

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on : 09.08.2019****Judgment Delivered on : 26.08.2019****Tax Case No. 31 of 2017**

(Arising out of Final Order dated 10.08.2016, passed in Appeal No. E/2540/2008 by the Customs, Excise, Service Tax Appellate Tribunal, Double Bench, New Delhi)

- Commissioner, Central Excise, Customs & Service Tax, Bilaspur, At – Central Excise Bhawan, Tikrapara, Dhamtari Road, Raipur (C.G.)

---- Appellant**Versus**

- M/s. Salasar Sponge & Power Limited, Village – Gerwani, Ambikapur Road, District – Raigarh (C.G.)

---- Respondent

For Appellant-Revenue	:	Shri Vinay Pandey, Advocate
For Respondent-Company	:	Shri Anumeh Shrivastava, Advocate

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice**Hon'ble Shri Parth Prateem Sahu, Judge****Per P. R. Ramachandra Menon, Chief Justice**

1. Correctness and sustainability of the Annexure-A/1 verdict passed by the Customs, Excise, Service Tax Appellate Tribunal (for short, 'CESTAT') Double Bench, New Delhi interdicting Annexure-A/3 order passed by the Commissioner Commissioner, Central Excise, Customs & Service Tax, Raipur is subjected to challenge in this appeal preferred by the Revenue under Section 35 G of the Central Excise Act, 1944.
2. The Respondent-Company is engaged in the manufacture of 'Sponge Iron' and has been availing the benefit of CENVAT Credit of duty paid on Inputs, Capital Goods and input services under the CENVAT Credit Rules, 2004. The Respondent-Company had also availed 'Input Service Tax

Credit' under services of "Transport of Goods by Road" for bringing 'Iron Ore' used commonly for manufacturing the dutiable item as well as exempted good i.e. 'Sponge Iron' and 'Iron Ore Fines'. The Respondent-Company had availed Credit on other input services, such as, Cargo Handling Service, Manpower Recruitment Services, Security Services etc. from 10.09.2004. Besides these, they had also availed 'Input Service Tax Credit' on services of "Transport of Goods by Road" in respect of the transportation of coal; which was used for the manufacturing of 'Sponge Iron' as well as for generation of Electricity. In fact, Electricity is wholly exempted from duty, if it used completely for manufacturing the final product, but the Respondent-Company sold a part of the Electricity manufactured to the Chhattisgarh State Electricity Board (CSEB) for valuable consideration, without payment of any duty.

3. The Central Excise Officers of the Audit Wing of the Raipur Commissionerate, while auditing the 'Books and Accounts' of the Respondent-Company for the period from September, 2005 to March, 2007, noted certain discrepancies in the matter of availing the CENVAT Credit and that the Respondent-Company had not been maintaining separate Accounts in respect of such inputs or input services which were used / consumed with regard to 'Iron Ore Fines' and also in respect of the Electricity sold, distinctly from the rest, in conformity with Rule 6 (2) of the CENVAT Credit Rules, 2004. It was noted that the Respondent-Company was liable to satisfy an amount equal to 10% of the value of the exempted goods removed / sold by them in terms of Rule 6(3)(b) of the said Rules. On perusal of the documents furnished by the Respondent-

Company, it was found that the Respondent-Company had sold 39950.190 M.T. of 'Iron Ore Fines' valued at Rs. 1,94,92,382/- and 'Electricity' valued at Rs. 29,99,94,352/- without paying an amount @ 10% of the aforesaid value of the goods, amounting to Rs. 3,19,48,673/- during the period 01.04.2004 to 31.10.2007, which hence was to be recovered with interest in the same manner as provided under Rule 14 of the CENVAT Credit Rules, 2004 for recovery of the CENVAT Credit wrongly taken. It was also noted that the Respondent-Company was liable for penal action under Rule 15 of the CENVAT Credit Rules, 2004 read with Section 11 AC of the Central Excise Act, 1944 for violation of Rule 6 read with Rule 9 of the CENVAT Credit Rules, 2004. It was accordingly, that Annexure-A/2 notice was issued seeking for explanation as to why the amount due with interest and penalty, as specified, shall not be recovered.

