnaces and mills, the appellants entered into several agreements (during the period 1987 -1996) with Haryana State Electricity Board (HSEB) to synchronize power with grid and receiving back an equivalent power from the grid; as the electricity generated by the DG Sets was used in the factory for manufacture of excisable goods, the appellants have taken CENVAT credit of duty paid on furnace oil etc. used in the generation of electricity. HSEB were charging 10% as wheeling charges from the appellants.

2.1. Department initiated an investigation and made enquiries with Assistant Electrical Engineer (AEE), Hisar, who vide letter dated 30.07.2003 informed that there is an arrangement between the appellants and HSEB wherein the charges for electricity produced and pumped by the appellants to the grid were adjusted in the monthly electricity bills of the appellants by charging 10%. On completion of the investigation, Revenue issued 04 show cause notices dated 30.12.2003, 28.06.2004, 28.12.2004 & 27.06.2005 seeking denial of CENVAT credit of duty paid by them on the inputs such as furnace oil etc. used in the manufacture of electricity. Commissioner vide OIO dated 30.11.2005 confirmed the demand of CENVAT credit of Rs.6,58,08,706/-, for the period January 1999 to December 2004, along with interest and penalty of Rs.4,22,06,993/- under Rule 57I(4) read with Rule 13(2) read with Section 11AC of the Central Excise Act, 1944; learned Commissioner also imposed a penalty of Rs.1,50,00,000 under Rule 13/15 of CENVAT Credit Rules

and a penalty of Rs.5 Lakhs under Rule 173Q(1)(bb) of Central Excise Rules, 1944.

2.2. The appellants challenged the impugned order before this Bench who vide Final Order dated 21.08.2008 decided the appeal in favour of the appellant; Revenue filed an appeal before the Hon'ble High Court of Punjab & Haryana raising a question of law as to whether the electricity generated and cleared to the grid outside the factory and received back after synchronization, can be treated as captively used for the manufacture of final product; Hon'ble High Court vide order dated 28.01.2025 remanded the matter back to the Tribunal to reconsider whether the electricity generated in the captive plant was not used in or in relation to the manufacture of final products within the factory of production but was sold to HSEB; the appellants also filed a miscellaneous application dated 17.07.2005 for placing certain documents on record, the same was permitted by this Bench; the hearing in the matter took place on 09.10.2025.

3. Shri B. L. Narasimhan, learned Counsel for the appellants, submits a table containing the details of electricity injected by the appellant, supplied by HSEB and the electricity billed by HSEB and submits that the entire quantity of electricity, including the quantity exported by the appellants, was used within the factory of production; the very fact that the appellants purchased extra quantity of electricity from the electricity board itself proves that the entire quantity of electricity generated was used within the factory.

He submits that at the time of setting up of power plant, the appellant requested the authorities in 1987 to conduct a feasibility test of the power plant; as per the report given, the electricity produced by the appellants was of fluctuating type and the same could not be used as such in the furnace, strip mill and blooming mill.

4. Learned Counsel submits that the issue of allowance/disallowance of the CENVAT credit on the fuel used as input is settled in favour of their own plant by Principal Bench of the Tribunal - 2015 (329) ELT 302 (Tri. Del.); the Bench held that the said arrangement wherein a portion of the electricity is injected into HSBSE grid, which is received back further after a retention fee of 10% as synchronization charges, does not amount to sale of electricity and hence, the credit of input cannot be denied; Revenue preferred an appeal, no. 64/2015, against this order before Hon'ble High Court of Punjab & Haryana which was later withdrawn under the Litigation Policy; he submits that even otherwise, as per the Electricity Act, 1948 and the agreement between the appellant and HSEB, they are not permitted electricity.

5. Learned Counsel submits that since the entire quantity of furnace oil is used within the factory and credit was availed in accordance with law, credit cannot be denied; clause (c) to the Explanation under Rule 57A (inserted on 01.03.1994) specifically included goods used as fuel; clause (d) introduced w.e.f. 16.03.1995, further allowed credit on inputs used for the generation

of electricity within the factory; these provisions were retained through subsequent amendments via Rule 57B (w.e.f. 1997), Rule 57AA under CENVAT Credit Rules, 2000 and Rule 2(f) of the CENVAT Credit Rules, 2001/2002; Commissioner erred in denying credit by applying only the second limb of the definition by assuming that the input was used a fuel.

