IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 06.02.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR. JUSTICE R.KARUPPIAH

C.M.A. NOS. 3688, 3689 & 3694 OF 2014
AND
M.P. NOS. 1 OF 2014 (3 Nos.)

M/s.The India Cements Ltd.
Sankar Nagar 627 357
Tirunelveli District.

... Appellant in all the appeals

- Vs -

1. The Customs, Excise & Service
Tax Appellate Tribunal
South Zonal Bench, Chennai
Shastri Bhavan Annex, Haddows Road
Chennai 600 034.

... R-1 in all the appeals

2. The Commissioner of Central Excise
No.1, Williams Road
Cantonment, Trichy 620 001.

... R-2 in CMA Nos.3688 & 3694/2014

3. The Assistant Commissioner
of Central Excise
Central Excise Building
NGO A Colony
Tirunelveli 627 007.

... R-3 in CMA No.3688/2014

4. The Commissioner of Central Excise
Central Revenue Building
Tractor Road, N.G.O. 'A' Colony
Tirunelveli 627 007.

... R-2 in CMA No.3689/2014

5. The Deputy Commissioner
of Central Excise
Tirunelveli Division
Tirunelveli 627 007. ... R-3 in CMA No.3689/2014

6. The Addl. Commissioner of
Central Excise, Madurai 625 002.
... R-3 in CMA No.3694/2014

Appeals filed under Section 35-G of the Central Excise Act against the order dated 21.10.05 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order Nos.1444, 1445 and 1446/2005 respectively in Appeal Nos.E/1058, 1028 & 1057 of 2004.

For Appellant : Mr. C.Saravanan

For Respondents : Mr.Rajnish Pthiyil, SCGSC
for RR-2 & R-3 in CMA No.3689/2014
Mr. T.Chandrasekaran, SPC for R-2
in CMA Nos.3688 & 3694/2014

COMMON JUDGMENT
(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the respective orders passed by the Tribunal in dismissing the appeals filed by it, the assessee is before this Court by filing the present appeals, by raising the following questions of law :-

> "i) Whether in the facts and circumstances of the case, the Appellate Tribunal was justified in denying modvat credit on inputs such as lubricants and grease used in the captive mines?
>
> ii) Whether the impugned orders of the Appellate Tribunal can be sustained in the light of the decisions of the Apex Court in Vikram Cement - Vs - CCE (2006 (194) ELT 3 (SC) and Vikram Cements - Vs - CCE, Indore (2006 (197) ELT 145 (SC))?"

2. The short facts of the case are that the appellant/assessee is engaged in the manufacture of cement falling under Chapter 25 of the Central Excise Tariff Act, 1985. The appellant/assessee availed Modvat credit on certain capital goods/inputs which were used in its captive mines.

3. Insofar as CMA No.3688/2014 is concerned, a show cause notice dated 8.11.02 for the period between 1.12.2001 to 30.7.02, was issued on the appellant, by the Superintendent of Central Excise, seeking to deny credit to the tune of Rs.69,264/= on inputs such as lubricants

and greases used in the mines and for the vehicles in the factory used in relation to manufacture. The appellant filed a detailed reply on 4.12.02 and written submission dated 28.3.03.

4. Insofar as CMA No.3689/2014 is concerned, a show cause notice dated 11.3.02 for the period between 1.3.2001 to 30.11.2011 was issued on the appellant, by the Superintendent of Central Excise, seeking to deny credit to the tune of Rs.2,44,320/= on inputs such as lubricants and greases used in the mines and for the vehicles in the factory used in relation to manufacture.

5. Insofar as CMA No.3694/2014 is concerned, a show cause notice dated 21.9.2000 for the period between 1.9.95 and 31.5.2000 was issued on the appellant, by the Addl. Commissioner of Central Excise, seeking to deny credit to the tune of Rs.18,35,002/= on inputs such as lubricants and greases used in the mines and for the vehicles in the factory used in relation to manufacture.