4. The Respondent-Company filed a reply claiming that the 'Iron Ore Fines' was neither an 'exempted item' within the meaning of Rule 2(d) of the CENVAT Credit Rules, 2004, nor was a manufactured product. The Respondent-Company had purchased the duty paid Iron Ore concentrate and had used the same in the manufacturing of their final product i.e. 'Sponge Iron'; adding that 'Iron Ore Fines' generated and sold by them did not have any nexus with it, being only a 'by-product'. It was also contended similarly, that the Cargo Handling Service, Man Power Recruitment Service, Security Service etc. were not related to the process of involving generation of Iron Ore Fines. Almost similar plea was taken in respect of sale of Electricity as well, however, adding that

since the Respondent-Company had reversed the Service Tax Credit with interest availed on 'Goods Transport Agency' (GTA) services attributable to the transportation of coal used in their power plant, the question of payment of any amount equal to 10% of the value of the Electricity would not arise.

5. The adjudicating Authority / Commissioner noted in Annexure-A/3, in paragraph 6, that during the course of personal hearing held on 31.07.2008, the Respondent Company had agreed to reverse the Credit of Service Tax availed on transportation of 'Iron Ore' which was directly related to generation of 'Iron Ore Fines'. They had also assured to furnish evidence of reversal by 25.08.2008 and informed that they had already paid back the Service Tax Credit with interest availed on GTA services attributable to transportation of coal used in their power plant for a sum of Rs. 14,15,922/- (including interest of Rs. 2,11,996/-). The Respondent-Company, as per subsequent letter dated 04.09.2008, had reported the reversal of CENVAT Credit of Rs. 2,77,419/- which Credit was reportedly taken on the GTA service availed for transportation of 'Iron Ore' that was used in generation of 'Iron Ore Fines' sold outside.
6. The rival stands were subjected to detailed scrutiny by the Commissioner and it was noted in paragraph 9 of Annexure-A/3 order that, non maintenance of separate Accounts for inputs and input services used in the manufacture of dutiable and exempted goods as well as the availing of CENVAT Credit on the input services was not disputed. However, the liability to effect payment of an amount equal to 10% of the value of the goods concerned was disputed, stating that the goods did not conform to

the definition of 'Exempted Goods' within the meaning of Section 2(d) of the CENVAT Credit Rules, 2004. The Commissioner found in paragraph 9.1 that in respect of 'Iron Ore Fines', the Respondent-Company's contention was that those goods were not different from 'Iron Ore', but was merely a changed form of Iron Ore. But the fact remains that under the tariff classification of Ores and Fines, they were not the same insofar as 'Iron Ores' were classified under tariff heading No. 26011110 and 26011120 whereas the 'Fines' were classified under tariff heading No. 26011130 and 26011140, depending upon the iron contents. It was also observed, as held by the Apex Court in ***National Mineral Development Corporation Ltd. Vs. State of Madhya Pradesh and Another***¹ that Ores, Fines, Synclines and Concentrates were distinct items and that Ore is not converted to Fines automatically, but it emerges out of the processing of 'Ore' during the course of manufacture of 'Sponge Iron'. The Commissioner held that the 'Fines' were not a waste and rather were goods having distinct names, character, use and marketability, thus holding that the contention of the Respondent-Company that the Ores and the Fines are one and the same was not liable to be accepted. The Commissioner noted that the Respondent-Company had realised a sum of Rs.1,94,92,382/- against the sale of 'Iron Ore Fines' and sought to apply the dictum laid down by the larger Bench of the CESTAT in ***Rallies India Ltd. Vs. Commissioner of Central Excise, Salem***² to the effect that as long as two final products emerging out of use of common inputs are excisable and one of them is exempted, the provision of Rule 57CC

¹ (2004) 6 SCC 281

² [2007 (208) ELT 25 (Tri-LD)]

of the Central Excise Rules, 1944 will apply (liability to maintain separate Accounts).