6. Learned Counsel submits that disallowance of CENVAT credit is incorrect even under the new CENVAT Credit Rules, 2004 as Rule 4(5)(a) of CENVAT Credit Rules permits credit on inputs used as fuel. He relies on *Sanghi Industries Ltd. v. Commissioner of Central Excise, Rajkot*, 2014 (302) E.L.T. 564 (Tri. - Ahmd.) and *Indorama Textiles Ltd. v. Commissioner of C. Ex., Nagpur*, 2007 (220) E.L.T. 471 (Tri. - Mumbai) further affirmed by the Hon'ble Bombay High Court in *Commissioner of C. Ex., Nagpur, v. Indorama Textiles Ltd.* 2010 (260) E.L.T. 382 (Bom.) which was further affirmed by the Hon'ble Supreme Court in *Commissioner v. Indorama Textiles Ltd.* - 2010 (260) E.L.T. A83 (S.C.).

7. Learned Counsel submits that the show cause notice dated 30.12.2003, covering the period January 1999 to June 2003, is time barred; all the relevant facts were known to the Department; assessee acted under a bona fide interpretation of law; several audits have been conducted and the respondents themselves made enquiries with electricity department from 2000 onwards; credit was availed after filing a declaration given under Rule 57G; therefore, extended period cannot be invoked. He submits that when the

demand is not sustainable, the question of imposition of penalty does not arise.

8. Ms. Amita Gupta, learned Authorized Representative for the Revenue takes us through the various definitions of inputs as applicable from time to time and submits that the electricity generated could be supplied to the State Electricity Board either when electricity generated was in excess of what could be utilised or when the electricity being generated was of an inferior quality which cannot be used in the factory of production; in both the cases the electricity generated cannot be said to be used in the manufacture of finished goods within the factory of production; in the first scenario, as electricity once generated cannot be stored for a future use and has to be supplied to Electricity Board; in the second scenario also electricity generated being of inferior quality cannot be used in the factory; therefore, the appellant is not entitled to the Cenvat credit on the fuel used in the generation of such electricity which was exported to the State Electricity Board. She submits that the appellant's contention that they have received from the grid equal quantity of power generated and supplied to grid; by the appellants own admission the total capacity of generated was 60MWs of the total quantity of 100MW required by the appellants. She submits that the appellants claim on payment of wheeling charges not relevant as the same cannot determine the eligibility to Cenvat credit.

9. Learned Authorized Representative submits that the appellants contend that the credit has been availed on the goods "used as fuel" within the factory of production, conveniently ignoring the phrase "used in the manufacture of final products". She submits that the appellants themselves submit that the quality of electricity generated being poor, they were forced to export the same to the HSEB grid; therefore, the question that arises is not about the quality or quantity of the electricity; it is an admission by the appellants that the electricity generated within the factory of production was not being used in the production of final product and therefore, credit is not admissible; the feasibility report given by the TCS also confirms that the electricity generated by the appellants was not capable of being used in the factory for production of final products. She submits, reverting to the claim of the appellants that the electricity produced by them cannot be sold, that if the power generator is aggrieved with any of the findings of the DISCOM, they can approach the Commission for redressal. She submits that the issue is no longer res integra. She also submits that as the duty is payable, interest is consequential. She would submit also that extended period has been rightly invoked as the appellants indulged in suppression/ fraud. She relies on the following cases:

- M/s Gujarat Narmada Fertilisers Co. Ltd. – 2004 (65) ELT 106
- M/s Vikram Cement – 2006 (194) ELT 3 (SC)
- M/s Maruti Suzuki Ltd. – 2009 (240) ELT 641 (SC)
- SRF Limited – 2005 (191) ELT 887 & 2013 (298) ELT 521 (Mad.)
- M/s Mehta & Co. – 2011-TIOL-17-SC-CX
- Neminath Fabrics Pvt Ltd. – 2010 (256) ELT 369 (Guj.)
- MMTC Ltd. – 2019 (28) GSTL 231 (Tri. Chennai)

10. Heard both sides and perused the records of the same. The appellants have entered in to an agreement with the State Electricity Board. The appellants transfer the electricity generated by them to the electricity Board. The electricity Board in turn supplied uninterrupted quality Electricity to the appellants. The quantity of Power supplied by the appellants to the grid and Power drawn by the appellants from the grid are periodically reconciled. The Electricity Board bills/charges the appellants the Electricity which is drawn by them in excess of the supply made to the Grid. The Electricity Board charges an amount from the appellants for the arrangements in the name of 'Wheeling Charges'.

