**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**

**CENTRAL EXCISE APPEAL NO. 45 OF 2004**

**M/s. Uttam Galva Steels Limited } Appellant**
**versus**
**The Commissioner of Central }**
**Excise and Custom, Mumbai-VII } Respondent**

Mr. Sushant Murthy with Mr. Sparsh Prasad i/b. Mr. Naresh S. Thacker for the Appellant.

Mr. Pradeep S. Jetly for the Respondent.

**CORAM :- S. C. DHARMADHIKARI &**
**SUNIL P. DESHMUKH, JJ.**
**DATED :- JANUARY 28, 2015**

**P.C.** :-

This Appeal arises out of the order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai, dated 22nd January, 2004.

2) The Tribunal allowed the Revenue's Appeal and therefore, the aggrieved Assessee is before us. The Appeal is admitted by this Court on the following two questions:-

> "1) Whether the Tribunal was correct in holding that storage tanks/vessels are excluded from the coverage of Rule 57Q of the Central Excise Rules, 1944?
>
> 2) Whether the Tribunal was correct in holding that when storage tanks/vessels have not been intentionally included under Rule 57Q, the benefit of modvat credit cannot be extended to the same even though they are used in the factory of manufacture in the manufacture of final product and form an integral part of the plot set up to manufacture the final product?"

3) We have heard Mr. Sushant Murthy appearing for the Assessee/Appellant and Mr. Pradeep Jetly for the Revenue.

4) The undisputed facts are that the Appellant is engaged in the manufacture of cold rolled plain/galvanised steel coils/sheets. They availed *inter alia* Modvat Credit on storage vessels/storage tank/structure classified under headings 73.11, 73.09 and 73.08 of the Central Excise Tariff Act respectively. They invoked therefore Rule 57Q to claim and avail of this Modvat Credit. The Revenue proceeded against them and issued a show cause notice, calling upon the Appellant to show cause why an amount of Rs.6,83,673/- wrongly availed of as Modvat Credit should not be recovered and penalty imposed in terms of the applicable Rules.

5) The reply was given to this notice, in which, the Assessee informed the Revenue that it has already reversed the credit to the extent of Rs.5,52,473/-, a copy of that reply is at Annexure 'B'.

6) Thereafter, an order was passed by the Assistant Commissioner, disallowing the Modvat Credit, but directing that a sum of Rs.1,31,200/- can be availed of in terms of the said Rules. In other words, he disallowed the Modvat Credit to the extent of Rs.5,52,473/- on storage vessels and structure.

7) The aggrieved Appellant/Assessee preferred Appeal to the Commissioner (Appeals) to the extent of disallowance of the credit and the said Commissioner allowed the Appellant's Appeal.

8) The Revenue approached the Tribunal against such an order of the Commissioner and the only contention raised by the Revenue was that in terms of the applicable Rules, the storage vessels/storage tanks, which are stated to be an integral part of the plant of the manufacturing unit of the Appellant, were not specifically mentioned in the Table below the Rule with the tariff heading numbers and so long as these items or goods were not part of the Scheme under Rule 57Q, the Modvat Credit could not have been allowed. The Tribunal considered this argument in the light of the Rules prevailing and at the relevant time. It accepted the said argument, which is upon plain reading of the Rule and the Table below. It is such a finding which is assailed before us by the Assessee.

9) Mr. Murthy appearing for the Assessee submits that Rule 57Q, even at the relevant time did not prohibit availing of such a credit. If these are capital goods and used in the factory of the manufacturer and without which the plant cannot work and function, then, the Modvat Credit was rightly allowed. That could not have been disallowed. The reliance on the amendment w.e.f. 1st March, 2001

could not support the conclusion of the Tribunal, because that amendment is clarificatory in nature. It must be given a retrospective effect.

10) Mr. Murthy places reliance upon the view taken by the Karnataka High Court in the case of *Commissioner of Central Excise, Mysore vs. ICL Sugars Ltd.* reported in **2011 (271) ELT 360**.