7. With regard to the question of sale of Electricity, after referring to the relevant provisions of law and some of the precedents, it was held in paragraph 11 as follows :

“11. The Noticee have claimed that they have reversed Cenvat credit availed on GTA services used in relation to manufacture of the exempted goods, hence, demand is not sustainable. But, from the report of the Superintendent, Range- Raigarh dated 05.09.2008 and 18.09.2008, I find that the GTA service is not the only input service but the Noticee have also availed credit of service tax paid on several other input services viz. cargo handling service, consulting engineer service, security service, maintenance & repair service, telephone service, manpower recruitment service, erection & commissioning service, site formation service, courier service, mining service, chartered accountant service, insurance & auxiliary service, commercial or industrial construction service, cost accountant service, design & engineering service and business auxiliary service. The Noticee's contention that such other input services do not have any nexus or link with the processes involving generation of Iron Ore fines is not acceptable. The input service like mining service, erection & commissioning service, site formation service, manpower recruitment service, maintenance & repair service, cargo handling service, consulting engineer service, have direct relation to manufacturing process of which the generation of Iron Ore Fines is an inherent activity. Even by conventional wisdom, such services can be clearly attributed to the procurement of Iron Ore and Coal from the Mines and its subjection into the manufacturing of Sponge Iron. These apart, other services have an indirect relation to manufacture. From 2005-06 to 2007-08, the Noticee have reportedly utilized credit of service tax total amounting to Rs. 2,00,70,855/- but they have reversed only Rs. 14,81,345/-. The Noticee have also availed credit of duty paid on inputs viz. Lubricants & Welding Electrodes total amounting to Rs. 15,88,023/- during 2004-05 to 2007-08. These inputs have been used in or in relation to manufacture of dutiable and exempted goods both but no amount on this count have been reversed by the Noticee. Further,

as per Order-in-Appeal No. 25/RPR-I/2008 dated 17.03.2008 passed by the Commissioner (Appeals –I) Raipur, the Noticee have also availed credit of duty amounting to Rs. 21,31,137/- paid on various inputs of the capital goods which are used in or in relation to manufacture of dutiable and exempted goods both. However, they have also failed to reverse such input duty credit. Hence, their contention on compliance of the Rule is not correct.”

As obvious from the above, the Commissioner noted that the Respondent-Company had availed various other services as well, as discussed therein and that their version that such input services did not have any nexus or link with the process involving generation of 'Iron Ore Fines' was not acceptable. The input services like Mining Service, Erection and Commissioning Service, Site Formation Service, Manpower Requirement Service, Maintenance and Repair Service, Cargo Handling Service, Consulting Engineer Service were held as having direct relation to the manufacturing process of which the generation of 'Iron Ore Fines' was an inherent activity. It was accordingly held that the Respondent-Company had failed to reverse such Input Duty Credit to the requisite extent, thus, passing an order sustaining the levy of Rs.3,19,48,674/- with interest and imposing penalty for an equal amount in accordance with the relevant provisions of law.

8. On challenging the above order before the CESTAT, after taking note of the rival submissions and the relevant precedents sought to be relied on by both the sides, the CESTAT simply held that, by virtue of the law declared by the Apex Court in ***Union of India (UOI) and Ors. Vs. Hindustan Zinc Ltd.***³ and also a similar view taken by the CESTAT in

³ (2015) 15 SCC 312

Commissioner of C. EX. & S.T., Raipur Vs. Aarti Sponge and Power Ltd.⁴, the issue was no more *res integra*. It was held the first issue that the 'Iron Ore Fines' was only a by-product and selling of the same without payment of any excise duty, without maintaining separate Accounts in terms of Rule 6 of the CENVAT Credit Rules, 2004 would not attract any liability. The relevant portion as contained in paragraph 5 is as follows :

"5.We have gone through the cited case laws. In the decision of Apex Court in the case of Union of India Vs. Hindustan Zinc Ltd. (supra), the Hon'ble Supreme Court has held that a distinction has to be made between final product as well as by-products. It was held that by-products cannot be held to be main final products. The court was examining the question of reversal in the context of Rule 57CC as well as Rule 6 of the Cenvat Credit Rules, 2004 and decided that for clearance of exempted by-products there will be no need for reversal of 8%/10% of the value of the exempted products. This decision of the apex court is squarely applicable in the present case in the case of iron ore fines. This Tribunal has also taken similar view in the subsequent decision in the case of CCEST, Raipur Vs. Aarti Sponge & Power Ltd. (supra). We find that the issue is no more *res integra* in-as-much-as the issue stands decided in favour of the appellant by the apex court."