11. The brief issue that requires to be decided in this case is as to whether the appellants are eligible to avail Cenvat credit of the input i.e. fuel used in the generation of Electricity which is claimed to have been laundered in the above manner. This is a second round of Litigation. In the first round, the appellant challenged the Impugned Order before this Tribunal vide Excise Appeal bearing no. E/587/2006; Tribunal vide order dated 21.08.2008 decided the appeal in favour of the Appellant; aggrieved by the same, the department filed an Appeal No. 84/2009 before the Hon'ble High Court of Punjab and Haryana; Hon'ble High Court vide their order dated 28.01.2025 remanded the matter back to this Tribunal with the following observations/directions.:

"11. A perusal of the above shows that the dispute in the present case is that the electricity generated in captive plant was not used in or relation to manufacture of final products within the factory of production but was sold to HSEB whereas learned

Tribunal did not decide this dispute and held that there is no dispute with regard to the appellant receiving same quantity of electricity which was cleared to the Electricity Board, therefore, the issue in dispute was never decided by the learned Tribunal."

12. In view of the above, our mandate is to decide whether electricity generated in captive plant was used in or relation to manufacture of final products within the factory of production or was sold to HSEB. The appellants submit that they did not sell the electricity excess generated by them. They base their arguments on the provisions of electricity act and the correspondence they entered in to with the electricity authorities as follows.

(i). As per the Electricity (Supply) Act, 1948, no captive power plant can sell his surplus energy either to any consumer or to the Nigam

(ii). Letter dated 30.11.1987, permission letter dated 11.10.1990 of the HSEB and the approval letter dated 9.11.1995 all given by HSEB stipulated that the appellants will not be allowed to supply/sell energy, so generated from your captive plant without the specific approval from the Board.

(iii). Letter dated 17.02.2006, by the GM/Commercial, DHBVNL, Hisar, to the Appellants, confirmed that any energy injected into the grid by the Appellant cannot be treated as a sale of energy to DHBVNL.

(iv). the Appellants addressed a letter dated 16.12.2009 to the DHBVN seeking confirmation that the power cleared to the grid of DHBVN was not sale of power and to clarify

Board's letter dated 17.02.2006 and 30.07.2003; DHBVN, clarified, vide letter dated 21.12.2009, that the letter dated 17.02.2006, by the GM Commercial supersedes the letter dated 30.07.2003 issued by the AEE Hisar, and that the captive power plant runs parallel with the grid, and the power injected into the DHBVN grid cannot be treated as sale of energy to DHBVNL; DHBVNL issued similar clarification letter dated 17.12.2009.

13. Appellants submit that all the documents issued by the HSEB and the DHBVNL categorically state that there has been no sale of energy by the appellant to the grid when the energy generated from the captive power plant is injected into the grid, and it is only part of the wheeling arrangement; when there has been no sale of energy by the appellant to the grid in any manner whatsoever, the denial of CENVAT credit on the fuel used for the generation of such electricity is clearly unsustainable. They further submit that Tribunal, in the appellant's own case 2015 (329) ELT 302 (Tri-Del) dealt with the very same issue of denial of CENVAT credit on the fuel used in the captive generation plant, for the period 1st January 2005 to 30th June 2005; Bench after considering all the factual aspects, including the arrangement between the plant and HSEB and the other communications etc. held that there has been no sale of energy by the appellant to the grid, when the energy generated from the CPP is injected into the grid. They further submit that this order of the Tribunal has attained finality inasmuch as appeal NO.CEA 64/2015 filed by the Department against this order before the Hon'ble Punjab

& Haryana High Court was dismissed as withdrawn vide order dated 17th October 2019 passed by the Hon'ble High Court. Tribunal held that

8. In the present case, there is no sale of electricity to the power grid. It is also noted that the electricity sent to power grid was returned back to the appellant, which was further used in the manufacture of final product. The Hon'ble Supreme Court categorically observed that the reversal of credit would be required on the wheeled out of electricity at a price to the joint venture/vendor etc., for manufacture. In the present case, there is no sale of electricity, and the same was returned back to their factory for consumption in their final product. So, we do not find any substance in the submissions of the learned Authorized Representative."

