COMMISSIONER OF CENTRAL EXCISE, JAIPUR

v.

J.K. UDAIPUR UDYOG LTD.

SEPTEMBER 3, 2004

[S.N. VARIAVA AND G.P. MATHUR, JJ.]

Central Excise Rules, 1944—Modvat Scheme— Rules 57AA, 57AB — Explosives for blasting mines to excavate limestone used in manufacture of cement in a plant few kilometers away from mines—CENVAT Credit — Disallowed—Commissioner (Appeals) allowing it—On appeal by Revenue, held: Use of 'inputs' was not within factory of production—Mines operated by assessee itself—Hence CENVAT credit rightly disallowed by authorities.

Central Excise Act 1944, Section 2(e)—Factory—Scope of—Mine connected to factory by ropeway for carrying excavated raw materials is not part of factory since no manufacturing activity undertaken therein.

Practice and procedure—Appeal to Supreme Court in Central Excise cases—Plea not raised either in show cause notice or before Excise authorities could not be raised for first time before Apex Court.

Respondent-assessee was using explosives for blasting mines to excavate limestone for use in manufacture of cement. The mining area was at a distance of few kilometers from the plant where cement was manufactured. During the period April to August 2000, they took Cenvat Credit under Rule 57AB of Central Excise Rules, 1944 on the explosives used in the mines. The appellant-Revenue issued show cause notice to the assessee as to why the aforesaid credit should not be disallowed and further action taken against them, on the ground that the explosives used for blasting purpose in the mines had not been used in the factory premises for production or in relation to the manufacture of final product i.e. cement; that as per Rule 57AB, the input must be used within the factory of production and therefore, the explosives do not qualify to be inputs for the manufacture of excisable goods in terms of the aforesaid rule. The assessee replied that the mining area as well as the cement factory, were not only interdependent, but had a direct nexus with each other; that the mining activity and the manufacturing activity cannot be

A considered as isolated events as without mining limestone, the cement plant cannot be run and that for all practical purposes the mining area is an extension of the factory area. Assistant Commissioner, Central Excise disallowed the CENVAT credit taken by respondent. Appeal preferred by the assessee was allowed by the Commissioner (Appeals) B on the finding that the explosives are inputs in terms of Rule 57AB. Revenue filed appeal against this order before CEGAT and it was dismissed. Hence the present appeals.

Assessee contended that limestone was brought from the mines to the factory by a ropeway and, therefore, the mining area is an extension C of the factory area; and that CENVAT scheme was introduced on 1-4-2000 but Rule 57AB was amended on 29-8-2000 and was given retrospective effect from 1-4-2000 and it is this amended Rule which will govern the situation.

D Allowing the appeals, the Court

HELD : 1.1. In Rule 57AA of the Central Excise Rules, 1944, the expression 'used for manufacture of final products or for any other purpose, within the factory of production' in the definition of 'input' is important and it clearly indicates that in order to satisfy the requirement E of this sub-rule, the article or goods must be used within the factory of production. If the article is not used within the factory of production, it will not be 'input' within the meaning of sub-rule (d) of Rule 57AB. Rule 57AC deals with conditions for allowing CENVAT Credit and under sub-rule (1) thereof such credit can be taken immediately on F receipt of the inputs in the factory of manufacture. This provision also shows that actual receipt and use of the 'inputs' within the factory of production is essential for availing CENVAT Credit. It is the admitted case of the assessee that the explosives have been used for blasting purpose in the mines and not in the factory where cement is produced and consequently on the plain language of sub-rule (d) of Rule 57AA and G Rule 57AC it will not qualify to be 'input' for which CENVAT Credit may be taken under Rule 57AB. [44-G-H; 45-A-B]

1 .2. The definition of 'input' as given in sub-rule (d) of Rule 57AA which is material for the present case, is entirely different from the H manner in which the said word has been expounded in explanation to

Rule 57A. Under sub-rule 57AA only such articles or goods which are used for manufacture of final product or for any other purpose within the factory of production can qualify to be 'input'. However, no such restriction or condition was imposed in the main part of Rule 57A. Explanation (a) no doubt provided that for purpose of Rule 57A, 'input' would include inputs which are manufactured and used within the factory of production, or in relation to the manufacture of final products. But this explanation could not in any manner curtail or restrict the scope of the substantive provision contained in sub-rule (1). [46-G-H; 47-A-B]