9. In this context, it is to be noted that the decision rendered by the CESTAT in **Aarti Sponge and Power Ltd.** (supra) was subjected to challenge before the High Court as putforth by the learned Counsel during the course of hearing, but subsequently it was withdrawn, as the challenge raised was not meeting the requirements of the amended litigation policy, in terms of the monetary value involved.

⁴ [2016 (333) ELT 415 (Tri-Del.)]

10. With regard to the second point as to the availing of 'Input Credit' in respect of Electricity, the observation of the CESTAT in paragraph 6 is that the appellant had reversed the entire credit taken on input services, namely, GTA services in respect of transportation of coal, even though part of coal was used in the manufacture of dutiable 'Sponge Iron'. Reference was made to the verdict of the Apex Court in **Chandrapur Magnet Wires (P) Ltd., Nagpur Vs. Collector of Central Excise, Central Excise Collectorate, Nagpur**⁵, wherein the Court held that if the Credit originally availed is reversed subsequently, it would amount to the effect as if no credit had been availed and hence there was no justification to the demand of 10% of the value of electricity wheeled out.
11. The specific assertion made from the part of the Department that in addition to the credit taken on GTA services, the appellant had availed credit of over Rs.2 crores on various other services as well and hence the entire demand can't be waived on the basis of the reversal of GTA services. The relevant observation in this regard is extracted below :

“7. Ld. Departmental Representative during the hearing has raised the issue that in addition to the credit taken on GTA, appellant has availed credit to the extent of over Rs.2 crores on various other services as well. Accordingly, he has submitted that the entire demand cannot be waived on the basis of reversal of GTA services. We find from the impugned order that the appellant has availed Cenvat credit not only on GTA service but also on various other services such as cargo handling service, consulting engineering service, security service, telephone service etc. It is easily seen that credit availed on service tax on transportation of coal is the only service on which credit can be said to have been taken where it is used for generation of electricity and the same has been reversed.”

⁵ (1996) 2 SCC 159

From the above, it is clear that the CESTAT noted that as per the order under challenge, the Respondent-Company / appellant before the CESTAT had availed the CENVAT Credit not only on GTA services, but also on various other services; such as Cargo Handling Service, Consulting Engineering Service, Security Service, Telephone Service etc. But, on the very next breath, it was easily said that 'Credit' availed on service tax on transportation of coal was the only service on which Credit could be said to have been taken where it was used for generation of Electricity and that the same had been reversed, in turn, leading to setting aside of the impugned order.

12. Absolutely no reason has been stated, as to the basis of the finding given in this regard; which become more relevant in view of observation made by the Apex Court in ***Chandrapur Magnet Wires (P) Ltd.*** (supra); paragraphs 7 & 8 of which are relevant, which are extracted below :

"7. It is true that the assessee has not maintained separate accounts or segregated the inputs utilised for manufacture of dutiable goods and duty free goods, as should have been done. The contention of the Department that in this situation, the assessee is not entitled to reverse the entries and get the benefit of the tax exemption is a question which merits serious consideration. There is no doubt that the assessee should have maintained separate accounts for duty free goods and the goods on which duty has to be paid. But our attention was drawn to a departmental circular letter on this problem in which it has been clarified by the Ministry of Finance as under:-

"3. The credit account under MODVAT rules may be maintained chapterwise.

MODVAT credit is not available if the final products are exempt or are chargeable

to nil rate of duty. However, where a manufacturer produces along with dutiable final products, final products which would be exempt from duty by a notification (e.g. an end use notification) and in respect of which it is not reasonably possible to segregate the inputs, the manufacturer may be allowed to take credit of duty paid on all inputs used in the manufacture of the final products, provided that credit of duty paid on the inputs used in such exempted products is debited in the credit account before the removal of such exempted final products."

