

CASE NO.:
Appeal (civil) 1197 of 2005

PETITIONER:
M/s Vikram Cement

RESPONDENT:
Commnr. Of Central Excise, Indore

DATE OF JUDGMENT: 18/01/2006

BENCH:
Ruma Pal, B.N. Srikrishna & Dalveer Bhandari

JUDGMENT:
J U D G M E N T
With
C.A.Nos.3422/2004 and 4149-4153/2004, 4120-4122/2004,
C.A Nos. 7175-7189/2004, C.A Nos. 2318-2320/2005, CA
Nos. 1815, 6514, 1613, 6169-71, 6698 of 2005 and
SLP (C)No.23205/2003 & SLP (C) No.19603/2005)

RUMA PAL, J.

The question whether the decision in Jaypee Rewa Cement Vs. CCE 2001 (133) ELT 3 SC would apply to the CENVAT Rules 2000 framed under the Central Excise Tariff Act 1985 (referred to as the 'Act') is to be decided on a reference made in this case. A Bench of two judges of this Court in Commissioner of Central Excise, Jaipur Vs. J.K. Udaipur Udyog Ltd 2004 (171) ELT 289 SC held that Jaypee Rewa Cement did not apply to the CENVAT Rules. The view was doubted in this case by a Bench of coordinate strength which referred the following question to us:-

"In the light of the provisions of the Cenvat scheme vis-'-vis Modvat scheme reproduced hereinabove, we are of the view that the observations made in paragraph 9 of the decision of the Division Bench, quoted above, in the case of Commissioner of Central Excise, Jaipur vs. J.K. Udaipur Udyog Ltd. reported in 2004 (171) ELT 289 needs reconsideration".

The reference was made in the factual context of the appellants availing of CENVAT credit on explosives and other inputs used in quarrying limestone, which was in turn used for the manufacture of cement and clinkers, which are classifiable under Chapter 25. The limestone mines of the appellants are situated at some distance away from the factory premises of the appellants. The Adjudicating Authority held that the appellants were not entitled to the credit availed of by the appellants and raised a demand for excise duty only on the explosives. The narrower question raised in this appeal therefore is whether the adjudicating authority was correct in denying the appellants the CENVAT credit on the inputs. On the broader question, namely, whether there is a difference in substance between the MODVAT and the CENVAT schemes, Modified Value Added Tax Scheme (MODVAT) was introduced in 1986 granting credit of excise duties used in or in relation to the manufacture of final products. The scheme was contained in Rules 57A to 57J of the Central Excise Rules, 1944 (referred to as the 'Rules'). We

set out below the relevant extracts of these Rules:-

"Rule 57A - Applicability.\027

- | | | | | |
|-----|------|------|------|------|
| (1) | xxxx | | xxxx | xxxx |
| (2) | xxxx | xxxx | xxxx | |
| (3) | xxxx | | xxxx | xxxx |

(4) The credit of specified duty under this section shall be allowed on inputs used in the manufacture of final products as well as on inputs used in or in relation to the manufacture of the final products whether directly or indirectly and whether contained in the final product or not.

Rule 57B. Eligibility of credit of duty on certain inputs\027(1) Notwithstanding anything contained in Rule 57A, the manufacturer of final products shall be allowed to take credit of the specified duty paid on the following (inputs), used in or in relation to the manufacture of the final products, whether directly or indirectly and whether contained in the final products or not, namely:-

(i) inputs which are manufactured and used within the factory of production;

(ii) paints;

(iii) inputs used as fuel;

(iv) inputs used for generation of electricity or steam, used for manufacture of final products or for any other purpose, within the factory of production;

(v) packing materials and materials from which such packing materials are made provided the cost of such packing materials is included in the value of the final product;

(vi) accessories of the final product cleared alongwith such final product, the value of which is included in the assessable value of the final product.

