

(2013) 03 MAD CK 0090
In the Madras High Court
Case No : C.M.A. No's. 2071 of 2005

The Commissioner of Central Excise Pondicherry
Commissionerate

APPELLANT

Vs

M/s. EID Parry (I) Ltd.

RESPONDENT

Date of Decision : 11-03-2013

Acts Referred:

Central Excise Rules, 1944 — Rule 57A

Citation : (2013) 197 ECR 225 : (2013) 293 ELT 10 : (2013) 20 GSTR 6

Hon'ble Judges : R. Banumathi, J;K. Ravichandrabaabu, J

Bench : Division Bench

Advocate : K. Ravi Anantha Padmanbhan, Central Govt. Standing in C.M.A. No. 2071 of 2005, Mr. Kumar Pal R. Chopra, in C.M.A. Nos. 1352 of 2008 and 1087 of 2010 and Mr. T.S. Rajmohan, in C.M.A. Nos. 1122 of 2009 and 638 of 2010, for the Appellant; M. Muthu Venkataraman for R1 in C.M.A. No. 2071 of 2005, Mr. J. Shankarraman for R2 in C.M.A. Nos. 1352 of 2008 and 1122 of 2009 and Hari Radhakrishnan for R2 in C.M.A. Nos. 638 and 1087 of 2010, for the Respondent

Judgement

K. Ravichandrabaabu, J.—In all these appeals, the issue involved are one and the same and common. It is represented by the learned

counsels appearing in all these matters that the decision to be rendered in C.M.A. No. 2071 of 2005 will cover the other appeals. Therefore, the

first case, viz., C.M.A. No. 2071 of 2005 is taken up for consideration. The Revenue is on appeal against the final order passed by the CESTAT,

South Zonal Bench, Chennai in No. 1040 dated 1.12.2003.

2. Case of the Revenue:-

The first respondent is the manufacturer of Sugar, Molasses and Denatured Ethyl Alcohol. It was noticed by the preventive Officers that the first

respondent manufactured Bio-compost fertiliser falling under Chapter Heading

3105.00 of the Central Excise Tariff Act, 1985 and availed credit of duty on inputs viz., Molasses, Acetaldehyde, Benzene and Toluene, Tyridin, Light Taoutchocine, Sulphuric Acid, Chloroform and Methanol which are the common inputs for both Bio-compost fertiliser as well as Denatured Ethyl Alcohol. Bio-compost fertiliser is exempted from payment of duty vide Notification No. 8/96 dated 23.7.1996 etc., whereas Denatured Ethyl Alcohol is a dutiable product. During the course of manufacture of sugar, a waste product called Press mud emerged and during the manufacture of denatured ethyl alcohol, another bi-product viz., spent wash emerged. The press mud and spent wash were treated together for about 40 days and out of such treatment, an organic manure viz., Bio-compost emerged. The said organic manure is sold as ""Farm boon"" and ""Garden bloom"" by the first respondent. On further verification of the lab report, in respect of spent wash, it was noted that the same contained chemicals such as chlorides, sulphides, di-phosphates, potassium, sodium and nitrogen. Thus, from the lab report of the final product viz., ""Farm boon"" and ""Garden bloom"", it was noted that the above said chemicals were present in those final products. The first respondent manufactured and cleared bio-compost fertiliser during the period from 21.8.1996 to 28.3.2000 without following the Central Excise Procedures.

3. As per the provisions of erstwhile Rule 57A of the Central Excise Rules, 1944, an amount at the rate of 8% of the price of the final product charged for the sale of bio-compost fertiliser, at the time of clearance from the factory, is payable by the first respondent. A show cause notice was issued to the first respondent demanding the amount at the rate of 8% as stated supra by invoking the extended period of limitation as the first respondent suppressed the fact of clearance with an intention to evade payment of the duty. The first respondent replied to the show cause notice and denied its liability. After due process of law, the adjudicating authority confirmed the demand vide its Order in original dated 20.9.2000.

