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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CENTRAL EXCISE APPEAL NO.89 OF 2008

ACC Limited ...Appellant
vs.
The Commissioner of Central
Excise, Pune-II ...Respondent

ALONG WITH
CENTRAL EXCISE APPEAL NO.99 OF 2008

ACC Limited ...Appellant
vs.
The Commissioner of Central
Excise, Pune-II ...Respondent

ALONG WITH
CENTRAL EXCISE APPEAL NO.227 OF 2008

ACC Limited ...Appellant
vs.
The Commissioner of Central
Excise, Nagpur ...Respondent

Mr.Anupam Survey a/w Mr.Priyanka Pol and Mr.Pratik Divakar i/b Little and Company for the appellant
Ms P.S.Cardozo for the respondent

CORAM : A.S.OKA, & A.K.MENON,JJ.
DATE ON WHICH JUDGMENT IS RESERVED: NOVEMBER 15,2017
DATE ON WHICH JUDGMENT IS PRONOUNCED:MARCH 28, 2018

JUDGMENT : (PER A.S.OKA,J.)

1 These appeals can be conveniently disposed of by a common Judgment as the issue which arises in these appeals is more or less same. So far as CEXA No.89 of 2008 is concerned, it takes exception to the Judgment and Order dated 22nd August 2007 passed

by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai (for short "the Appellate Tribunal"). The appeal was admitted by the order dated 13th August 2008 on the following substantial questions of law:

> "1 Whether in the facts and circumstances of the case credit of excise duty paid on welding electrodes is eligible to be taken as inputs and/or capital goods, under the Cenvat Rules in respect of its use in repair and maintenance of capital goods and also installation of new machines used in the factory for manufacture of excisable final products?
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> 2 Whether in the facts and circumstances of the case credit of excise duty paid on welding electrodes is available to the appellant for its use in the installation of capital goods used in the factory for manufacture of excisable goods?
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> 3 Whether in the facts and circumstances of the case when the issue involves an interpretation of a legal provision is penalty under the Cenvat Rules imposable?
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> 4 Whether in the facts and circumstances of the case is establishment of mens rea on the part of the Appellant essential before any penalty can be imposed upon the

Appellant under Rule 13 of the Cenvat Rules?"

2 Show cause notice dated 7th February 2005 was issued by the Assistant Commissioner of Central Excise, at Chandrapur to the appellant. By the said show cause notice, the appellant was called upon to show cause as to why cenvat credit duty amounting to Rs.40,556/- should not be disallowed and recovered from the appellant under Rule 12 of the Cenvat Credit Rules, 2002 read with section 11A of the Central Excise Act,1944. Consequently, show cause notice called upon the appellant to show cause as to why penalty should not be imposed under Rule 13 of the Cenvat Credit Rules,2002 (for short "the said Rules of 2002") and as to why interest should not be recovered under section 11AB of the Central Excise Act,1944 (for short "the said Act of 1944"). The show cause notice was replied by the appellant. In the reply, it was stated that the appellant was inter alia engaged in manufacture of cement falling under the Sub Heading No.2502.29 of the Central Excise Tariff Act,1985 (for short "the Tariff Act") and for that purpose, the appellant has a manufacturing unit in District Chandrapur. It was pointed out that the appellant has availed credit of Rs.40,556/- of duty paid on welding electrodes falling under chapter heading No.8311.00 of the Tariff Act. It was pointed out that the said welding electrodes are utilized for the repairing/ maintenance of capital goods and are further used in manufacture. It was pointed out that the welding

electrodes are consumed in the work of fixing of machinery and also the same are used for maintenance for the capital goods. In fact, the said welding electrodes are an integral part of the manufacturing process and can be said to have been utilized in or in relation to manufacture of the final product. It was also contended that when the electrodes are used for installation/fixing of machinery or are used as accessories, credit is available. It was contended that no penalty and interest was payable. Similar notices have been issued by the Assistant Commissioner on 22nd February 2005 and 10th March 2005 making similar allegations for a different period. The amounts involved in the said notices were Rs.61,730/-and Rs.2,06,803/- respectively. Similar reply was issued by the appellant to the said notices.

