
(2005) 12 RAJ CK 0019
In the Rajasthan High Court
Case No : Civil Writ Petition No. 5661 of 2003

Raj Cement

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 07-12-2005

Acts Referred:

Central Excise Rules, 1944 — Rule 57A, 57J, 57Q
Central Excises and Salt Act, 1944 — Section 2, 35H

Citation : (2006) 197 ELT 491 : (2006) 2 RLW 1333 : (2006) 2 WLC 591

Hon'ble Judges : Rajesh Balia, J; R.P. Vyas, J

Bench : Division Bench

Advocate : Rajendra Mehta, for the Appellant; Vineet Kumar Mathur, for the Respondent

Final Decision : Allowed

Judgement

Rajesh Balia, J.—These two cases of M/s. Raj Cement raise identical issues and are being heard and decided together.

2. Tax Reference Application No. 10/2002 has arisen out of the order passed by the Customs Excise and Gold Control Appellate Tribunal on 25.7.2002 before the provision for filing appeal came into force and in respect of the show cause notice dated 17.6.1998 issued by Superintendent, the Central Excise, Range Beawar stating that the assessee has erroneously availed the Modvat Credit from January 1998 to April 1998 on the items viz., Blowbar, Impector, Scrapper chain, Apron feeder with scrapper and conveyor etc. as capital goods under Rule 57Q of the Central Excise Rules, 1944. The notice was also issued in respect of capital goods viz. components for belt conveyor, and rubber conveyor belt which were used to carry lime stone from their mines to the factory premises.

3. The Assessing Officer as well as the Commissioner, Central Excise (Appeals) decided against the appellant and passed an order withdrawing the modvat credit availed by the assessee on the aforesaid items. Before the Tribunal while the Revenue relied on the observations made by the Supreme Court in M/s. Jaypee

Rewa Cement Vs. Commissioner of Central Excise, M.P., the assessee contended after putting the plan which shows the factory, the mining area and the crusher, including the conveyor belt connecting the crusher within the factory, that the land on which the conveyor belt has been installed is the property of the assessee and is connected to and is part of the factory; that all these items are installed in an area which is adjacent to the factory i.e., in an area which can be called as precincts of the factory in terms of Section 2(e) of the Central Excise Act, 1944 and are being used in connection with the manufacture of final product. Thus, they are eligible for modvat credit under Rule 57Q. The assessee relied on the decision of the Tribunal in case of C.C.E. Chennai v. Pepsico India Holdings Ltd. 2001 (42) RLT 8 (CEGAT), wherein PVC pipes used for drawing water from a well situated at a distance of 200 metres away from the factory premises was considered to be falling within the definition of "factory" as given in Section 2(e) and who held to be admissible for the purpose of modvat credit under Rule 57Q. The other decisions of the Tribunal following the Pepsico India Holdings Ltd's. Case were also relied on.

4. However, the Tribunal did not agree with this contention and referred to the following observations made in Jaypee Rewa Cement & case (supra):

We have gone through the decision of Tribunal. In view of the provisions of Rule 57Q, the appellant is not entitled to any relief. The appeal is dismissed.

5. The above order was passed in a connected appeal No. C.A. No. 4263/2001 whereas main judgment had considered and laid down the ratio related to use of inputs in manufacture of intermediate product and the same were held to be eligible for modvat credit under Rule 57A and 57J.

6. In the aforesaid circumstances, an application has been moved u/s 35H of the Central Excise Act, 1944. In this application, the following questions have been sought to be raised as questions of law arising from the Tribunal's order:

1. Whether capital goods used in the precincts of the factory area for obtaining crushed limestone and transporting crushed limestone into raw mill which is then used in the plant for the manufacture of cement can be considered as eligible for Modvat credit in terms of Rule 57Q of the Central Excise Rules, 1944?
2. Whether in the facts and circumstances of the present case, the precincts of the plant area, where the crusher and conveyor belt are installed, can be called as a factory within the meaning of Sec 2(e) of the Act?
3. Whether the mining area and the area covered under the crusher and the conveyor belt reaching plant falls within the premises/precincts of the factory as defined in Section 2(e) of the Act?
4. Whether the Tribunal was right in holding that capital goods in question could not be considered as eligible for modvat credit because they were used at a place away from factory?

5. Whether the use of capital goods in captive mines for obtaining limestone, an intermediate product, which is then used for manufacturing cement can be considered to be a process in the manufacture of final goods?