4. Aggrieved by the said order, the first respondent preferred an appeal before the CESTAT. By an order dated 1.12.2003, which is impugned in this appeal, the Tribunal allowed the appeal and set aside the demand. The Revenue by challenging the said order of the Tribunal, filed the above appeal and raised the following substantial questions of law:-

1. Whether the Tribunal is correct in holding that the inputs used in the manufacture of Denatured Ethyl alcohol are not used in the non-duty paying product (Bio-compost fertiliser)?

2. Whether the Tribunal is correct in holding that the provisions of erstwhile Rule 57CC Central Excise Rules, 1944 is not applicable in this case?

5. Mr. K. Ravi Anantha Padmanaban, learned Senior Central Government Standing Counsel appearing for the Revenue submitted as follows:-

i) Credit of duty is permissible not only when the inputs are used directly in the manufacture of final product but also when the same is used in relation to the manufacture of final product.

ii) The credit availed chemicals were used in the course of manufacture of sugar. Pursuant to its utilisation various final products emerged. These

final products include sugar, ethyl alcohol, press-mud and spent wash. The said exempted final products viz., press-mud and spent wash are used

in the manufacture of Bio-compost fertiliser, which is also exempted. Thus there is a common link/chain connecting the inputs used in the manufacture of Bio-compost fertiliser.

iii) As per the provision of erstwhile Rule 57A of the Central Excise Rules, 1944 and Rule 6(3)(b) of CENVAT Credit Rules, 2002 credit is

allowed on the inputs even if it is utilised indirectly or in relation to the manufacture of final product.

iv) What is manufactured and marketed by the first respondent is not mere press-mud, but enriched press mud. The Tribunal failed to differentiate

the issue involved in the case of 2003 (107) ECR 219 with the issue on hand since the marketability of the press mud alone was the issue in that

case. As no evidence on the marketability of press mud was placed by the Revenue before the Apex Court, it was held therein that the press mud

was a non-excisable item. In this case, the first respondent assessee marketed the enriched press mud under the brand name ""Farm Boon"" and Garden Bloom"".

v) As ""Farm Boon"" and ""Garden Boom"" are final products, it only shows that Bio-compost is a manufactured excisable item. Only the payment of

duty on such excisable item is exempted by virtue of several notifications till March 2011 and therefore the exempted product is an excisable

product attracting nil rate of duty.

vi) Bio-compost is an excisable item cleared on sale. Therefore, it is one of the final products manufactured by the assessee and when the inputs

mentioned above are used in or in relation to the manufacture of the said final product, the first respondent is liable to pay the demand of duty.

vii) The excisable item Bio-compost is a product manufactured from sugarcane along with excisable goods viz., sugar, molasses, denatured spirit

by using various MODVAT credit availed inputs. Therefore, it is an exempted final product manufactured out of the usage of said inputs.

Consequently, as held by the Apex Court in the case of Collector of Central Excise Vs. Solaris Chemtech Limited and Others, the relationship

with the credit availed inputs is established resulting the liability on the assessee to pay the demand of duty.

Thus, the learned counsel for the Revenue strongly relied on the decision of the Apex Court in the Solaris Chemtech Ltd., case and submitted that

the first respondent assessee is liable to pay an amount of 8% on the price of the bio-compost under Rule 57CC of the Modvat Credit Rules

1944. Case of the Assessee:-

6. Per contra, the learned counsel appearing for the first respondent assessee submitted as follows:-

i) The first respondent assessee is the manufacturer of Sugar, molasses, de-natured Ethyl Alcohol.

ii) Rule 57C read with Rule 57CC has been wrongly invoked by the Revenue as there is no allegation in the notice that factory where Bio-compost

fertiliser was manufactured was part of registered premises wherein sugar was manufactured.

iii) When the first respondent initiated the activity of manufacturing of Bio-compost fertiliser, the department was intimated about the same and also

about the fact that no registration is required under Rule 174.

iv) The requirement to pay 8% of price of exempted products would arise only at the time of removal of goods from factory. Both dutiable and

exempted goods must have been produced in the same factory. Since the fertiliser was not manufactured within the factory, the provision of Rule

57C read with Rule 57CC is not attracted.

v) Press mud was removed to compost yard where it was mixed with spent wash, to finally get the product viz., bio-compost fertiliser. Both press

mud and spent wash are waste products emerged in the process of manufacture of sugar.

vi) Rule 57C read with Rule 57CC contemplates payment of 8% of price of exempted products only when the manufacturer took credit of specific

duty on any input which was used in or in relation to manufacture of final product. The mixture of press mud and spent wash did not derive their

characteristics of manure from any of the modvatted or cenvated item, but from the characteristics of sugar cane, water and natural organic

substances contained in them.

vii) None of the credit availed input had been used in or in relation to manufacture of Bio-compost fertiliser as contemplated under Rule 57C(2).