3 The show cause notices were decided by the Order in Original passed by the Assistant Commissioner of Central Excise, Chandrapur by order dated 28th July 2005. He disallowed the CENVAT credit of Rs.3,09,089/- subject matter of three notices. He imposed penalty of Rs.78,000/- on the appellant in exercise of power under Rule 13 of the said Rules of 2002. He also directed payment of interest on the amount of Rs.3,09,089/- by exercising power under section 11AB of the said Act of 1944. Separate appeals were preferred by the appellant against the said Order in Original which were dismissed by the Commissioner (Appeals), Customs and Central Excise, Nagpur. Being aggrieved by the

order of the Appellate Authority, an appeal was preferred by the appellant before the Appellate Tribunal which was dismissed by order dated 22nd August 2007 which is impugned in this appeal. The Appellate Tribunal referred to and relied upon the decision of its own Larger Bench in the case of Jaypee Rewa Plant v. CCE, Raipur[1]. Relying upon the said decision, the Appellate Tribunal held that gases and electrodes which were used for repairs and maintenance of the plant and machinery cannot be considered to have been used in relation to manufacture of final products as they were not used co-extensively with the process of manufacture of final products. It was held that the use of welding electrodes was not integrally connected with the process of manufacture. The Larger Bench of the Appellate Tribunal in case of Jaypee Rewa Plant (supra) rejected the contention that the expression, "in or in relation to the manufacture of goods" was wide enough to cover the welding electrodes and gases used for repairs and maintenance of the plant, machinery and equipments in the appellant's cement factory. Therefore, by the impugned order, the Appellate Tribunal confirmed the finding that the appellant was not entitled to take credit of Rs.3,09,089/-. However, penalty was brought down from Rs.78,000/- to Rs.20,000/-.

4 As far as Appeal No.99 of 2008 is concerned, it arises out of show cause notice issued in April 2006 to the appellant. This was a case where the

1 2003 (159) ELT 553 (LB)

appellant had availed Cenvat Credit amounting to Rs.1,05,980/- on welding electrodes. The allegations in the show cause notice were similar to the one made in the show cause notices subject matter of Appeal No.89 of 2008. There is one more show cause notice which is the subject matter of the same appeal which relates to the Cenvat credit amounting to Rs.2,25,051/- availed of by the appellant. The Order in Original was passed by the Deputy Commissioner of Central Excise confirming dis-allowance of Cenvat credit of Rs.3,31,031/-. By the said order dated 25th July 2016 and penalty of Rs.1,75,000/- was imposed in exercise of power under Rule 15 of Cenvat Credit Rules,2004 (for short "the said Rules of 2004"). Interest on the aforesaid amount was also made payable in accordance with Rule 14 of the said Rules of 2004. An Appeal preferred by the appellant was dismissed by the Commissioner (Appeals), Central Excise, Nagpur. By the impugned Judgment and order dated 20th November 2007, the Appellate Tribunal dismissed the appeal preferred by the appellant by relying upon decision of its own Larger Bench in the case of Jaypee Rewa Plant (supra).

5 The Appeal No.227 of 2008 arises out of a similar show cause notice wherein it is alleged that credit in the sum of Rs.2,81,565/- was illegally taken on welding electrodes. The demand made on the basis of the show cause notice was confirmed by the Assistant Commissioner. He imposed penalty of Rs.75,000/- on the basis of Rule 15 of the said

Rules of 2004. Interest was also ordered to be paid. The said demand has been confirmed upto the Appellate Tribunal.

6 The learned counsel for the appellant in support of the Appeal Nos.88 and 89 of 2008 submitted that the Appellate Tribunal has only relied upon the decision of its larger Bench in the case of Jaypee Rewa Plant (supra). He submitted that the Appellate Tribunal ignored the subsequent decision in the case of India Sugars and Refineries Limited vs. Commissioner of Central Excise, Bangalore[2] in which the Appellate Tribunal has departed from the view taken in the case of Jaypee Rewa Plant (supra) by relying upon its earlier decision in the case of Commissioner of Customs & Central Excise, Meerut-I vs. Mody Rubber Limited[3] and held that the welding electrodes used for repairs and maintenance of plant and machinery are eligible for cenvat credit both as capital goods as well inputs. He pointed out the decision of the Division Bench in the case of Rajasthan High Court in the case of Hindustan Zinc Ltd. vs. Union Of India[4]. He submitted that the decision of the Appellate Tribunal in the case of Jaypee Rewa Plant (supra) was disapproved by the Rajasthan High Court by holding that the Appellate Tribunal has not correctly read what the Supreme Court has held in the case of J.K.Cotton Spinning and Weaving Mills Co. Limited vs. Sales Tax Officer, Kanpur[5].

2 2006 (205) E.L.T. 717
3 (119) E.L.T. 197
4 2008 (228) E..L.T. 517 (Raj.)
5 1997 (91) E.L.T. 34 (S.C.)

