IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 28.8.2015.

CORAM

THE HON'BLE MR.JUSTICE V.RAMASUBRAMANIAN
AND
THE HON'BLE MR.JUSTICE T.MATHIVANAN

C.M.A.Nos.633 to 635 of 2009

M/s.Dalmia Cements (Bharat) Ltd.,
rep. by its Assistant Executive Director,
Rajiv Bakshi
Dalmiapuram, Perambalur District.
Tamil Nadu 621 651. ..Appellant in all CMA's

vs.

1. The Customs, Excise and Service Tax Appellate Tribunal,
Shastri Bhavan Annex,
26, Haddows Road, Chennai 600 006.

2. The Commissioner of Central Excise (Appeals),
Tiruchirapalli.

3. The Assistant Commissioner of Central Excise, Division I,
Tiruchirapallai. Respondents in all CMA's

Civil Miscellaneous Appeals against the final order Nos.637, 638 and 640 of 2006 dated 26.7.2006 in Appeal Nos.E/672/1999, E/673/1999 and E/675/1999 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For appellant
(in All CMA's) : Mr.R.Bharanidharan

For R2 and R3
(in All CMA's): Mr.T.Chandrasekaran, Senior Panel Counsel

COMMON JUDGMENT

(Judgment of the Court was delivered by V.RAMASUBRAMANIAN, J.)

These appeals are by the asssessee, under section 35G of the Central Excise Act, 1944.

2. Heard Mr.R.Bharanidharan, learned counsel for the appellant and Mr.T.Chandrasekaran, learned Senior Panel Counsel for the Revenue.

3. The appellant/assessee is the manufacturer of various kinds of cement under CSH 2502.29 and 2502.90 of the Central Excise Tariff Act, 1985. During the course of verification of a declaration filed by the assessee, under Rule 57A of the Central Excise Rules, 1944, the assessee declared certain capital goods as inputs under Rule 57A for the manufacture of intermediary product viz., machinery and machinery parts falling under Chapter 84.00, reportedly used for manufacture of final product viz., cement. They claimed exemption under the Notification No.67/95 CE dated 16.3.1995.

4. Claiming that the assessee failed to furnish certain particulars, show cause notices were issued calling upon them to show cause as to why the declaration filed under Rule 57A should not be rejected under Rule 57G.

5. Thereafter, a scrutiny of RT 12 returns filed by the assessee were made and they were alleged to have wrongly taken modvat credit for the capital goods declared as per the aforesaid declaration. Hence, contending that they are not entitled to avail modvat credit for the capital goods declared under Rule 57G, three show cause notices were issued by the Superintendent of Central Excise respectfully on 16.5.1997, 21.11.1997 and 5.5.1998.

6. After the assessee gave their reply, the Assistant Commissioner passed three orders in original bearing numbers 133, 153 and 154 of 1998 dated 29.6.1998, 28.7.1998 and 28.7.1998 respectively, expunging the modvat credit availed by the assessee to the extent indicated in each of those order in original.

7. The assessee filed three independent appeals under section 35 before the Commissioner of Central Excise (Appeals). The Commissioner, by a common order dated 8.1.1999, allowed the appeals partly. The effect of common order passed by the Commissioner of Excise (Appeals) on 8.1.1999 was that he allowed modvat credit to the assessee on (1) Channels (2) Bars (3) Plates (4) Joints (5) Industrial Gas and (6) Electrodes. But, the Commissioner (Appeals) denied the benefit in respect of (1) Cement, and (2) Steel angles.

8. Therefore, the Revenue filed three appeals in Appeal No.E/840 to 842 of 1999 on the file of the CESTAT. The assessee filed four appeals in E/672 to 675 of 1999.

9. All the seven appeals (four filed by the assessee and three filed by the Revenue) were taken up together by the Tribunal. The Revenue made an endorsement that they were not pressing two out of three appeals. Therefore, Appeal Nos.E/841 and 842 of 1999 were dismissed and Appeal No.E/840 of 1999 alone was taken up.

