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**Modi Cement Ltd. Vs. Collr. of Cus. and C. Ex.**

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**SooperKanoon Citation** : sooperkanoon.com/11510

**Court** : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Jul-10-1997

**Reported in** : (1998)(99)ELT378TriDel

**Appellant** : Modi Cement Ltd.

**Respondent** : Collr. of Cus. and C. Ex.

**Judgement** :

1. This appeal with cross-objection arises from the order-in- original dated 2-1-1995 passed by the Collector, Central Excise, Raipur.

2. By the impugned order, the Id. Addl. Collector has directed to pay/reverse Modvat credit amounting to Rs. 2,53,369/- said to have been wrongly availed/taken during the period May, 1987 to April, 1990 and October, 1990 to February, 1991 under Rule 57-1 of the Central Excise Rules read with Section 11A of the Central Excise Rules. He has also imposed a penalty of Rs. 25,000/- under Rule 57Q of Central Excise Rules, 1944. It is alleged in the show cause notice dated 9-4-1992 issued to the appellants contravention of Rule 57D(1) of Central Excise Rules in as much as they did not use 16086.92 MT of chemicals falling under Chapter Sub-heading 2806.90 of Central Excise Tariff, 1985 in the manufacture of final product for which it was brought in the factory and took credit on the aforesaid quantity of gypsum. On the plea that this quantity had been lost in the process for the period May, 1987 to April, 1990 and October, 1990 to February, 1991. It has been stated that there is no process shown in the raw material record/Modvat record and hence they have wrongly taken the credit of the

said amount which was used in or in relation to the manufacture of the same, therefore, they were issued with the show cause notice.

3. It was contended by the assessee that gypsum was chemically known as calcium sulphate ($CaSO_4.2H_2O$) which contains considerable percentage of moisture and that the calcium sulphate ($CaSO_4.2H_2O$) is the byproduct of fertilizers i.e. Tri-ammonium phosphate; that when the calcium sulphate is taken out during manufacture of Tri-Ammonium phosphate, it remains in wet form and considerable percentage of water is found in it. Since a good quantity of calcium is found in calcium sulphate ($CaSO_4.2H_2O$), therefore, it is widely used for manufacture of cement. It is stated that for the purpose of paying excise duty on gypsum, the quantity is weighed including moisture and duty is paid on total quantity including water percentage. It is also stated that the receiving factory also does not have any device to separate the moisture percentage, therefore, the calcium sulphate (gypsum) is used as it was received.

When the gypsum is mixed with clinker and grinded in cement mill, the moisture gets evaporated as the temperature of cement mill during grinding remains high i.e. around 100 to 110C. They have challenged the percentage of moisture taken by the department for calculating the duty as based on imagination and it bears no solid proof. It is also contended by the appellant that Rule 56A(3)(iv) of Central Excise Rules, 1944 provides that any waste generated out of the material brought under Rule 56A can only be removed after payment of duty or where the waste is unfit for further use it can be destroyed in the presence of proper officer and duty payable thereon shall be remitted.

In respect of visible losses, Rule 56A allows utilisation of credit if it is not removed from the factory. It is stated that since in the case of unvisible losses there is no question of any removal from the factory, therefore, they cannot be disallowed to utilise the Modvat credit on gypsum. The moisture loss in gypsum is unvisible, therefore, the question of removal from factory does not arise. Further, no removal has taken place in case of moisture loss in gypsum, therefore, the question of reversing Modvat credit from RG 23 Pt. II is also out of question. In terms of provision of Rule 57A read with Rule 57D of Central Excise Rules, 1944, Modvat

credit is allowed on specified inputs used in or in relation to the manufacture of final product and is not to be denied in respect of inherent moisture losses arisen during the manufacture of the final product. It is stated that no reduction in the Modvat credit will be made on account of bona fide processing losses occurred during the manufacturing operation, to which the material or component parts received under Rule 56A or subjected.

It is stated that gypsum is an important ingredients for manufacture of cement and it is consumed as it was received. During the course of manufacture of cement, moisture gets evaporated as the temperature of cement mill remains between 100 to 110C. The losses on account of inherent moisture is purely bona fide processing losses, therefore, the Modvat credit cannot be disallowed under Rule 57D of Central Excise Rules, 1944.

4. Ld. Collector on adjudication did not agree with them and has gone to hold that they were liable to pay duty on loss occurred in kutcha yard/open space since inception. He further held that larger period is invokable and the demand can be confirmed under Rule 57-1 read with Section 11A of the Act and penalty also imposable.

5. Ld. Advocate for the appellant submits that the Collector has gone beyond the period of six months as the allegation of loss that occurred in the kutcha pit which was not originally in the show cause notice or about the fact of loss occurring during the month of manufacture. He also submits that there was no allegation of any mis-statement in the show cause notice and duty confirmed is for the period 1987 upto 1990 and the show cause notice is dated 9-4-1992 and hence the demands are clearly time-barred. He submits that the process loss is invisible during the course of manufacture and hence such process loss is admissible under Rule 57D of Central Excise Rules. He submits that the Tribunal in similar cases have granted the benefit as in the case of Rishi Iron & Steel Ltd. v. C.C.E., Raipur as reported in 1996 (87) E.L.T. 110 (Tribunal), wherein it had been held that burning losses are technologically unavoidable in the process of manufacture of the final products after the inputs received have been put to the intended use.

