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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 18.06.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

C.M.A. Nos. 24 of 2009, 3062 to 3064 of 2009, 2981 of 2010 and 2424 to 2428 of 2011

The Commissioner of Central Excise,
Pondicherry Commissionerate,
No.1, Goubert Avenue, Beach Road,
Pondicherry - 605 001. .. Appellant in all appeals

- Vs -

1.M/s.New India Surfactants,
A 86 & 87, PIPDIC Industrial Estate,
Pondicherry - 605 111. ..1st Respondent in CMA No.24/09
3062 to 3064/09

2. M/s. Advance Detergents Ltd.,
Pallithennal Post, Mangalam Road,
Kandamangalam,
Pondicherry 605 102. ..1st Respondent in CMA.2981/10
and 2424 to 2428/2011

3.Customs, Excise and Service Tax
Appellate Tribunal, South Zonal Bench,
Shastri Bhawan Annexe, 1st Floor,
Haddows Road, Chennai – 600 006.
..2nd Respondent in all CMAs.

Appeals filed under Section 35G of the Central Excise Act, 1944 against the order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in (i) Final Order Nos.892 to 898 of 2005 dated 10.06.2005 (ii)Final order No.543 to 545 of 2005 dated 30.03.2005 (iii) Final order No.390/05, 392 to 396/05 dated 10.03.2005 respectively.

For Appellant in the above C.M.As: Mr.A.P.Srinivas
For Respondents in C.M.A.No.2981 of 2010 : Mr.Ponnambala Thiyagarajan -R1
For Respondents in C.M.A.Nos.2424 to 2428/2011
24/09 and 3062 to3064/09 : Mr.P.R.Renganath - for R1
for M/s.Raghavan

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C O M M O N J U D G M E N T
(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the common order passed by the Tribunal in dismissing the appeals filed by the Revenue, the Revenue/appellant is before this Court by filing the present appeals. The common issue that arises for consideration in the above appeals is whether the assessee is entitled to the credit of duty taken on the inputs, when the final product was cleared at nil rate of duty.

2. It is seen that the issue involved in the above appeals is arising out of the common order passed by the Tribunal. The said common order of the Tribunal has been challenged before this Court in C.M.A.No.285 of 2007. This Court vide order dated 18.06.2015 in C.M.A.No.285 of 2007, following the decision of the Supreme Court in the case of Union of India v. Hindustan Zinc Ltd. 2014 (303) ELT 321 (SC) dismissed the appeal, holding as follows:

> " 11. The issue whether the Spent Sulphuric Acid is a by-product or not has been put to rest by the Allahabad High Court in the case of Varuna Sulphonators Pvt. Ltd. V. Union of India (1993 (68) ELT 42 (All) and also by the Supreme Court in the recent decision in the case of Union of India v. Hindustan Zinc Ltd. 2014 (303) ELT 321 (SC).
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> 12. The Supreme Court in the in the case of Union of India v. Hindustan Zinc Ltd. 2014 (303) ELT 321 (SC), while dealing with the entitlement of the assessee to Modvat/Cenvat Credit for the use of inputs in the manufacture of final products which are exempt or subject to nil rate of duty, held as follows:
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>> "16. Before we advert to the interpretations of the aforesaid provisions and to discuss the argument of the Union of India as to whether literal interpretation is to be given to Rule 57CC, it would be necessary to understand the properties of sulphuric acid. From what is explained above including the use of sulphuric acid for the production of zinc, it becomes apparent that sulphuric acid is indeed a by-product. In fact, it is so treated by the respondents in their balance sheet as well as various other documents which were filed by the respondents in the courts below. It is also a common case of the parties that Hindustan Zinc Limited and Birla Copper were established to produce zinc and copper respectively and not for the production of sulphuric acid. It was argued by the learned Counsel for the respondents, which could not be disputed by the learned Solicitor General, that emergence of sulphur dioxide in the calcination process of concentrated ore

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is a technological necessity and then conversion of the same into sulphuric acid as a non-polluting measure cannot elevate the sulphuric acid to the status of final product. Technologically, commercially and in common parlance, sulphuric acid is treated as a by-product in extraction of non-ferrous metals by companies not only in India but all over the world. That is the reason why the department accepted the position before the Tribunal that sulphuric acid is a by-product. In these circumstances the position taken now by the appellant that sulphuric acid cannot be treated as a by-product cannot be countenanced. Mr. S.K. Bagaria, learned Senior Counsel appearing for the respondent while explaining the manufacturing process in detail, also pointed out that the ore concentrates (Zinc or Copper) are completely utilised for the production of zinc and copper and no part of the metal, zinc or copper forms part of the sulphuric acid which is cleared out. It was submitted that the extraction of zinc from the ore concentrate will inevitably result in the emergence of sulphur dioxide as a technological necessity. It is not as though the respondents can use lesser quantity of zinc concentrate only to produce the metal and not produce sulphur dioxide. In other words, a given quantity of zinc concentrate will result in emergence of zinc sulphide and sulphur dioxide according to the chemical formula on which respondents have no control."

13. A reading of the above-said decision of the Supreme Court makes it clear that the invocation of Rule 57C by the Department is not justified and the Commissioner (Appeals) and the Tribunal were correct in holding in favour of the assessee.

14. Insofar as Rule 57D is concerned, the very language of Rule 57D makes it clear that credit of duty shall not be denied or varied on the ground that part of the inputs contained in any waste, refuse or by-product arising during the manufacture of the final product, or that the inputs have become waste during the course of manufacture of the final product. It also states that it is of no consequence whether the by-product such as waste, refuse or by-product is exempt from the whole of the duty of excise leviable thereon or chargeable to nil rate of duty or is specified as a final product.

15. In the present case, as the Spent Sulphuric Acid is not a final product, as has been held in the decision of the Supreme Court and assuming it is a waste, refuse or by-product, it is chargeable to nil rate of duty, Rule 57D provides for taking credit.

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16. There is yet another factor which needs to be considered is that part of the Spent Sulphuric Acid, which is a by-product in the manufacture of the final product, namely, Acid Slurry, is cleared on payment of duty and part of it is cleared at nil rate of duty under Chapter X procedure in terms of Notification No. 8/96-CE dated 23.7.1996 and Notification No.4/97-CE dated 1.3.97. Therefore, the provisions of Rule 57D get squarely attracted to the present case and the Department shall not deny the credit of specified duty whether or not such waste or refuse is exempt from whole of the duty of excise leviable thereon or chargeable to nil rate of duty.

17. In view of the above, following the above-said decision of the Supreme Court in the case of Union of India v. Hindustan Zinc Ltd. 2014 (303) ELT 321 (SC), we have no hesitation to uphold the order of the Commissioner (Appeals), which was confirmed by the Tribunal.

18. In the result, we answer the question of law in favour of the assessee and against the Revenue and consequently, this Civil Miscellaneous Appeal stands dismissed. No costs. "

Following the above-said decision of this Court dated 18.6.2015 in C.M.A.No.285 of 2007, the above appeals are dismissed. No costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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To

Customs, Excise & Service Tax Appellate Tribunal
South Zonal Bench Shastri Bhavan Annexe
1st Floor, No.26, Haddows Road, Chennai 600 006.

+1cc to Mr.R. Raghavan, Advocate, S.R.No.30500

KU(CO)
EU(13/07/2015)

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