11) Mr. Jetly appearing for the Revenue would support the conclusion of the Tribunal. He would submit that no conclusion other than arrived at by the Tribunal is possible, in the light of the Rules. He has taken us through Rule 57Q and the Scheme of Modvat Credit. He submits that if the final product is described in column 3, the goods with specific tariff entries are set out in Table column 2, then, so long as the said column 2 does not and with reference to the tariff item numbers describe the capital goods on which Modvat Credit can be availed of, then, the Assessee cannot take any assistance of the amended Rule. The amendment was not clarificatory, but for the first time brought in the tariff headings, under which the capital goods of the Assessee would fall. In such circumstances and with greatest respect, the Karnataka High Court has not taken a view which would be in consonance with these Rules. He therefore submits that the Appeal be dismissed.

12) Rule 57Q of the Central Excise Rules, 1944 reads as under:-

**"RULE 57Q. Applicability.** - (1) The provisions of this section shall apply to goods (hereafter in this section, referred to as the "final products") described in column (3) of the Table given below and to the goods (hereafter, in this section, referred to as "capital goods"), described in the corresponding entry in column (2) of the said Table, used in the factory of the manufacturer of final products.

**TABLE**

| **S. No.** | **Description of capital goods falling within the Schedule to the Central Excise Tariff Act, 1985 (5 to 1986) and used in the factory of the manufacturer.** | **Description of final products** |
|---|---|---|
| (1) | (2) | (3) |
| 1. | All goods falling under heading Nos. 82.02 to 82.11; | All goods specified in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than the following, namely:-<br>(i) all goods falling under Chapter 24; and<br>(ii) ingots and billets of non-alloy steel falling under sub-heading Nos. 7206.90 and 7207.90, manufactured in an induction furnace unit, whether or not any other goods are produced in such induction furnace, and hot re-rolled products of non-alloy steel falling under sub-heading Nos. 7211.11, 7211.19, 7211.30, 7211.52, 7211.59, 7211.60, 7211.92, 7211.99, 7213.90, 7214.90, 7215.90, 7216.10 and 7216.90 on which duty is paid under section 3A of the Central Excise Act, 1944 (1 of 1944) |
| 2. | All goods falling under chapter 84 (other than | |

| | | |
|---|---|---|
| | internal combustion engines falling under heading No.84.07 or 84.08 and of a kind used in motor vehicles, compressors falling under heading No. 84.14 and of a kind used in refrigerating and airconditioning appliances and machinery, heading or sub-heading Nos. 84.15, 85.18, 8422.10, 84.24, 84.29, 84.37, 84.40, 84.50, 84.52, 84.69 to 84.73, 84.76, 84.78, expansion values and solenoid valves falling under sub-heading No. 8481.10 of a kind used for refrigerating and airconditioning appliances and machinery); | |
| 3. | All goods falling under chapter 85 (other than those falling under heading Nos. 85.09 to 85.13, 85.16 to 85.31, 85.39 and 85.40); | |
| 4. | All goods falling under heading Nos. 90.11 to 90.13, 90.16, 90.17, 90.22 (other than for medical use), 90.24 to 90.31 and 90.32 (other than of a kind used for refrigeration and airconditioning appliances and machinery); | |
| 5. | Components, spares and accessories of the goods specified against S.Nos. 1 to 4 above; | |
| 6. | Moulds and dies; | |
| 7. | Refractories and refractory materials; | |
| 8. | Tubes and pipes and fittings thereof, used in the factory; | |
| 9. | Pollution control equipment; | |

| | | |
|---|---|---|
| 10. | Grinding wheels and the like goods falling under sub-heading No. 6801.10; | |
| 11. | Goods falling under heading No. 68.02; and | |
| 12. | Lubricating oils, greases, cutting oils and coolants. | |

(2) (i) The manufacturer of the final products shall be allowed credit of the duty of excise or the additional duty leviable under section 3 of the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as "specified duty") paid on the capital goods.

(ii) The manufacturer availing of the credit may utilise the same for payment of duty of excise payable on the final products manufactured in his factory.

(3) Notwithstanding anything contained in sub-rule (1), the manufacturer of the final products shall be allowed credit of additional duty leviable under section 3 of the Customs Tariff Act, 1975 (51 of 1975) on goods falling under Chapter heading No.98.01 of the first schedule to the said Customs Tariff Act, to the extent of 75% of the said additional duty paid on such goods.

