

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
SPECIAL JURISDICTION (EXCISE APPEAL)
ORIGINAL SIDE**

RESERVED ON: 02.09.2022
DELIVERED ON:30.09.2022

CORAM:

**THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE PRASENJIT BISWAS**

CEXA NO. 56 OF 2008

**COMMISSIONER OF CENTRAL EXCISE, BOLPUR
VERSUS
INDIAN IRON AND STEEL COMPANY LIMITED, BURNPUR WORKS,
BURNPUR**

Appearance:-

Ms. Manasi Mukherjee, Learned Standing Counsel.

.....For the Appellant.

.....Standing Counsel for Central Excise

Mr. Rahul Tangri, Adv.

.....For the Respondent.

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. This appeal by the revenue filed under Section 35G of the Central Excise Act, 1944 (the Act for brevity) is directed against the order dated November 21, 2008 passed by the Customs Excise and Service Tax Appellate Tribunal, East Regional Bench, Kolkata (Tribunal) in Excise Appeal No. EDM-716 of 2004 in Order No. A-254/Kol/2008. The revenue has raised the following substantial questions of law for consideration:

- (b) Whether M/s. India Iron and Steel Co. Ltd., Burnpur Works, Burnpur took credit of Central Excise duty paid on inputs namely Wash Oil and Sulphuric Acid which were used directly or indirectly, in or in relation to the manufacture of coal Gas falling under Chapter Sub-heading No. 2705.00 of the Schedule which is chargeable to 'nil' rate of duty, but did not debit an amount of RRs. 1,15,10,820/- being payable in terms of rule 57C(2) read with Rule 57CC of the Central Excise Rules, 1944 and/or Rule 57AD of the Central Excise Rules, 1944 and/or Rule 6(3)(b) of Cenvat Credit Rules, 2002 at the time of clearance of exempted final product i.e. coke oven gas/ 'Coal Gas' from the factory during the period from July 01, 1996 to September 30, 2003.*
- (c) Whether the manufacture of Coke Oven Gas is said to be final and complete unless it is made usable and/or marketable.*
- (d) Whether the view expressed in the impugned CESTAT Order bearing No. A-254/Kol/2008 dated February 21, 2008 that the inputs viz. Wash Oil and Sulphuric Acid have no role to play in the production of coke oven gas and these are merely used in the production of the by-products and that the demand under the provisions of Rule 57C(2) read with Rule 57CC of the Central Excise Rules, 1944 and/or Rule 6(3)(b) of the Cenvat Credit Rules, 2002 correct and proper.*

(e) Whether the Tribunal failed to appreciate the scope of the Rule 57C(2) read with Rule 57CC of the Central Excise Rules, 1944 and/or Rule 57AD of the Central Excise Rules, 1944 and/or Rule 6(3)(b) of Cenvat Credit Rules, 2002.

2. The respondent assessee is an integrated steel plant engaged in the manufacture of various excisable goods falling under Chapters 26 to 29, 70 to 73 and 84 of the Schedule of the Central Excise Tariff Act, 1985 (Tariff Act). Show-cause notice dated 23.05.2001 was issued to the assessee stating that it has come to the notice of the department that the assessee are also manufacturing and clearing another excisable product namely, coal gas falling under Chapter sub-heading 2705.00 which is chargeable to Nil rate of duty. It was stated that initially coke and crude coke oven gas were manufactured by destructive distillation process through high temperature carbonization of Bituminous Coal in a separate unit called coke oven battery. The crude coke oven gas containing important by-products comes out as exhaust gas from the coke oven unit. The crude gas as such cannot be used as fuel as it consists of coal tar and other organic compounds which would disrupt the supply system. The crude coke oven gas is taken to another unit called product recovery plant where the crude gas is cleansed from the other major by-products namely, Naphthalene, Ammonia, Motor Spirit, Light Oil etc. and waste (coal tar) through use of MODVAT Inputs, namely, Sulphuric Acid, Wash Oil etc. The pure coal gas thus manufactured in a marketable stage portion of which is consumed by the assessee within their factory and a portion is also sold outside without payment of duty as the product was chargeable to Nil rate of duty under Chapter sub-heading 27.05.

3. After mentioning about the above manufacturing process, it was stated in the show-cause notice that coal gas was the only manufactured product of by-product recovery plant where other important products namely, Ammonium Sulphate, Naphthalene, Benzene, Toluene, LS Naphtha, Coal Tar were also manufactured. Further, they were purified through use of Sulphuric Acid, Wash Oil (MODVAT Inputs) in the recovery plant on which credit was taken by the assessee. The coal gas has been cleared without payment of duty as it was chargeable to Nil rate of duty. Hence, it was alleged that the assessee had taken credit of duty on those inputs, utilized the inputs in the manufacture of dutiable as well as Nil duty final products without debiting an amount equal to 20% or 8% of the price of the final products at the time of their clearance during the period from 01.09.1996 to 31.03.2000 from the factory in terms of Rule 57CC(1) of the said Rule. The show-cause notice stated that the total amount which ought to have been paid by the assessee come to Rs. 67,32,348/-. After referring to Rule 57C(1),(5) and (9) it was stated that a reading of the rules would lead to the conclusion that a manufacturer engaged in the manufacture of both dutiable and exempted final products can neither avail of the credit of duty of inputs and pay the prescribed amount at the time of clearance of the exempted/ chargeable to Nil rate of duty final product or not both the credit of duty on inputs used in or in relation to the manufacture of exemptible/ chargeable to Nil rate of duty final produce. After referring to Rule 57CC of the said Rules it was stated that whether or not any of the said MODVAT Inputs contained in the final product, coal gas, an amount of 8% of the price of such fuel gas would be chargeable on the quantity cleared outside on sale

without payment of duty. It was further alleged that the assessee had not maintained separate inventory and accounts in respect of the said inputs which were used in or in relation to manufacture of the said Nil rate of duty final product and have availed the credit of inputs used in the manufacture of both the aforesaid categories of final product; that the assessee had neither debited an amount equal to 20% or 8% of the price of the said exempted final product at the time of its clearance from the factory in terms of Rule 57CC(1) of the said Rules and thus violated Rule 57C(1) and consequently are required to pay the amount quantified. Further, it was alleged that the assessee had knowingly and wilfully with intent to avoid payment of duty adopted such process and the assessee was called upon to submit their reply to the show-cause notice.

4. The assessee denied all the allegations as contained in the show-cause notice, particularly the allegation that they withheld information from the department. It was stated that to the best of their knowledge and understanding, they had disclosed all information from time to time as required and that the show-cause notice has been issued without appreciating the long standing process prevalent in iron and steel industry throughout the country. Further, they stated that they are a Public Sector Undertaking and there cannot be any motive to deprive the Government of its legitimate duties.
5. The assessee explained their manufacturing process in the following manner:

In an integrated steel plant like IISCO, metallurgical coke is manufactured by carbonization of Coal for use in the Blast Furnace for iron making. In the course of manufacture of coke by coal carbonization coke oven gas/ coal gas emerged as a by-product, raw coal is carbonized by heating in a closed chamber at high temperature during which the volatile matter content of coal comes out in the form of coke oven/ coal gas which is collected through pipe lines. This is the manufacturing process of coke oven gas using coal as the only input. Subsequent steps are carried out for cooling and cleaning or purifying which does not give rise to anything different from coke oven gas itself. The following steps are taken for purifying coke oven gas:-

- (i) Coal tar fog from coke oven gas is removed using unfiltered water at the cooling stages.*
- (ii) Recovery of Naphthalene from coke oven gas is done by passing the gas through wash oil spray. Wash oil absorbs Naphthalene which is subsequently separated from wash oil and cleared on payment of duty.*
- (iii) Benzol products, such as Benzol, Benzene toluene are separated from coke oven gas by absorbing them in wash oil. These Benzol products are cleared on payment of duty.*

From the above, it is cleared that the wash oil is used for the manufacturing of excisable products not for coke oven gas.