14. We find that in a series of judgments, Hon'ble Apex court held that though the assessee is entitled to credit on the eligible inputs utilized in the generation of electricity to the extent to which they are using the produced electricity within their factory (for captive consumption); However, 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. Hon'ble Supreme Court in the case of Maruthi Suzuki Ltd 2009 (240) ELT 641 (SC), held as under.

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, assessee was not entitled to Cenvat credit. In short, assessee is entitled to credit on the eligible inputs utilized 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.”

15. It was held in Gujarat Narmada Fertilizers Co Ltd 2009 (240) ELT 661 (SC) that

9. As can be seen from the submissions, the contention of the assessee is that exclusion of fuel-inputs from the purview of sub-rule (2) of Rule 6 would mean that such inputs are also automatically excluded from sub-rule (1) whereas according to the Department sub-rule (1) is a general rule which provides, that except for the circumstances mentioned in sub-rule (2), CENVAT credit shall not be allowed on such quantity of inputs used in the manufacture of exempted goods and even though fuel-inputs are excluded from sub-rule (2), such inputs would still fall under sub-rule (1).

10. In our view, sub-rule (1) is plenary. It restates a principle, namely, that CENVAT credit for duty paid on inputs used in the manufacture of exempted final products is not allowable. This principle is in-built in the very structure of the CENVAT scheme. Sub-rule (1), therefore, merely highlights that principle. Sub-rule (1) covers all inputs, including fuel, whereas sub-rule (2) refers to non-fuel-inputs. Sub-rule (2) covers a situation where common cenvatted inputs are used in or in relation to manufacture of dutiable final product and exempted final product but the fuel-input is excluded from that sub-rule. However, exclusion of fuel-input vis-a-vis non-fuel input would still fall in sub-rule (1). As stated above, sub-rule (1) is plenary, hence, it cannot be said that because sub-rule (2) is inapplicable to fuel-input(s), CENVAT credit is automatically available to such inputs even if they are used in the manufacture of exempted goods.

The cumulative reading of sub-rules (1) and (2) makes it abundantly clear that the circumstances specified in sub-rule (2), which inter alia requires separate accounting of inputs, are not applicable to the fuel-input(s). However, the said sub-rule (2) nowhere says that the legal effect of sub-rule (1) will stand terminated in respect of fuel-inputs which do not fall in sub-rule (2). In other words, the legal effect of sub-rule (1) has to be applied to all inputs including fuel-inputs, only exception being non-fuel inputs, for which one has to maintain separate accounts or in its absence pay 8% /10% of the total price of the exempted final products. Therefore, sub-rule (1) shall apply in respect of goods used as "fuel" and on such application, the credit will not be permissible on such quantity of fuel which is used in the manufacture of exempted goods. In our view, the above aspect has not been properly appreciated by the Gujarat High Court in the above case of M/s. Gujarat Narmada Valley reported in 2006 (193) E.L.T. 136 (supra).

11. For the above reasons, we find merit in the Department's civil appeals.

12. Before concluding, one point needs to be noted. In this batch of cases there is a civil appeal bearing Civil Appeal No. 1862 of 2006 - CCEC, Vadodara v. M/s. Gujarat Narmada Valley which concerns the period November 2000 to February 2001. In that matter, apart from interpretation of Rule 6(1) and Rule 6(2), the question which arises for determination is: whether the Department was right in reversing proportionate CENVAT credit to the extent of electricity wheeled out/cleared to the Grid and to the Township. Therefore, on the question of interpretation of Rule 6(1) and Rule 6(2), the above reasoning squarely covers the case. On the case of reversal of CENVAT credit, to the extent of the electricity wheeled out/cleared to the Grid and to the Township, our judgment delivered today in the case of M/s. Maruti Suzuki Ltd. v. Commissioner of Central Excise, Delhi-III [Civil Appeal No. 5554 of 2009 - (arising out of S.L.P. (C) No. 3826 of 2009)], would apply.