10. However, the CESTAT found that even the appeal in E/840 of 1999 was liable to be dismissed as the order of the Commissioner (Appeals) actually denied modvat credit to the assessee on cement and angles and that the assessee themselves was on appeal against the same. Therefore, holding that the Revenue cannot have any cause to complain, the third appeal of the Revenue viz., E/840 of 1999 was dismissed. Thereafter, the four appeals filed by the assessee were taken up by the Tribunal for consideration. Eventually, the Tribunal held that insofar as the cement and steel used in the civil foundation for supporting the conveyor system in the factory was concerned, the items used therein was not eligible capital goods under Rule 57Q. However, the Tribunal held that the capital goods credit under Rule 57Q was admissible in respect of steel angles used in the fabrication of conveyors for the period prior to 23.7.1996, which is the date on which the earlier clauses (a) and (b) of explanation (1) to sub-rule (1) of Rule 57Q were deleted. As a consequence of the above finding, the Tribunal dismissed the three appeals filed by the assessee and allowed one appeal partly and remanded the matter to the original authority to quantify the capital goods credit on steel angles for the period prior to 23.7.1996. Therefore, the assessee has come up with the three appeals.

11. On 11.6.2009, the appeals were admitted on the following two questions of law:-

> "1. Whether the modvat credit is admissible on cement and steel used in laying the foundation on which machinery is fixed to function effectively?
> 2. Whether modvat credit is admissible on cement and steel angles used in the construction of support structure for providing support to machinery employed in manufacture of final product?"

12. As can be seen from the two questions of law framed, the assessee claimed modvat credit, first in respect of cement and steel used in laying the foundation on which the machinery is fixed. The second claim is for modvat credit on cement and steel angles used in the construction of support structure for the machinery employed in manufacture of final product.

13. It is seen from the decision in COMMISSIONER OF CENTRAL EXCISE v. INDIA CEMENTS LTD. (2012 (285) ELT 341 (Madras)) that a Division Bench of this court held that the structural steel items such as Rebar Coils, CTD Bars, TOR Steel and Cement used

for construction activity, being in the nature of building materials, are capital goods eligible for credit in terms of Rule 57Q. Similarly, in COMMISSIONER OF CENTRAL EXCISE v. INDIA CEMENTS (2014 (305) ELT 558), this court held that structural steel items such as M.S. Plates, Angles, Channels and HR Sheets used for civil construction activity, are capital goods eligible for credit in terms of Rule 57Q. Therefore, these two decisions appear to support the case of the assessee.

14. Before we proceed further, we must take note of one fact that was also taken note of by the Bench while admitting the appeal on 11.6.2009. At the time when the above appeals were admitted, the question whether the items used in the construction of support structure were eligible for credit was referred to a larger bench of CESTAT. It appears that the larger Bench answered the question in favour of Revenue and the assessee has already gone on appeal to the Chattisgarh High Court. Be that as it may, for answering the questions arising for consideration, it is necessary to take note of Rules 57A and 57Q. Rule 57A reads as follows:-

> "Rule 57A. Applicability -- (1) The provisions of this section shall apply to such finished excisable goods (hereinafter referred to as the "final products"), as the Central Government may, by notification in the Official Gazette, specify in this behalf, for the purpose of allowing credit of any duty of excise or the additional duty under Section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be specified in the said notification (hereinafter referred to as the "specified duty") paid on the goods used in or in relation to the manufacture of the said final products (whether directly or indirectly and whether contained in the final product or not) (hereinafter referred to as the "inputs") and for utilising the credit so allowed towards payment of duty of excise leviable on the final products, whether under the Act or under any other Act, as may be specified in the said notification, subject to the provisions of this section and the conditions and restrictions that may be specified in the notification:
>
> Provided that the Central Government may specify the goods or classes of goods in respect of which the credit of specified duty may be restricted.
>
> Explanation -- For the purposes of this rule, "inputs" includes--

(a) inputs which are manufactured and used within the factory of production, in or in relation to, the manufacture of final products,