6. Whether the process of mining limestone in captive mines undertaken by cement factory can be considered as integral to the process of manufacture of cement, more particularly in view of the fact that mining area lying adjacent to the cement factory area is also nothing but a part of factory area?

7. Whether it can be said that Hon''ble Supreme Court has in Jay Pee Rewa's case disallowed Modvat credit on capital goods used in mines?

8. Whether the Tribunal was right in disallowing modvat credit on the basis of judgment of the apex Court in Jay Pee Rewa's case more particularly when in the present case capital goods in question were used at crusher and conveyor belt and not at all in the mining area?

9. Whether the Tribunal was bound to allow modvat credit in question on the basis of its earlier judgment allowing such credit on capital goods used in mines and/or at place outside the factory area?

10. Whether in the facts and circumstances of the present case, more particularly in view of the fact that the mining area as well as crusher and conveyor belt area also falls within the site plan of the factory area, the Tribunal was right in holding that the said area did not form part of the factory as defined in Section 2(e) of the Act?

11. Whether crushed limestone is excisable commodity and therefore the place where it is manufactured (i.e. crusher lying in mining area) is obviously factory area?

7. Though the questions are found in multifacets but the question of law arising for consideration can be summed up as under:

Whether the assessee is entitled to avail modvat credit in respect of Duty paid on crushers and conveyors belts and parts thereof installed at mines for the purpose of obtaining intermediate product by crushing the limestone and then transporting it through conveyor belt from mines to the factory connecting the rope ways for being used in the factory?

8. Subsequent to filing of the reference application No. 10/2002, the petitioner filed Writ Petition No. 5661/2003 against the order of the Tribunal refusing to stay the recovery of the demand confirmed by the order which is subject matter of reference. During the course of earlier proceedings, the writ petition was connected with the Excise Reference No. 10/2002.

9. Having heard learned Counsel for the parties we are of the opinion that substantial questions of law do arise for consideration in the application u/s 35H as noticed Uay us aforesaid as it relates to interpretation of Rule 57Q and the eligibility of modvat credit on the crusher and conveyor belts used for the

purpose of transporting the crushed lime-stone from the area under the mining lease to the factory side through rope way which connects two sites for the purpose of transporting inputs to the factory for being used there and for manufacture of goods.

10. In the ordinary course, it would have involved framing of question and directing the Tribunal to State the case and refer the questions of law to this Court for its decision and then decision was to be rendered after the statement of case has been received. However, it has been pointed out to us that since filing of the aforesaid application as well as the writ petition, the subject matter is no more *res Integra* and is finally decided by the Supreme Court in *Birla Corporation Ltd. Vs. Commnr. of Central Excise*, Therefore, the matter may be decided by considering the aforesaid decision.

11. It is pointed by the learned Counsel for the petitioner that the Supreme Court in *Birla Corporation Ltd's* case (*supra*) has held that rope way installed for transporting raw material from the mines to the factory premises and that duty paid on spares of rope way used for transporting of raw material from the mines to the factory premises are eligible for availing the modvat credit. The Supreme Court noticed that identical issue came up for consideration before the 2002 (83) ECC 503 and in that case the Tribunal held, following the principles laid down in *Pepsico India Holdings Ltd.*, that the assessee was entitled to the modvat credit. The Supreme Court also noticed that the said decision of CEGAT was accepted by the Department and on that basis the appeal filed in *J.K. Udaipur Udyog* also came to be dismissed as not pressed. The Supreme Court held that in the instant case the same question arises for consideration under the almost identical facts and therefore, the revenue cannot be permitted to take different stand in respect of the same subject matter at different times in respect of different assessees.

12. On the other hand, the learned Counsel for the Revenue urged that mines are not part of the factory premises as has been held by the Supreme Court in another decision rendered in *Commissioner of Central Excise, Jaipur Vs. J.K. Udaipur Udyog Ltd.*, . This judgment was rendered while interpreting the scheme of CENVAT Credit introduced w.e.f. 1.4.2000 and related to the assessment period April to August 2000 whereas the present controversy relates to Modvat Credit claim arisen under the Rules of 1944 which were in force before 1.4.2000. The Supreme Court has distinguished the *Jaypee Rewa Cement's* case on the ground that the scheme of CENVAT Credit is different from modvat credit. Moreover *Jaypee Rewa Cement's* case was primarily concerned with the eligibility of material used in manufacture of intermediated goods used by the assessee's factory in manufacture of end products, though the intermediate product was manufactured away from the factory. It did not deal with the eligibility of modvat credit in respect of the goods in question and the observations made by the Supreme Court in connected appeal, noticed by us as above and relied on by the Tribunal does not refer to the controversy that has been raised in connection with the claim nor any decision has been rendered.

