

Aditya Cement Vs. Commissioner of Central Excise,

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-16-2002

Reported in : (2002)(143)ELT389TriDel

Judge : P Chacko

Appellant : Aditya Cement

Respondent : Commissioner of Central Excise,

Judgement :

1. The appellants are cement manufacturers. One of their raw materials is limestone. They have their own limestone mines situate away from the factory. They have crushers also which crush big boulders of the mined limestone into smaller ones. Dumpers are used for transferring the big boulders from the mines to the crushers. During March, 1996, the appellants took Modvat credit of Rs. 56,100/- on the dumper tyres under Rule 57Q. The department, by show cause notice, proposed to disallow this credit on the ground that the dumper tyres were not eligible capital goods under the said rule. The proposal was contested by the party. In adjudication of the dispute, the Jurisdictional Assistant Commissioner denied the above credit to the as-sessee and imposed on them a penalty of Rs. 10,000/-, after recording a finding that the dumpers were not used in the factory of production of cement and, for that reason, the dumper tyres did not qualify to be capital goods under Rule 57Q. This decision of the Assistant Commissioner was upheld by the Commissioner (Appeals) in the appeal preferred by the aggrieved party.

Hence the present appeal.

2. Heard both sides. Ld. Advocate, Shri B.L. Narasimhan for the appellants submits that, as pleaded by them before the adjudicating and first appellate authorities, the dumpers were actually used as a means of transportation of their raw material (limestone) from the mines via crushers to the factory and hence ought to have been accepted as having been used for the manufacture of cement and having qualified to be capital goods under Rule 57Q. Ld. Counsel relies on the decision of the Tribunal's South Zonal Bench (Chennai) in CCE v. Pepsico India Holdings Ltd. [2001 (130) E.L.T. 193 (Tribunal) = 2001 (42) RLT 800]. In the cited case, the Bench distinguished the Tribunal's Larger Bench decision in Vikas Industrial Gas v. CCE - 2000 (118) E.L.T. 257 (Tribunal-LB) and held that PVC pipes used for drawing water from a well to the assessee's factory premises were within the factory as defined under Section 2(e) of the Central Excise Act and the same were eligible capital goods under Rule 57Q, having been used for drawing water (raw material) for manufacture of the final product viz. aerated water. Ld. Counsel seeks to draw analogy between the PVC pipes involved in the cited case and the dumpers in the instant case. With regard to the penalty imposed on the appellants, Ld. Counsel submits that, in the absence of wilful contravention of rules by the appellants and in view of the fact that the dispute between them and the department involved interpretation of the provisions of Rule 57Q, there is no room for imposing any penalty in this case.

3. Ld. JDR, Shri S.C. Pushkarna reiterates the findings of the authorities below.

4. Examined the submissions. It appears that, in their reply to the show cause notice as well as in their appeal preferred to the Commissioner (Appeals), the assessee had taken a definite stand that the dumpers were used both within the factory and outside it. The authorities below have found that the dumpers were used for transporting limestone boulders from the mines to the crushers which were found to be located outside the factory premises. They have, therefore, held that the tyres of the dumpers were never used within the factory and hence did not qualify to be capital goods under Rule 57Q. In the show cause notice, the department had alleged that the dumper tyres were not eligible capital goods

under Rule 57Q "in view of their use as stated by the assessee". No statement by the party given to the department prior to the issuance of the show cause notice is forthcoming from the record. On the other hand, their definite plea as to the use of the dumper tyres is available in their reply to the show cause notice as well as in their appeal filed with the Commissioner (Appeals). None of the lower authorities has found any inconsistency between such plea and the statement allegedly given by the party prior to issuance of the show cause notice. Therefore, it has to be observed that the authorities below were seized of the appellants' consistent case that the dumpers were used not only outside the factory but also within it. If any dumper was used within the limits of the 'factory' as defined under Section 2(e) of the Central Excise Act, the same would certainly qualify to be capital goods under Rule 57Q, and so would any tyres attached thereto. If, on the other hand, any dumpers in question were located beyond the factory limits, the consequence would be otherwise. Undisputedly, the dumpers were used for transferring big limestone boulders from the mine to the crushers. The mine was admittedly located away from the factory limits. The question now is about the location of the crushers. If the crushers were also located beyond the factory limits with reference to the approved plan of the factory, then the dumpers should be held to be located beyond such limits, in which event the benefit of capital goods credit would not be available to the dumper tyres. If, on the other hand, it be found that the crushers were located within the factory limits with reference to the approved plan of the factory, then the dumpers would be held to have been used for transferring raw material into the "factory as defined under Section 2(c). These subtle facts require to be ascertained at the adjudicatory level for which purpose the matter will stand remanded. As regards the case law cited by Id. Advocate. I have to say that I am not impressed with the reliance placed on the cited decisions. The facts of the instant case are not similar to those of the case of *Pepsico India Holdings*, nor of *Vikas Industrial Gas*.

5. The orders of the authorities below are set aside and the appeal is allowed by way of remand, directing the adjudicating authority to inspect the premises, ascertain as to whether the crushers are located within the factory defined under Section 2(e) of the Act with reference to the approved plan, and decide the matter afresh in accordance with law and the principles of natural justice and having

regard to the observations contained in Para (4) above.

6. It is also made clear that it will be open to the adjudicating authority to examine whether the appellants have been allowed to avail of the credit of duty paid on the dumpers during the material period.

In case they were so allowed, the tyres being accessories to the dumpers would be eligible capital goods under Rule 57Q as the rule stood at that time. If the party either did not claim capital goods credit or was not allowed to take such credit on dumpers in accordance with law during the material period their claim to avail Modvat credit on the dumper tyres as accessories will be unsustainable.

7. It is made clear that a reasonable opportunity of being heard should be given to the assessee before final order is passed by the adjudicating authority.

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