

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. 3692 OF 2014

AND

M.P. NOS. 1 OF 2014

M/s.The India Cements Ltd.
Sankari WestSankari 637 303. ... Appellant

- Vs -

The Commissioner of Central Excise
No.1, Foulks Compound
Annai Medu, Salem 636 001. ... Respondent

Appeal filed under Section 35-G of the Central Excise Act against the order dated 06.12.2005 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order Nos.1534 & 1535/2005 in Appeal Nos.E/535 & 536/04.

For Appellant : Mr. C.Saravanan

For Respondents : Mr. E.Vijay Anand

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

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

"i) Whether the amended Notification No.25/96-CE (NT) dated 31.08.1996 is clarificatory and therefore restorative in nature or not?

ii) Whether benefit of Modvat credit of capital goods can be denied where there is a apparent shortage?

iii) Whether the Appellate Tribunal, the Appellate Commissioner and the lower authorities were justified

in disallowing the credit on capital goods falling under Heading 73.25, 40.09, 82.07 of Central Excise Tariff Act (CETA), 1985, merely because they were incidentally part of goods falling under Chapter Heading 84.74 of CETA, 1985, for the period between?

iv) Whether the impugned orders of the Appellate Tribunal can be sustained seeking to deny credit on tyres and tubes falling under heading 4011.00 of CETA, 1985 used in the captive mines. In the light of the decision 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/Cenvat credit on certain capital goods received from their factory and captive mines. Show cause notices dated 7.4.00 and 4.1.99 were issued on the appellant, by the Superintendent of Central Excise, seeking to deny credit to the tune of Rs.40,271/= and Rs.2,31,974/=. Vide orders dated 28.8.01 and 22.7.03 the authority disallowed modvat credit availed by the appellant.

3. Aggrieved by the said orders, the appellant/assessee preferred appeals before the Commissioner (Appeals). The Commissioner (Appeals), vide orders dated 9.1.04 and 13.1.04 rejected the appeals on the ground that Notification No.25/1996-CE (NT) dated 31.8.96 was not retrospective and, therefore, the amended notification did not entail the appellant to the benefit of modvat credit.

4. Aggrieved by the said order, the appellant/assessee preferred appeal before the Appellate Tribunal. The Appellate Tribunal, on consideration of the common appeal, passed two final orders, wherein the basic issue considered was whether the components, spares and accessories of cement manufacturing machinery, received in the factory of the appellant/assessee from 23.7.96 to 31.8.96 are eligible for Modvat credit. Primarily, the Tribunal came to hold the order of the Department that the components, spares and accessories of cement manufacturing machinery received during the period in question was covered by an earlier Final Order No.760/05 dated 25.5.05. In the said decision, before the Tribunal, it was contended by the assessee that Notification No.25/96 C.E. (NT) was clarificatory and retrospective. But the argument was rejected by the Tribunal following decision in Final Order No.760/05 and dismissed the appeal filed by the assessee. Aggrieved against the said orders, the present appeal has been preferred by the assessee/appellant.

5. Learned counsel appearing for the respondent laid much stress on Notification No.25/96-CE (NT) dated 31.8.1996 to drive home the point that the said notification is clarificatory and retrospective in nature. In support of the said submission, reliance was placed on the decision of this Court in India Cements Ltd. - Vs - Commissioner of Central Excise, Trichy-1 (2013 (297) ELT 508 (Mad.)). On the other issue relating to entailment of modvat credit on capital goods, such as components, spares and accessories used in the captive mines/factory of the appellant, reliance was placed on the decision of the Apex Court in Vikram Cement - Vs - Commissioner of Central Excise, Indore (2006 (194) ELT 3 (SC) and 2006 (197) ELT 145 (SC)), wherein the Supreme Court has categorically held that if the capital goods are used by the assessee for their own use in their captive mines, be it inside the factory premises or outside the factory premises, they are entitled for modvat credit.

6. Heard the learned counsel appearing for the appellant/assessee and the learned standing counsel appearing for the respondent and also perused the materials available on record and also the decisions relied on by the learned counsel for the assessee/appellant.

7. When the matter was taken up for hearing, learned counsel appearing on either side fairly submitted that with regard to the first issue, the same stands squarely covered by the judgment of this Court in the respondent/assessee's own case in India Cements Ltd. - Vs - Commissioner of Central Excise, Trichy-1 (2013 (297) ELT 508 (Mad.)), wherein this Court has answered the issue against the Revenue.

8. A Division Bench of this Court, considering similar issue in the case of the very same assessee in the abovesaid case, has held as under :-

"12. The assessee also placed reliance on the decision reported in 2010 (255) ELT 481 (Commissioner of Central Excise v. Rajasthan Spinning and Weaving Mills Ltd), wherein, the Apex Court, applying "user test" evolved in the judgment in Jawahar Mills' case, held that items used in the fabrication of chimney would fall within the ambit of "capital goods" and that the assessee was entitled to avail modvat credit in respect of the disputed items under Rule 57Q. In fact, the said decision was followed by this Court in respect of the assessee's own case on earlier occasion in C.M.A.No.3101/05 by order dated 13.12.2012. Having accepted the case of the assessee

by applying the Apex Court decision reported in 2010 (255) ELT 481 (Commissioner of Central Excise v. Rajasthan Spinning and Weaving Mills Ltd), this Court rejected the Revenue's contention and affirmed the view of the Tribunal that the impugned goods were capital goods entitled to credit under Rule 57Q of Central Excise Rules.

