(1994) 10 MAD CK 0024

In the Madras High Court

Case No : Writ Petition No''s. 11089, 11090 and 12924 of 1994

India Cements Ltd. APPELLANT

Vs

Assistant Collector of C. Ex., Tirunelveli RESPONDENT

Date of Decision : 07-10-1994

Acts Referred:

Central Excise Rules, 1944 — Rule 57A
Central Excises and Salt Act, 1944 — Section 2, 3, 4, 5A

Citation : (1994) 48 ECC 215 : (1995) 75 ELT 493

Hon'ble Judges : Shivraj V. Patil, J

Bench : Single Bench

Advocate : Shri C. Natarajan, for the Appellant; Shri K. Jayachandran, Addl. C.G.S.C., for the Respondent

Judgement

1. All these three writ petitions are filed against the common respondents for various reliefs. They are taken together for convenience and they are

disposed of by this common order :

2. In Writ Petition No. 11089 of 1994, the petitioner has sought for the issuance of a writ of mandamus, directing the respondents herein to

forbear from denying or disallowing the credit of duty paid on paper bags received and used in the manufacture, packing and wholesale marketing

of cement or in any manner interfering with utilisation of the credit of the duty paid on the paper bags.

3. In Writ Petition No. 11090 of 1994, the petitioner has sought for calling of the records on the file of the first respondent in C. No.

V/68/30/100/92, dated 30-3-1994 by issue of a writ of certiorarified mandamus, and quashing the said proceedings, and further to direct the first

respondent to permit the petitioners to avail credit of the duty paid on paper bags used in relation to packing and manufacture of cement cleared

from the factory of the petitioners under Rule 57A of the Central Excise Rules, 1944.

4. In Writ Petition No. 12924 of 1994, the petitioner has sought for the issuance of a writ of certiorarified mandamus by calling for the records of

the third respondent, relating to the order No. 520/92, dated 7-10-1992 to quash the same and to direct the respondents to permit the credit of

duty under Rule No. 57A of the Central Excise Rules on paper bags used as packing materials in the manufacture of cement.

5. Facts which are considered necessary for the disposal of these writ petitions briefly stated are the following :

The petitioners are a Company incorporated under the Companies Act, 1956 and the petitioners are engaged in the manufacture of various

categories of cement, which are classified under Chapter 25 of the Central Excise Tariff Act, 1985. A duty of excise is levied u/s 3 of the

provisions of the Central Excises and Salt Act, 1944 on the cement manufactured and cleared. The goods falling under Chapter Heading 2502.29

attract duty at Rs. 330 per tonne, by virtue of Notification No. 7/92 C.E., dated 1-3-1992 issued u/s 5A of the Act, instead of collecting the duty

on the wholesale value determined u/s 4. The duties are collected at specified rates under a notification to dispense with the need to determine the

value under price list. This appears to have been done because of the fluctuation in wholesale prices of cement which keep varying and for

administrative convenience. The petitioners have been marketing their cement through network of more than 1600 stockists, who were appointed

under standard terms and conditions. In addition, the petitioners are also marketing their cement by direct negotiation with bulk purchasing

consumers, which are either Government Departments, quasi-government undertakings or even bulk purchasing consumers or individuals. In such

cases, the prices are negotiated at a value expressed per metric tonne ex-factory, freight being extra. The prices are exclusive of excise duty and

inclusive of packing. The controversy in this case is as regards packing. As per the practice, manufacture and marketing of the cement is invariably

in packed condition (paper bags or HDPE sacks). For the said purpose, the petitioners get manufactured specific packing material. The packing operation is a part of the continuous operation for manufacture of cement and highly sophisticated automatic rotary packers are installed in each of

the factories. After the process of clinkerisation in the kiln, the clinker so produced is ground to make cement in the cement mill. Then it is spread

to cement silos for storage by flux pump. The cement from the silo is drawn into the Automatic Rotary packers installed in the packing pump house