(b) paints and packaging materials,

(c) inputs used as fuel,

(d) inputs used for generation of electricity, used within the factory of production for manufacture of final products or for any other purpose, and

(e) accessories of the final product cleared alongwith such final product, the value of which is included in the assessable value of the final product,

but does not include --

(i) (i) machines, machinery, plant, equipment, apparatus, tools, appliances, or capital goods as defined in rule 57Q (other than those used as component parts in the manufacture of final product) used for producing or processing of any goods or for bringing about any change in any substance in or in relation to the manufacture of the final products or used for any purpose in the factory;

(ii) packaging materials in respect of which any exemption to the extent of the duty of excise payable on the value of the packaging materials is being availed of for packaging any final products;

(iii) packaging materials or containers, the cost of which is not included in the assessable value of the final products under section 4 of the Act; and

(iv) crates and glass bottles used for aerated waters.

(2) Notwithstanding anything contained in sub-rule (1), the Central Government may, by notification in the official Gazette, declare the inputs on which declared duties of excise or additional duty (hereinafter referred to as 'declared duty') paid shall be deemed to have been paid at such rate or equivalent to such amount as may be specified in the said notification and allow the credit of such declared duty deemed to have been paid in such manner and subject to such condition as may be specified in the said notification even if the declared inputs are not used directly by the manufacturer of final products declared in the said notification, but are contained in the said final products.

Explanation - For the purposes of this sub-rule, it is clarified that even if the declared inputs are used directly by a manufacturer of final products, the credit of the declared duty shall, notwithstanding the actual amount of duty paid on such declared inputs, be deemed to be equivalent to the amount specified in the said notification and the credit of the declared duty shall be allowed to such manufacturer."

15. A careful look at 57A would show that the said Rule is made applicable to finished excisble goods. The benefit conferred by Rule 57A is that a credit is allowed in respect of any duty of excise or additional duty under section 3 of Customs Tariff Act, 1975, paid on the goods used in or in relation to the manufacture of the final product, whether directly or indirectly or whether contained in the final product or not.

16. It is to be noted that even in the body of sub-rule 1 of Rule 57A, it is made clear that the credit allowed therein was in respect of any duty of excise or additional duty paid on the goods used in or in relation to the manufacture of the final products. The words shown within brackets viz., "whether directly or indirectly and whether contained in the final product or not" make it very clear that the duty paid in respect of which credit is claimed, need not necessarily be used in the final product. Even if such goods had been used in relation to the manufacture of the final product, the credit stipulated in sub-rule (1) is allowable.

17. To lay emphasis on the words included within brackets, the body of sub-rule contains another set of words, again within brackets. Those words are "hereinafter referred to as inputs". Thus, they emphasis on the fact that credit is allowed in respect of the duty paid on goods whether they could be found in the final product or not, by using certain expression within brackets, not once but, twice. Sub-Rule (1) also contains explanation that defines the term inputs. The explanation (a) of sub-rule (1) makes it clear that the expression input would include inputs which are manufactured and used within the factory of production in or in relation to the manufacture of the final products. Therefore, if an assessee is able to show that he is manufacturing finished excisable goods which are covered by a notification and if he is able to establish that he has paid a duty of excise or additional duty on goods used even in relation to manufacture of a final product, he is entitled to credit irrespective of the fact whether those goods are contained in the final product or not.

18. The explanation under sub-Rule(1) excludes certain items from the definition of the expression inputs. Machines, machinery, plant, equipment, apparatus, tools, appliances which

are capital goods as defined in Rule 57Q are not included within the meaning of the expression inputs under the explanation under sub-Rule (1) of Rule 57A. Therefore, the claim of the Revenue and to some extent by the assessee is that the cement and steel used in the construction of the foundation and the cement and steel and angles used in the construction of the support structure should atleast be treated as those that come under Rule 57Q. Rule 57Q reads as follows:-