13. It may be noted that litigation on interpretation of CENVAT Credit Rules has arisen on account of various conflicting decisions given by the various Benches of CESTAT, the reason

being that the Rules have not been properly drafted. In the circumstances, we are of the view that in this batch of cases no penalty is leviable, however, in order to decide the amount of duty payable by each of the assesseees, the matters are remitted to the Adjudicating Authority to decide the amount of duty payable without penalty on reversal of credit to the extent of the input being used in the manufacture of exempted final products/to the extent of the excess electricity being wheeled out to the Grid and to the Township.

16. It was held by Hon'ble Supreme Court in Vikram Cement 2006 (194) ELT 3 (SC) that

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4. *We observe that Rule 57B commences with a non obstante clause. It allows credit to be taken by a manufacturer on inputs used in or in relation to the manufacture of the final products whether directly or indirectly and whether contained in the final products or not. There is no qualification as to where the inputs must be used in the main body of sub-rule (1). Qualifications have been introduced to the extent stated in Clauses (i) to (vi) read with the Explanation. Thus Clause (i) provides for inputs which are manufactured and used within the factory of production. Paints, fuel, packing materials and accessories are also treated as inputs under clauses (ii), (iii), (v) and (iv) without any requirement for user within the factory. Clause (iv) provides for credit on inputs used for generation of electricity or steam used for manufacture of the final products or for any other purposes "within the factory of production". 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 intermediate product. The utilization 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. As far*

as the Explanation is concerned, the inputs are restricted to inputs notified under Rule 57A. There is no dispute that both explosives and limestone are notified under Section 57A for manufacture of the final product viz. cement.

17. We find that Hon'ble High Court of Madras in the case of SRF Ltd 2013 (298) ELT 521 (Mad) relied on the decision of the Apex Court in the case of Maruti Suzuki Limited 2009 (240) ELT 641 (SC) and holding that the decision of Apex Court in that case was subsequent to the decision by CESTAT, remanded the case back to CESTAT. Hon'ble High Court held that

14. The issue raised by the assessee is no longer res integra in view of the judgment of the Supreme Court in Maruti Suzuki Limited v. Commissioner of Central Excise, Delhi-III, (2009) 9 SCC 193 = 2009 (240) E.L.T. 641 (S.C.).

15. In Maruti Suzuki, the specific question was as to whether the Department was right in reversing proportionate Cenvat credit to the extent of power wheeled out by the appellant to its sister units, vendors, joint ventures. The assessee had used Naphtha fuel for generation of electricity. The electricity so generated was used in their factory premises and it was also supplied to their vendors and joint ventures. The Department reversed proportionate Cenvat credit to the extent of power wheeled out by the assessee to its sister units, vendors and joint ventures. The Supreme Court held that unless and until the input is used in or in relation to the manufacture of final product within the factory of production, the said item would not become an eligible input. The Hon'ble Supreme Court further held that the observation "use in or in relation to manufacture" has many shades and would cover various situations, based on the purpose for which the input is used. However, the specific input would become eligible for credit only when used in or in relation to the manufacture of final product

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16. *Since the Supreme Court has made the position clear that the assessee would not be entitled to claim Cenvat credit in case where it sells electricity outside the factory to joint ventures, vendors, etc., the finding given by the Tribunal is liable to be set aside.*

17. *The learned counsel for the assessee distinguished the judgment of the Supreme Court in Maruti Suzuki Limited v. Commissioner of Central Excise, Delhi-III, (2009) 9 SCC 193 = 2009 (240) E.L.T. 641 (S.C.) on the ground that the issue in the said judgment relates to the entitlement of credit on eligible inputs utilized in generation of electricity to the extent to which excess electricity cleared at the contractual rates in favour of sister units, vendors, joint ventures, etc., which was sold at a price. However, in the case on hand, electricity was wheeled out only in favour of sister units and as such, there was no element of sale.*