Jaypee Rewa Cement **v.** *Commissioner of Central Excise, Raipur,* **(2001) ELT 3, held inapplicable.**

2. Rope way is merely a device or mechanism for transporting limestone. Merely because a ropeway connects the factory with the mines, the mine itself will not become part of the factory where cement is produced. On that logic, even if the mine is situate hundreds of miles away but is connected with the factory by a railway line for transporting mineral or raw material the said mine will become part of the factory of production. In view of the definition of 'factory' in Section 2(e) of the Central Excise Act, 1944, a mine from where the raw material is extracted and is situate at some distance, but no manufacturing process is carried on, cannot qualify to be a factory. [50-B-E]

3. A manufacturer or producer himself cannot be a job worker. Here the mines are operated by the assessee itself. Therefore, in terms of the amended Rule 57AB also, the assessee cannot take CENVAT Credit for the explosives used for the blasting purposes in the mining area. [52-B-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7257-7258 of 2003.

From the Judgment and Order dated 20.8.2002 of the Central Excise and Gold (Control) Appellate Tribunal, New Delhi in A. No. E/720-721/2002-NB/SM in F.O. No. A/1017-1018/2002-NB/SM.

T.L.V. Iyer, Dileep Tandon, Ms. Smeeta I., P. Parmeswaran and B.K. Prasad for the Appellant.

A WITH

C.A. Nos. 7259-7261 of 2003.

V. Lakshmikumaran, Alok Yadav, Rajesh Kumar and Praveen Kumar for the Respondent.

B

The Judgment of the Court was delivered by

G.P. MATHUR, J. : These appeals by special leave have been preferred by the Commissioner of Central Excise, Jaipur II, against the judgment and order dated 20.8.2002 of Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi (for short CEGAT) by which the appeal preferred by the appellant against the order of Commissioner (Appeals) allowing CENVAT Credit to the respondent M/s. J.K. Udaipur Udyog Ltd., on explosives used in mines was dismissed.

C

D

The assessee carries on the business of manufacturing cement falling under Chapter 25 of the Schedule to the Central Excise Tariff Act, 1985. The assessee has been granted a mining lease by the Government of Rajasthan and the limestone excavated from the mines is used for manufacture of cement. The mining area is at a distance of few kilometers from the plant where the cement is manufactured. Explosives are used for blasting purpose in the mines. During the period April to August 2000, the assessee took CENVAT Credit under Rule 57AB of the Central Excise Rules (for short 'Rules') on the explosives used in mines. The Assistant Commissioner, Central Excise, issued a notice to the assessee on 18.4.2001 on the ground, *inter alia*, that the explosives used for blasting purpose in the mines had not been used in the factory premises for production or in relation to the manufacture of final product i.e. cement; that as per Rule 57AB, the input must be used within the factory of production and, therefore, the explosives do not qualify to be inputs for the manufacture of excisable goods in terms of the aforesaid rule. The assessee was required to show cause why the aforesaid credit taken by him in contravention of Rule 57AB should not be disallowed and recovered from him under the provisions of Rule 57AH read with section 11A of Central Excise Act and further, why penal action should not be taken under Rule 173 (Q) (1) (bb). The assessee gave a reply to the notice on the ground, *inter alia*, that the mining area as well as the cement factory, are not only interdependent, but have a direct nexus with each other;

E

F

G

H

that the mining activity and the manufacturing activity cannot be considered as isolated events as without mining limestone, the cement plant cannot be run and that for all practical purposes the mining area is an extension of the factory area. The Assistant Commissioner, Central Excise, by his order dated 29.8.2001 disallowed the CENVAT Credit taken by the assessee, but did not impose any penalty. The assessee preferred an appeal, which was allowed by the Commissioner (Appeals) on the finding that the explosives are inputs in terms of Rule 57AB and CENVAT Credit was allowed. Feeling aggrieved by the order of the Commissioner (Appeals), the Revenue preferred an appeal before the CEGAT, but the same was dismissed.