The inputs were brought into factory for manufacture of sugar.

viii) Sugar cane itself contained chemicals such as potassium, Fluoride, Calcium, Magnesium, Phosphorous, Phosphatic, Iron, Carbonite Ash etc.,

and therefore the characteristics of press mud were relatable to sugar cane only and not to any modvatted input.

ix) No cenvated inputs or chemicals have been used in such a process of conversion of press mud and effluent waste (spent wash).

x) Admittedly, both press mud and spent wash are wastes emerged during the process of manufacturing sugar. So long as bio-compost is not the

final product of the sugar industry and so long as it is not produced out of cenvated inputs, it does not come under the description of final products

for the purpose of invoking Rule 57CC.

xi) When two waste materials arise, inevitably, during the process of manufacture of final product viz., sugar, the mixture of such waste materials

cannot be said to have been produced or manufactured from the cenvated inputs.

7. By contending so, the learned counsel for the first respondent assessee relied on the following decisions:-

1. Commissioner of Central Excise Vs. Titawi Sugar Complex,

2. Commissioner of Central Excise, Tirunelveli Vs. Dharani Sugars & amp; Chemicals Ltd., (2008 (232) ELT 633 (Tri-Che.)

3. J.S.W. Steel Limited vs. Commissioner of Central Excise

4. 2008 (134) ECC 241

5. Commissioner of Central Excise, Visakhapatnam Vs. Sri Sarvarya Sugars Ltd.

(2010 (250) ELT 542 (Tri-Bang)

6. 2013 (196) ECR 1 14

7. 2009 (233) E.L.T. 301 (Bom.) (Rallis India Ltd. Vs., Union of India)

8. Commissioner of C. Ex. and Customs, vadodara-I Vs. Sterling Gelatin,

9. Heard the learned counsels for the Revenue and the assessee. Discussion:-

10. The issue involved in this case is as to whether the first respondent assessee is liable to pay 8% on the price of the final product viz., Bio-

compost fertiliser, which is a mixture of bye products viz., Press mud and Spent wash, under Rule 57C read with Rule 57CC of the Central Excise

Rules or not.

10. For proper appreciation of the facts, the relevant Rule 57CC of the Central Excise Rules 1944 is extracted hereunder:-

Rule 57CC:- Adjustment of Credit on inputs used in exempted final products or maintenance of separate inventory and accounts of inputs by the

manufacturer (1) Where a manufacturer is engaged in the manufacture of any final product which is chargeable to duty as well as in any other final

product which is exempt from the whole of the duty of excise leviable there on or is chargeable to nil rate of duty and the manufacture takes credit

of the specified duty on any input (other than inputs used as fuel) which is used or ordinarily used in or in relation to the manufacture of both the

aforesaid categories of final products, whether directly or indirectly and whether contained in the said final products or not, the manufacturer shall,

unless the provisions of sub-rule (9) are complied with, pay an amount equal to eight per cent of the price (excluding sales tax and other taxes, if

any, payable on such goods) of the second category of final products charged by the manufacturer for the sale of such goods at the time of their

clearance from the factory.

(2) The amount mentioned in sub-rule (1) shall be paid by the manufacturer by adjustment in the credit account maintained under sub-Rule (7) of

Rule 57G or in the accounts maintained under Rule 9 or sub-Rule (1) of Rule 173G and if such adjustment is not possible for any reason, the

amount shall be paid in cash by the manufacturer availing of credit under Rule 57A.