The Raw Coke oven gas can be used for the same purpose as purified coke oven gas, still the same is purified for two reasons:

- i) Prolonged use of raw coke oven gas may cause damage to the burners and other downstream equipments.*
- ii) The by-products separated out during cooling and cleaning of coke oven gas has their own market value.*

6. By referring to the above process, it was submitted that none of the inputs were/ are being used for the manufacture of product as mentioned in the show-cause notice. Further, it was stated that the assessee's object is to

manufacture iron and steel and coal gas is a by-product/ intermediate product and, therefore, the question of paying amount equal to 8% of the price of the goods would not arise. Alternatively, it was submitted that credit of duty should not be denied in view of Rule 57D as it then stood which provided that the credit of specified duty allowed in respect of any input should not be denied or varied on the ground that part of the inputs was contained in any waste, refuse or by-product arising during the manufacture of the final produce or any intermediate product coming into existence during the course of manufacture of the final products whether or not such waste or intermediate product was exempt from payment of duty or chargeable to Nil rate of duty.

7. With regard to the allegation of non-submission of monthly return RT-12, it was stated that filing of RT-12 return in case of exempt goods is not necessary and a declaration as required under rule 173B of the Rules was filed every year and in this declaration the details of the products manufactured by the assessee including the products/ intermediate products arising or coming into existence during the manufacture of final products were mentioned. With the above submissions, the assessee requested for dropping the proceedings by accepting the explanation submitted by them.

8. The adjudicating authority by order dated 15.07.2004 rejected the explanation offered and confirmed the proposal in the show-cause notice, by observing that the perception of the assessee is not correct since Rule 57C(1) and/or Rule 57AD (1) and/or Rule 6(1) stipulates that credit of duty

shall not be allowed if the inputs are utilized in the manufacture of final products, which is exempt from the whole of the duty of the excise leviable thereon or is chargeable to Nil rate of duty. Rule 57C(2) and/or Rule 57AD(2) and/or Rule 6 allows a manufacturer to avail credit subject to observance of Sub-Rule 1 or Sub-Rule 5 or Sub-Rule 9 of Rule 57CC and/or Sub-Rule 2(a) or Sub-Rule 2(b) of Rule 57AD of the said Rules. Therefore, the adjudicating authority concluded that the assessee had violated Rule 57C(1) and/or Rule 57AD(2) and/or Rule 2, 3(a)(b) of Rule 6 of the said Rules and they are required to pay Rs. 1,15,10,820/- which was calculated at the rate of 20% and 8% on the value of the said final products cleared from the factory during the material period. Equal amount of penalty was imposed under Rule 173Q read with Section 11AC of the Act. Aggrieved by such order, the assessee filed the appeal before the learned Tribunal, reiterating the stand taken before the adjudicating authority, the Tribunal by order dated 21.02.2008 allowed the appeal filed by the assessee. Learned Tribunal held that the assessee had explained before the authority as well as before the Tribunal, that the coke oven gas is produced in the coke oven while converting coal into coke and impugned inputs or not utilized in the production of such coke oven gas.

9. The Tribunal notes that the assessee clarified that before selling the coke oven gas partly and partly using the same as fuel, some by-products such as Benzene, Toluene etc. are derived from the coke oven gas and the impugned inputs are used merely for deriving such by-products. The Tribunal took note of the submission of the assessee that the inputs do not

contribute to production of coke oven gas which comes into being at an earliest stage in the coke oven itself. After noting the technical process involved in the production of coke oven gas including subsequent segregation of by-products from it, the Tribunal was convinced that the impugned inputs have no role in the production of coke oven gas and these are merely used in the production of by-products. Hence, the Tribunal held that the order of the adjudicating authority demanding an amount of 20% or 8% of the value in respect of coke oven gas, which is otherwise chargeable to Nil rate of duty under the tariff is not justified. Accordingly, the appeal was allowed. Aggrieved by such order, the revenue is an appeal before us.

10. Ms. Manasi Mukherjee, learned Standing Counsel for the appellant submitted that the case of the revenue is that the assessee have taken credit of Central Excise duty on inputs namely, Sulphuric Acid and Wash Oil which were used in the manufacture of Coal Gas (which is chargeable to Nil rate of duty) without debiting 20% or 8% of the price of the value of the final product only at the time of clearance during 1996 to 2006. With regard to the manufacturing process adopted by the respondent assessee it is submitted that coke and crude coke oven gas is put to high temperature carbonization of Bituminous Coal in Coke Oven Battery by which the by-products that comes into being is crude gas which cannot be commercially used as it contained Coal Tar and the Coal Tar is cleansed from crude gas in order to procure pure coal gas as a final product and in the process certain by-products such as Naphthalene, Ammonia, light oil, motor spirit and the coal tar is cleansed through use of MODVAT inputs namely wash oil and

Sulphuric Acid. Hence, it is submitted that in order to obtain pure coal gas which is the final product here, crude coal gas needs to be cleansed by using Sulphuric Acid and Wash Oil to remove the coal tar and in the process few by-products like Naphthalene, Ammonia, light oil etc. comes out.

11. It is further submitted that after that cleansing operation, pure coal gas emerged out in a marketable stage, used within the factory itself or outside payment of duty as the product was chargeable to Nil rate of duty falling under Chapter Sub-heading No. 2705.00 of the Schedule. It was thus evident that Coal Gas was the only final product of recovery plant where other important value added products referred were also manufactured and such coal was purified through use of MODVAT inputs (Wash Oil and Sulphuric Acid) in the recovery plant on which MODVAT credit was taken and such coal gas was cleared outside without payment of duty, as it was chargeable to Nil rate of duty. Hence, it is submitted that the assessee has taken credit on inputs, utilized input in manufacture of final product which they have cleared as Nil duty product without debiting an amount equal to 20% or 8% of the price of the said final product during the period 1996 to 2006.