and each bag is automatically filled with 50 kgs. of cement by the Rotary Packers. Thereafter, the bags filled with cement fall on the conveyor belt

which is directly connected to the lorry/wagon loading platform, which after loading, is carried by the common carrier to the market stream. The

petitioners contend that cement in bulk form is stored in silo, and bagging is a continuous operation and immediately on the cement being packed is

delivered to the common carriers at the packing house to enter the wholesale market. The price of cement as quoted in the market is inclusive of

the cost of packing. Even when orders are received, they are expressed in terms of tons. The implication is that per ton consisting of 20 bags each

weighing 50 kgs. of cement will be delivered. Either the wholesale trader or the common consumer accepts cement to be delivered only in bagged

condition. The petitioners do not deny that it is possible to say that the cement can be marketed in naked condition, but that will relate to a further

very limited and isolated segment of consumer. The petitioners on a very few occasions in the distant past, sold bulk cement in naked condition to

Kerala State Electricity Board during the year 1988, where the customer had specialty built silo at site and arranged for special type of carriers or

wagon to collect naked cement ex-factory and had arranged wagon movement to the construction site. Such category of sale is so exceptional and

its very nature so cumbersome and commercially non-viable for considering it as a marketing practice. It is stated that packing is fundamentally and

integrally necessary to protect the cement from disintegration, as it is hydroscopic in character. Bulk cement cannot be stored except in fully

protected specially built silos and it can hardly be suggested that any wholesaler will have such silos to buy and market cement. The fact that

packing is used to handle cement or to transport it is only a factor incidental to the manufacture and sale of cement to wholesaler.

HDEP sacks have certain specification to ensure no seepage during transit. Paper bags on the other hand have a distinct advantage and are specially designed to ensure the protection of the cement by employing different grades of thickness, say 4 ply, 5 ply etc., which besides ensuring

no loss of weight, do not cause dust pollution besides being easy to handle and attractive in packing.

6. Rule 57A is included in Chapter V(AA) of the Rules and it provides for credit of duty paid on excisable goods used as input. The object of the

said Rule is to ensure that the cascading effect of excise duty on raw materials used as input is reduced when further duty is imposed on the final

product. The said Rule provides that the provision is applicable to the finished excisable goods notified. Under the Rule, a duty of excise or

additional duty paid on the input used in or in relation to the manufacture of final product for the purpose of outilising the credit was allowed

towards payment of duty of excise leviable on the final product. It is the case of the petitioners that the duty of excise paid on the paper bags sold

to the petitioners ought to be allowed as a credit for the purpose of discharging the duty paid on the clearances of packed cement. But the

respondents have negatived the same.

7. The Superintendent of Central Excise, Tirunelveli by his order dated 17-5-1988 in Order No. 1584 of 1988 took the view that the petitioners

are not entitled to the credit of duty paid on the paper bags to be utilised for discharging the duty on cement. In the appeal, the Collector of Central

Excise (Appeals) confirmed the stand of the revenue by his order in Appeal No. 278/88 (M.D.), dated 30-11-1988. Even the CEGAT rejected

the claim of the petitioners in Appeal in Order No. 520 of 1992, dated 7-10-1992. Since then the petitioners have been denied the credit of the

duty of excise paid on the paper bags, although these paper bags have been used in or in relation to the manufacture of packed cement. It is

submitted that this disallowance of the credit did not cause much hardship or inconvenience, as the paper bags falling under Chapter 48 were

themselves exempted by Notification No. 280/88 dated 16-11-1988 and as such, the adverse orders had the effect only for the limited period 10-

3-1988 to 15-11-1988. However, by Notification No. 64/94, dated 1-3-1994, the exemption granted to paper bags was taken away and the

petitioners are buying paper bags incurring duty of excise on their receipts and again the issue is of grave implication to the economies of manufacture and sale.