> "Rule 57Q. Applicability -- (1) The provisions of this section shall apply to finished excisable goods of the description specified in the Annexure below (hereinafter referred to as the "final products") for the purpose of allowing credit of specified duty paid on the capital goods used by the manufacturer in his factory and for utilising the credit so allowed towards payment of duty of excise leviable on the final products, or as the case may be, on such capital goods, if such capital goods have been permitted to be cleared under rule 57S, subject to the provisions of this section and the conditions and restrictions as the Central Government may specify in this behalf:
>
> Provided that credit of specified duty in respect of any capital goods produced or manufactured -
>
> (a) in a free trade zone and used for the manufacture of final products in any other place in India; or
>
> (b) by a hundred per cent export-oriented undertaking or by a unit in an Electronic Hardware Technology Park or by a unit in Software Technology Parks and used for the manufacture of final products in any place in India,
>
> shall be restricted 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 exercise paid on such capital goods.
>
> Explanation - For the purpose of this section, -
>
> (1) 'capital goods' means, following goods falling within the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) and used in the factory of the manufacturer, namely:-
>
> (a) all goods falling under heading Nos.82.02 to 82.11;
>
> (aa) 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, 84.18, 8422.10, 84.24, 84.29 to 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);

(b) 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);

(c) all goods falling under heading No.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 air-conditioning appliances, and machinery);

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

(e) moulds and dies;

(f) refractories and refractory materials;

(g) tubes and pipes and fittings thereof, used in the factory;

(h) pollution control equipment; and

(i) grinding wheels and the like goods falling under sub-heading No.6801.10.

(2) "specified duty" means duty of excise or the additional duty under section (3) of the Customs Tariff Act, 1975 (51 of 1975).

(2) Notwithstanding anything contained in sub-rule (1), -

(i) no credit of the specified duty paid 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 23rd day of July, 1996) shall be allowed if such capital goods were received in the factory before the 23rd day of July, 1996.)

(ii) no credit of the specified duty paid on capital goods other than those capital goods covered under sub-clause (d) and (f) of clause (1) of Explanation to sub-rule (1) received in the factory on or after the 1st day of January, 1996, shall 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 an officer designated by him for this purpose;

Provided that where the manufacturer intend to remove such capital goods from his factory for home consumption or for export, prior to their being installed or used, as the case may be, the manufacturer 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 appropriate duty of excise leviable thereon."

19. It is seen that the benefit of Rule 57Q is applicable to the finished excisable goods of the description specified in the annexure. The benefit of Rule 57Q is available, on the duty paid on the capital goods used by the manufacturer in his factory and for utilising the credit so allowed towards payment of duty of excise leviable on the final products.

20. The expression "capital goods" is also defined in Explanation (1) under sub-Rule (1) of Rule 57Q. The stand taken by the Revenue is that the cement and steel used in the construction of the foundation and the cement and steel angles used in the construction of the support structure would fall within the definition of the expression capital goods, but, they do not qualify for any credit. But, such a contention has to be tested on the basis of clause (1) of Explanation to sub-rule (1) of Rule 57Q. Sub-rule (1) of Rule 57A excludes capital goods as defined in rule 57Q, if they are used for producing or processing of any goods or for bringing about any change in any substance in or in relation to the manufacture of the final products or used for any purpose for manufacture in the factory. Therefore, Rule 57Q is subject to Rule 57A.

21. Therefore, we are of the considered view that the denial of the benefit by the Revenue under Rule 57A as well as under Rule 57Q, is impermissible. Hence, the questions of law are answered in favour of the assessee. The civil miscellaneous appeals are allowed. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

ssk.

To

1. The Customs, Excise and Service Tax
   Appellate Tribunal,
   Shastri Bhavan Annex,
   26, Haddows Road, Chennai 600 006.

2. The Commissioner of Central Excise
   (Appeals), Tiruchirapalli.

3. The Assistant Commissioner of
   Central Excise, Division I,
   Tiruchirapallai.

+1cc to Mr.R. Karthikeyan, Advocate, S.R.No.46083

+1cc to Mr.T. Chandrasekaran, Advocate, S.R.No.46102

EV(CO)
EU(15/04/2016)

C.M.A.Nos.633 to 635 of 2009