12. The learned Standing Counsel referred to Rule 57C, Rule 57AD of the Cenvat Credit Rules, 1944 and Rule 6(3)(b) of the Cenvat Credit Rules, 2002. It is submitted that the learned Tribunal has failed to consider the arguments placed by the revenue with regard to the manufacturing process and use of the inputs on which credit of Central Excise duty was evaded. It is further submitted that on a reading of the order passed by the learned

Tribunal it is not clear as on what basis the learned Tribunal formed an opinion in support of the respondent assessee as no reason has been assigned by the learned Tribunal. Further, the learned Tribunal mechanically accepted the explanation given by the assessee in the reply to the show-cause notice without taking note of the relevant rules and the arguments which were placed before it by the revenue. Further, the learned Tribunal failed to appreciate that unless the by-products are removed and/or taken out by the use of the inputs such as Wash Oil and Sulphuric Acid in the manufacturing process, the coke oven gas does not become usable or even marketable. Further, it is submitted that the respondent assessee failed to maintain a separate account in respect of inputs which were used in or in relation to the manufacture of the final and usable product coal gas on which Nil rate of duty was leviable under law and on the other hand, availed the credit of inputs used in the manufacture of coal gas. Further, the learned Tribunal ought to have seen that the Sulphuric Acid and Wash Oil which were used as inputs in the process of manufacture of coal gas were used directly or indirectly in or in relation to the manufacture of coal gas as final product in order to make coal gas or coke oven gas a marketable and usable product. Further, the learned Tribunal failed to consider the fact that the assessee has admitted to the use of Wash Oil and taking input credit on it and kept silent on the use of Sulphuric Acid. Further, the respondent assessee has failed to give details of any raw material against which inputs have been used and also admitted to the allegation made by the revenue that no inventory on accounts of inputs were maintained by them in violation of the rules by keeping silent on the said

issue. Thus, it is submitted that the case of the revenue is not whether Rule 57C, Rule 57AD of the 1944 Rules or Rule 6 of the 2002 Rules is applicable to the by-products but the case is that the respondent assessee have willfully evaded payment of duty by violating the Rules. Further, the respondent did not disclose to the department by way of filing return or maintaining register of separate accounts for receipt, consumption and inventory of inputs meant for the use in the manufacture of dutiable final products and quantity of inputs meant for the use in the manufacture of exempted goods and avail credit only on that quantity of inputs which is intended for use in the manufacture of dutiable goods. Once again referring to the relevant rules, it is submitted that the intention of the legislation is very clear on the aspect that a manufacturer cannot take double benefit by way of availing credit on inputs from the Government for manufacturing a final product which is exempted or to be cleared at Nil rate of duty and precisely for these reasons, Rules have been framed insisting upon maintaining separate accounts of receipt of input, their consumption in the factory and quantity of inputs used in the manufacture of an exempted final product. Therefore, the respondent assessee by not maintaining the register of inputs or inventory, have suppressed material facts from the department in order to evade the duty liability. In support of her contention the learned Counsel referred to the decision in ***Collector of Central Excise Versus East End Paper Industries Ltd.***¹.

13. Mr. Rahul Tangri, learned Advocate appearing for the respondent reiterated the contentions which are placed before the adjudicating

¹ 1989 (43) ELT 201 (SC)

authority as well as the Tribunal. Learned Advocate has referred to the flow chart and also a write up submitted by the assessee on the manufacturing process and submitted that during the manufacture of metallurgical coke, crude coke oven gas emerges as an inevitable by-product and such coke oven gas is hazardous since it contains Ammonia and other products like coal tar, Naphthalene, Toluene, Benzene etc. and for extraction of such by-products the crude coke oven gas is taken to the by-product recovery plant within the factory wherein Sulphuric Acid which is a duty free input reacts with Ammonia to obtain Ammonium Nitrate as fertilizer and Wash Oil which is a duty paid input is used to extract other by-products like Naphthalene, Toluene, Benzene etc. which are cleared on payment of excise duty. It is submitted that there is a categorical finding of fact recorded by the learned Tribunal that Wash Oil and Sulphuric Acid have no role in the production of coke oven gas which is produced as a by-product in the coke oven battery much prior to the use of such inputs for extraction of other by-products from crude coke oven gas. Therefore, it is submitted that no substantial question of law arises for consideration in this appeal. It is reiterated that the inputs on which credit is sought to be reversed are Sulphuric Acid and Wash Oil and such inputs are not used in the generation of coke oven gas. It is further submitted that Sulphuric Acid was a duty free input since it was exempt from excise duty under notification No. 6 of 2002- CE dated 01.03.2002. The exemption was available to the assessee since Sulphuric Acid was used for removal of Ammonia from the coke oven gas which led to the emergence of Ammonium Sulphate, a fertilizer. Therefore, it was contended since no excise duty was payable on the procurement of

Sulphuric Acid, there arises no question of reversal of any credit availed. With regard to Wash Oil it is submitted that it is used for recovery of other by-products such as Naphthalene, Toluene, Benzene and Benzol from the coke oven gas which are then separated and cleared on payment of duty. Therefore, it was submitted that since Wash Oil is utilized at the stage after the generation of coke oven gas, no part of such Wash Oil can be said to be used in the generation thereof. Thus, it was contended that since both Wash Oil and Sulphuric Acid are used at the stage after emergence of coke oven gas, the question of reversal of credit by treating these inputs as used in the manufacture of coke oven gas does not avail. It is submitted that though the above was the consistent stand of the assessee before the adjudicating authority, no finding has been rendered by the adjudicating authority in its order dated 15.07.2004 on this aspect. It is further submitted that Rule 57C/57CC of the Central Excise Rule, 1944 and Rule 6 of the Cenvat Credit Rules, 2001/02 are not attracted in the case of generation of unavoidable by-products. In this regard, reliance was placed on the decisions in **Union of India Versus Hindustan Zinc Ltd.²**, **Rallis India Ltd. Verses Union of India³** and **Commissioner of Central Excise and Customs, Vadodara-I Versus Sterling Gelatin⁴** which was affirmed by the Hon'ble Supreme Court in **Commissioner Versus Sterling Gelatin.⁵**

14. The learned Advocate appearing for the respondent placed reliance upon the technical literature as published in the *"The Making, Shaping and*

² (2014) 303 ELT 321 (SC)

³ (2009) 233 ELT 301 (Bom)

⁴ 2011 (270) ELT 200 (Guj.)

⁵ 2015 (320) ELT A343 (SC)

Treating of Steel”, edited by Harold E. McGannon, 9th Edition. This literature was referred to explain the classification of fuels and what are by-products and wastes. Further, it is submitted that in the preamble portion of the show-cause notice dated 23.05.2001, the department themselves have referred to coke oven gas as exhaust gas. It is submitted that the learned Standing Counsel for the appellant placed reliance on the decision of the Tribunal in ***Binani Zinc Ltd. Versus Commissioner of Central Excise.***⁶ The said decision of the Tribunal was referred to a Larger Bench which agreed with the finding of the Two Judge Bench of the learned Tribunal in the decision reported in ***2007 (208) ELT 25 (Tri-LB)***. However, the decision of the Larger Bench of the learned Tribunal was reversed by the High Court of Bombay in the case ***Rallis India Ltd. (Supra)*** and the said decision was affirmed by the Hon’ble Supreme Court in the case of ***Hindusthan Zinc.*** Therefore, it is submitted that the revenue cannot be place reliance on the decision in ***Binani Zinc Ltd.*** On the above ground, the learned Advocate prayed for dismissal of the appeal.

15. We have elaborately heard Ms. Manasi Mukherjee, learned Senior Standing Counsel of the appellant and Mr. Rahul Tangri, learned Advocate appearing for the respondent.