18. *The order passed by the CESTAT does not contain any discussion about the contention now raised by the assessee or the distinguishing features. CESTAT by following the earlier decision of the Tribunal, held that the assessee is entitled to credit in spite of the fact that electricity so generated was used in the other units also. The CESTAT has not decided the question as to whether the electricity supplied to the other units of the assessee situated in different premises are also entitled to the credit. The sale made to the other concern was also not made referred to in the order passed by the Tribunal.*

19. *Since the judgment in Maruti Suzuki was rendered subsequent to the decision of the CESTAT and the distinguishing features now pointed out by the learned counsel for the assessee requires factual adjudication, we are of the considered view that the matter requires fresh consideration by CESTAT.*

20. *In the result, by answering the question of law in favour of the revenue and against the assessee, impugned order is set aside the matter is remanded to the CESTAT for fresh consideration.*

18. In view of the above, while it is clear from the above judgments that the appellants are eligible for Cenvat Credit on the

inputs used in the generation of steam used in the manufacture of electricity which is used in the factory of production, credit of inputs used in electricity which is not used in the factory of production is not admissible. We find that the reliance of the appellants on the decision of the Delhi Bench of the Tribunal in their own case 2015 (329) ELT 302 (Tri-Del) is of no avail, as the decision was based on the earlier decision of the Bench, vide order dated 21.08.2008 2009 (239) ELT 49 (Tri - Del.), which is remanded back to this Bench by Hon'ble Punjab & Haryana High Court (2025) 28 Centax 244 (P&H.) with a specific direction to see whether there was a sale of electricity produced by the appellants. We find that against a decision of the Tribunal in one case, we have two judgments of High Courts remanding the matter back to the Tribunal do decide the issue and a series of judgments by the Hon'ble Apex Court. We further find that Tribunal held, in the case of Mehsana District Cooperative Milk producers Union Ltd 2019(31) GSTL 484(Tri-Ahmd), that the Appellant has mainly relied upon the judgment of Hon'ble Gujarat High Court in their own judgment of Tribunal as upheld by the Hon'ble High Court. We are of the view that in tax matters the principle of *res judicata* is not applicable. In case of *Gujarat Narmada Valley Fertilizers Co. Ltd. - 2014 (306) E.L.T. 315* (Guj.) the Hon'ble Gujarat High Court has held that the ratio of judgment in case of *Gujarat Narmada Valley Fertilizers Co. Ltd. - 2009 (240) E.L.T. 661* (S.C.) and *Maruti Suzuki Ltd. - 2009 (240) E.L.T. 641* (S.C.) are binding on the department and even the Hon'ble High

Court unless and until the same are overruled by the Larger Bench of the Hon'ble Supreme Court.

19. We find that the appellants claim that they appointed M/s Tata consultancy engineers (for short TCE) to verify the feasibility of the power plant, which was set up; TCE, after undertaking the study, issued a feasibility report in September 1987, observing that the power which was generated by the appellant was of a fluctuating type, and that the said power generated could not be used in the arc furnace, strip mill, and blooming mill and recommended parallel operation of the captive DG set with the Haryana State electricity Board Grid. As per their own submission the electricity generated could never be utilized within the factory of production by the applicant. The appellants accordingly, entered into an agreement dated 30.11.1987 with the Haryana State Electricity Board. The appellants submit that the entire quantity of fuel on which credit was taken has been used within the factory of production; in view of the poor quality of electricity generated, which result in jerking loads, breakdown etc, the appellants were forced to export the quantity of electricity generated to the grid. The appellants claim, however, that they received equal quantity of electricity back from the grid.