8. This circular deals with a case where the manufacturer produces dutiable final products and also final products which are exempt from duty and it is not reasonably possible to segregate inputs utilised in manufacture of the dutiable final products from the final products which are exempt from duty. In such a case, the manufacturer may take credit of duty paid on all the inputs used in the manufacture of final products on which duty will have to be paid. This can be done only if the credit of duty paid on the inputs used in the exempted products is debited in the credit account before the removal of the exempted final products."

We are of the view that, before recording the conclusion as above, it was quite necessary for the CESTAT to have recorded the reasons to support the finding; to see whether the circumstances mentioned by the Apex Court in **Chandrapur Magnet Wires (P) Ltd.** (supra) were actually satisfied to have the benefit therein to be extended.

13. Mr. Anumeh Shrivastava, the learned counsel appearing for the Respondent-Company sought to place reliance on the decision rendered by a Division Bench of this Court in Tax Case No. 48 of 2016 (decided on 08.05.2017), where almost a similar activity in connection with manufacturing of 'Sponge Iron' was involved. The said decision is stated

as not applicable by Mr. Vinay Pandey, the learned counsel appearing for the Appellant-Revenue, points out that, it was on the basis of the conceded factual position from the part of the Department, that the judgment was rendered, as discernible from paragraph 6 therein. The said portion is extracted below :

“6. On the aforesaid admitted factual premise, taking into consideration that the electricity is not an item for which any particular rate of duty is fixed in the Tariff Act, none can be criticized for not having raised the issue of maintaining separate accounts either before the first appellate authority. The original order and its preceding notice of proposal including as to penalty, were not dealt with, or based on any issue relating to non-maintenance of separate accounts. In fact, we see no consideration of any objection by the Department to the noticee's appeal before the Commissioner on a ground referable to the question as to whether separate accounts ought to have been maintained. The fact of the matter remains that maintaining of separate accounts as was sought to be raised did not impress the CESTAT, having regard to the quality of the findings it rendered on the facts particularly when the quantification of the electricity sold out by the Respondent was an admitted situation as far as the authority which generated the original order and the first appellate authority are concerned. At the best, this issue is a mixed question of facts and law which has been answered by the CESTAT on the basis of materials on record. That having been done, we do not see that any substantial question of law arises for decision in this appeal under Section 35-G of the Central Excise Act, 1944. This appeal therefore fails.”

14. In support of the contention of the Respondent-Company that no liability could have been mulcted upon Respondent-Company with reference to the Electricity generated and used, making use of the coal procured, a reference is made to the verdict passed by the Apex Court in *Collector of Central Excise and Others Vs. Solaris Chemtech Ltd. And Others*⁶.

⁶ (2007) 7 SCC 347

The question considered therein was whether the Assessee was entitled to MODVAT Credit under Rule 57-A on Low Sulphur Heavy Stock (LSHS) and Furnace Oil used for generating Electricity captively consumed for the manufacture of final products, such as, caustic soda, cement etc. The position was answered against the Revenue, but, it was specifically observed that in some of the cases, Electricity generated was consumed by the residential colony of the factory workers' family, schools etc. and to that extent, MODVAT Credit will not be admissible. This observation was pressed into service by Mr. Vinay Pandey, the learned counsel representing the Revenue, in support of the contentions raised before this Court to sustain Annexure-A/3 order passed by the Commissioner and to hold against Annexure-A/1 verdict passed by the Tribunal.

15. **Union of India (UOI) Vs. Ahmedabad Electricity Co. Ltd. and Ors.**⁷ is cited by Mr. Anumeh Shrivastava, the learned counsel for the Respondent-Company, in support of the contention that 'Iron Ore Fines' is virtually a waste product, just as 'Cinder'. The question considered by the Apex Court in the said case was regarding excisability of the 'Cinder' to excise duty. The Respondents in the Appeals used coal as a fuel for producing steam to run the machines used in their factories to manufacture the end products. Coal was burnt in the boilers or furnaces for producing steam and normally, in the process of burning coal, it gets reduced to 'ash', but some part of the coal would not get fully burnt because of its low compatible quality and this un-burnt or half-burnt