16. As against the impugned order passed by the learned Tribunal, this appeal was filed before this Court which was dismissed by the Division Bench by judgment dated 28.08.2008. Challenging the said judgment, the revenue preferred appeal before the Hon’ble Supreme Court which was

⁶ 2005 (187) ELT 390 (Tri-Bang)

allowed and the judgment dated 28.08.2008 was set aside and the matter was remitted back to this Court to decide the matter afresh in accordance with law as expeditiously as possible (***Commissioner Versus Steel Authority of India Ltd.***⁷). In terms of the directions issued by the Hon'ble Supreme Court, the appeal has been heard by us and is being disposed of by this judgment and order.

17. The question involved in the instance case is whether the inputs namely Wash Oil and Sulphuric Acid on which credit of duty was availed had a role in the production of coke oven gas/ coal gas directly or indirectly or in or in relation thereto or whether these were used in the production of by-products only as claimed by the assessee. Before we examine the factual and legal issues which have been elaborately canvassed before us, it would be useful to refer to the manufacturing process adopted by the respondent assessee which is stated as hereunder:

**GENERATION AND CLEANING OF COKE OVEN GAS
AT COKE OVENS IN ISP, SAIL**

In integrated steel plant like ISP, Coke Ovens play a vital role for providing metallurgical coke in blast furnace and coke oven gas which is used as a fuel in the entire steel plant operation.

Raw coke oven gas thus generated during coal carbonization contains lot of impurities like Coal Tar, Ammonia, Naphthalene etc. which are potential threat towards choking as well as corrosion to the entire gas distribution network. For this, purification of raw coke oven gas is a must and technological necessity for its use as a fuel. However in the process of cleaning, several by products like Coal Tar, Ammonium Sulphate, Naphthalene, Crude Benzol are generated.

⁷ 2015 (320) ELT A39 (SC)

Coke oven gas generated during high temperature carbonization of coal charge leaves free space of ovens at 800-850 Degree Celsius and passes through stand pipes to the hydraulic mains where it is sharply cooled to 80-82 Degree Celsius by spraying flushing liquor. Intensive cooling results in partial condensation of tar water vapours. About 70-75% of tar separates out in hydraulic mains. C.O. gas is then cooled to 30-35 Degree Celsius in Primary Gas Coolers by indirect cooling with water where about 20% of tar separates before it is sucked by Exhauster and transported through different by product recovery units. C.O. gas then enters Detarrers (electrostatic precipitators) where final traces of tar is removed by employing strong electric field of 33KV. The liquid phase thus collected comprises of tar and liquor, and is pumped to a gravity decanter for settling and separation. Tar and liquor are collected in respective storage tanks.

Ammonia present in the coke oven gas is removed and recovered as Ammonium sulphate by semidirect process through intimate contact with dilute sulphuric acid in an equipment called Saturator according to the following reaction:



The C.O. gas after Detarrer flows through gas preheater where it is heated by means of indirect steam to 65-70 Degree Celsius before entering the saturator. In saturator, gas is bubbled through an aqueous acidic solution. Concentrated Sulphuric Acid of 98% strength is continuously supplied into the saturator for maintaining bath acidity to 4-6%. As gas bubbles through saturator liquor, reaction between Ammonia and Sulphuric Acid proceeds and Ammonium Sulphate is continuously formed and settled down at the bottom of saturator as crystals. The slurry containing 30-40% crystals is taken out by air ejector and the crystals are separated in settling pan and then by centrifugation. Wet salt from centrifuge containing moisture upto 45 is dried in rotary drum drier to 0.2-0.3% moisture and bagged in HDPE bags for selling.

After the recovery of tar and then ammonia by saturator process, Coke Oven Gas enters at a temperature of 50-55 degree Celsius at the bottom of Secondary Cooler (Stage I) where it is

cooled by means of direct contact with water in counter current direction to a temp. (approx 35-38 degree Celsius) near that of gas after Primary Cooler. Gas, thus cooled, emerges from the top of secondary cooler (stage II) consists of two sections.

Wash oil, a petroleum fraction is sprayed in the lower section by means of spray nozzles. The gas during its passage comes in direct contact with the oil and Naphthalene from C.O. Gas is absorbed into oil. The circulation of Wash Oil in the lower part of Sec. Cooler (stage II) is continuous and a part of this naphthalene rich oil is sent to naphthalene stripping plant where naphthalene is recovered as saleable product. The gas from the lower part ascends to the upper part of the cooler where it is cooled further by direct contact with water.

C.O. gas from Sec. Cooler (stage II) passes through Scrubber for the recovery of crude benzol present in gas wash oil is sprayed continuously from the top of the Scrubber at the rate of 1.8 to 2.5 lts./Nm³ of C.O gas. Benzol hydrocarbons are absorbed by wash oil. Benzol rich oil known as "Benzolised Oil" is then stripped in Benzol. Toluene Plant to recover crude benzol and the stripped oil is again fed back into the scrubbing system. The clean coke oven gas after the scrubber is used as fuel in coke oven under firing and steel making.

Sd/-
11.07.08

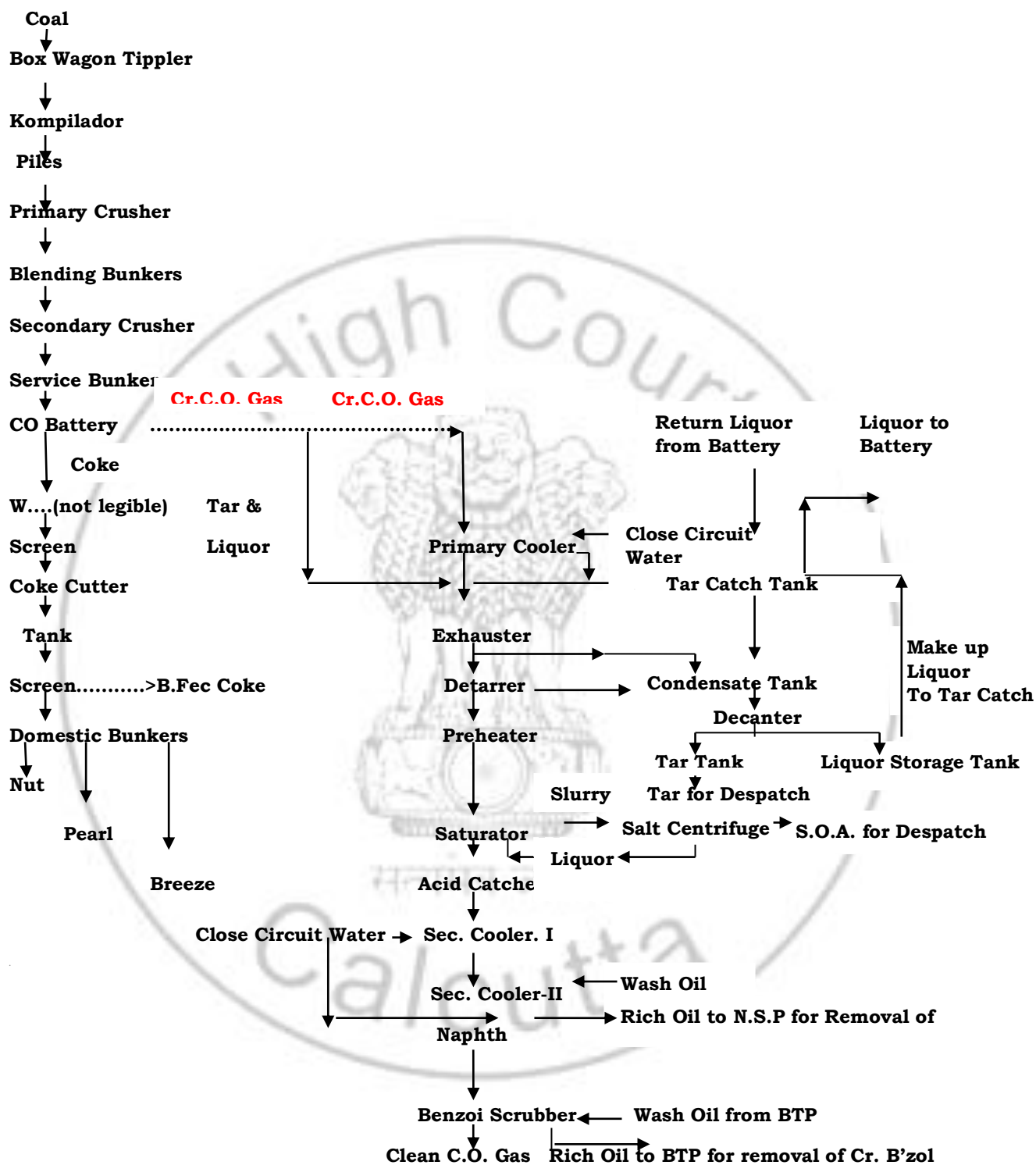
A.G.M
Steel Authority of India Limited
SCO Steel Plant Burnpur