6. The Department was of the view that Modvat/Cenvat credit on duty paid inputs is available only when the goods are used within the precincts of the factory premises for manufacture of notified final products. The adjudicating authority came to the conclusion, on interpretation of the relevant rules, that Modvat/Cenvat credit shall apply only when inputs are used within the factory. If it is used in the captive mines and outside the factory, it is not eligible for the credits. Accordingly, the respective adjudicating authority while confirming the demand/partly modifying the demand by its respective orders, imposed penalty as well on the appellant/assessee.

7. Aggrieved by the said orders of the respective adjudicating authority, the appellant/assessee preferred appeals to the CIT (Appeals). The CIT (Appeals), in two of the appeals preferred by the assessee, held against the assessee confirming the order of the adjudicating authority, whereas in one other appeal, the CIT (Appeals) allowed the appeal in favour of the assessee.

8. The assessee, aggrieved by the order of the CIT (Appeals) denying Modvat credit in respect of grease and lubricants used in the captive mines, filed two appeals to the Tribunal, while the Department, aggrieved by the order of the CIT (Appeals) in allowing the benefit of Modvat credit used in the captive mines of the assessee, also filed appeal before the Tribunal. Though it was brought to the notice of the Tribunal that the decision of the Supreme Court in Commissioner of Central Excise, Jaipur - vs - J.K.Udaipur Udyog Ltd. (2004 (171) ELT 289 (SC)) has been referred to a Larger Bench of the Court, the Tribunal held that the Supreme Court has just made a reference and has not rendered any ruling and, therefore, the judgment of the Supreme Court in J.K.Udaipur case (supra) will hold the field till the Larger Bench decides the issue.

The Tribunal also further observed that there is no stay of operation of the judgment in J.K.Udaipur case (supra). In effect, the relief given in the decision of the Supreme Court in Jaypee Rewa Cement - Vs - Commissioner of Central Excise, M.P. (2001 (133) ELT 3 (SC)), was denied. Accordingly, the Tribunal, while dismissed the appeals filed by the assessee affirming the order of the CIT (Appeals), allowed the appeal filed by the Department by setting aside the order of the CIT (Appeals). Aggrieved by the said orders of the Tribunal, the present appeals have been filed before this Court.

9. Learned counsel appearing for the appellant/assessee contended that Larger Bench of the Supreme Court in Vikram Cement - Vs - Commissioner of Central Excise, Indore (2006 (194) ELT 3 (SC) and 2006 (197) ELT 145 (SC)) has held that Modvat credit on capital goods will be available to the assessee if the capital goods are used by the assessee in their factory/captive mines. Therefore, it was submitted that the Tribunal has erred in its order denying the credit to the appellant/assessee and, the orders of the Tribunal has to be set aside. On the above contention, this Court heard the learned counsel appearing for the respondent/Department.

10. Heard Mr.Saravanan, learned counsel appearing for the appellant/assessee and Mr.Chandrasekaran and Mr.Rajnish Pathiyil, learned standing counsel appearing for the respective respondent/Department and perused the materials available on record as also the judgments relied on by the learned counsel for the appellant/assessee.

11. In Jaypee Rewa Cements case (supra), the appellant/assessee was a cement manufacturer, who had a factory at Raipur. Limestone, an essential raw material for manufacture, was extracted for the said mine by the use of explosives. On the explosives so used, excise duty had been paid, but the limestone, which was extracted, though an excisable item, was exempt from payment of excise duty by reason of an exemption notification and as a result, the manufacturer of the cement claimed Modvat credit under the provision of Rule 37 of the Central Excise Rules. The Supreme Court, in the said case, held as follows :-

> "10. Reading of Rule 57A clearly shows that the notification is to specify the goods used in or in relation to the manufacture of the final product whether directly or indirectly. In the present case, inputs which are used in relation to the manufacture even directly would be regarded as an input for the purpose of Rule 57A. Sub-rule (1) of Rule 57A does not, in any way, specify that the inputs have to be utilised within the factory premises. The explanation contained in Rule 57A is merely meant to enlarge the meaning of the word "input" and does not

in any way restrict the use of the input within the factory premises nor does the said Rule 57A require the inputs to be brought into the factory premises at any point.”