Explanation.- For the purposes of this sub-rule, it is hereby clarified that the term 'inputs' refers only to such inputs as may be specified in a notification used under Rule 57A". {Emphasis supplied}

We observe that Rule 57B commences with a non obstante clause. It allows credit to be taken by a manufacturer on inputs used in or in relation to the manufacture of the final products whether directly or indirectly and whether contained in the final products or not. There is no qualification as to where the inputs must be used in the main body of sub-rule (1). Qualifications have been introduced to the extent stated in Clauses (i) to (vi) read with the Explanation. Thus clause (i) provides for inputs which are

manufactured and used within the factory of production. Paints, fuel, packing materials and accessories are also treated as inputs under clauses (ii), (iii), (v) and (iv) without any requirement for user within the factory. Clause (iv) provides for credit on inputs used for generation of electricity or steam used for manufacture of the final products or for any other purposes "within the factory of production". It appears to us on a plain reading of the clause that the phrase "within the factory of production" means only such generation of electricity or steam which is used within the factory would qualify as an intermediate product. The utilization of inputs in the generation of steam or electricity not being qualified by the phrase "within the factory of production" could be outside the factory. Therefore, whatever goes into generation of electricity or steam which is used within the factory would be an input for the purposes of obtaining credit on the duty payable thereon. As far as the Explanation is concerned, the inputs are restricted to inputs notified under Rule 57A. There is no dispute that both explosives and limestone are notified under Section 57A for manufacture of the final product viz. cement.

The next relevant rule is Rule 57F. What we are concerned with is sub-rule (4) of Rule 57F. This provides:

"(4) The inputs can also be removed as such or after they have been partially processed by the manufacturer of the final products to a place outside his factory under the cover of a challan specified in this behalf by the Central Board of Excise and Customs, for the purposes of test, repair, refining, re-conditioning or carrying out any other operation necessary for the manufacture of the final products or for manufacture of intermediate products necessary for the manufacture of final products and return the same to his factory".

Therefore credit on inputs sent by a manufacturer from the factory to a job worker for test, repair etc. but ultimately utilized in the final product, is allowable.

Then comes Rule 57J which, in so far as it is material, reads:-

Rule 57J. Credit of duty in respect of inputs used in an intermediate product.\027(1) Notwithstanding anything contained in these rules, the manufacturer shall be allowed to take credit of the specified duty paid on inputs described in column (2) of the Table below and used in the manufacture of intermediate products described in column (3) of the said Table received by the said manufacturer for use in or in relation to the manufacture of final products described in the corresponding entry in column (4) of the said Table."

"(2) The manufacturer of final products shall take credit under sub-rule (1) only if the intermediate products are manufactured in a factory as a job work in respect of which the exemption contained in the notification of the Government of India in the Ministry of

Finance (Department of Revenue)
No.214/86-Central Excises, dated the
25th March, 1986 has been availed of".

(3) xxx xxx

xxx

xxx

{Emphasis supplied}

This Rule allows credit on inputs used in manufacture of intermediate products described in column 3 of the Table provided the intermediate products are received by the manufacturer for use in or in relation to the manufacture of final products described in the corresponding entry in column 4 of the Table. Explosives, limestone and cement are admittedly covered by columns 1, 2 and 3 respectively of the Table.

It may be noted at this stage that Rule 57J(2) was explained by a Trade Notice No.38/1999 dated 2nd April, 1991 issued by the Bombay Collectorate. It was said :-
"the basic aim of the MODVAT Scheme is to avoid the cascading effect of duties on a product. Therefore, the scheme permits MODVAT credit on all goods forming a part of the final product, though the final product may be manufactured in several stages, provided duty is paid at each stage of the manufacturing chain.

However, to ensure an unbroken chain of MODVAT, rule 57J has been incorporated under the MODVAT Scheme so as to extend credit of duty on certain inputs, even in respect of exempted intermediate products (notified under Notification No.351/86. C.E., dated 20.6.1986) which are brought from outside. However, one of the provisions of this notification requires that the intermediate products should be manufactured in a factory as a job work and exemption contained in Notification No.214/86-C.E. dated 25.3.1986 should have been availed in respect of them. Thus, it may be observed that rule 57J grants limited flexibility of job work. The rule merely requires that the unit availing this facility should be a job worker in terms of Notification No.214/86-C.E. A manufacturing unit of the same manufacturer can also be a job worker. Therefore, so far as the aforesaid manufacturing unit is job worker, it would also be eligible for credit under rule 57J".