(4) A manufacturer of the final products purchasing capital goods from a unit situated in a Free Trade Zone or from a hundred per cent export-oriented undertaking or from a unit in an Electronic Hardware Technology Park of Software Technology Parks and using them in the manufacture of final products, shall be allowed to take the credit of the specified duty paid on such capital goods only to the extent of duty which is equal to the additional duty leviable on like goods under section 3 of the Customs Tariff Act, 1975 (51 of 1975), equivalent to the duty of excise paid on such capital goods.

(5) The credit of the specified duty on capital goods (other than those capital goods in respect of which credit of duty was allowable under any other rule or notification prior to the 1st day of March, 1997) shall not be allowed if such capital goods were received in the factory before the 1st day of March, 1997.

(6) A manufacturer shall be allowed credit of specified duty paid on capital goods manufactured by him for the manufacture of final products in his factory.

(7) The credit of the specified duty on capital goods [other than those capital goods covered under S. Nos. 5, 7, 10, 11 and 12 of column (2) of the Table below sub-sule (1)] and received in the

> factory on or after the 1st day of January, 1996, shall not be taken on a date prior to the date on which such capital goods are installed or, as the case may be, used for manufacture of excisable goods, in the factory of the manufacturer as certified by such manufacturer or a person designated by him for this purpose.
>
> (8) Notwithstanding anything contained in sub-rule (7), a manufacturer intending to remove the capital goods from his factory for home consumption or for export, prior to their being installed or used, as the case may be, shall be allowed to take credit on the date on which such capital goods are so removed by him from his factory on payment of the appropriate duty of excise leviable thereon as provided in rule 57S."

13) If we peruse the sub-rules, below the Table, it is very clear and in terms of Rule 57Q(2)(i) that the manufacturer of the final products shall be allowed credit of the duty of excise or the additional duty leviable under section 3 of the Customs Tariff Act, 1975 paid on the capital goods. The manufacturer availing of the credit may utilise the same for payment of duty of excise payable on the final products manufactured in his factory. The other Sub-Rules need not be referred to. The Table very elaborately describes the final products/goods i.e. in column (3). In that Table, in column (2), the corresponding entry has been set out, inasmuch as the description of capital goods falling within the Schedule to the Central Excise Tariff Act and used in the factory of the manufacturer are the once which go into the manufacture of final products. It is on them that the credit can be availed of. That can be availed of in respect of the duty on the final products and leviable in terms of the Central Excise Act and Tariff thereunder. In these

circumstances, the goods falling under specific heading numbers have been set out in column (2) against serial numbers. The components, spares and accessories of the goods specified against serial numbers 1 to 4 alone are referred and without specific heading numbers. Moulds and dies, the refractories and refractory materials, tubes and pipes and fittings thereof used in the factory, pollution control equipment, lubricating oils, greases, cutting oils and coolants are the items or capital goods which have been set out without reference to any heading numbers. In referring to grinding wheels and the like goods falling under sub-heading No. 6801.10, description is once again referable to serial numbers 1 and 2. Therefore, when internal combustion engines are excluded from the description of capital goods falling within the Schedule to the Central Excise Tariff Act, 1985 and used in the factory of the manufacturer under the Table but what is included are all goods falling under Chapter 84, then, it is apparent that the intent was to give benefit or to allow availing of Modvat Credit either on goods falling in heading numbers or goods falling under Chapter but with Chapter number clarified and identified. Therein also number of goods falling under that Chapter are described in the column 2. Even in relation to all goods falling under Chapter 85 against serial number 3, there are certain deletions or exclusions. Similar is the position in relation to serial number 4. The components, spares and accessories of the goods specified against serial numbers 1 to 4 alone are mentioned against serial number 5.

14) If such is the sweep of Rule, then, it is not possible to agree with Mr. Murthy that the amendments or changes brought about after 1st March, 2001 are only clarificatory in nature. If the period of dispute is 1997-98 and at that time the capital goods of the Appellant were not mentioned with the heading numbers in the Table (column 2), then, it is not possible to infer that storage tanks and storage vessels being integral or essential part of the manufacturing plant were always included. The reference to them may not be found in column 2, but since they were used in the factory of the manufacturer and being the integral part of the plant, they always intended to be included. If that was the position, then, there was no need for a specific amendment or change. These submissions cannot be accepted and for obvious reason.