11. Rule 57CC contemplates that a manufacturer, who takes credit of specified

duty on any inputs which are used or ordinarily used in or in relation to the manufacture of both the dutiable and exempted final products shall pay an amount equal to 8% of the price of final product charged by the manufacturer for sale of such goods at the time of their clearance from the factory. To put it simply, if the manufacturer uses any inputs in or in relation to the manufacture of both the dutiable and exempted final products and when he had taken credit of specified duty on such inputs, he has to pay 8% on the price of such final product. Therefore, what is mandatory is that the credit taken inputs should have been used by the manufacturer in or in relation to the manufacture of both dutiable and exempted final products. If this requirement is satisfied without any doubt or ambiguity, then application of Rule 57CC is attracted to such goods.

12. Keeping in mind the above mandatory requirement to invoke Rule 57CC, let us consider the facts of the present case to find out as to whether

the demand made by the Revenue is sustainable or not. Admittedly, the first respondent assessee is the manufacturer of sugar, molasses and

Denatured Ethyl Alcohol, which are all dutiable final products and the cenvated credit inputs were used only one time by the first respondent

assessee at the time of manufacturing of sugar. It is also seen that ""press mud"" and ""spent wash"" emerged as wastes during the course of

manufacturing of sugar and Denatured Ethyl Alcohol. It is also admitted by the Revenue that those two products viz., ""spent wash"" and ""press

mud"" were treated together to manufacture the bio-compost fertiliser. It is not the case of the Revenue that after the emergence of these two

wastes viz., spent wash and press mud, further cenvated inputs or chemicals have been added or used by the manufacturer into those two wastes

to manufacture bio-compost fertiliser. On the other hand, it is their contention, based on the lab report, that spent wash contained certain chemicals

such as chlorides, sulphides, di-phosphates, potassium, sodium and nitrogen. Consequently, it is their case that the final product viz., bio-compost

fertiliser which is sold under the name of ""Farm boon"" and ""Garden bloom"" also contained those chemicals. Thus, based on such lab report, the

Revenue sought to project its case as though the exempted final product viz., bio-compost fertiliser was also manufactured by using the cenvated

credit inputs or chemicals.

13. Repudiating such contention of the Revenue, the first respondent would submit that they have not used any credit availed inputs while manufacturing bio-compost fertiliser and on the other hand those inputs were brought into factory and used in the manufacture of sugar only. It is also their case that sugar cane itself contained various chemicals such as potassium, Fluoride Calcium, Magnesium, Phosphorous, Phosphatic, iron, Carbonite Ash etc., and therefore the characteristics of press mud or spent wash are relatable to sugar cane only and not to any of the modvatted inputs, which were used in the manufacture of sugar.

Findings:-

14. We find force in the submission made by the first respondent assessee. Certainly, the cenvated inputs were brought into the factory by the assessee for using it in the manufacture of their final products viz., sugar, molasses, Denatured Ethyl Alcohol. Once they use those cenvated inputs at the initial stage and obtain certain final products as well as wastes such as press mud and spent wash, there was no further application or usage of those inputs either in or in relation to the manufacture of final products once again. In other words, the commencement of journey of those cenvated inputs used either in or in relation to the manufacture of final products ends with the emergence of those final products along with inevitable wastes. Their usage cannot be traced beyond the first degree. The same inputs cannot be considered to have been utilised or used even indirectly in the manufacture of disputed item viz., bio-compost fertiliser, especially under the factual circumstances that the same came to be manufactured only by adding those two waste materials together. May be those two waste materials contained the trace of certain chemicals with the characteristics of original inputs. That itself cannot be taken to mean that the product emerged out of those wastes was also manufactured by using those cenvated credit inputs.

15. As rightly contended by the learned counsel for the assessee, the characteristic of sugar cane containing various chemicals cannot be stopped or prevented by the manufacturer to pass on even to the wastes, as it is undoubtedly a natural flow of in born character from one stage to another. Only when there is a further addition of inputs or chemicals with similar characteristics externally by the manufacturer, the Revenue can invoke Rule

57CC. In other words, when spent wash and press mud had emerged as inevitable wastes during the process of manufacturing of final products

viz., sugar and Denatured Ethyl Alcohol and the said wastes are combined and treated together to form another final product viz., bio-compost,

the said final product cannot be brought under Rule 57CC.