12. The view expressed in Jaypee Rewa Cement's case (supra) was, however, distinguished by the Supreme Court in J.K.Udaipur Udyog's case (supra), wherein the Supreme Court held that the decision in Jaypee Rewa Cement's case (supra) did not apply to Cenvat Rules.

13. The ratio laid down in the decision in J.K.Udaipur Udyog's case (supra) was doubted by a Bench of coordinate strength and, therefore, the matter was referred to a Larger Bench in the case of Vikram Cement - Vs - Commissioner of Central Excise, Indore (2006 (194) ELT 3 (SC)). The point in reference before the Larger Bench in the abovesaid case, for better clarity, is quoted hereunder :-

> “The question whether the decision in Jaypee Rewa Cement Vs. CCE 2001 (133) ELT 3 SC would apply to the CENVAT Rules 2000 framed under the Cement Excise Tariff Act 1985 (referred to as the ‘Act’) is to be decided on a reference made in this case. A Bench of two judges of this Court in Commissioner of Central Excise, Jaipur Vs. J.K. Udaipur Udyog Ltd. 2004 (171) ELT 289 SC held that Jaypee Rewa Cement did not apply to the CENVAT Rules. The view would doubted in this case by a Bench of coordinate strength which referred the following question to us:-
>
> > "In the light of the provisions of the Cenvat scheme vis-a-vis Modvat scheme reproduced hereinabove, we are of the view that the observations made in paragraph 9 of the decision of the Division Bench, quoted above, in the case of Commissioner of Central Excise, Jaipur vs. J.K. Udaipur Udyog Ltd. reported in 2004(171) ELT 289 needs reconsideration."
>
> 2. The reference was made in the factual context of the appellants availing of CENVAT credit on explosives and other inputs used in quarrying limestone, which was in turn used for the manufacture of cement and clinkers, which are classifiable under Chapter 25. The limestone mines of the appellants are situated at some distance away from the factory premises of the appellants. The Adjudicating Authority held that the appellants were not entitled to the credit availed of by the appellants and raised a demand for excise duty only on the explosives. The narrower question raised in this appeal therefore is whether the adjudicating authority was correct in denying the appellants the CENVAT credit on the inputs.”

14. The answer of the Larger Bench to the above reference is extracted hereinbelow for better clarity :-

"13. Analyzed, it is clear that sub-rule (d) of Rule 57AA has merely reframed Rule 57B to include all the ingredients of inputs while at the same time broadening the base not only by referring to "all goods" but also by using the word "includes".

14. Rule 57AC provides for the conditions for allowing CENVAT credit in respect of inputs received in the factory of the manufacturer. Sub-rule (1) of Rule 57AC which was relied on in J.K. Udaipur Udyog to differ from the conclusion in Jaypee Rewa Cement reads:-

"Rule 57AC. Conditions for allowing CENVAT credit.—(1) The CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer".

15. Rule 57 J of the MODVAT Rules was deleted. This led to controversy and on 29th of August, 2000, a clarification was issued by the Central Board of Excise and Customs (CBEC) inter alia to the effect that:-

"It has been represented that when the inputs are sent directly to a job worker, the erstwhile MODVAT credit scheme permitted availment of MODVAT credit under Rule 57J read with the Notification No. 214/86-C.E. as amended. Several associations have requested that similar provision may be made in the CENVAT scheme. This request has been acceded to and Rule 57AB (1) has been amended suitably for this purpose. The amended provisions of Rule 57B (1) apply to goods received in the factory on or after 1st April, 2000. Credit is therefore permissible in respect of intermediate goods received from a job worker on or after 1.4.2000. Credit shall, of course, be allowed only if the intermediate products received by the manufacturer of the said final products are accompanied by any of the documents as specified under rule 57AE(1) evidencing the payment of duty on such inputs of capital goods." {Emphasis supplied}

* * * * * * * * *

17. Rule 57AB effectively duplicates the substance of Rule 57J (1) and (2) and deals with a situation where inputs are received by a job worker for production of intermediate goods which are used in the manufacture of a final product.