15) Mr. Murthy has fairly brought to our notice the Cenvat Credit (Second Amendment) Rules, 2000, further amendment thereto and Rule 57AA containing the definitions so amended, but, therein as well, we do not find any reference to the capital goods falling under the relevant and applicable Chapter. In such circumstances and in relation to capital goods in question, we are not in agreement with Mr. Murthy

that the Tribunal's order suffers from any error of law apparent on the face of the record or perversity.

16) The reliance placed on the decision of the Karnataka High Court in the case of *Commissioner of Central Excise vs. Doodhaganga Krishna Sahakari Sakkare Karkhane Niyamit* reported in **2013 (297) ELT 361** needs to be now noted. There, the Revenue was in Appeal. A show cause notice came to be issued to the Assessee before the Karnataka High Court, holding that they are not eligible to avail and utilise the Cenvat Credit on the capital goods such as (i) all the goods falling under Chapter 82, 84, 85, 90 under the headings 6802, 6801.10 of the first Schedule to the Tariff Act; (ii) the pollution control equipment; (iii) components, spares and accessories of the goods specified at (i) and (ii) above; (iv) moulds and dies; (v) refractories and refractory materials; (vi) tubes and pipes and fittings thereof; (vii) storage tanks used in the factory of the manufacturer of final products. There, the Assessee was manufacturing the final products. The further reading of this Judgment would reveal that the items in para 2 of the Judgment find place in column 2 of Rule 57Q, as applicable prior to 1$^{st}$ March, 2001. It is in relation to this aspect and particularly the MS Plates, Channels, MR Coils and HR Coils, in respect of which the Cenvat Credit was availed of and utilised that the learned Judge presiding over

that Bench concluded that the issue is identical to one decided and dealt with in CEXA/95/2009 disposed of on 8th April, 2011. The Assessee before us relies upon the view taken by the Karnataka High Court and followed in this Judgment.

17) That view was taken in the case of *ICL Sugars Ltd.* (supra) and which came to be followed and applied in the case of *Doodhaganga Krishna Sahakari sakkare Karkhane* (supra). There as well, one finds that the Assessee was engaged in the manufacture of sugar. In para 2, facts are noted and particularly, the Cenvat Credit availed of on the raw materials used for construction of storage tanks. The assessing authority allowed Modvat Credit in respect of water storage tanks on the ground that water is an essential raw material for manufacture of sugar after conversion into steam. The water storage tank is a component of the main machinery, namely boiler and the excise duty paid on the inputs in the construction of water storage tanks are eligible for availing Modvat Credit. However, the Assessing Officer disallowed the Modvat Credit in respect of syrup and molasses storage tank-MS Staging of tank and shell plates/bottom plates/roof plates used for constructing non-excisable final molasses storage tank and shell of final molasses storage tank, under Rule 57U of the Central Excise Rules, 1944. The reasoning given for disallowing the Cenvat Credit to these

storage tanks was that the molasses tank is constructed on the floor with a concrete foundation and the shell of the final molasses storage tank will be placed over the concrete to hold about 2500 tons and since the final molasses storage tank is erected to the earth, it becomes non-excisable. Therefore, any components used in the non-excisable molasses final storage tanks are ineligible for Modvat Credit. This reasoning was not approved by the Commissioner and he extended the benefit to the Assessee in respect of these storage tanks. The Revenue approached the Tribunal and it dismissed the Appeal. The Karnataka High Court was shown the amendments, namely the second and third amendments made by Notification dated 1st March, 2001 the definition of term "capital goods" and the insertion of storage tank therein. However, the Karnataka High Court, in paras 4 and 5 of its order, held thus:-