Therefore, we shall have to consider the submissions made by the rival parties on the basis of other material which was placed before us.

13. Birla Corporation's case relied on by the learned Counsel for the petitioner precisely concerned with the eligibility of modvat credit under Rule 57Q in respect of capital goods used for transporting limestone from mines located 4.2 kms away from factory. The Revenue Department has disallowed the claim of the assessee precisely on the ground that the capital goods on which the modvat credit was sought to be availed were not material handling equipments within the factory premises.

14. This stand of the Revenue was rejected by the Supreme Court on the ground that an identical issue had come up for consideration before CEGAT in J.K. Udaipur Udyog Ltd. v. CCE (supra), wherein it was held that the assessee was entitled to the modvat credit.

15. The said decision of CEGAT in J.K. Udaipur Udyog Ltd. was rendered in appeal No. E/1344/2002-NB decided on 2.8.2002. It was a case in which captive mines were situated at a few kilometers away from the factory. The entire quantity of lime stone excavated was crushed at the mine site and the crushed lime stone was transported to factory for manufacturing. The Revenue has urged that since the rope ways are not installed in the factory, therefore, they cannot be treated as capital goods eligible for modvat credit. The Tribunal relying on Pepsico India Holdings Ltd's case in which capital goods employed for the purpose of drawing water from the well situated away from factory premises and brought to the factory by transportation for use therein were held to be eligible for modvat credit accepted the claim of J.K. Udaipur Udyog's in respect of aforesaid capital goods installed at the mines site for transporting the crushed lime stone to the factory site through connecting ropeways. The judgment of the Pepsico India Holdings Ltd. was accepted by the department vide letter dt. 5th June, 2003 which was placed before the Supreme Court in which it was stated that the case of C.C.E. Chennai v. Pepsico India Holdings Ltd. (supra), Final Order No. 1581/2000 dated 27.10.2000 in appeal No. E/2603/1998/MAS has been accepted as reported by Chief Commissioner, Central Excise, Chennai vide his letter C.No. IV/16/16/2003-CZO, dated 3.6.2003. By placing the aforesaid order on record, the department conceded about the correctness of the Tribunal's order in J.K. Udaipur Udyog Ltd. (reported in 147 ELT 996) and got the appeal dismissed before the Supreme Court.

16. Subsequent thereto the said decision of J.K. Udaipur Udyog Ltd. and Pepsico India Holdings Ltd. had been followed in large number of cases and the position stood settled.

17. In view of the aforesaid circumstances, the Supreme Court said that:

In the instant case the same question arises for consideration and the facts are almost identical: We cannot permit the Revenue to take a different stand in this case. The earlier appeal involving identical issue was not pressed and was

therefore, dismissed. The respondent having taken a conscious decision to accept the principles laid down in *Pepsico India Holdings Ltd.* (supra) cannot be permitted to take the opposite stand in this case. If we were to permit them to do so, the law will be in a state of confusion and will place the authorities as well as the assessee in a quandary.

18. In view of the aforesaid clear pronouncement of the eligibility of the modvat credit in respect of material handling equipments connected with the factory premises issue does not survive for further consideration.

19. Before parting with the case we may notice that correctness of the decision of the Supreme Court in *Commissioner of Central Excise, Jaipur Vs. J.K. Udaipur Udyog Ltd.*, has since been doubted by the another Bench of the Supreme Court in *M/s. Vikram Cement v. Commissioner of Central Excise Indore* 2005 (7) Judgment Today 637 and by detailed order the matter has been referred to the Larger Bench for consideration.

20. In view of the aforesaid circumstances, we hold that the Tribunal has erred in holding the assessee ineligible to avail modvat credit In respect of the crusher and rope way for the purpose of conveying the crushed lime stone to the factory premises in terms of the Rule 57Q and therefore, the consequential demand raised for withdrawing the modvat credit shall not be recovered from the assessee, if not already recovered. If the recovery has already been effected, the assessee may apply for refund, which application may be decided by competent authority in accordance with law.

21. Accordingly, the reference is answered in favour of the assessee and against the Revenue and the writ petition is allowed.