8. The main consideration on which the authorities rejected the claim of the petitioners was that Rule 57A of the Rules visualises input used in or in

relation to manufacture of cement and since cement was known to have marketability in naked condition, paper bags cannot be considered to have

been used in the manufacture of cement. According to them, cement was complete the moment it was put in the silo. The packing operation

involving drawal of cement from silo, being filled up in paper bags and delivered to the wholesale stream of trade from the packing house was

considered to be a post-manufacturing operation.

9. It is the further case of the petitioners that the stand of the Revenue is not compatible with the provisions of the Act and the Rules, although the

revenue itself has no definite stand or fixed assessment practice. Credit of duty on paper bags is allowed in respect of clearances by M/s. Chettina

Cement Corporation Limited by the Superintendent of Central Excise, Karur Range. The petitioners state that almost all the cement units in Tamil

Nadu State are having a similar facility. Even outside Tamil Nadu, the entire Eastern Region as well as Northern Region of the country is following

the orders of the CEGAT. The Eastern Regional Bench of the Tribunal by order, dated 28-1-1993 in 1993 (47) ECR 1 23 upheld the MODVAT

facility for use of HDPE sacks. The Northern Regional Bench of the Tribunal at New Delhi has taken the similar view in its order, dated 15-12-

1993 in the case of 1994 (52) ECR 417 . According to the petitioners, they are isolated in hostile practice of discrimination in respect of the credit

facility available for the packing unit. This resulted in considerable loss to the petitioners and every month the loss amounts to about Rs. 13 lakhs.

The petitioners have also filed a reference application against the orders of the Southern Regional Bench on 30-3-1993 and the same is pending.

Under these circumstances, these writ petitions were filed by the petitioners.

10. Mr. C. Natarajan, learned counsel for the petitioners urged that the object of Rule 57A is to ensure that the cascading effect of excise duty on

raw material used as input is reduced when further duty is imposed on the final product; the duty of excise paid on paper bags sold to the

petitioners ought to be allowed as a credit for the purpose of discharging the duty paid on the clearance of packed cement predominantly and mostly cement is sold in bags : may be in some exceptional cases, cement is sold in naked state. The paper bag should be construed as input used

in or in relation to the manufacture of cement and the authorities were wrong in rejecting the claim of the petitioners on the ground that the paper

bags in which the cement is marketed cannot be taken as used in or in relation to the manufacture of cement. He further stated that even in the

State of Tamil Nadu credit of duty on paper bags is allowed in respect of clearance by M/s. Chettinad Cement Corporation by the Superintendent

of Central Excise, Karur Range. He added that almost all the cement units in the State of Tamil Nadu are having similar facility. Even outside Tamil

Nadu, the entire Eastern as well as Northern region the MODVAT facility for use of HDPE sacks is allowed. It is unfortunate that the petitioners

are isolated in the hostile practice of discrimination in respect of the credit facility in the packing unit.

11. On the other hand, Mr. K. Jayachandran, learned Additional Central Government Standing Counsel contended that the paper bags cannot be

construed as inputs used in or in relation to the manufacture of element. According to him, the use of paper bags is post-manufacture element.

Hence, the authorities have rightly negatived the claim of the petitioners. However, he did not dispute that in the State of Tamil Nadu itself the

MODVAT facility is available in almost all the remaining cement units in regard to the use of paper bags. He also contended that the paper bags

are excluded from ''inputs''.

12. In view of the contentions of the learned counsel for the parties on facts and similar circumstances of these cases on hand, the only point that

arises for consideration is whether the petitioners can be allowed credit of any duty or additional duty paid on the cement bags entitled for utilising

the credit so allowed towards payment of duty of excise livable on cement. Rule 57A reads thus :

Rule 57A. Applicability. - (1) The provisions of this Section shall apply to such finished excisable goods (Hereinafter referred to as the final

products), as the Central Government may, by notification in the official Gazette, specify in this behalf, for the purpose of allowing credit of any

duty of excise or the additional duty u/s 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be specified in the said notification (hereinafter referred to as the ""specified duty"") paid on the goods used in or in relation to the manufacture of the said final products (hereinafter referred to as

the inputs) and for utilizing the credit so allowed towards payment of duty of excise leviable on the final products, whether under the Act or under

any other Act, as may be specified in the said notification, subject to the provisions of this section and the conditions and restrictions that may be

specified in the notification :

(i) ....