> "4. The learned counsel appearing for the revenue assailing the impugned order contended that as per the definition of Rule 57Q there was no storage tank included in the definition of capital goods. It is only by Notification dated 1-3-2001 in the definition of capital goods the storage tank is inserted. Therefore, for the period anterior to the said amendment the Cenvat credit could not have been given on the inputs used in the manufacture of storage tanks. Even otherwise though the water stored in a storage tank is used in the manufacture of sugar, the syrup and molasses stored in the storage tank are not used in the manufacture of sugar, on the contrary it is derived in the course of manufacture of sugar and therefore the assessee is not entitled to the benefit of Cenvat credit. Though in the definition of Rule 57Q the storage tank was not included, it is clear from the aforesaid definition that the tubes, pipes and fittings thereof used in the factory were included in the definition of capital goods. The storage tank has been held to be a

component to the main machinery namely, boiler and the benefit is extended to the inputs used in the construction of the storage tank though it is also embedded to the land. On the same reasoning the assessing authority ought to have extended the benefit to the syrup and molasses storage tank also, as they are bye-products in the course of manufacturing activity which are also excisable at the time of selling the same to the assessee. It appears even when the storage tanks if specifically mentioned in the definition of capital goods by liberally incorporating these provisions the benefit was extended to the assessee. However the controversy remains. In order to set right this controversy by a Notification, specifically storage tank is introduced within the definition of capital goods. The said insertion is clarificatory in nature. Under these circumstances even though the said insertion was in the year 2001 we are concerned with the period anterior to the said insertion.

5. Having regard to the aforesaid facts and also the fact that the assessing authority has himself extended the benefit to storage tank storing water as a component to main machinery namely, boiler, he ought to have extended the benefit to the storage tanks which are also part of the factory premises, in which the bye-products are stored and thereafter sold as a finished product. In that view of the matter, we do not find any justification to interfere with the orders passed by appellate authority. In those circumstances we answer the substantial questions of law in favour of the assessee and against the revenue."

18) We are of the opinion that the Karnataka High Court's Judgment must be seen in the light of the admitted factual position and noted by it in para 2. Therefore, the Cenvat Credit was disallowed on the storage tanks and of the nature described in para 2, not on the ground that there was non inclusion thereof in column 2 of the Table below Rule 57Q. The denial thereof is on distinct ground. That was because the final molasses storage tank, if erected to the earth becomes non excisable. There was no dispute with regard to the availment of Modvat Credit up to 30th June, 2000 and Cenvat Credit up to 1st July, 2000 in respect of duty paid inputs and capital goods. The Cenvat

Credit was on the raw material used for construction of storage tank. That was firstly in respect of a water storage tank and secondly the Modvat Credit in respect of syrup and molasses storage tank. That being held to be a part and parcel of the plant manufacturing sugar and the denial not being on the ground of the amendment is inapplicable but syrup and molasses are bye-products, the end product being sugar, that the Karnataka High Court dismissed the Revenue's Appeal. In doing so, strictly it was not necessary for it to make any general observation with regard to storage tanks. Once the byproducts, namely syrup and molasses are also stored in these storage tanks and in the course of manufacturing activity, which are also excisable at the time of selling the same to the Assessee, then, that credit was admissible. The rest of the observations and pertaining to the controversy covered by a Notification dated 1st March, 2001 in relation to storage tanks and in general are not the ratio of this decision. We do not think that the Karnataka High Court Judgment can be read in the manner suggested by Mr. Murthy.

19) Assming that it can be so read, with greatest respect to the Karnataka High Court, when it completely omits from consideration the important aspects of this Rule, which we have noted above, the specific purpose of the amendments to Rule 57Q noted by us in the foregoing

paragraphs, then, all this would enable us not to agree with the Judgment of the Karnataka High Court and to this limited extent.

20) As a result of the above discussion, we do not find that the Tribunal's order can be said to be vitiated by any error of law apparent on the face of the record. It is not perverse either. The view taken by the Tribunal is in consonance with the reading of the Rules prevailing and during the period in question, namely, 1997-98. In these circumstances, the questions of law termed as substantial questions of law and framed by this Court would have to be answered against the Assessee and in favour of the Revenue. They are answered accordingly and the Appeal is dismissed accordingly. No costs.

**(SUNIL P. DESHMUKH, J.)** **(S.C.DHARMADHIKARI, J.)**