

**Diamond Cements Vs. Cce**

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

**Decided On :** Feb-13-2003

**Reported in :** (2003)(87)ECC560

**Judge :** A T V.K., P Bajaj

**Appellant :** Diamond Cements

**Respondent :** Cce

**Judgement :**

1. In all these 11 appeals, filed by M/s. Diamond Cements, the issue involved is regarding admissibility of Modvat Credit.

2. Shri M.P. Devnath, learned Advocate, submitted that in 8 appeals Modvat Credit has been denied to them in respect of Lubricants on the ground that the lubricant has been used in dumpers, D.G. sets, aerial ropeway which are not used in the factory of production but for transportation of goods either in the mines or transportation of goods from mines to the factory, placing reliance on the decision in the case of Jay Pee Rewa Cement v. CCE, 2001 (77) ECC 457 (SC : 2001 (133) ELT 3 (SC). The learned Advocate, further, submitted that at the appellants' unit at Narsingarh, Damoh, the only activity undertaken is clinkerisation and cement grinding is done at Imlai; that the findings for disallowing the Modvat Credit on Lubricants is factually incorrect; that no D.G. sets are located outside the factory in which the lubricants and greases are used; that all the D.G. sets are located within the approved factory premises; that, further, the D.G. sets are not

used for transportation of goods in the mines or for transportation of goods from mines to the factory since these are used for the operation of the kiln; that therefore, the Modvat Credit cannot be denied to them.

3. Countering the arguments Shri D.N. Chaudhary, learned DR, submitted that the Appellants themselves have mentioned in paragraph 2.5 of their memorandum of appeal that "all lubricants were not used in transportation of goods in mines or from mines or in D.G. sets or in ropeway. It is submitted that a substantial part of lubricants are used in other processing plants and machinery like mills, crushers, kiln, etc." The learned D.R. contended that it is, thus, evident that all the lubricants were not used within the factory premises.

4. We have considered the submissions of both the sides. It has not been disputed by the Revenue that the Modvat Credit of the duty paid on lubricants is available to the Appellants. It has been disallowed only on the ground that lubricants have been used in dumpers, D.G. sets, Aerial Ropeway which are not used in the factory of production but in the mines. The Appellants on the other hand have contended that the lubricants are used only within the factory of production. As per the decision of the Supreme Court in Jay Pee Rewa Cement case Modvat Credit of the duty paid on the capital goods is admissible only when the capital goods are used within the factory of the manufacture. In all these 8 appeals the issue revolves around the fact whether the lubricants were used in the machine/machinery within the factory or outside the factory which is a matter of fact. We, therefore, remand all these 8 appeals to the Adjudicating Authority with the direction to first determine the place where lubricants in question had been used.

Both, the Appellants and the Department are at liberty to adduce evidence in support of their contentions.

5. In Appeal No. 1280/2002 the issue involved is availability of Modvat Credit in respect of Gear Box and Sprocket used in Ropeway System for transportation of goods from outside the factory to the factory. The learned Advocate submitted that as Ropeway is coming inside the factory they are eligible to avail the Modvat Credit of the duty paid on Gear box and Sprocket. He relies upon the decision in

the case of India Cement Ltd. v. CCE, Hyderabad, 2002 (147) ELT 393 (Tri) wherein the Tribunal had allowed the Modvat Credit on parts of the conveyor belt which was used both in the mines and the factory's end. The learned DR places reliance on the decision in the case of Jay Pee Rewa Cement and contended that as the Ropeway is used for transporting the goods from mines, Modvat Credit is not used in respect of the impugned two items.

6. We have considered the submissions of both the sides. As in respect of Gear box and Sprocket the issue is to be decided on verification of actual fact, the matter is remanded to the Adjudicating Authority.

7. In Appeals No. E/1278/2002 and E/1282/2002-NB the Modvat Credit in excess of the duty paid on the goods has been availed of as the supplier included depot surcharge in the assessable value and calculated the amount of duty on the inflated price. The learned Advocate fairly conceded that the Modvat Credit is available only in respect of the duty paid by the manufacturer of the goods and the excess amount of duty cannot be taken by the Appellants. In view of this the Appellants are not eligible to the MODVAT Credit in excess of the duty of excise paid on the inputs by their manufacturer.

Accordingly both these appeals are rejected.

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