16. We are conscious of the fact that what is in dispute is not the question as to whether bio-compost fertiliser is a final product or not, but on the

other hand the question is as to whether such final product is liable to be brought under Rule 57CC of the Central Excise Rules or not. Press mud

is an unavoidable and inevitable waste which arises when the cane juice obtained after crushing the sugar cane is further processed for manufacture

of sugar. Press mud is nothing but impurities present in the cane juice. Likewise, spent wash is an inevitable waste product when molasses is

treated to bring out ethyl alcohol or denatured spirit. Both press mud and spent wash are exempted from duty by virtue of certain notifications.

Bio-compost is the mixture of two waste products viz., press-mud and spent wash and is marketed by the assessee. What is to be seen is as to

whether such final product had emerged by using any cenvated inputs either in or in relation to such manufacture of final product. As we have

already found that no cenvated inputs or chemicals were used either in or in relation to the manufacture of such exempted final product viz., bio-

compost fertiliser, we are of the view that demand made by the Revenue is unsustainable.

17. The learned counsel for the Revenue relied on the decision of the Apex Court reported in Collector of Central Excise Vs. Solaris Chemtech

Limited and Others, to contend that if manufacture of final product cannot take place without the process in question then that process is an integral

part of the activity of manufacture of the final product. Thus, the learned counsel by taking support from such decision contended that the words ""in

relation to the manufacture of final product"" should convey the expanded meaning in order to bring even the inputs which even do not enter into

finished goods. In the above said decision of the Apex Court, the facts show that inputs viz., LSHS and furnace oil on which modvat credit availed

have been used for generation of electricity, which is non-excisable product which was again used for the manufacture of cement/caustic soda etc.,

Therefore, the inputs that were used in relation to the manufacture of final products viz., cement and caustic soda were allowed modvat credit.

18. But on the other hand, the facts of the present case is in converse. Here, the cenvat credited inputs were, in fact, used in the manufacture of

excisable products and thereafter during the course of such manufacture, two inevitable wastes emerged which are combined together to

manufacture an exempted final product. Therefore, the stage at which the inputs were used is very crucial and relevant for consideration as to

whether Rule 57CC is applicable to the facts of particular case or not. As we have already found in this case that the inputs were used only one

time that too during the course of manufacture of final product viz., sugar, molasses and Denatured Ethyl Alcohol and that the consequent

emergence of inevitable wastes are subjected to certain treatment to manufacture exempted final product viz., bio-compost fertiliser, the facts of

the present case are totally different and distinguishable with the facts of the case in Solaris Chemtech Limited and the above decision is not

applicable to the case on hand.

19. On the other hand the decisions relied on by the learned counsel for the assessee are discussed hereunder.

20. In the decision reported in 2009 (233) E.L.T. 301 (Bom.) (Rallis India Ltd. Vs., Union of India), the Bombay High Court had considered the

similar issue and found at paragraph 27 as follows.

27. 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 mother 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".

21. In Commissioner of C. Ex. and Customs, vadodara-I Vs. Sterling Gelatin, the Gujarat High court considered similar issue and found that 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. In that case, the Gujarat High Court relied on the decision of the Hon'ble Supreme Court in the

case of Commissioner of Central Excise, Mumbai Vs. National Organic Chemical Industries Limited,

22. The learned counsel also placed reliance on a decision of the Tribunal of the very same Bench which passed the present impugned order to the

effect that bio-compost prepared by mixing press mud and effluents from distilleries is not exigible to excise duty and consequently Rule 57CC is

not invocable. It is represented that the said decision of the Tribunal on the same issue reported in 2008 (232) ELT 633 (Tri-Che.) (Commissioner

of Central Excise, Tirunelveli Vs. Dharani Sugars & Chemicals Ltd.) has been accepted by the Revenue and no further appeal is filed before this

Court and thus became final.

23. Likewise another decision of the Tribunal of Bangalore Bench reported in 2009 (235) ELT 873 (Tri-Bang) (Navabharat Ventures Ltd., Vs.

Commissioner of Central Excise, Visakhapatnam) is also placed before us, wherein it has been held that the very same bio-compost manufactured

by using spent wash with press mud is a non-dutiable product and does not attract Rule 57CC duty demand.