* * * * * * * * *

21. Three reasons were given by the Court for holding that credit could be taken only on inputs received in the factory of the manufacturer of the final product. First, the Court held that the definition of input given in sub-rule (d) of Rule 57AA was "entirely different from the manner in which the said word had been expounded in the explanation to Rule 57A of the MODVAT Rules". We cannot agree with this reading of the Section. As we have said there was only a re-arrangement of the several provisions of Rule 57B in Rule 57AA. Rule 57AA is in fact more broadbased than Rule 57B.

22. Second, the Court proceeded on the basis that under the CENVAT scheme there was no provision similar to Rule 57J of the MODVAT scheme. As we have seen, Rule 57J was replaced in substance by Rule 57AB. This provision was overlooked.

23. The third reason given by the Court in J.K. Udaipur Udyog for holding that the CENVAT Scheme was different from the MODVAT Scheme was Rule 57AC (1). However, that Rule is limited to inputs received in the factory of the manufacturer and does not impinge on Rule 57AB at all.

24. The schemes of MODVAT and CENVAT Credit are not therefore different and we are unable to agree with the conclusion of the Court in J.K. Udaipur Udyog that the decision in Jaypee Rewa Cement (supra) would have no application to CENVAT Rules.

25. In our opinion the doubt expressed by the referring Bench about the correctness of the decision in CCE Vs. J.K. Udaipur Udyog Limited (supra) was well founded. Having regard to the fact that the CENVAT Rules in effect substitute the MODVAT Rules, the decision in Jaypee Rewa Cement would continue to apply. The decision in Commissioner of Central Excise, Jaipur Vs. J.K. Udaipur Udyog Limited (supra) holding to the contrary is, in our opinion, not good law. The reference is answered accordingly. All the appeals and special leave petitions will now be listed for being disposed of in the light of this judgment."

15. The Larger Bench, in the above decision in Vikram Cement (supra) held that the decision in Jaypee Rewa Cement case (supra) would continue to apply. The said ratio of the Larger Bench was, in fact, followed by the Supreme Court in the subsequent decision in Vikram Cement - Vs - Commissioner of Central Excise (2006 (197) ELT 145 (SC)), wherein the Supreme Court held as under :-

"4. Insofar as the Modvat/Cenvat credit on inputs (explosives, lubricating oils, etc.) is concerned, the issue is squarely covered by the decision of this Court in the case of Vikram Cement v. CCE reported in 2006 (194) ELT 3 (SC). Therefore, the appeals, where credit on inputs is concerned, are allowed.

5. As regards the Modvat/Cenvat credit on capital goods, if the mines are captive mines so that they constitute one integrated unit together with the concerned cement factory, Modvat/Cenvat credit on capital goods will be available to the assessee. On the other hand, if the mines are not captive mines but they supply to various other cement companies of different assessees, Modvat/Cenvat credit on capital goods used in such mines will not be available to the concerned assessee under the appropriate Modvat/Cenvat Rules. The matters are remanded to the respective original authorities for decision only on the above issue."

16. The abovesaid view of the Supreme Court in Vikram Cement case (supra) was reiterated in a subsequent decision in the case of Madras Cements Ltd. - Vs - Commissioner of Central Excise, Chennai (2010 (257) ELT 321 (SC)).

17. From the above decisions, it is clear that grease and lubricants used in the factory/captive mines, which is not in dispute, and which are used as inputs, are entitled to the benefit of Modvat credit. In the present, case, it is not in dispute that the inputs were used in the factory/captive mines of the appellant/assessee. That being the case, the judgments in Vikram Cement case (2006 (197) ELT 145 (SC)) and Madras Cements Ltd. Case (supra) are squarely applicable to the facts of the present case. Accordingly, the substantial questions of law are answered in favour of the appellant/assessee and against the Department/respondent.

18. In the result, all the above appeals are allowed. Consequently, connected miscellaneous petitions are closed. However, there shall be no order as to costs.

Sd/-
Asst. Registrar

/true copy/

Sub Asst. Registrar.

GLN

To

1. The Customs, Excise & Service
   Tax Appellate Tribunal
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   Central Excise, Madurai 625 002.

+1cc to Mr.C.Saravanan, Advocate, S.R.No.6537
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C.M.A. NOS. 3688, 3689
& 3694 OF 2014

KSJ(CO)
CA(27/02/2015)