⁷ (2003) 11 SCC 129

portion of coal left out in boilers is called 'Cinder'. Raising different points / questions including as to whether the item in question satisfied the test of being manufactured in India and marketability, it was held in paragraph 36, that it was not possible to say that 'Cinder' satisfied the requirement of being manufactured in India and hence it cannot be subjected to levy of excise duty. Observation in the next paragraph is important and hence it is extracted below :

“37. From the above discussion it is clear that to be subjected to levy of excise duty “excisable goods” must be produced or manufactured in India. For being produced and manufactured in India the raw material should have gone through the process of transformation into a new product by skilful manipulation. Excise duty is an incidence of manufacture and, therefore, it is essential that the product sought to be subjected to excise duty should have gone through the process of manufacture. Cinder cannot be said to have gone through any process of manufacture, therefore, it cannot be subjected to levy of excise duty.”

16. Reliance is sought to be placed on a Division Bench Judgment passed by the High Court Allahabad (Lucknow Bench) in ***Balrampur Chini Mills Ltd. Vs. Union of India and Ors.***⁸ in support thereof. The question involved was whether 'bagasse' can be subjected to any duty under the Central Excise Act, 1944, it being a waste and not a manufactured product. In the process of manufacturing of sugar, sugar-cane is crushed, its juice is extracted and 'bagasse' emerges as residue / waste of the sugar-cane. Placing reliance on the verdict passed by the Apex Court in this regard, as referred in paragraph 5, it was held in paragraph 19, that the law was well settled that the 'bagasse' generated from

⁸ 2014 (300) ELT 372 (All.)

crushing of sugar-cane was a neither manufactured good nor a manufactured final product, but a residue / waste. After making reference to Rule 6 of the CENVAT Credit Rules, 2004, which was equivalent and analogous to the Rule 57 CC of the Central Excise Rules, 1944 and also placing reliance on verdict passed by the Apex Court in CCE Vs. Gas Authority of India Ltd. (2008) 232 ELT (7) SC, it was held that the Rules denying benefit of MODVAT Credit can only be in respect of final products and since the commodity mentioned in the show-cause notice was not the final product, the benefit of MODVAT Credit could not be denied.

17. The learned counsel also placed a copy of the Circular bearing No.1027/15/2016-CX dated 25.04.2016 issued by the Government of India, Ministry of Finance, Department of Revenue (Central Board of Excise and Customs) as to withdrawal of the Circulars/Instructions on excisability of 'bagasse', aluminium/zinc dross by virtue of the declaration of law by the Supreme Court in M/s. Union of India and Ors. Vs. M/s. DSCL Sugar Limited [2015-TIOL-240-SC-CX] dated 15.07.2015. It was held in paragraph 4.2 of the said Circular, that Bagasse, Dross and Skimmings of non-ferrous metals or any such by-product or waste, which are non-excisable goods and are cleared for consideration from the factory need not be treated like exempted goods for the purpose of reversal of credit of input or input services, in terms of Rule 6 of the CENVAT Credit Rules, 2004. But here, one thing to be noted is that Clause 4.2 of the said Circular specifically mentions that concession / declaration would only be in respect of skimmings of non-ferrous metals,

which virtually means that the position is different in the case of 'ferrous metals' (Iron). As such, this Court finds it difficult to accept the applicability of the said Circular insofar as the item involved in the present case is 'Iron Ore Fines' (Ferrous).

18. In the attempt to assert that 'Iron Ore Fines' are obtained as a 'by-product' and that no manufacturing process is involved, Mr. Anumeh Shrivastava, the learned counsel for the Respondent-Company placed reliance also on a verdict rendered by a Division Bench of Bombay High Court in ***Hindalco Industries Limited Vs. The Union of India***⁹. The Petitioner therein was engaged in the activity of melting aluminium ingots to obtain rolled products like sheets, foils etc. and during the melting process, some quantity of aluminium ingots get oxidised, resulting in emergence of dross and skimming. It is stated that, though dross and skimming may be capable of fetching of some sale price (observation that for that matter any rubbish can be sold), the criteria can be something different and it could not be said that dross and skimming were results of treatment, labour or manipulation, where the end product was dross and skimming. There again, the position was answered against the Revenue, holding that though dross and skimming may contain some small percentage of metal, they are not metal in the same class as they are waste or scrap.
19. Coming to the verdict passed by the Apex Court in ***Union of India and Others Vs. Hindustan Zinc Limited***¹⁰ which made the CESTAT to hold in paragraphs 5 (extracted above) that in view of the said declaration of law by the Apex Court, the question was no more *res integra* and that

⁹ 2015 (315) ELT 10 (Bom.)