24. Another decision of the very same Bangalore Bench of the Tribunal reported in 2010 (250) ELT 542 (Tri-Bang) (Commissioner of Central

Excise, Visakhapatnam Vs. Sri Sarvarya Sugars Ltd.) also supports the case of the assessee.

25. Yet another decision of the Principal Bench of the Tribunal at New Delhi reported in 2013 (196) ECR 1 14 considered similar issue and held

that it cannot be said that Cenvat Credit was availed on common inputs used for manufacture of dutiable final products (sugar and molasses) and

exempted final product (bio-compost). In fact, the Delhi Tribunal relied on the decision of the Chennai Tribunal, which decision is presently

impugned in this appeal.

26. Learned counsel for the assessee also relied on a decision of the Hon''ble Supreme Court reported in Swadeshi Polytex Ltd. Vs. Collector of

Central Excise, . He would like to rely on paragraph 20 of the said decision to fit into the facts of the present case, which reads as under:-

It is clear, however, that ethylene glycol was used in the manufacture of polyester fibre. It appears that methanol arises as a part and parcel of the

chemical reaction during the process of manufacture when ethylene glycol

interacts with DMT to produce polyester fibre. It is not possible to use a lesser quantum of the ethylene glycol to prevent methanol from arising for producing a certain quantity of polyester fibre. Thus the quantity of ethylene glycol required to produce a certain quantum of polyester fibre is determined by the chemical reaction. It may be mentioned herein that it is not as if the appellants have used excess ethylene glycol wontedly to produce the methanol. It is clear that the appellants are not engaged in the production of methanol but in the production of polyester fibre. That position is undisputed. Therefore, it appears that the Tribunal erred when it held that the appellants were not entitled to a part of the credit of duty since ethylene glycol when it interacts with DMT also gives rise to methanol.

27. If we just substitute various chemicals used herein for ethylene glycol; sugar for polyester fibre; various chemicals interacting with sugarcane

juice for "ethylene glycol interacts with DMT" and Bio-compost for "methanol", in the above case, we are of the view that the ratio laid down by

the Hon'ble Supreme Court squarely applies to the present case. The first respondent is not engaged in the production of bio-compost; but in the

production of sugar and ethyl alcohol. It is not as if any extra chemicals are added for production of bio-compost. It is the product that emerges

out of mixture/treating of two inevitable wastes viz., Press mud and Spent wash.

28. It is also brought to our notice that the Hon'ble Apex Court in a decision reported in Commissioner of Central Excise Vs. Titawi Sugar

Complex, has observed that press mud is not a marketable commodity. No doubt the learned counsel for the Revenue submitted that the said

decision came to be made only because of the fact that the Revenue was not in a position to establish the marketability of such commodity. On the

other hand, it is submitted that the assessee in this case is admittedly selling those products viz., bio-compost and therefore they cannot rely on the

said decision. Certainly the issue of marketability of bio-compost or press mud is not the issue in this case. On the other hand it is only the

applicability of Rule 57CC to the said final product, is the issue. Therefore, even if it is a marketable product, still it has to be seen as to whether

the assessee is liable to be levied under Rule 57CC or not based on the mandatory requirement as contemplated under Rule 57CC. Such liability

should not be considered based on the fact as to whether such commodity or

product is an excisable product or not. Certainly, there cannot be any dispute about excisability of such product in view of the fact that only exemption is granted from payment of duty. Therefore, the contention of the Revenue in this aspect is also not justified.

29. Though the learned counsel for the assessee has raised another issue with regard to the place of manufacture of bio-compost to contend that

the same was not manufactured within the registered premises so as to attract Rule 57C read with Rule 57CC, we do not wish to go into that issue

and give any finding in view of the fact that the same was not contended before the Tribunal and no finding to that effect had also been given by it.

The Revenue has also not raised any question of law in that aspect.