20. The clear direction given by the Hon'ble Punjab & Haryana High Court for the remand proceedings is to decide whether the appellants have sold electricity to the HSEB or DHBVL or say Grid. The appellants rely on the Electricity Act and the Correspondence they had with the HSEB to claim that there was no sale. Since, the

proceedings are under the Central Excise Act, 1944, it would be required to see as to how the term sale is defined under the Act. The Central Excise Act, 1944 defines "sale" as follows;

(h) "sale" and "purchase", with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration;

From the above definition, it can be understood that, for a transaction to be "sale" under the Central Excise Act, it has to be a transfer of possession of goods for cash, or deferred payment, or other valuable consideration. In the instant case, the transaction involves supply, of the entire electricity being unsuitable to be used in the factory of the appellants in the production of excisable goods, to the grid and receiving the stable power from the grid in return. The electricity the appellants receive from the grid is the consideration. It is on record that the HSEB/DHBVNL is billing the appellant for the differential quantity plus wheeling charges. In a way the appellants are bartering the unusable electricity with the usable electricity and are paying for the difference. We find that in the CGST Act, 2017, defines "supply", to include sale, transfer, barter, exchange etc. The Act provides that 7(1) For the purposes of this Act, the expression —supply includes— (a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be

made for a consideration by a person in the course or furtherance of business.

21. We find that that barter is also a kind of sale, it is transfer of property in goods for a consideration. As seen above, though the terms "barter" and "exchange" are not defined in the Central Excise Act, 1944, sale is defined to be a transaction involving a consideration. We find that the same are recognized under the CGST Act, 2017 as forms of "supply". Barter involves exchange of goods or services without the use of money and constitutes two independent taxable supplies. Barter transactions have been held to be taxable under the CGST Act as well as under the VAT Act. Further, Hon'ble High Court of Mumbai in the case of Sumer Corporation, Writ Petition No.2119 of 2016, while dealing with "sale" and "consideration", held that a transaction involving exchange of rights in immovable property for construction constitutes "other valuable consideration" capable of being computed in money and is liable to tax. The Court held as follows:

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14..... The classic definition of "valuable consideration" is given in Currie v. Misa, (1875) 10 Ex. 153 at p. 162, thus: "A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other."

22. As per their own admission and as per the feasibility report given by the consultants appointed by the appellants in this regard,

the Electricity generated by the appellants was not unusable in the factory of the appellants and therefore, the appellants entered in to an agreement with the HSEB/DHBVNL and transferred the same to grid. The appellants contend that since they have received back equivalent or more quantity of suitable Electricity, transfer to Grid did not constitute a sale. A reading of the provisions of the Electricity Act and the correspondence entered in to by the appellants with the HSEB/DHBVNL, gives to understand that the appellants were forbidden to sell the electricity to others. It does not in any way conclude that the supply to grid does not amount to sale under any other Act. We are of the considered opinion that the term 'sale' is to be understood in the context of the Central Excise Act or Sale Tax Act, GST Act etc. as applicable to goods. It is not denied that Electricity is goods. As per our discussion as above, transfer of goods for a consideration constitutes a sale.

23. Having found that the supply of the entire electricity generated by the appellant to the grid of HSEB/DHBVNL constitutes a sale, we now turn our attention to the admissibility of Cenvat Credit. We find that the legal position as far as the definition of inputs is concerned, the same was as follows over the years. Rule 57AA of the Central Excise Rules 1944, during the period 01.01.1999 to 30.06.2001, defines inputs as follows.

(d) "input" means all goods, except 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 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 for manufacture of final products or for any other purpose, within the factory of production, and also includes lubricating oils, greases, cutting oils and coolants.

23.1. Rule 2(f) of the Cenvat Credit Rules 2001, during the period 01.07.2001 to 28.02.2002, provides that

(f) "input" means all goods, except 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 for manufacture of final products or for any other purpose, within the factory of production.

23.2. Rule 2(g) of the Cenvat Credit Rules 2002, for the period 01.03.2002 onwards defines input as

(g) "input" means 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 for manufacture of final products or for any other purpose, within the factory of production.

24. From a bare reading of the definitions as above, it is observed that the primary eligibility for some goods to be input" for the purpose of availing Modvat/ Cenvat credit, is that they should be

used in the ***manufacture of final product or for any other purpose, within the factory of production***. In the instant case, the entire electricity generated by the appellants in their premises is wheeled out to the HSEB or the grid in short. It is not denied that the same is located outside the factory of production. The inputs thus, have not been used either in the manufacture or for any other purpose in the factory of production. We find that though the appellants contend that the appellant that the credit has been availed on the goods "*used as fuel*" "*within the factory of production*", there is no denying that the same are not "*used in the manufacture of final products*".