The main question to be considered is whether explosives used in the mines for blasting purpose can be held to be "inputs" so as to qualify for taking CENVAT Credit under Rule 57AB. The relevant part of Rule 57AB under which CENVAT Credit can be taken reads as under:

> "*57AB. CENVAT credit.* — (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 (5 of 1986) (herein-after referred to as the said First Schedule), leviable under the Act;
>
> (ii) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act,. 1985, leviable under the Central Excise Act, 1944 in relation to the goods falling under sub-heading Nos. 2401.90, 2404.99, 5402.20, 5402.32, 5402.42, 5402.43, 5402.52, 5402.62, 8415.00, 8702.10, 8703.90, 8706.21 and 8706.39 of the said First Schedule;
>
> (iii) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978);
>
> (iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957); and
>
> (v) the additional duty leviable under section 3 of the

A Customs Tariff Act, 1975, equivalent to the duty of excise specified under clauses (i), (ii), (iii) and (iv) above,

paid on any inputs or capital goods received in the factory on or after the first day of April, 2000.

B *Explanation* . — ....

....

....”

Rule 57AC of the Rules deals with Conditions for allowing CENVAT C Credit and sub-rule (1) thereof reads as under:

“ (1). - The CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer”.

D Rule 57AA gives the definitions and sub-rule (d) thereof reads as under:

(d) “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 E and whether contained in the final product or not, and includes accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used for manufacture of final products or for any other purpose, within the factory of production, and also includes lubricating oils, greases, F cutting oils and coolants.

Explanation.— the high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever”.

G The expression “used for manufacture of final products or for any other purpose, within the factory of production” in the definition of “input” is important and it clearly indicates that in order to satisfy the requirement of this sub-rule, the article or goods must be used within the factory of production. If the article is not used within the factory of production, it will H not be “input” within the meaning of sub-rule (d) of Rule 57AA and

CENVAT Credit will not be admissible under Rule 57AB. Rule 57AC deals with Conditions for allowing CENVAT Credit and under sub-rule (1) thereof such credit can be taken immediately on receipt of the inputs in the factory of manufacture. This provision also shows that actual receipt and use of the "input" within the factory of production is essential for availing CENVAT Credit. It is the admitted case of the assessee that the explosives have been used for blasting purpose in the mines and not in the factory where cement is produced and consequently on the plain language of sub-rule (d) of Rule 57AA and Rule 57AC it will not qualify to be "input" for which CENVAT Credit may be taken under Rule 57AB.

The CEGAT has relied upon a three judge bench decision of this Court rendered in *Jaypee Rewa Cement* v. *Commissioner of Central Excise, Raipur,* (2001) 133 ELT 3 for holding that even if "inputs" are not used within the factory of production, CENVAT Credit would be admissible. Shri Lakshmikumaran, learned counsel for the assessee has also placed strong reliance on the aforesaid decision and has submitted that it has been clearly held therein that the Rule does not require that the "inputs" should be used within the factory premises and, therefore, the assessee was fully entitled to take CENVAT Credit for the explosives used in the mining area. In view of the contention raised, it becomes necessary to examine the said decision in a little detail.

The assessee in the said case (Jaypee Rewa Cement) claimed MODVAT Credit under Rule 57A of the Central Excise Rules. Rule 57A under which MODVAT Credit could be taken read as under:

> "Rule 57A. *Applicability.* (1) The provisions of this section shall apply to such finished excisable goods (hereinafter referred to as the "final products"), as the Central Government may, by notification in the Official Gazette, specify in this behalf, for the purpose of allowing credit of any duty of excise or the additional duty under Section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be specified in the said notification (hereinafter referred to as the "specified duty") paid on the goods used in or in relation to the manufacture of the said final products [whether directly or indirectly and whether contained in the final product or not] (hereinafter referred to as the "inputs") and for utilizing the credit so allowed towards payment of duty of excise leviable on the final products, whether under the Act or under any other Act, as may be specified

A in the said notification, subject to the provisions of this section and the conditions and restrictions that may be specified in the notification:

Provided that Central Government may specify the goods or classes of goods in respect of which the credit of specified duty may be restricted.

