

(2015) 02 MAD CK 0443

In the Madras High Court

Case No : C.M.A. Nos. 3691, 3693, 3695, 3696 of 2014 and M.P. No. 1 of 2014
(4)

The India Cements Ltd.

APPELLANT

Vs

The Customs, Excise and Service Tax Appellate Tribunal and
Others

RESPONDENT

Date of Decision : 06-02-2015

Acts Referred:

Citation : (2015) 02 MAD CK 0443

Hon'ble Judges : R. Sudhakar, J;R. Karupiah, J

Bench : Division Bench

Advocate : C. Saravanan, for the Appellant

Judgement

R. Sudhakar, J.—Aggrieved by the respective orders passed by the Tribunal in dismissing the appeals filed by it, the assessee is before this Court by filing the present appeals, by raising the following questions of law :-

"i) Whether in the facts and circumstances of the case, the Appellate Tribunal was justified in denying modvat credit on capital goods used in the captive mines?

ii) Whether the impugned orders of the Hon"ble Tribunal can be sustained in the light of the decision of the Apex Court in Birla Corporation Ltd. Vs. Commnr. of Central Excise, (2005) 125 ECR 8 : (2005) 186 ELT 266 : (2005) 6 SCC 95 : (2005) 1 SCR 821 Supp

iii) Whether para 22 of M/s. Jaypee Rewa Cement Vs. Commissioner of Central Excise, M.P., AIR 2001 SC 3935 : (2001) 77 ECC 457 : (2001) 98 ECR 193 : (2001) 133 ELT 3 : (2001) 7 JT 261 : (2001) 6 SCALE 96 : (2001) 8 SCC 586 : (2001) AIRSCW 3904 : (2001) 6 Supreme 753 is applicable to the appellant's case?"

2. The short facts of the case are that the appellant/assessee is engaged in the manufacture of cement falling under Chapter 25 of the Central Excise Tariff Act,

1985. The appellant/assessee availed Modvat credit on certain capital goods/inputs which were used in its captive mines. A show cause notice dated 26.3.01 for the period between March, 2000 and October, 2000 was issued on the appellant, by the Superintendent of Central Excise, seeking to deny credit to the tune of Rs. 1,52,986/= on capital goods listed in Annexure B to the show cause notice, as the same were used in the mines outside the factory. The appellant/assessee filed its reply dated 26.3.01. The Deputy Commissioner of Central Excise, confirmed the demand and also imposed penalty vide order dated 23.8.01.

3. Aggrieved by the said order, the appellant/assessee preferred appeals before the Commissioner (Appeals). The Commissioner (Appeals), vide orders dated 13.05.04, 22.12.03, 25.3.04 and 28.11.03, reversed the orders of the lower authority and held that the appellant was eligible to avail credit on capital goods used in the mines during the relevant period and, consequently, the penalty was also set aside.

4. Aggrieved by the said order of the Commissioner (Appeals), the Revenue preferred appeals before the Appellate Tribunal. The Tribunal, primarily relied upon the decision of the Supreme Court in M/s. Jaypee Rewa Cement Vs. Commissioner of Central Excise, M.P., AIR 2001 SC 3935 : (2001) 77 ECC 457 : (2001) 98 ECR 193 : (2001) 133 ELT 3 : (2001) 7 JT 261 : (2001) 6 SCALE 96 : (2001) 8 SCC 586 : (2001) AIRSCW 3904 : (2001) 6 Supreme 753 , and held that the appellant was not entitled to Modvat credit under Rule 57Q on capital goods used in off-factory mines. For better clarity, the relevant portion of the judgment of the Supreme Court is extracted hereunder :-

"10. Reading of Rule 57A clearly shows that the notification is to specify the goods used in or in relation to the manufacture of the final product whether directly or indirectly. In the present case, inputs which are used in relation to the manufacture even directly would be regarded as an input for the purpose of Rule 57A. Sub-rule (1) of Rule 57A does not, in any way, specify that the inputs have to be utilised within the factory premises. The explanation contained in Rule 57A is merely meant to enlarge the meaning of the word input ? and does not in any way restrict the use of the input within the factory premises nor does the said Rule 57A require the inputs to be brought into the factory premises at any point."

5. Learned counsel appearing for the appellant placed reliance upon two subsequent decisions of the Supreme Court in Vikram Cement Vs. Commnr. of Central Excise, Indore, (2006) 194 ELT 3 : (2006) 1 JT 385 : (2006) 1 SCALE 327 : (2006) 2 SCC 351 : (2006) 1 SCR 465 : (2006) AIRSCW 362 : (2006) 1 Supreme 288 and submitted that Sub-rule (1) of Rule 57A of the Rules nowhere states that the inputs have to be utilised within the factory premises and, therefore, the denial of credit by the Tribunal has to be set aside, so long as the same is used by the appellant for its own use.

6. Heard the learned counsel appearing for the appellant and the learned

standing counsel appearing for the respondents and also perused the documents available in the record as also the decisions of the Supreme Court on which reliance placed by the learned counsel for the appellant.

7. The Apex Court, in its subsequent decision in *Vikram Cement Vs. Commnr. of Central Excise, Indore*, (2006) 194 ELT 3 : (2006) 1 JT 385 : (2006) 1 SCALE 327 : (2006) 2 SCC 351 : (2006) 1 SCR 465 : (2006) AIRSCW 362 : (2006) 1 Supreme 288 , has specifically refrained from discussing the issue relating to Rule 57Q, which deals with credit on capital goods used as inputs. However in *Vikram Cement case* (2006 (197) ELT 145 (SC)), in para-5 of the said judgment, the Supreme Court observed that for availing Modvat credit on capital goods, if the mines are captive mines, they constitute one integrated unit together with the concerned cement factory. Therefore, Modvat/Cenvat credit on capital goods will be available to the assessee so long as the goods are used by the assessee. However, where the goods are supplied to other cement companies of different assessees, the credit is not available. For better clarity, the relevant portion is extracted hereunder :-

"5. As regards the Modvat/Cenvat credit on capital goods, if the mines are captive mines so that they constitute one integrated unit together with the concerned cement factory, Modvat/Cenvat credit on capital goods will be available to the assessee. On the other hand, if the mines are not captive mines but they supply to various other cement companies of different assessees, Modvat/Cenvat credit on capital goods used in such mines will not be available to the concerned assessee under the appropriate Modvat/Cenvat Rules. The matters are remanded to the respective original authorities for decision only on the above issue."

8. The abovesaid view of the Supreme Court was reiterated in a subsequent decision in the case of *Madras Cements Ltd. Vs. Commissioner of Central Excise*, (2010) 176 ECR 87 : (2010) 5 SCALE 387 : (2010) 27 STT 61 : (2010) AIRSCW 3633 : (2011) AIRSCW 147 : (2010) 4 Supreme 309 .

9. In view of the above law laid down by the Supreme Court, the question of fact as to whether the capital goods were utilised in the own factory or in an integrated mine of the assessee or in other mines is the core issue to be decided.

10. From a perusal of the order passed by the Tribunal, it is evident that the Tribunal has not gone into the issue whether the capital goods were utilised in the own factory of the assessee or in an integrated mine of the assessee or in other mines. That being the core issue, there being no finding on the said aspect by the Tribunal, the orders of the Tribunal in disallowing credit on capital goods to the assessee cannot be sustained. Therefore, this Court, without going into the questions of law as raised by the appellant, is inclined to set aside the said orders and remand the matters back to the Original Authority for reconsideration.

11. Accordingly, these appeals are disposed of and the matters are remanded back to the respective Original Authorities to reconsider the issue in the light of

the decisions of the Supreme Court in Vikram Cement cases (supra) and Madras Cements Ltd. case (supra). Consequently, connected miscellaneous petitions are closed. However, in the circumstances of the case, there shall be no order as to costs.