(ii) Packing materials in respect of which any exemption to the extent of the duty of excise payable on the value of the packaging materials is being

availed of for packaging any final products;

(iii) ....

(iv) cylinders for packing gases,

(v) plywood for tea (chests : or)

(vi) ....

As can be seen from the Explanation to Rule 57A, extracted above, it is clear that ''inputs'' include (a) inputs which are manufactured and used

within the factory of production, in or in relation to the manufacture of final products; (b) paints and packaging materials. But it does not include

cylinders for packing gases and plywood for tea (chests or); bags or sacks made out of fabrics : packaging materials specified in clauses (2) and

(3) of Rule 57A(b) are excluded. The paper bags do not come under these categories. If cylinders for packing gases and plywood for tea could be

excluded, paper bags for containing cement ought to have been excluded, if it was so intended.

13. A Division Bench of this Court in Ponds (India) Ltd. Vs. Collector of Central Excise, , following the decision of the Supreme Court in the

cases of Doypack Systems Pvt. Ltd. Vs. Union of India (UOI) and Ors, and Collector of Central Excise, New Delhi Vs. Ballarpur Industries Ltd.,

has taken the view having regard to the expression"" goods used in or in relation to the manufacture of the said final products, (hereinafter referred

to as the ''inputs'') in Rule 57A. Wide connotation should be given to the words ""in relation to"". Explanation to Rule 57A clearly shows of an

inclusive definition of the term ''inputs''. The inclusive definition, as observed by the Supreme Court in The State of Bombay and Others Vs. The

Hospital Mazdoor Sabha and Others, denotes, explanation, but not restriction in any sense. While dealing with inclusive definition, it would be

inappropriate to put a restrictive interpretation upon terms of wider denotation. In the same decision, it is further held that final product cosmetics

and toilet preparations being not marketable unless packed in containers, containers treatable as component part of the final product and held that

containers in such situation have to be considered as integral part of the final products. After elaborate consideration on various aspects, the

Division Bench of the Court, following the Supreme Court Judgments has stated that it is settled law that even if two views are possible, the view

favourable to the assessee has to be followed. In my opinion, this decision of the Division Bench applies to the petitions on hand in all force.

14. The Supreme court in M/s. Hindustan Polymers Vs. Collector of Central Excise, in paragraph 9 has stated that ""Section 2(f) of the Act

provides the definition of the term ''manufacture''. It states, inter alia, that manufacture includes any process incidental or ancillary to the competition

of manufactured product. It is therefore necessary to bear in mind that a process which is ancillary or incidental to the completion of the

manufactured product, i.e. to say to make the manufacture complete would be ''manufacture''. In the same judgment in paragraph 11, it is stated

thus :

''In my opinion, however, the correct position must be found out bearing in mind the essential nature of excise duty. Excise duty, as has been

reiterated and explained, is a duty on the act of manufacture. Manufacture under the excise law, is the process or activity which brings into being

articles which are known in the market as goods and to be goods these must be different, identifiable and distinct articles known to the market as

such. It is then and then only that manufacture takes place attracting duty. In order to be goods, it was essential that as a result of the activity,

goods, must come into existence. For articles to be goods, these must be known in the market as such and these must be capable of being sold or

being sold in the market as such.''

In the same decision, the Supreme Court while considering the secondary packing in paragraph 13 has observed thus :

Even secondary packing would be within the terms of the Explanation, because such secondary packing would also constitute a wrapper or a

container in which the excisable goods are wrapped or contained. But the test to determine whether the cost of any particular kind of secondary

packing is liable to be included in the value of the article is whether a particular kind of packing is done in order to put the goods in the condition in

which they are generally sold in the wholesale market at the factory gate. If they are generally sold in the wholesale market at the factory gate in a

certain packed condition, whatever may be the reason for such packing, the cost of such packing would be includible in the value of the goods for

assessment to excise duty.

