

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. NO. 3690 OF 2014

AND

M.P. NO. 1 OF 2014

M/s.The India Cements Ltd.
Sankari West 639 303
Salem District.

... Appellant

- Vs -

1. The Commissioner of Central Excise
6/7, ATD Street, Race Course Road
Coimbatore 641 018.

2. The Assistant Collector of Central Excise
Erode Division, Erode.

... Respondents

Appeal filed under Section 35-G of the Central Excise Act against the order dated 12.09.05 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order Nos.1231 & 1232/2005 in Appeal Nos.E/3537/98 and E/50/98.

For Appellant : Mr. C.Saravanan

For Respondents : No Appearance

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order passed by the Tribunal in dismissing the appeal filed by it, the assessee is before this Court by filing the present appeal, 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 capital goods used in the captive mines?

ii) Whether the impugned orders of the Hon'ble Tribunal can be sustained in the light of the decision of the apex Court in Vikram Cement - Vs -

CCE (2006 (194) ELT 3 (SC)) and the unreported decision/order dated 16th Feb., 2006 of the Apex Court in Civil Appeal No.1197 of 2005?"

2. The short facts of the case are that the appellant/assessee is in the manufacture and sale of cements. The appellant/assessee had availed modvat credit on certain capital goods and inputs which were used in its captive mines and factory/plant. The Assistant Commissioner disallowed the credit to the extent of Rs.22,83,670.81 against which the appellant preferred appeal to the Commissioner (Appeals). The Commissioner (Appeals) partially allowed the appeal filed by the appellant to the extent of Rs.12,75,938.01 and disallowed credit to the extent of Rs.10,07,732.80. Against the relevant portion of the order, which went against the respective parties, the appellant/assessee and the Department filed separate appeals.

3. Before the Tribunal, the assessee challenged the order wherein the assessee was denied capital goods credit in respect of equipments used for mining of limestone in the mines situate away from the factory on the ground that capital goods used outside the factory were not eligible for Modvat credit under Rule 57Q and also the imposition of penalty. However, in the order passed by the Tribunal, the Tribunal has recorded as under :-

"After hearing both sides, we find that the challenge against denial of capital goods credit on equipments used in the off-factory mines is not pressed. The assessee, however, is seriously aggrieved by imposition of the above penalty."

4. In view of the assessee not pressing the said relief, the Tribunal, taking into consideration the condition that prevailed in respect of the availment of modvat credit under Rule 57Q and since the assessee did not press the said relief, on the question of penalty alone, decided in favour of the assessee that no penalty should be imposed. Against the said portion of the judgment by which penalty was set aside, the Department has not chosen to file any appeal. However, on the other limb, viz., denial of capital goods credit on equipments used in the off-factory mines, which went against the assessee, the assessee is before this Court by filing the present appeal.

5. It is submitted by the learned counsel appearing for the appellant/assessee that the recording of the Tribunal that the assessee is not pressing the relief in respect of denial of capital

goods credit on equipments used in the off-factory mines, is wrong since the assessee/appellant, at no point, had acceded for giving up the said point before the Tribunal. Therefore, it is submitted that the matter should be remitted back to the Tribunal for fresh adjudication.

6. Heard the learned counsel appearing for the appellant/assessee and perused the documents available on record. In spite of notice, there is no representation on behalf of the respondent/Department.

7. A reading of the order of the Tribunal, which has been extracted above, clearly shows that the Tribunal has recorded that the challenge against denial of capital goods credit on equipments used in the off-factory mines is not pressed and that the assessee is only aggrieved by the imposition of penalty. The assessee having given up his plea on merits insofar as denial of capital goods credit on equipments, is not entitled to pursue the present appeal, albeit claiming that no such concession was made by the assessee before the Tribunal. If such is the contention of the assessee, the proper course for the assessee would be to move before the Tribunal and seek for modification of the order if there is an error on fact. At this point of time, it is not open to the assessee to canvass the said plea before this Court, as it pertains to a factual aspect. Therefore, this Court is not inclined to accept such an argument advanced on behalf of the assessee.

8. For the reasons recorded above, the appeal fails and the same is dismissed. However, it is open to the assessee/appellant to move the Tribunal and seek modification of the order, if so advised and permissible at this point of time. Consequently, connected miscellaneous petition is closed. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-

Asst. Registrar

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Sub Asst. Registrar.

GLN

To

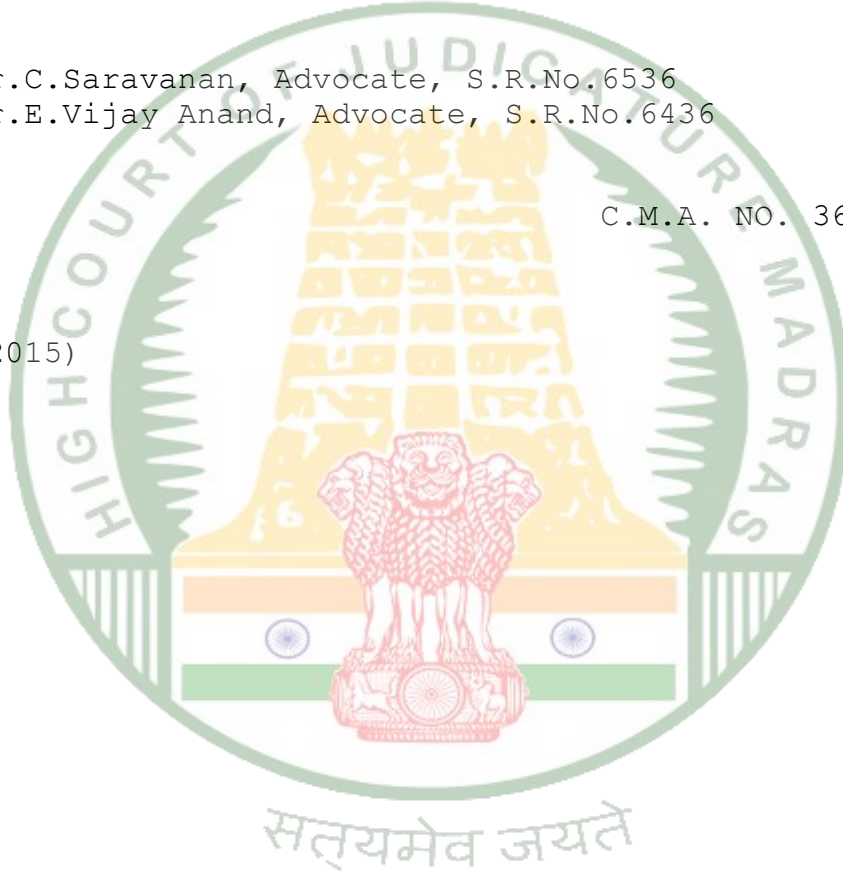
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South Zonal Bench, Chennai.

+1cc to Mr.C.Saravanan, Advocate, S.R.No.6536

+1cc to Mr.E.Vijay Anand, Advocate, S.R.No.6436

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



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