B

Explanation :- For the purposes of this rule, "inputs" includes-

(a) inputs which are manufactured and used within the factory of production, in or in relation to the manufacture of final products,

C

(b) paints and packaging materials,

(c) inputs used as fuel,

D (d) inputs used for generation of electricity, used within the factory of production for manufacture of final products or for any other purpose, and

(e) accessories of the final product cleared along with such final product, the value of which is included in the assessable value of the final product, but does not include -

E

(i) .... (omitted as not relevant)

(ii) .... (omitted as not relevant)

F (iii) .... (omitted as not relevant)

(iv) .... (omitted as not relevant)

It will be seen that the definition of "input" as given in sub-rule (d) of Rule 57AA which is material for the present case, is entirely different from the

G manner in which the said word has been expounded in *explanation* to Rule 57A reproduced above. Under sub-rule (d) of Rule 57AA only such articles or goods which are used for manufacture of final product or for any other purpose within the factory of production can qualify to be "input". However, no such restriction or condition was imposed in the main part of Rule 57A.

H Explanation (a) no doubt provided that for the purpose of Rule 57A, "input"

would include inputs which are manufactured and used within the factory of production, or in relation to the manufacture of final products. But this explanation could not in any manner curtail or restrict the scope of the substantive provision contained in sub-rule (1). In fact, this view has been expressed by the Bench also which will be clear from paragraph 10 of the reports, which reads as under:

> "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 utilized 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 of time."

Further under the Scheme for MODVAT the relevant portion of Rule 57F provided as follows:

> *"57-F. Manner of utilization of the inputs and the credit allowed in respect of duty paid thereon.* — (1) The inputs in respect of which a credit of duty has been allowed under Rule 57-A —
>
> (i) may be used in, or in relation to, the manufacture of final products for which such inputs have been brought into factory;
>
> ....
>
> .... "

However, Rule 57J of the MODVAT Scheme read as follows:

> *"57-J. Credit of duty in respect of inputs used in an intermediate product.* — Notwithstanding anything contained in these Rules, the Central Government may, by notification in the Official Gazette, specify the inputs used in the manufacture of intermediate products received by a manufacturer for use in or in relation to the manufacture of final products, in respect of which the specified duty paid on the

A said inputs shall, subject to the conditions and restrictions that may be specified in the notification, be allowed as credit under Rule 57-A."

The Bench then took note of the Notification issued under Rule 57A on 1st March, 1994 and held as follows in paras 12 to 14 of the reports:

B

"12. As we have already noticed, the Tribunal has relied upon Rule 57-F in coming to the conclusion that the inputs in respect of which a credit of duty is claimed must be those which are used in or brought into the factory premises. The Tribunal, however, has not referred to the provisions of Rule 57-J, 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 57-J, 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. Pursuant to this Rule 57-J, notification was issued on 20.6.1986 which was amended from time to time. The relevant part of the notification is as follows:

C

D

E

S. No.	Description of Inputs	Description of intermediate products	Description of final Products
(1)	(2)	(3)	(4)
1.	All goods falling within the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than the following, namely, - (i) goods classifiable under any heading of Chapter 24 of the Schedule to the said Act; (ii) goods classifiable under Heading 36.05	All goods falling within the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than the following, namely, - (i) goods classifiable under any heading of Chapter 24 of the Schedule to the said Act; (ii) goods classifiable under Heading 36.05	All goods falling within the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than the following namely,- (i) goods classifiable under any heading of Chapter 24 of the Schedule to the said Act; (ii) goods classifiable under Heading 36.05

F

G

H

	or 37.06 of the Schedule to the said Act; (iii) goods classifiable under Sub-Heading 2710.11, 2710.12, 2710.13, or 2710.19 (except natural gasoline liquid) of the Schedule to the said Act; (iv) high-speed diesel oil classifiable under Heading 27.10 of the Schedule to the said Act.	or 37.06 of the Schedule to the said Act; (iii) goods classifiable under Sub-Heading 2710.11, 2710.12, 2710.13, 2710.19 (except natural gasoline liquid) of the Schedule to the said Act; (iv) high-speed diesel oil classifiable under Heading 27.10 of the Schedule to the said Act.	or 37.06 of the Schedule to the said Act; (iii) woven fabrics classifiable under Chapter 52 or Chapter 54 or Chapter 55 of the Schedule to the said Act;

13. Explosives would fall under column (2) being a tariff item in Chapter 36; the intermediate product, namely, limestone 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 57-J 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, limestone which, in turn, was used for the manufacture of cement.