Sd/-
11.07.08

(Superintendent)
Central Excise
Hirapur Range
Burnpur-713328

18. A flow diagram of the coke ovens has also been placed before us and in our opinion, the said flow diagram would make the factual position clearer and therefore, we extract the same.

FLOW DIAGRAM OF COKE OVENS



A.G.M. (C.O. Oprn)
Steel Authority of India Limited
IISCO Steel Plant, Burnpur

(Superintendent)
Central Excise
Hirapur Range
Burnpur-713325

19. The undisputed facts are that the assessee is an integrated steel plant and in their factory they manufacture and clear excisable goods falling under Chapters 26 to 29, 72, 73 and 84 of the Schedule to the Central Excise Tariff Act, 1945 (the Tariff Act). In the show-cause notice it has been stated that initially coke and crude coke oven gas were manufactured by destructive distillation process and through high temperature carbonization of Bituminous Coal in a separate unit called coke oven battery. The crude coke oven gas containing by-products comes out as exhaust gases from the coke oven unit. The crude gas cannot be used as fuel as it contains coal tar and other organic compounds as by-products which on natural condensation would jam the pipeline thereby disrupting the supply system. The crude coke oven gas is therefore taken to another unit called by-product recovery plant where this crude gas is cleansed from the major by-products namely, Naphthalene, Ammonia, Motor Spirit, light oil etc. and waste (Coal tar) by using MODVAT inputs namely, Sulphuric Acid and Wash Oil. The pure coal gas thus manufactured in a marketable stage is partly consumed in the assessee's factory and the remaining sold outside without payment of duty as the product was chargeable to Nil rate of duty under SH 27.05. The revenue would state that from the aforementioned manufacturing process it is evident that coal gas was the only manufactured product of by-product recovery plant where other important products namely, Ammonium Sulphate, Naphthalene, Benzene, Toluene, LS Naphtha, coal tar were also manufactured. Further it is evident that coal gas was purified through use

of MODVAT inputs namely, Sulphuric acid and Wash Oil in the recovery plant on which the credit was taken. It was further evident that coal gas was cleared by the assessee without payment of duty as it was chargeable to Nil rate of duty. Therefore, it was stated that the assessee has taken credit of duty on those inputs, utilized those inputs in the manufacture of dutiable as well as Nil rate of duty final products without debiting an amount equal to 20% or 8% of the price of the said final products at the time of their clearance during the period from 1st September, 1996 to 31st March, 2000 in terms of Rule 57CC(1) of the Rules.

20. Rule 57C(1) of the Rules states that credit of duty shall not be allowed If the inputs are utilized in the manufacture of a final product which is exempt from the whole of the duty of excise leviable thereon or is chargeable to Nil rate of duty. Rule 57C(2) of the Rules permits the manufacturer engaged in the manufacture of dutiable as well as exempted final products to avail credit of duty paid on inputs in the manufacture of dutiable as well as exempted final products subject to absorbance of the procedure under Rule 57CC(1) or (5) or (9) of the said Rules. In terms of Rule 57CC (1), the manufacturer can avail credit of duty paid on inputs used in the manufacture of dutiable as well as exempt final products if he pays an amount equal to 8% or 20% (for 1996-97) of the price of the exempted final product at the time of clearance from the factory. Rule 57CC(9) provides that the manufacturer shall maintain separate inventory and accounts of the receipt and use of inputs for the purpose of manufacture of such exempted final products and shall not take credit on the specified duty on such

inputs. The further allegation against the assessee is that they have not maintained separate inventory and accounts as required under Rule 57CC(9) of the Act of the Rules. The rigour of Rule 57CC(1) of the Rules is dispensable if the inputs used for the manufacture of exempted final products or those chargeable to Nil rate of duty are inputs used by the assessee namely, Sulphuric Acid and Wash Oil cannot be considered as fuel and these items are used directly or indirectly in or in relation to the manufacture of coke oven gas. As the extended period of limitation was invoked for issuance of the show cause notice, it has been alleged that the assessee have done so knowingly and willfully with intention to evade payment of duty.

21. The assessee while contesting the allegations in the show-cause notice at the very outset pointed out that all information to the best of their belief and understanding have been disclosed to the department from the point of view as required. Further it was stated that the long standing practice prevalent in Iron and Steel Industry throughout the country has not been taken note of the by the respondent. More importantly, the assessee contended that they being the public sector undertakings there cannot be any motive to deprive the Government of its legitimate dues. Further the assessee had stated that no proper enquiry was conducted by the department for issuing the show cause notice and the allegations are misconceived in law as well as on facts. Further it was stated that the department failed to take into consideration that no credit of duty has been availed on the inputs under Rule 57AA or Rule 2 of the 2001 Rules for the

final product namely Coal Gas. Manufacturing process adopted by the assessee has been noted above as well as the flowchart showing the process. The revenue has not denied the manufacturing process nor disputed the contents of the flow chart that sets out various stages in the process of manufacture. From the materials placed before this Court, it is seen that metallurgical coke is manufactured by the carbonization of coal for use in the Blast Furnace for making iron. In the course of manufacture of coke by coal carbonization by-product such as coke oven gas/coal gas emerges. It is being further explained that raw coal is carbonized by heating in closed chamber at high temperature during which the volatile matter content of coal comes out in the form coke oven/coal gas which is collected through pipelines. It has been specifically stated in the manufacturing process that coal is the only input for manufacturing process of coke oven gas. Further steps which are carried out such as process of cooling, cleaning or purifying does not give rise to anything different from coke oven gas. In the preceding paragraph, we have noted the steps taken for purifying coke oven gas. The respondent assessee has been able to explained through note on the manufacture process and the flow chart that wash oil use for manufacturing of excisable product not for coke oven gas. This factual aspect has not been shown to be wrong by the department nor there is any finding to the said effect in the adjudication order or that MODVAT inputs are used for manufacture of coke oven gas. The question would be whether the allegations made in the show cause notice against the assessee was justified. From the note on the manufacturing process, it is evident that during the process of manufacture of metallurgical crude coke oven gas