We do not, for the purpose of this reference, discuss Rule 57Q which deals with credit on capital goods used as inputs. The question whether it was necessary for inputs to be used within the factory premises where the manufacture as defined in Rule 57AB of final products takes place for the purposes of availing of credit, came up before a Bench of three Judges in the case of Jaypee Rewa Cement Vs. CCE (supra). As in this case, in that case the input in question was explosives which were used in quarrying limestone used in the

manufacture of cement. The Court came to the conclusion on a consideration of the Rules which we have already quoted, that sub-rule (1) of Rule 57A did not in any way specify that the inputs have to be utilized within the factory premises. The Tribunal had relied upon Rule 57F in coming to the conclusion that the inputs in respect of which credit of duty was claimed must be those which were used in or brought in to the factory premises. In reversing the decision of the Tribunal this Court observed that:-

"The Tribunal, however, has not referred to the provisions of Rule 57J, the opening portion of which makes it clear that the said Rule will be applicable notwithstanding anything contained in the other Rules. According to Rule 57J, when the Central Government by notification specified the inputs used in the manufacture of intermediate products received by the manufacturer for use in or in relation to the manufacture of final product, then all such products on which duty has been paid credit will be allowed\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005.

Explosives would fall under column (2) being a tariff item in Chapter 36; the intermediate product, namely, lime stone would fall under column 3 being covered by Chapter 25; and the final product, namely, cement would also fall under Chapter 25 and would fall under column 4. The reading of Rule 57J along with the aforesaid notification can leave no manner of doubt that even in respect of inputs used in the manufacture of intermediate product which product is then used for the manufacture of a final product. The manufacturer would be allowed credit on the duty paid in respect of the input. On the explosives a duty had been paid and the appellants would be entitled to claim credit because the explosives were used for the manufacture of the intermediate product, namely, lime stone which, in turn, was used for the manufacture of cement".

The appeal of the manufacturer was accordingly allowed and it was held that the MODVAT was allowable on the use of the explosives in the manufacture of cement irrespective of the fact that the explosives were used directly in the mines and never entered the factory of the manufacturer of cement. In 2000 the MODVAT Rules were replaced by the CENVAT Rules by the Central Excise (2nd Amendment) Rules 2000. Basically there was a re-arrangement of the earlier rules which in substance remained the same. Thus Rule 57AA defined inputs as :-

"input" means all goods, except high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes accessories of the final products cleared along with

the final products, goods used as paint, or as packing material, or as fuel, or for generation of electricity or stem used for manufacture of final products or for any other purpose within the factory of production and also includes lubricating oils, greases, cutting oils and coolants.

{Emphasis supplied}

Analyzed, it is clear that sub-rule (d) of Rule 57AA has merely reframed Rule 57B to include all the ingredients of inputs while at the same time broadening the base not only by referring to "all goods" but also by using the word "includes". Rule 57AC provides for the conditions for allowing CENVAT credit in respect of inputs received in the factory of the manufacturer. Sub-rule (1) of Rule 57AC which was relied on in J.K. Udaipur Udyog to differ from the conclusion in Jaypee Rewa Cement reads:-
"Rule 57AC. Conditions for allowing CENVAT credit.- (1) The CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer".

Rule 57 J of the MODVAT Rules was deleted. This led to controversy and on 29th of August, 2000, a clarification was issued by the Central Board of Excise and Customs (CBEC) inter alia to the effect that:-

"It has been represented that when the inputs are sent directly to a job worker, the erstwhile MODVAT credit scheme permitted availment of MODVAT credit under Rule 57J read with the Notification No.214/86-C.E. as amended. Several associations have requested that similar provision may be made in the CENVAT scheme. This request has been acceded to and Rule 57AB(1) has been amended suitably for this purpose. The amended provisions of Rule 57AB (1) apply to goods received in the factory on or after 1st April, 2000. Credit is therefore permissible in respect of intermediate goods received from a job worker on or after 1.4.2000. Credit shall, of course, be allowed only if the intermediate products received by the manufacturer of the said final products are accompanied by any of the documents as specified under rule 57AE(1) evidencing the payment of duty on such inputs of capital goods".