In order to determine whether a packaging material is used in or in relation to the manufacture, what is to be seen is as to how the goods are

generally sold. In the case of cement, it is a matter of common knowledge that it is mostly used in kgs. Even in the cases on hand, though the

cement was sold in naked state i.e. otherwise than in paper bags is less when compared to the total quantity of cement sold in bags. Paragraph 14

of the aforesaid Judgment of the Supreme Court advances the case of the petitioners in this regard. In the decision in Collector of Central Excise v.

Eastend Paper Bags Industries Ltd., 77 S.T.C. 203 , it was held that manufacture includes incidental or ancillary process. It that case, the question

was whether wrapping paper was eligible as a raw material. It was held that the goods manufactured were paper packed and wrapped in paper

and that it was essential for the goods to be marketable, to be wrapped in paper. The processes incidental or ancillary to wrapping were to be

included in the process of manufacture, and manufacture in the sense of bringing the goods into existence as those were known in the market is not

complete until those were wrapped in wrapping paper. Similarly, in the cases on hand, it is an essential requirement to pack cement in paper bags

to make the cement marketable. Thus, the paper bags form part of the manufacture and they were component part of the end-product viz.,

cement. In yet another case in K. Rasiklal & Company v. State of Gujarat 86 S.T.C. 238, the Gujarat High Court has held that the expression

used in the manufacture of goods"" has to be given a liberal construction to include not only the process of actual production of finished goods but also processes which are an integral part of the ultimate manufacture in the absence of which the manufacture may not be commercially expendient.

It cannot be denied that as per practice marketing of the cement is mostly done in packed condition (paper bags or HDPE sacks). The petitioners

get manufactured specific packing material. After the process of clinkerisation in the kiln, the clinker so produced is ground to make cement in the

cement mill. Thereafter, the clinlker so produced is spread to cement silos for storage by flux pump. The cement from the silo is drawn into the

automatic Rotary packers installed in the packing house and each bag is automatically filled with 50 kgs. of cement. Thereafter, the bags filled

which cement fall on the conveyor belt which is directly connected to the lorry/ wagon loading platform. Thereafter, loading is carried by the

common carrier to the marked stream.

15. In view of the plain language of Rule 57A and having regard to the law laid down in the aforementioned decisions as to the inputs regarding the

packaging material, so as to avail MODVAT credit facility, I do not think it necessary to refer to the various other decisions cited by the learned

counsel for the parties. In my opinion controversy raised is fully covered by the aforementioned decisions. In this view, I have no hesitation to hold

whatsoever that the paper bags are to be considered as inputs used in or in relation to the manufacture of cement. As such, the paper bags used in

or relation to the manufacture of cement are entitled to MODVAT credit facility. Having concluded as aforementioned, I also do not think it

necessary to drive the petitioners to avail of the alternative remedy in respect of the reliefs sought for in Writ Petition Nos. 11090 and 12924 of

1994, The petitioner in Writ Petition No. 12924 of 1994 has stated in paragraph 4 of the affidavit that he has filed a reference application before

the third respondent, which is pending consideration and decision. Relying on the decision of this Court, learned counsel for the petitioner

submitted that the petitioner should be permitted to withdraw the said reference application and that relief can be given to the petitioner.

16. In the result, for the reasons stated, I pass the following order :

(i) Writ Petition Nos. 11090 and 12924 of 1994 are allowed. The orders impugned in Writ Petition Nos. 11090 & 12924 of 1994 are quashed;

(ii) Respondents 1 to 3 in Writ Petition No. 11089 of 1994 are directed to permit the petitioners to utilise the credit of duty paid on the paper

bags, received by the petitioners and used in the manufacture and marketing of packaged cement;

(iii) Petitioner in Writ Petition Nos. 12924 of 1994 is directed to withdraw the reference application made before the third respondent, dated 30-

3-1993;

(iv) No costs;