emerges as by product and it is inevitable by-product. The assessee's case has not been disputed by the revenue that coke oven gas contains lot and hazardous substances. The crude coke oven gas which emerges as an inevitable by-product has taken to another plant called as the by-product recovery plant which is a separate and independent process. This fact has not been disputed by the department rather admitted. It is in the by-product recovery plant sulphuric acid which is duty free input is used to obtain Ammonium Nitrate by a process of reaction with Ammonia and the end product is used as fertilizer. The wash oil which is the duty paid input is used to extract other by-products like naphthalene, toluene, benzene which are cleared on payment of duty. After recovery of these products in the by-product recovery plant clear coke oven gas emerges which is partly used as fuel in the assessee's factory and some sold outside without payment of duty since it attracts Nil rate of duty. These facts are not controverted by the department. Thus, going by the manufacturing process what emerges is that the sulphuric acid (duty free input) and wash oil (duty paid input) are not used for producing coke oven gas which in fact, is by-product which automatically emerges in the manufacturing process of metallurgical coke.

22. In the book *The Making, Shaping and Treating of Steel* by Harold E. McGannon, 9th Edition, classification of fuels has been explained. It is stated that there are four general classes of fuel namely fossil, by-product or waste, chemicals and nuclear. The first three classes of fuel are energy released by combustion of carbon and hydrogen with an oxidant usually oxygen; process involves electronics exchange to form products of lower energy such

as a consequence of energy released in an exothermic reaction. By-product are derived from a main product and order of secondary nature and example of these fuel are coke oven gas, coke, blast furnace gas, wood waste, and so on. It has been further stated that fossil and by-product fuel accordingly used in the steel industry are classified further into three general divisions namely solid, liquid and gaseous fuel. Fuel in each general division can be classified further as natural manufacture or by-product. Fuel found in nature sometimes are called primary fuel; those manufactured for a specific purpose are market altogether with those that are inevitable by-product of some regular manufacturing process, are called secondary fuel. In the classification of fuel under the general division can gaseous the primary fuel being natural gas and one of the product manufactured is coal gas, which is secondary fuel and the by-product which arises during coke manufacture is coke oven gas. In the article there is an elaborate discussion of by-product gaseous fuel. It is stated two major products gaseous fuel are blast furnace and coke oven gas. It is stated that the steel industry which uses 90% of the total coke oven gas generated in United States, generally classified coke oven gas, as by-product of coke manufactured. This is untimely due to the former waste of coke oven gas and other coal products for so many years in the beehive coke process. It is further stated that coke oven gas is produced during the carbonisation or destructive distillation of bituminous coal in the absence of air. The combustion of coke oven gas varies in accordance with grade and density of coal and operating practices. Coke oven gas contains hydrogen sulphide. The above literature clearly demonstrates that coke oven gas is classified as a by-product. If such is the technical position, the

department are not justified in holding that such is a by-product which is inevitable by-product as being manufactured by use of MODVAT inputs.

23. In the given fact situation, we are to consider as to whether the allegations made by the department is justified. To answer these questions, we seek the guidance of certain decisions. In **Hindustan Zinc Limited**, the question which arose for consideration was with regard to the entitlement of the assessee therein 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 and the requirement of the assessee to maintain separate accounts with regard to inputs used in dutiable goods as well as exempted goods and the liability arising on failure of the assessee to maintain such separate account. In one of the appeals in the batch, the product was sulphuric acid as in the case on hand. The question which fell for consideration was whether the assessee therein were entitled to MODVAT/CENVAT on inputs used in the manufacture of the exempted or MODVAT rate of duty final products.

24. As contended before us by Ms. Mukherjee, the revenue has argued before the Hon'ble Supreme Court that the assessee therein are liable to pay 8% excise duty as an amount under Rule 57 CC of the 1944 rules or Rule 57 AD of the 2000 rules or Rule 6 of the 2004 rules on the value of the by-product namely sulphuric acid, which was cleared to fertilizer plant under exemption in terms of the bonds executed by the fertilizer plant. After noting the manufacturing process as explained before the Hon'ble Supreme Court, it was held that sulphuric acid is indeed a by-product and it was so treated

in the balance sheet of the respondent therein as well as various other documents and the assessee were established for the purpose of producing zinc and copper and not sulphuric acid. The revenue could not dispute the fact that emergence of sulphuric acid in the calcination process of concentrated ore is not 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. Further it was pointed out that 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. Further the respondent therein had explained that ore concentrates zinc or copper are completely utilized for the production of zinc and copper and no part of the metal zinc and copper forms part of the sulphuric acid which is cleared out. Further it was explained that the extraction of zinc from the ore concentrate will inevitably result in the emergence of sulphuric acid as technological necessity and it is not that the respondent therein can use lesser quantity of zinc concentrate only to produce the metal and not produce sulphuric acid; 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 assessee therein have no control. Thus, the Hon'ble Supreme Court accepted the contention of the respondent therein that ore concentrate is completely consumed in the production of zinc and no part of the metal is formed part of the sulphuric acid. The next aspect examined by the Hon'ble Supreme Court is with regard to the position contained in Rule 57CC of the rules and noting of the facts stated therein and held as follows:

Let us now examine the position contained in Rule 57CC on the touchstone of the aforesaid position. No doubt, Rule 57CC requires and assessee to maintain separate records for inputs which are used in the manufacture of two or more final 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, sulphurs vulcanizing agents which are used in production of tyres are indeed common to both dutiable and exempt tyres. Such assessees 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 57CC 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 57CC were fully met in the way in which the Respondent was maintaining records and inventory and the mischief of recovery of 8% under Rule 57CC on exempted sulphuric acid is not attracted.

25. Further the Hon'ble Supreme Court had pointed out as to in what manner rules have to be read and that the Rule 57CC cannot be read in isolation

Furthermore, the provisions of Rule 57CC cannot be read in isolation. In order to understand the scheme of Modvat credit contained in this Rule. A combined reading of Rules 57A, 57B and 57D along with Rule 57CC becomes inevitable. We have already reproduced Rule 57D above. It can be easily discerned from a combined reading of the aforesaid provisions that the terms used are 'inputs', final products, 'by-products', 'waste product' 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 57CC, 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 57CC will apply. The appellant seeks to apply Rule 57CC when Rule 57D does not talk about application of Rule 57CC 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 by-product and final product thereby obliterating the difference though recognized by the legislating itself. Significantly this interpretation by the Tribunal in Sterility (supra) was not appealed against by the department.