¹⁰ (2015) 15 SCC 312

'Iron Ore Fines' was only a 'by-product', the issue considered by the Apex Court and the description therein gives a clear idea as to what is a 'by-product' and what is not. As discussed in paragraph 27, the contention of the Appellant/Revenue was that 'Sulphuric Acid', generated in the course of manufacture of Zinc, Copper etc. (by the Respondent-Company) could not be treated as a by-product. The observations in paragraphs 27 to 30 are relevant, which hence are reproduced below :

"27. 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 the respondents have no control.

28. On these facts this Court is inclined to accept the version of the respondents that the ore concentrate is completely consumed in the extraction of zinc and no part of the metal is forming part of sulphuric acid.

29. Once we proceed keeping in mind the aforesaid factual, technological and commercial position available on the records, it has to be accepted that the respondents have consumed the entire quantity of zinc concentrate in the production of zinc.

30. Let us now examine the position contained in Rule 57-CC on the touchstone of the aforesaid position. No doubt, Rule 57-CC requires an assessee to maintain separate records for inputs which are used in the manufacture of two or more final products one of which is dutiable and the other is non-dutiable. In that event,

Rule 57-CC will apply. For example, a tyre manufacturer manufactures different kinds of tyres, one or more of which were exempt like tyre used in animal carts and cycle tyre, where car tyres and truck tyres attract excise duty. The rubber, the accelerators, the retarders, the fillers, sulphur, vulcanising agents which are used in production of tyres are indeed common to both dutiable and exempt tyres. Such assesseees are mandated to maintain separate records to avoid the duty demand of 8% on exempted tyres. But when we find that in the case of the respondents, it is not as though some quantity of zinc ore concentrate has gone into the production of sulphuric acid, applicability of Rule 57-CC can be attracted. As pointed out above, the entire quantity of zinc has indeed been used in the production of zinc and no part can be traced in the sulphuric acid. It is for this reason, the respondents maintained the inventory of zinc concentrate for the production of zinc and we agree with the submission of the respondents that there was no necessity and indeed it is impossible, to maintain separate records for zinc concentrate used in the production of sulphuric acid. We, therefore, agree with the High Court that the requirements of Rule 57-CC were fully met in the way in which the respondent was maintaining records and inventory and the mischief of recovery of 8% under Rule 57-CC on exempted sulphuric acid is not attracted.”

20. Similarly, the observations made in paragraphs 33 to 37 are also relevant to consider and decide the question as to when the item concerned could be treated as a 'by-product' and not as a final product with reference to the applicability of the Rule 57CC of the Central Excise Rules (akin to) Rule 6 of the CENVAT Credit Rules, 2004. They are reproduced below :

"33. In this very direction, the learned Solicitor General's further submission was that the term "by-products" is not defined either in the Act or in the Rules. Dictionary meanings cannot be resorted to in this case as it would then mean that final products would be treated as by-products defeating the plain language of Rule 57-CC and Rule 6 which are applicable to final products. The only test is "excisability of goods manufactured or produced" and only if the requirements of this test are satisfied, the goods can be "final

products” and never “by-products”. On this basis, the learned Solicitor General submitted that even an admission made before the Tribunal in the Birla Copper case of the goods being a “by-product”, cannot be relied on by the respondent.