13. It is seen from the facts narrated in the case before us that the item in question were classifiable under Chapter Heading 84.31 and they were parts of materials conveying equipments falling under Chapter Heading 84.28. Apart from that, there were goods falling under Chapter Heading No.84.74 for the period between 23.07.1996 and 31.08.1996. The dispute herein related to goods falling under Chapter Heading 84.74. As is evident from the reading of the amended Rule 57Q(1)(d) under Notification No.14/96-CE dated 23.7.1996, the provision reads as follows:

"(d) components, spares and accessories of the goods specified against items (a) to (c) above."

Going by the liberal meaning given to Clause (d) in Rule 57Q that the position prior to 23.07.1996 Supreme Today With All High Courts Page 5 of 6 when credit was available for components, spares and accessories irrespective of the classification of specified capital goods, we have no hesitation in accepting the case of the assessee. Quite apart, even going by the circular, we agree with the argument advanced by the learned counsel for the assessee that the amendment under Notification No.25/96 dated 31.8.1996 has to be read only as clarificatory and retrospective effect has to be given for availing modvat credit. In view of this reasoning, we find that capital goods itself were eligible for modvat credit under Rule 57Q.

14. Thus, in the light of the decision of this court following the Apex court decision and in the background of the circular issued by the Government of India dated 2.12.1996 that the benefit of modvat credit under Rule 57Q would be applicable to all components, spares and accessories of the specified goods, irrespective of their classification under any chapter heading, we have no hesitation in granting the relief in favour of the assessee, thereby the order of the Customs, Excise and Service Tax Appellate Tribunal is set aside. Consequently, the Civil Miscellaneous Appeal is allowed. No costs."

On the first issue, as laid down by this Court in the abovesaid decision, this Court holds that Notification No.25/96 C.E. (NT) dated 31.08.1996 is retrospective and clarificatory in nature. Accordingly, the first issue relating to Notification No.25/96-CE (NT) dated 31.08.1996 is answered in favour of the assessee/appellant and against the Revenue.

9. The 2nd issue that has been urged before this Court by the learned counsel for the appellant/assessee is whether components, spares and accessories used as capital goods in the mines would be entitled to the benefit of Modvat credit.

10. The Tribunal upheld the order of the Department by placing reliance on the decision of the Supreme Court in Jaypee Rawa Cements - Vs - Commissioner of Central Excise (2001 (133) ELT 3 (SC)), to state that the benefit under Rule 57Q of the Central Excise Rules was not available for the goods in question. However, on a perusal of the said decision, this Court finds that only in relation to one of the appeal in Jaypee Rawa's case (supra), it has been held as follows :-

"22. We have gone through the decision of the Tribunal. In view of the provisions of Rule 57Q, the appellant is not entitled to any relief. The appeal is dismissed."

11. Subsequently, a Larger Bench of the Supreme Court in the case of Vikram Cement - Vs - Commissioner of Central Excise, Indore (2006 (194) ELT 3 (SC)) refrained to discuss Rule 57Q, which deals with credit on capital goods used as inputs.

12. However in the subsequent decision in Vikram Cement - Vs - Commissioner of Central Excise (2006 (197) ELT 145 (SC)), in para-5 of the said judgment, the Supreme Court observed that for availing Modvat credit on capital goods, if the mines are captive mines, they constitute one integrated unit together with the concerned cement factory. Therefore, Modvat/Cenvat credit on capital goods will be available to the assessee so long as the goods are used by the assessee. However, where the goods are supplied to other cement companies of different assessees, the credit is not available. For better clarity, the relevant portion is extracted hereunder :-

"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."

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

14. This Court, in the earlier batch of appeals, viz., C.M.A. Nos.3691, 3693, 3695 and 3696 of 2014, pertaining to the very same assessee, found that the Tribunal has not gone into the issue whether the capital goods were utilised in the own factory of the assessee or in an integrated mine of the assessee or in other mines. Therefore the matter was remanded to the Original Authority for reconsideration of the claim of the assessee in the light of the decision in Vikram Cement case (2006 (197) ELT 145 (SC)).

15. In the present case as well, the core issue being that there is no finding as to whether the capital goods were utilised in the own factory of the assessee or in an integrated mine of the assessee or in other mines, this Court, without going into the other questions of law as raised by the appellant, is inclined to set aside the impugned orders and remand the matter back to the Original Authority for reconsideration.

16. Accordingly, this appeal is disposed of and the matter is remanded back to the Original Authority to reconsider the 2nd issue, in relation to the usage of capital goods, in the light of the decision of the Supreme Court in Vikram Cement case (2006 (197) ELT 145 (SC)) and Madras Cements Ltd. case (supra). Consequently, connected miscellaneous petition is closed. However, in the circumstances of the case, 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
South Zonal Bench, Chennai
Shastri Bhavan Annex, Haddows Road
Chennai 600 034.

2. The Commissioner of Central Excise
No.1, Foulks Compound
Annai Medu, Salem 636 001.

+1cc to Mr.C,Saravanan, Advocate, S.R.No.6534

+1cc to Mr.E.Vijay Anand, Advocate, S.R.No.6435

C.M.A. NOS. 3692 OF 2014

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



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