14. We are, therefore, in agreement with the learned counsel for the appellants that the wide language used in Rule 57-A entitles the appellants to claim the benefit when the said Rule is read along with Rule 57-J."

It is to be noticed that under the CENVAT Scheme there is no provision similar to Rule 57J of the MODVAT Scheme.

The schemes for MODVAT and CENVAT Credits being different and

A 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.

Shri Lakshmikumaran, learned counsel for the assessee has submitted B that the limestone is brought from the mines to the factory by a ropeway and, therefore, the mining area is an extension of the factory area. It is difficult to accept the submission made. Ropeway is merely a device or mechanism for transporting limestone. Merely because a ropeway connects the factory with the mines, the mine itself will not become a part of the factory where cement is produced. On that logic, even if the mine is situate hundreds of C miles away but is connected with the factory by a railway line for transporting mineral or raw material, the said mine will become a part of the factory of production. 'Factory' has been defined in section 2 (e) of the Central Excise Act, 1944 and it reads as under:

D
> "factory" means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process connected with the production o. these goods is being carried on or is ordinarily carried on."

E In view of this definition, a mine from where the raw material is extracted and is situate at some distance, but no manufacturing process is carried on, cannot qualify to be a factory.

Learned counsel for the assessee has lastly submitted that CENVAT scheme was introduced on 1.4.2000, but Rule 57AB was amended on F 29.8.2000 and was given retrospective effect from 1.4.2000, and it is this amended Rule which will govern the situation. This plea was not taken by the assessee in reply to the show cause notice, nor was it raised before any of the Excise authorities. A new plea cannot be allowed to be raised for the first time in this Court. However, even if the amended Rule is taken into G consideration, the assessee can get no advantage. The amended Rule 57AB reads as under:

> "(1) A manufacturer or producer of final products shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of,—

H
> (i) the duty of excise specified in the First Schedule to the Central

A

Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the said First Schedule), leviable under the Act;

(ii) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985, leviable under the Central Excise Act, 1944 in relation to the goods falling under sub-heading Nos. [2401.90, 2404.40, 2404.50, 2404.99] 5402.20, 5402.32, 5402.42, 5402.43, 5402.52, [5402.62, 5703.90, 8415.00, 8702.10, 8703.90, 8706.21, 8706.39 and 8711.20] of the said First Schedule;

B

C

(iii) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978);

(iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957); and

D

(v) the additional duty leviable under section 3 of the Customs Tariff Act, 1975, equivalent to the duty of excise specified under clauses (i), (ii), (iii) and (iv) above,

E

paid on any inputs or capital goods received in the factory on or after the first day of April, 2000, 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 contained in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 214/86 - Central Excise, dated 25th March, 1986 vide GSR No. 547(E), dated 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 April, 2000."

F

G

This provision shows that a manufacturer or producer shall be allowed to take CENVAT credit paid on any inputs used in the manufacture of intermediate products by a job-worker availing the benefit of exemption contained in the notification No. 214/86 dated 25th March, 1986 and received by the manufacturer for use in or in relation to the manufa-cture of final products. Explanation I of Notification No. 214/86 reads as under:

H

A

> " *Explanation I.* — For the purposes of this notification, the expression "job work" means processing or working upon of raw materials or semi-finished goods supplied to the job worker, so as to complete a part or whole of the process resulting in the manufacture or finishing of an article or any operation which is essential for the aforesaid process."

B

A manufacturer or producer himself cannot be a job worker. Here the mines are operated by the assessee itself. Therefore, in terms of the amended Rule 57AB also, the assessee cannot take CENVAT Credit for the explosives used for the blasting purposes in the mining area.

C

In view of the discussion made above, the appeals are allowed with costs. The orders passed by the CEGAT and also the Commissioner (Appeals) are set aside.

C.A. Nos. 7259-7261/2003

D

The issue involved in these appeals is exactly identical. The appeals are accordingly allowed with costs and the orders passed by the CEGAT and also the Commissioner (Appeals) are set aside.

V.S.S. Appeals allowed.