26. The above decision in our considered opinion would apply with full force to the case on hand for which all that we need to do is to substitute the product sulphuric acid with crude coke oven gas and the resultant position would be a by-product which is inevitable by-product which emerges as technological necessity has been shown to emerge without utilizing either sulphuric acid or wash oil which are MODVAT inputs in such process. The flow chart clearly demonstrates as to the stage in which the crude coke oven gas emerges and the only product which goes into the manufacture at that stage is coal. The decision in **Reliance India Private Limited** was affirmed by the Hon'ble Supreme Court in **Hindustan Zinc Limited**. It would be beneficial to refer to the one paragraph of the said decision which would match the factual position in the case on hand which is quoted herein below:

The fact that the waste mother liquor arising in the manufacture of gelatin was further processed to manufacture exempted phosphoryl 'A' and 'B' would not attract Rule 57CC, because, if Rule 57CC, was not applicable at the time of clearance of the waste liquor arising in the manufacture of

dutiable gelatin, then the said rule cannot be applied merely because mother liquor was further processed to manufacture exempted final product, namely, phosphoryl 'A' and 'B'. In other words, liability to pay the presumptive amount under Rule 57CC would arise only if the waste mother liquor is held to be a final product. It is not even the case of the revenue that the waste mother liquor arising in the manufacture of gelatin is a final product. Therefore, in the facts of the present case, if Rule 57CC was not applicable at the time of clearance of waste mother liquor, then Rule 57CC would not apply at the time of clearance of the exempt phosphoryl 'A' and 'B' manufactured out of waste mother liquor.

27. In the preceding paragraph, we have noted the manufacturing process adopted by the assessee and the emergence of crude coke oven gas is technological necessity and inevitable by-product and it is not exempted final product and it is neither the case of the department that it is the final product. The decision in **Hi-Tech Carbon** is closest to the facts of the case on hand. The assessee therein manufactured carbon black that are goods classified under Chapter 28 of the First Schedule of the Tariff Act, 1985 using Carbon Black Feed Stock (CBFS) the raw material/input. In that process RFO/LSHS/LDO/FO was used as fuel. The assessee therein subjected CBFS to process known as thermal cracking. It resulted in production of carbon black in particle form. However in this process "off gases" also known as "lean gases" emerged by way of technological necessity and those gases have high content of carbon mono-oxide and are hazardous and cannot be released freely into atmosphere. Therefore, the assessee therein burnt carbon mono-oxide content in the 'off gases'/lean gases' before releasing the same into atmosphere. The burnt of carbon mono-oxide generated heat that could either to be allowed to escape or put to use which

the assessee did by generating steam from demineralised raw water treated with caustic soda and hydrochloric acid by employing boiler and the steam generated were then used, part to pre-heat CBFS the remaining quantity of steam we sold. The tribunal in the said case held for reversal of input credit utilization to Rule 57C or Rule 57CC of the rules it was pre-requisite that the input on which the input credit has arisen should have been used to manufacture of exempted product along with dutiable product. The Tribunal further held that by insertion of Rule 57CC, there was no intention to deprive the assessee of the benefit available under rules 57D(1) of the rules to a by-product, waste, or refuse. Thus, it was held that no part of input credit availed was to be disallowed. The order passed by the tribunal was challenged by the revenue before the High Court at Allahabad and the questions were answered against the revenue in the following terms:-

- *In the first instance 'off gases'/lean gases appear to be a 'waste' or 'refuse'. However, in the present case, the Tribunal has found them to be a 'by-product'. In any case being hazardous to the environment (on account of high content of Carbon Monoxide), they could not be freely released into the atmosphere. The assessee burnt the Carbon Monoxide present in 'off gases' / 'lean gases' before releasing the same in the atmosphere.*
- *The language of Rules 57C and 57CC of the Rules is clear. Those Rules would operate to disallow input credit to a manufacturer in specified situations involving manufacture of goods in which duty paid input had been used to manufacture goods that were either exempt from duty payment or liable to clearance at nil rate of duty.*
- *For Rule 57C to apply it must be shown that the goods so cleared were 'final product' (other than a final product as had been excluded under that Rule) that*

were either exempt from payment of duty or chargeable to nil rate of duty. On the other hand, Rule 57CC applies to a situation where using a duty paid input, 'any product' (other than such products as have been excluded under that Rule) is cleared by an assessee and such a 'product' is either exempt from the whole of duty of excise or is chargeable to nil rate of duty.

- *Thus, two things must be established before a disallowance of input credit may be made under Rules 57C or 57CC. First 'use' of the duty paid input 'in the manufacture of' of a 'final product' or any product as the case may, must be established. Then such 'final product' or 'other product' must itself either be exempt from payment of duty or be chargeable nil rate of duty. In the instant case there is no doubt that 'steam' was exempt from payment of duty. However, it remains to be seen whether it was a final product obtained from duty paid input.*
- *As to the scheme of the Rules, upon a co-joint reading of Rule 57C and Rule 57CC and Rule 57D it thus emerges that full input credit is to be availed by the assessee in cases covered under Rule 57D that is where the 'waste', 'refuse', 'by-product' or 'intermediate product' emerges but at the same time is chargeable to nil rate of duty or is exempt from payment of duty.*
- *In the instant case, the Tribunal has correctly examined the issue on facts and thereafter found that 'off gases' / 'lean gases' were the 'by-product' in the manufacture of Carbon Black by subjecting CBFS to thermal process.*
- *The 'off gases' / 'lean gases' itself arose because of technological necessity upon CBFS being subjected to thermal cracking process to product Carbon Black. However, for that process to be completed there was no requirement to burn 'off gases' / 'lean gases'. The process to manufacture Carbon Black was complete before the 'off gases' / 'lean gases' were burnt. The second process involving burning of 'off gases' / 'lean gases' was therefore, totally separate and disconnected with the first, as emerges from the order of the Tribunal.*

- Then in the second process, 'off gases' / 'lean gases' were burnt to generate heat and it was heat that was used to manufacture 'steam', 'off gases' / 'lean gases' did not contain 'steam' and they could not produce steam on their own. They had to be burnt to produce the heat that in turn was used to generate 'steam' from water.
- Therefore, it would be too far fetched and fanciful to reason that 'steam' was generated by using CBFS as in input when (i) no part of CBFS was burnt to generate 'steam' (ii) the entire quantity of CBFS was subjected to thermal cracking to produce Carbon Black only, (iii) the process of thermal cracking of CBFS did not result in generation of steam but only in the manufacture of Carbon Black as the final product and 'off gases' / 'lean gases' as a 'by-product' (iv) 'off gases' / 'lean gases' were burnt in a separate process. It generated heat (v) the heat so generated was in turn utilized to generate 'steam'.
- Thus, in view of the above, there never arose a situation to apply Rule 57C or 57CC of the Rules. Those Rules would be of relevance when two products emerge from a single process (upon utilization of a duty paid input), one of which is either exempt from duty payment or is cleared at nil rate of duty.