Reliance was accordingly placed on the decision of the Apex Court in the case of J.K.Cotton Spinning and Weaving Mills Co. Limited (Supra). He relied upon a decision of the Division Bench of Chhastisgarh High Court dated 19th April 2010 in the case Ambuja Cement Vs. Commissioner of Central Excise and another. Even the said decision holds that the decision of the Appellate Tribunal in the case of Jaypee Rewa Plant (supra) is no longer good law.

7 The learned counsel for the respondent submitted that the decisions of the Rajasthan and Chhatisgarh High Court do not have binding efficacy. He submitted that in the impugned orders, the Appellate Tribunal has considered the decision in the case of J.K.Cotton Spinning and Weaving Mills Co. Limited (supra).

8 After the conclusion of the submissions, our attention was invited to the decision of the Apex Court in the case of Ramala Sahakari Chini Mills Limited, Uttar Pradesh vs. Commissioner of Central Excise, Meerut-I[6].

9 We have given careful consideration to the submissions. The facts of the case in these appeals are similar. Only the amount of credit and the period for which it was taken differ. We have perused the relevant decisions relied upon by the parties. The stand taken throughout by the

6 (2010) 14 SCC 744

Appellant right from the reply to the show cause notices is very consistent. For that purpose, we must quote paragraphs 8 to 12 of the reply to one of the notices forming subject matter of Appeal No.89 of 2008 which read thus:

> "8 It is submitted that the show cause notice under reply proceeds on an erroneous assumption that we had availed credit of duty paid on Welding Electrodes as Capital goods. This is factually incorrect.
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> 9 It is submitted that the said welding electrodes are consumed in the process of installation & fixing of the Machinery and also for the maintenance of the capital goods used by us. As such, the said welding electrodes are an integral part of the manufacturing process and can be said to have been utilised in or in relation to the manufacture of the final product. Also they used for fixing/installation of the machinery for the manufacturing of the Final Product.
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> 10 It is submitted that the Cenvat Credit Rules 2002 define "inputs" as under:
>
> (g) "input" means all goods, expect 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 lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for any other purpose, within the factory production.

Explanation 1 – The high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

Explanation 2 – Inputs includes goods used in the manufacturer of capital goods which are further used in the factory of the manufacturer:

11 It is submitted that it is clear from the definition above that inputs includes oil goods, used in or in relation to the manufacturer of a final products whether directly or indirectly and whether or not the same is contained in final product.

12 It is submitted that although the said welding electrodes used for repairs and maintenance of machinery, do not fall within the definition of `capital goods' under Rule 2(b) of the Rules, they are nevertheless eligible for credit as `inputs' within the meaning of section 2(g) of the Rules. It is

submitted that in or to be eligible for credit as inputs under Rule 2(g) of the Rules, the only requirement is that the said goods must have been used in or in relation to the manufacture of the final product."

(underline supplied)

10 At this stage, it will be necessary to refer to the decision of the Apex Court in the case of J.K.Cotton Spinning and Weaving Mills Company Limited vs. Sales Tax Officer,Kanpur (supra) which is by a Bench of three Hon'ble Judges. In paragraphs 8 and 9 of the said decision, the Apex Court has held thus:

"8...The expression "in the manufacture of goods" should normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. Where any particular process is so integrally connected with the ultimate production of goods that but for that process, manufacture or processing of goods would be commercially inexpedient, goods required in that process would, in our judgment, fall within the expression "in the manufacture of goods." For instance, in the case of a cotton textile manufacturing concern, raw cotton undergoes various processes before cloth is finally turned out. Cotton is cleaned, carded, spun into yarn, then cloth is woven, put on rolls, dyed, calendered and pressed. All these

processes would be regarded as integrated processes and included "in the manufacture" of cloth. It would be difficult to regard goods used only in the process of weaving cloth and not goods used in the anterior processes as goods used in the manufacture of cloth. To read the expression "in the manufacture" of cloth in that restricted sense, would rise many anomalies. Raw cotton and machinery for weaving cotton and even vehicles for transporting raw and finished goods would qualify under Rule 13, but not spinning machinery, without which the business cannot be carried on. In our judgment, Rule 13 does not justify the importation of restrictions which are not clearly expressed, nor imperatively intended. Goods used as equipment, as tools, as stores, as spare parts, or as accessories in the manufacture or processing of goods, in mining, and in the generation and distribution of power need not, to qualify for special treatment under section 8(1), be ingredients or commodities used in the processes, nor must they be directly or actually needed for "turning out or the creation of goods."