30. The Tribunal had in fact extracted two decisions of the Commissioner of Appeals, wherein they have taken the view in favour of the assessees

therein in respect of similar issue. Only in this case, one of the very same Commissioner, who passed an order in favour of the assessee in other

case, has taken a different stand. We fail to understand as to how the Department is justified in taking different stand for different assessees in

respect of the same issue. Certainly there must be some consistency. They are entitled to take a different view or stand only when there is change

of law or any other binding decision of the superior forum warranting such change of view. We have already noted that the very same Tribunal

considered the same issue and given a finding in favour of the assessee in the case reported in 2008 (232) ELT 633 (Tri-Che.) (Commissioner of

Central Excise, Tirunelveli Vs. Dharani Sugars & amp; Chemicals Ltd.,). It is also claimed by the assessee and not disputed by the Revenue that

the said decision of the Tribunal had become final and conclusive. If that being the position, we wonder as to how the Revenue is justified in

contesting the very same issue in this appeal in respect of another assessee. If an issue is decided in favour of any party and had attained finality

and accepted by the parties, the affected party in that case is certainly precluded from questioning its correctness in an another case. At this

juncture, the decision of the Apex Court reported in 2006 (202) E.L.T. 213 (SC) (Commissioner of Central Excise, Navi Mumbai Vs. Amar

Bitumen & Allied Products Pvt. Ltd.,) is relevant to be quoted. Paragraphs 4 to 7 are usefully extracted hereunder:-

4. The Tribunal relying upon an earlier decision of another Bench of the 1999 (107) ELT 58 , held that "Bituminised Hessian based felt" is covered

under Chapter Heading 59.09 as contended by the assessee and not under 68.07 as contended by the revenue.

5. Admittedly, no appeal was filed by the Revenue against the earlier decision of the Tribunal in Bitumen Products (India) (supra) and the same has become final.

6. This Court in a catena of cases has consistently taken the view that if an earlier order is not appealed against by the Revenue and the same has

attained finality, then it is not open to the Revenue to accept judgment/order on the same question in the case of one assessee and question its

correctness in the case of some other assessees. The Revenue cannot pick and choose. (See: Union of India and Others Vs. Kaumudini Narayan

Dalal and Another, ; Collector of Central Excise, Pune Vs. Tata Engineering and Locomotives Co. Ltd., ; Birla Corporation Ltd. Vs. Commnr. of

Central Excise, ; Jayaswals Neco Ltd., V. Commissioner of Central Excise, Nagpur (2006 (195) E.L.T. 142 (S.C.) etc.,)

7. It was held in Birla Corporation Ltd., (Supra) as under:

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 2001 (73) ECC 813 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 assessees in a quandary.

31. Similarly, in another decision of the Apex Court reported in 2007 (13) SCC 807 (Jayaswals Neco Limited Vs. Commissioner of Central

Excise, Nagpur), it has been observed as follows:-

7. This Court in Birla Corpn. Ltd. V. CCE (2005 (6) SCC 95 relying upon an earlier decision of this Court, held that the Department having

accepted the principles laid down in the earlier case cannot be permitted to take a contra stand in the subsequent cases. In para 5 of the said

judgment it was observed, thus: (SCC p.97)

5. 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 2001 (73) ECC 813 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 assesseees in a quandary.

8. Since the point involved in the present case is identical to the point decided in 1996 (88) ELT 413 and the Department having accepted the principle laid therein to the effect that the inserts did not require any precision machining or that any such machining was done by the appellant, cannot be permitted to take a stand different than the principles laid down in the earlier case.

32. Going by the above decisions of the Apex Court, we are of the firm view that the Revenue cannot pick and choose between the assesseees of same nature to file appeal in respect of the very same issue. The Tribunal has also pointed out that the Commissioner who had taken the view in this case in favour of the Revenue is the very same Commissioner, who as an appellate authority took different view in favour of the assessee in another case. This sort of inconsistency need to be avoided.

33. In the result, the appeal filed by the Revenue is dismissed by answering the questions of law in favour of the assessee and against the Revenue.

In respect of other appeals in C.M.A. No. 1352 of 2008, C.M.A. No. 1122 of 2009, C.M.A. Nos. 638 and 1087 of 2010, as similar issues raised by the Revenue have been decided in the first case viz., C.M.A. No. 2071 of 2005 in favour of the assessee, by applying the above decision, all these appeals are also dismissed. No costs.