28. The decision in **Sterling Gelatin** also gives assistance to the case of the assessee, the facts are more or less identical except that the assessee therein was engaged in the manufacture of Gelatin and Di-Calcium Phosphate the following paragraphs of the decision would support the case of the assessee before us:-

- ❖ Thus, on a plain reading sub-rule (1) of Rule 6, it is apparent that CENVAT credit is admissible in respect of the inputs used in the manufacture of dutiable goods and is inadmissible on such quantity of inputs which is used

in the manufacture of exempted goods. Sub-Rule (2) imposes an obligation on the manufacturer who manufactures final products and exempted goods from the common input to maintain separate accounts for receipt, consumption and inventory of inputs. Examining the applicability of the aforesaid rules to the facts of the present case, as noted hereinabove, it not as it more quantity of Hydrochloric Acid is used than that required for manufacturing Gelatin or that by using a smaller amount of Hydrochloric Acid, the product of Mother Liquor could be averted. In the manufacturing process adopted by the assessee, it is not possible to manufacture Gelatin without Mother Liquor coming into existence. Thus, when the entire quantity of input viz. Hydrochloric Acid is used in the manufacture of the final product being Gelatin which is dutiable product, the mere fact that a by-product emerges during the process would not bring the by-product within the ambit of Rule 6 of the Rules so far as to call for maintaining separate accounts in respect of the same. When the entire quantity of input is used in the manufacture of Gelatin, the question of maintaining separate accounts or of paying a percentage of the total price of the exempted goods would not arise. In the peculiar facts of the present case, sub-rule (1) of Rule 6, itself would not come into play in as much the manufacturer does not deliberately use any quantity of the inputs, viz. Hydrochloric Acid for manufacturing Mother Liquor, the entire Hydrochloric Acid is used in the manufacture of Gelatin. Thus, when no input is specifically used for the purpose of manufacturing Di-Calcium Phosphate, there would be no question of maintaining separate accounts for receipt, consumption and inventory of input.

- ❖ *At this stage, it may be germane to refer to the decision of the Supreme Court in the case of Commissioner of Central Excise, Mumbai Versus National Organic Chemical Industries Limited, (2008) 16 SCC 490 = 2008 (232) ELT 193 (S.C) wherein the question before the Supreme Court was as to whether emergence of methane and ethane during the course of manufacture of ethylene and propylene would be a ground for denial of benefit of exemption in respect of ethylene and propylene which*

was exempt from excise duty. It was contended on behalf of the respondent assessee that there was no way by which the respondent could have manufactured ethylene and propylene for producing ethane and methane. The Court held that it was not as if by using a smaller quantity of raw materials or other goods involved in the process the respondent could have averted the emergence of ethane and methane. In other words, in the technology utilized for the manufacture of ethylene and propylene, the emergence of ethane and methane was inevitable. Hence, while it was no doubt correct to say that ethylene and propylene had been used in or in relation to manufacture of ethylene and propylene. The emergence of ethane and methane therefore, by itself was not a ground to deny the benefit of the exemption notification.

- ❖ *On behalf of the appellant it has been submitted that common input Hydrochloric Acid was used in the manufacture of both Gelatin as well as Di-Calcium Phosphate hence, in the light of the provisions of Rule 6(2) of the Cenvat Credit Rules, 2002, the respondent was required to maintain separate accounts for receipt, consumption and inventory of input meant for use in the manufacture of dutiable final products and the quantity of input meant for use in the manufacture of exempted products and take Cenvat credit only on that quantity of input which was intended for use in the manufacture of dutiable goods. In the present case, the assessee has taken Cenvat credit only on that quantity of input, which was intended for use in the manufacture of dutiable goods, therefore also the question of invoking sub-rule (2) of Rule 6 of the Rules would not arise.*

29. The above decision was affirmed by the Hon'ble Supreme Court as the appeal against the said decision was dismissed as reported in **2015 320 ELT A 343 (SC)**.
30. The revenue placed reliance on the decision in the case of **Paper Industries Limited**. In the said case, the respondent manufactured

different varieties of printing papers including wrapping papers falling under Item No. 17 (1) of the Erstwhile Central Excise Tariff. The Department's contention was the respondent therein had violated the provisions of Rule 9 (1) Rule 173 F and Rule 173 G of the 1944 rules in as much as they have removed 4000 wrapping papers without payment of central excise duty. The show cause notice was issued. It was contended that the wrapping of carbon product by wrapping paper is process incidental and auxiliary to the completion of manufactured product under 2(F) of the Act and wrapping is used as component part of having excisable goods attracting the benefit of notification dated 09.07.1993. The department did not agree with the stand taken by the assessee. The appeal filed before the Collector was also rejected. On further appeal to the tribunal, the order of the Collector was set aside and challenging the same appeal was preferred to the Hon'ble Supreme Court. While dismissing, the Hon'ble Supreme Court held that to be able to be marketed or to be marketable, (considering the facts of the said case) that wrapping in paper was an essential requirement and anything required to make goods marketable must form part of the manufacture and any raw materials or any materials used for the same would be component part for the end product. The said decision is wholly distinguishable on facts and can never assist the case of the revenue. More so, when it remains an undisputed that position MODVAT inputs are used much after emergence of coke oven gas and therefore the question of reversal of credit by treating them as inputs used in the manufacture of coke oven gas does not arise. Thus, the learned tribunal was right in granting relief to the assessee.

31. The appellant department while issuing the show-cause notice dated 2.05.2001 for the period from 01.07.1996 to 31.03.1997 and 01.04.1997 to 30.03.2003 had invoked the extended period of limitation. In the show-cause notice further setting out the allegations against the respondent it is alleged that the assesseees have committed such violations knowingly and willfully with intent to evade payment of duty. The respondent in the reply to the show-cause notice had specifically denied the allegations that he withheld information from the Central Excise Department. They had stated that according to the best of their knowledge and understanding they have disclosed all information from time to time as required and the show-cause notice has been issued without appreciation a long standing practice prevalent in the iron and steel industries throughout the country. Further the respondent stated that they are a Public Sector Undertaking and there cannot be any motive to deprive the Government of its legitimate dues. The Commissioner of Central Excise, Bolpur in the order of adjudication dated 15.07.2004 though as referred to the specific submission of the respondent in the reply to the show-cause notice has not recorded any finding supported by material that the respondent assessee had willfully suppressed details from the department with an intent to evade payment of Central Excise Duty. Merely, by stating that the assessee had suppressed vital facts and had been availing credit on duty paid inputs even in respect of goods chargeable to Nil rate of duty is not sufficient to justify invoking the extended period of limitation by resorting to the power under Section 11AC and Section 11AB of the Act. The respondent assessee's specific case is that they are a Public Sector Undertaking and at no point of time they had any

intention to deprive the Government of its legitimate dues. Therefore, we can safely conclude that the ingredients of the relevant statutory provisions have not been made to invoke this extended period of limitation. Section 11A of the Central Excise Act states that when any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud, collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of the Act or the Rules made thereunder with intent to evade payment of duty, such person is levied to pay duty in full or any part accepted by him and interest payable under Section 11AB and penalty equal to 15% of the duties specified in the inputs or the duty was accepted by such person within 30 days of the receipt of the inputs. Section 11AC of the Act deals with penalty for short-levy or non-levy of duty in certain cases. The provision states that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of the Act or the Rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under Section 11A (2) was also liable to pay penalty equal to the duty do determined. Nowhere in the order of adjudication, the authority has recorded a finding that the respondent assessee is guilty of willful mis-statement, suppression of facts with an intent to evade payment of Central Excise Duty. Therefore, the invocation of the extended period of limitation to initiate action is vitiated.

32. In the result, the appeal filed by the revenue is dismissed and substantial questions of law are answered against the revenue. No costs.

(T.S. SIVAGNANAM, J.)

I Agree.

(PRASENJIT BISWAS, J.)



(P.A.-PRAMITA/SACHIN)