9 In our Judgment if a process or activity is so integrally related to the ultimate manufacture of goods so that without that process or activity manufacture may, even if

> theoretically possible, by commercially inexpedient quality for special treatment. This is to say that every category of goods "in connection with" manufacture of, or "in relation to" manufacture, or which facilitates the conduct of the business of manufacture will be included within Rule 13. Attention in this connection may be invited to a judgment of this Court in which it was held that vehicles used by a Company (which mined ore and turned out copper in carrying on activities as a miner and as a manufacturer) fell within Rule 13, even if the vehicles were used merely for removing ore from the mine to the factory, and finished goods from the factory to the place of storage. Spare parts and accessories required for the effective operation of those vehicles were also held to fall within Rule 13. See Indian Copper Corporation Ltd. v. Commr. of Commercial Taxes, Bihar, C.A.No.1021 of 1968, dated 19.10.1964."
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> (underline added)

11 In the case of Jaypee Rewa Plant (supra), It was held that the welding electrodes which are used for carrying out repairs to the plant and machinery are not used co-extensively for the purpose of the manufacture of final product. In the case of Hindustan Zinc Ltd. vs. Union Of India (supra), a Division Bench of Rajasthan High Court dealt with the decision of Jaypee Rewa Plant (supra). In

paragraph 11, the Rajasthan High Court observed that in the case of Jaypee Rewa Plant (supra), only a portion of relevant paragraph of the decision of the Apex Court in the case of J.K.Cotton Spinning and Weaving Mills Company Limited was reproduced and the material portion which lays down that the goods need not be ingredients or commodities used in the process, nor must they be directly and actually needed for "turning out or the creation of goods" was not considered. The Rajasthan High Court therefore, proceeded to hold that the decision of the larger Bench of the Appellate Tribunal is no longer a good law. The same issue arose for consideration of Chattisgarh High Court in the case of Ambuja Cement (supra). Ultimately it was held that the decision in the case of Jaypee Rewa Plant (supra) is not a good law.

12 Now, coming back to the impugned order, the Appellate Tribunal has proceeded on the footing that the decision of its Larger Bench in the case of Jaypee Rewa Plant (supra). After having perused the decision of the Apex Court in the case J.K.Cotton Spinning and Weaving Mills Co. Limited (supra), We agree with the view expressed by Rajasthan and Chhatisgarh High Courts that the said decision of the Larger Bench of the Appellate Tribunal in the case of Jaypee Rewa Plant is based on incorrect reading of the law laid down by the Apex Court in the said decision.

13 Therefore, the test laid down by the Apex Court

in the case of J.K.Cotton Spinning and Weaving Mills Co. Limited (supra) will have to be applied to the present case. The Appellate Tribunal ought to have applied its mind to the question whether the welding electrodes were used by the Appellant directly or indirectly in the manufacture of final products or in relation to manufacture of final products. The expression "in the manufacture of final products" should normally encompass the entire process carried on of converting raw material into finishing goods. The question is whether the particular process in which the electrodes were used was integrally related to the ultimate manufacture of goods so that without that activity or process, the manufacture though theoretically possible, but would be commercially inexpedient.

14 As the Appellate Tribunal proceeded to decide the Appeals only by relying upon the decision of its larger Bench in the case of Jaypee Rewa Plant (supra), the material factual aspects have not been examined. Only finding recorded is that there is no evidence on record to show that the welding electrodes and the gases were used in the actual process of manufacture of any capital goods.

15 Surprisingly, in paragraph 4 of the impugned order, the Appellate Tribunal has observed "I hold that admittedly the Appellants herein are not entitled to take credit". There was no such admission on the part of the appellant as can be seen from the Judgment.

16 In our view, the Appellate Tribunal will have to re-consider the case of the appellants on facts on the basis that the decision in the case of Jaypee Rewa Plant (supra) is no longer good law. In these appeals which are maintainable only on the substantial questions of law, it will not be appropriate for us to render findings of fact.

17 Merely because one issue is referred to the Larger Bench in the case of Ramala Sahakari Limited (supra), it cannot be said that the law which prevails today should not be followed. The Appellate Tribunal has not denied relief to the appellant on the ground that the definition of inputs is restricted only six categories mentioned therein.

18 Accordingly, we pass the following order:

(I) Impugned Judgments and Orders are set aside and the appeals before the Appellate Tribunal are remanded to the Appellate Tribunal for a fresh decision in the light of what is held in this Judgment;

(II) Considering the fact that the appeals before the Appellate Tribunal were of the year 2006, we are sure that necessary out of turn priority will be given by the Tribunal for deciding the Appeals;

(III) These appeals are partly allowed on above terms with no order as to costs.

(A.K.MENON,J.) (A.S.OKA,J.)