The Tribunal held burning losses have to be treated as waste in the nature of invisible loss and Modvat credit on inputs on account of burning losses can be extended the benefit contained under Rule 57D. He also relies on the judgment rendered in the case of C.C.E., Calcutta-II v. Multiwyn Industrial Corporation as reported in 1995 (80) E.L.T. 708 (Tribunal) wherein the similar view was taken. He also relies on the judgment rendered in the case of Varuna Sulphonators Pvt. Ltd. v.U.O.I, as reported in 1993 (68) E.L.T. 42 (All.). He also submits that there was no intention to evade duty or deliberate act on the part of the assesse to evade duty or misuse of rules and hence penalty is not imposable.

7. I have heard both sides. In the show cause notice the allegation was that there has been no loss in the process as shown in the production report and modvat record. It was contended as noted above that this loss occurred during the manufacture. While giving the findings, the ld. Commissioner held that the losses have occurred in the kutcha pit.

This is a new point made by the Collector which was not an allegation made in the show cause notice. The show cause notice does not specifically brings out the nature of loss on 16086.92 MT of gypsum was not used in or in relation to the manufacture of the cement. The ld.Collector has gone beyond the allegations made out in the show cause notice. The proceedings are liable to be quashed on this ground itself.

Further the proceedings are liable to be set aside on the time-bar as the show cause notice does not allege suppression, wilful mis-statement or mis-representation under the proviso to Section 11A of the Act. The demand has been raised on 9-4-1992 for the period 1987 to June 1990.

The Collector has not given any finding as to how the proviso to Section 11A of Central Excise Act could be invoked in the present case for the larger period. The details have been found from the relevant register. These material facts were available with the department and the same had been submitted along with the statutory returns. There cannot be any ground for allegation misrepresentation or fraud to attract the proviso to Section 11A of the Act. It has to be clearly held that the demands are barred by time and that the department has not made out any

case for imposing penalty. The department has to show the deliberate and concerted action on the part of the assessee to evade duty with a view to achieve personal benefit. In that view of the matter, the imposition of penalty under Rule 173Q(bb) does not arise in the present case.

8. The appellant's plea on merits is that it is a case of loss that has occurred during the manufacture of cement. It is the contention of the appellant that such technologically losses is unavoidable in terms of Rule 57D, Modvat credit on such losses cannot be denied. They have also challenged the percentage of losses arrived at by the department. On careful consideration on merits of the case, there is lot of force in the argument of the appellant that these losses occurred during the process of manufacturing cement and such losses are unavoidable. There is no finding given by the Collector but he proceeded to hold that the losses occurred in the kutcha pit, which is a new ground made out by him. The plea of the losses during the manufacture raised by the assessee is required to be accepted as the provision of Rule 57D itself clarifies that "Credit of specified duty allowed in respect of any inputs shall not be denied or varied on the ground that part of the inputs is contained in any waste, refuse, or by-product arising during the manufacture of the final product, whether or not such waste, refuse or by-product is exempt from the whole of the duty of excise leviable thereon or is chargeable to nil rate of duty or is not specified as a final product under Rule 57A. Ld. Counsel has also relied on the judgment which clearly brings out the facts and circumstances of the case of Rishi Iron & Steel Ltd. cited supra, wherein the Tribunal held that burning losses are technologically unavoidable in the process of manufacture of the final product after the inputs received have been put to the intended use. In such a situation burning losses have to be treated as waste in the nature of invisible loss and Modvat credit on inputs on account of burning losses can be extended the benefit. Thus this ratio of the above judgment of the Tribunal is squarely applicable to the present case. In the case of C.C.E., Calcutta-U v. Multiwyn Industrial Corporation, the Tribunal noted that the Assistant Collector has observed in his order that the burning losses vary from 5 to 8% and in some cases, can go upto 10%, whereas in the present case such losses were almost uniformly 10%. He had allowed 5% losses and demanded duty on the losses in excess thereof. He has also observed that the losses should be of varying levels and not uniform as reported by them. The

Tribunal has observed that there is no basis for such a finding. The loss due to burning in the manufacturing process will depend upon various factors like the material used, product made, the process, power supply including breakdown etc. Merely because the losses were reported around 10% it cannot be held that such figures did not represent the correct position and that the inputs were not accounted for. Moreover, the normal quantum of losses as per the enquiries conducted is reported to be in the range of 5 to 8%. There is no reason indicated, why the minimum level has been applied and excess there above disallowed. The method employed is arbitrary and cannot be upheld and the Revenue appeal was rejected. This ratio is also applicable to the facts of this case.

9. In view of the findings arrived at by me, the impugned orders are set aside and the appeal allowed. Cross-objection also stands disposed of accordingly. Operative part of the order was pronounced in the open Court on the date of hearing i.e. 20-6-1997.

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