25. It is another matter that the appellants are independently getting the power from state owned grid which has no linkage/synchronization with the line through which the generated electricity is sent out or supplied to the grid by the appellants. Apparently, the two lines are mutually exclusive to each other. In no way, it can be claimed that the electricity generated by the appellants was utilised in the factory of production. Even in the case of tangible inputs, a manufacturer can not avail credit on those inputs, which were sent out of the factory as they are unusable, for the reason that equal or more quantity of same class of goods are procured from the same source. It is a settled proposition of the scheme of Modvat/Cenvat that the credit is always associated with the goods which suffered duty. Having concluded that the appellants have sold the entire electricity produced by them to the grid and that the electricity produced/ generated by them using inputs on which credit was

availed was not utilised by them in the factory for production of excisable goods, we conclude that the appellants are not entitled to the Cenvat credit on the fuel used in the generation of such electricity which was entirely exported/ supplied/ fed to the grid of State Electricity Board, notwithstanding the averment that similar or more quantity of stable power was obtained from the Grid of HSEB/DHBNL.

26. It was also argued that the scope of input is wide encompassing and for that reason, the appellants are eligible to avail CENVAT credit on the inputs used in the manufacture of electricity as the same is indirectly used in the manufacture of final products. We find that though the scope of the term 'input' is vast, it comes with a rider that the same be used in the manufacture of final products in the factory. It cannot be extended to the input/intermediate products sent out side the factory, substituting the same with similar products procured from outside. We are of the considered opinion that the underlying principle enunciated by the Hon'ble Apex Court, in the case of Maruti Suzuki & ors (supra), is that the inputs should be used in the factory of production. We find that otherwise, Hon'ble Supreme Court could not have held that the appellants therein, are not eligible to avail CENVAT credit, on the inputs contained in the amount of electricity that was transferred/sold to other units, colony or to the grid. Therefore, the only logical conclusion that one can arrive, in view of the judgments mentioned above, is that credit on inputs is available only to the extent the electricity produced and utilized in the factory of

production and not on the portion of electricity transferred/sold to the grid.

27. Coming to the issue of limitation, we find that the appellants submit that the demand in respect of the Show Cause Notice dated 30.12.2003 is time-barred as all the relevant facts were known to the department, and the assessee acted under a bona fide interpretation of the law, the extended limitation cannot be invoked. He submits that the department was fully aware of the captive generation and synchronization arrangement; multiple audits were conducted during the period; the knowledge of the department is evident from the letter, dated 15.11.2000, written by department, enquiring about the wheeling agreement and the clear reply given by the appellants. He submits that the appellants availed impugned credit on the basis of declaration submitted under Rule 57G; the invoices were defaced by the department. He further submits that the appellants acted under a *bona fide* belief; there was neither suppression of facts nor intent to evade duty and thus, extended period could not have been invoked.

28. In the facts and circumstances of the case, we find that there is considerable force in the argument of the appellant. We find that the issue involved is that of interpretation of law. There were judgments, as cited above, in favour of the appellants in their own case. All the cases relied upon by the revenue are after the initial decision by the Tribunal in favour of the appellants. Therefore, we are of the considered opinion that there were reasons for the

appellants to entertain a bona fide belief. Moreover, we find that no reliable evidence of suppression of facts, willful misstatement, fraud, or collusion with an intent to evade duty, is present in the case. We find that in similar set of circumstances, Hon'ble apex Court, deciding the case of Gujarat Narmada Fertilizers (supra) remanded the case back to the tribunal holding that litigation on interpretation of CENVAT Credit Rules has arisen on account of various conflicting decisions given by the various Benches of CESTAT, the reason being that the Rules have not been properly drafted. In the circumstances, we are of the view that in this batch of cases no penalty is leviable. Therefore, we conclude that in the present case, the invocation of the extended period of limitation period is not sustainable.

29. In view of the discussion above, demand raised by Show Cause Notice dated 30.12.2003 is set aside; all penalties are also set aside; Rest of the order is upheld. Thus, the appeal is partly allowed.

(Order pronounced in the open court on 03.02.2026)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)