34. While pleading that the aforesaid interpretation to these Rules be accepted by this Court, submission of Mr Parasaran was that in such an eventuality the judgment in *Swadeshi Polytex Ltd. v. CCE* (1990) 2 SCC 358 was not applicable, nor was the judgment in *CCE v. GAIL* (2007) 15 SCC 91 relied upon by the respondent. Likewise his submission was that judgment of the Bombay High Court in *Rallis India Ltd. v. Union of India* (2009) 233 ELT 301 (Bom) was erroneous wherein the view taken is contrary to the aforesaid submission.

35. These arguments may seem to be attractive. However, having regard to the processes involved, which is already explained above and the reasons afforded by us, we express our inability to be persuaded by these submissions. We have already noticed above that in the case of *Birla Copper* (CA No. 2337 of 2011) the Tribunal has decided the matter following the judgment in *Swadeshi Polytex Ltd.* (supra) In that case, ethylene glycol was reacted with DMT to produce polyester and ethanol. Methanol was not excisable while polyester fibre was liable to excise duty. Credit was taken of duty paid on ethylene glycol wholly for the payment of duty on polyester. The Department took a position that ethylene glycol was used in the production of methanol and proportionate credit taken on ethylene glycol was to be reversed. This Court ruled that the emergence of methanol was a technological necessity and no part of ethylene glycol could be said to have been used in production of methanol and indeed it was held that the total quantity of ethylene glycol was used for the production of polyester. The facts in all these three appeals appear to be identical to the facts and the law laid down in *Swadeshi Polytex* (supra). Therefore, this judgment is squarely applicable.

36. Furthermore, the provisions of Rule 57-CC cannot be read in isolation. In order to understand the scheme of MODVAT credit contained in this Rule, a combined reading of Rules 57-A, 57-B and 57-D along with Rule 57-CC becomes inevitable. We have already reproduced Rule 57-D above. It can be easily discerned from a combined reading of the aforesaid provisions that the terms used are “inputs”, “final products”, “by-product”, “waste products”, etc. We are of the opinion that these

terms have been used taking into account commercial reality in trade. In that context when we scan through Rule 57-CC, reference to final product being manufactured with the same common inputs becomes understandable. This Rule did not talk about emergence of final product and a by-product and still said that Rule 57-CC will apply. The appellant seeks to apply Rule 57-CC when Rule 57-D does not talk about application of Rule 57-CC to final product and by-product when the by-product emerged as a technological necessity. Accepting the argument of the appellant would amount to equating the by-product and final product thereby obliterating the difference though recognised by the legislation itself. Significantly this interpretation by the Tribunal in *Sterlite Industries (India) Ltd. v. CCE* (2005) 191 ELT 401 (Tri) was not appealed against by the Department.

37*. We are also unable to agree with the submission of the learned Solicitor General that judgment in *GAIL case (supra)* is not applicable. Significantly, the question as to whether Rule 57-CC will apply when by-products are cleared without payment of duty came for discussion in that case. It was held that so long as the lean gas was obtained as a by-product and not as a final product, Rule 57-CC will not apply. We are, therefore, of the view that the respondent's case is squarely covered by the judgment in *GAIL case (supra)*."

21. On going through the Annexure-A/1 verdict passed by the CESTAT, the relevant portions of which have already been extracted (paragraphs 5 and 7), it is quite evident that no proper discussion has been made by the CESTAT with regard to the exigibility to duty / correctness of the Input Tax Credit / Services availed or as to the reversal of the Credit already availed to the requisite extent to have sustained the stand. There is no discussion with regard to what is the process of manufacture of 'Sponge Iron', how the 'Iron Ore Fines' are generated and whether the yardsticks mentioned by the Apex Court are available to have it declared as a 'by-product' and such other relevant aspects. We are of the firm view that

the matter requires detailed deliberation with reference to each and every aspect pointed out and accordingly, we answer the substantial question of law raised before this Court holding that the verdict passed by the CESTAT is not correct or sustainable and it requires to be re-considered. Annexure-A/1 stands set aside the matter is remitted to the CESTAT for fresh consideration with reference to all the relevant aspects as mentioned above.

22. The appeal stands allowed in part, to the said extent. It is open for the parties on both the sides to canvas the legal and factual position as sought to be asserted from their sides by placing necessary materials before the CESTAT.

Sd/-
(P.R. Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge