**(2013) 09 RAJ CK 0228**

**In the Rajasthan High Court**

**Case No :** Central Excise Appeal No. 73 of 2006

Union of India APPELLANT

Vs

Hindustan Zinc Ltd. RESPONDENT

**Date of Decision :** 17-09-2013

**Acts Referred:**

**Citation :** (2014) 305 ELT 123

**Hon'ble Judges :** V.K. Mathur, J;Dinesh Maheshwari, J

**Bench :** Division Bench

## Judgement

1. By way of this Central Excise Appeal, the Revenue seeks to question the Final Order Nos. 204-210/2006-EX, dated 2-2-2006 whereby the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (''the Tribunal'') has allowed the appeal (No. E/1473/2005) filed by the assessee and has granted consequential relief of availing Cenvat credit on cement, used as construction/building material in the mines. In brief, the relevant background aspects of the matter are that the respondent-assessee is engaged in manufacture of lead, zinc and other metal concentrates. The respondent-assessee had availed Cenvat Credit to the tune of Rs. 36,80,224/- on the inputs namely, cement, explosive, lubricant oil and grease used in mining area treating them as inputs under Rule 2(g) of the erstwhile Cenvat Credit Rules, 2002 (''the Rules of 2002''). It had been the case of the department that ordinary portland cement had been used by the respondent for the purpose of filling the gapes in the form of cut and fill for excavation of ores; and obviously, cement had been used as a construction material so as to provide safety to the roof of mining area. According to the appellant, cement being a construction material, is not eligible as input for availing Cenvat Credit under Rule 2(g) of the Rules of 2002.

2. A show cause notice was issued to the respondent-assessee proposing recovery of credit so taken on cement along with interest and penalty. The matter in the said show cause notice was decided by the Assistant Commissioner, Central Excise Division, Udaipur in his Order-in-Original No. 696/2004-CE, dated

 

25-8-2004 confirming the demand with interest but without imposing penalty.

3. Being aggrieved of the aforesaid order dated 25-8-2004, the respondent-assessee filed an appeal which was rejected by the Appellate Authority by its order dated 4-2-2005. The Tribunal, however, in its impugned order dated 2-2-2006 proceeded to allow the assessee''s appeal while relying upon the decision of the Hon''ble Apex Court in the case of Vikram Cement Vs. Commnr. of Central Excise, Indore, Hence, this appeal.

4. This Court, while admitting this appeal for consideration on 6-11-2006, formulated the following substantial question of law for consideration:-

Whether Cement, used as construction/building material in the mines is eligible as input for the purpose of availment of Cenvat Credit under the provisions of the Cenvat Credit Rules, 2002/2004.

5. During the course of submissions, it has not been a matter of dispute that the basic and core aspects related with the question above-referred have been considered and decided in favour of the Revenue in several decisions rendered by this Court including the one in D.B. Central Excise Appeal No. 75/2006: Union of India (UOI) Vs. Hindustan Zinc Ltd. and Another, and another in D.B. Central Excise Appeal No. 59/2006: Union of India (UOI) Vs. Hindustan Zinc Ltd. and Another,

6. In the judgment dated 9-8-2007, this Court has specifically held that cement, being a building material used for the purpose of building construction, cannot be said to be an input used for manufacturing of final product and hence, no Cenvat Credit is available so far the cement is concerned. This Court has specifically held that the foundation made of cement does not fall under the category of ''capital goods'' in terms of Rule 2(b) of the Rules of 2002; and cement cannot be said to be ''inputs'' in terms of Explanation-II to Rule 2(g) of the Rules of 2002. This Court has, inter alia, observed and held as under:-

We have heard learned counsel for the parties. While deciding D.B. Central Excise Appeal No. 75/2006 (Union of India v. M/s. Hindustan Zinc Ltd.), we have held that cement being a building material used for the purpose of building construction cannot be said to be an input used for manufacturing of final product and that no Cenvat Credit is available so far as cement is concerned. It is submitted by learned counsel Mr. Mehta that cement plays an important role in connection with the manufacturing of final product. In our view, it cannot be said that without cement manufacturing of final product is not possible. In our view, cement used as building material for laying foundation cannot be directly or indirectly said to be an integral part in connection with manufacture of final product. In our view, the First Appellate Authority therefore has rightly found that in the facts and circumstances of the case, cement cannot be considered as inputs. In the instant case, it is not in dispute that cement has been used in the construction of foundation for machineries and used as a building material. The foundation made of cement in our view does not fall under the category of capital goods as defined under Rule 2(b) of the Cenvat Credit Rules, 2002. The item in question i.e. cement also cannot be considered as inputs as per the definition of Explanation II of Rule 2(g) of the Rules, 2002. In D.B. Central Excise Appeal No. 75/2006, we have taken a view that no Cenvat Credit is available so far as the cement is concerned. In our view, the foundation made of cement does not fall under the category of capital goods as per the definition clause and since the cement was used in the construction of foundation, it cannot be said to be eligible capital goods in terms of Rule 2(b) of the Cenvat Credit Rules, 2002 and the cement cannot be said to be inputs in terms of Explanation II of Rule 2(g) of the Rules, 2002.

Considering the aforesaid aspect of the matter, in our view, the Tribunal has erred in allowing the appeal filed by the respondent-assessee. In our view, the Tribunal has committed substantial error of law in allowing the appeal of the respondent-assessee by holding that the assessee is entitled for getting benefit of Cenvat Credit on cement.

In our view, the foundation cannot be described as capital goods as per Rule 2(b) of the Cenvat Credit Rules, 2002, and it cannot be said that the same is used in connection with manufacturing of goods, which are further used for the manufacture of the ultimate product.

Accordingly, this appeal is allowed. The order of the Tribunal is set aside and the order of the Commissioner (Appeals), Customs and Central Excise, Jaipur-II is restored with no order as to costs.

7. The position aforesaid directly applies to the present case too. Therefore, in the opinion of this Court, the Tribunal has erred in allowing the appeal filed by the respondent-assessee and in holding that the assessee was entitled to get the benefit of Cenvat Credit on cement.

8. In the aforesaid view of the matter, the formulated question is answered in the negative, i.e., in favour of the Revenue and against the assessee. The appeal stands allowed accordingly; the impugned order dated 2-2-2006 is set aside and the orders dated 4-2-2005 passed by the Commissioner (Appeals), Customs and Central Excise Jaipur-II and dated 25-8-2004 passed by the Assistant Commissioner, Central Excise Division, Udaipur stand restored. No costs.