{Emphasis supplied}

Consequently, with the intention of re-introducing the benefit granted earlier under Rule 57J, Rule 57AB was introduced under the heading "CENVAT credit". The material extracts of Rule 57AB reads as follows:-
57AB(1) A manufacturer or producer of final products shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of.

(i) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred

to as the said First Schedule) ,
leviable under the Act;

(ii)	xxx	xxx	xxx	xxx
(iii)	xxx	xxx	xxx	xxx
(iv)	xxx	xxx	xxx	xxx
(v)	xxx	xxx	xxx	xxx

paid on any inputs or capital goods received in the factory on or after the first day of March, 2001, including, the said duties paid on any inputs or capital goods used in the manufacture of intermediate products, by a job worker availing the benefit of exemption specified in the notification of the Government of India in the Ministry of Finance(Department of Revenue) No.214/86. Central Excise, dated the 25th March, 1986, published in the Gazette of India vide number GSR 547(E), dated the 25th March, 1986, and received by the manufacturer for use in or in relation to the manufacture of final products, on or after the first day of March, 2001." {Emphasis supplied}

Rule 57AB effectively duplicates the substance of Rule 57J (1) and (2) and deals with a situation where inputs are received by a job worker for production of intermediate goods which are used in the manufacture of a final product. In this background, the question arose in the case of Commissioner of Central Excise, Jaipur Vs. J.K. Udaipur Udyog Limited (supra) whether the explosives used for blasting purposes in the mines and which had not been used in the factory premises for production or in relation to the manufacture of cement could qualify for CENVAT credit. The Court answered the question in the negative and in paragraph 9 of the judgment as reported said:-
"The scheme for MODVAT and CENVAT Credits being different and in view of the definition of "input" given in sub-rule (d) of Rule 57AA of the Rules and the omission of a Rule similar to Rule 57J, the ratio of Jaypee Rewa Cement (supra) can have no application here".

Three reasons were given by the Court for holding that credit could be taken only on inputs received in the factory of the manufacturer of the final product. First, the Court held that the definition of input given in sub-rule (d) of Rule 57AA was "entirely different from the manner in which the said word had been expounded in the explanation to Rule 57A of the MODVAT Rules". We cannot agree with this reading of the Section. As we have said there was only a re-arrangement of the several provisions of Rule 57B in Rule 57AA. Rule 57AA is in fact more broadbased than Rule 57B. Second, the Court proceeded on the basis that under the CENVAT scheme there was no provision similar to Rule 57J of the MODVAT scheme. As we have seen, Rule 57J was replaced in substance by Rule 57AB. This provision was overlooked. The third reason given by the Court in J.K. Udaipur Udyog for holding that the CENVAT Scheme was different from the MODVAT Scheme was Rule 57AC(1). However, that Rule is limited to inputs received in the factory of the

manufacturer and does not impinge on Rule 57AB at all.

The schemes of MODVAT and CENVAT Credit are not therefore different and we are unable to agree with the conclusion of the Court in J.K. Udaipur Udyog that the decision in Jaypee Rewa Cement (supra) would have no application to CENVAT Rules.

In our opinion the doubt expressed by the referring Bench about the correctness of the decision in CCE Vs. J.K. Udaipur Udyog Limited (supra) was well founded. Having regard to the fact that the CENVAT Rules in effect substitute the MODVAT Rules, the decision in Jaypee Rewa Cement would continue to apply. The decision in Commissioner of Central Excise, Jaipur Vs. J.K. Udaipur Udyog Limited (supra) holding to the contrary is, in our opinion, not good law. The reference is answered accordingly. All the appeals and special leave petitions will now be listed for being disposed of in the light of this judgment.