

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

CIVIL APPEAL NOS. 1586-1587 OF 2001

M/s. IDL Industries Ltd.

Appellant (s)

Versus

Commissioner, Central Excise & Customs

Respondent (s)

(With office report)

Date: 30/03/2006 This matter was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ASHOK BHAN
HON'BLE MR. JUSTICE LOKSHWAR SINGH PANTA

For Appellant(s) Mr. P. Narasimha, Adv.
Mr. V.G. Pragasam, Adv.

For Respondent(s) Mr. B. Dutta, ASG
Mr. Rupesh Kumar, Adv.
Mr. P. Parmeswaran, Adv.

UPON hearing the counsel the Court made the following
O R D E R

The appeals are accepted in terms of the signed order. No costs.

(J.S. Rawat)
AR-cum-PS

(Kanwal Singh)
Court Master

[Signed order is placed on the file].

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

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O R D E R

The present appeals have been filed under section 35L(b) of the Central Excise Act, 1944 [for short "the Act"] against the majority decision of the Customs, Excise & Gold (Control) Appellate Tribunal, Eastern Bench at Calcutta [for short "the Tribunal"] dated 14th September, 2000 in Appeal Nos. E/R-302/95 and 38/96.

The appeals were initially heard by a two Member Bench of the Tribunal. Member (Judicial) had taken the view denying the benefit of Notification No. 191/87-CE dated 4th August, 1987 to the assessee, on the other hand, Member (Technical) took the view that benefit of the said notification or the subsequent Notification No. 7/94-CE dated 1st March, 1994 which superseded the earlier notification, was available to the assessee. In view of difference of opinion between the Member (Judicial) and Member (Technical), the matter was referred to the Umpire (a third Member).

The third Member agreed with the reasoning given by the Member (Judicial) and consequently, the appeals were rejected. The third Member, relying upon the decision of the five Members Bench of the Tribunal in the case of Jaypee Rewa Cements v. CCE, Raipur [2000(38) RLT 1111 = 2000(119) ELT 552(T-LB)], took the view that the benefit of exemption notification is not available to the assessee. The question considered in the

five Members Bench was, whether explosives used in the mines for mining limestone, which, in turn, was used for manufacture of cement, are eligible inputs for the purpose of MODVAT credit under Rule 57A of the Central Excise Rules, 1944. This question was answered in the negative. It was held that explosives used for quarrying limestone in mines situated away from the cement factory cannot be held to be the goods used 'in or in relation to' the manufacture of cement.

The notification in question extends the benefit to the goods used in the manufacture of "zinc" or "lead concentrates". For proper appreciation of the point involved herein, the relevant portion of the notification in question is extracted below:

"In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts goods falling within Chapters 28, 29, 36 and 38 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) and used in the manufacture of zinc or lead concentrates, from the whole of the duty of excise leviable thereon which is specified in the said schedule. Provided that where such use is elsewhere than in the factory of production, the procedure set out in Chapter X of the said Rules is followed."

The assessee was engaged in the manufacture of explosives classifiable under sub-heading 3602.00 in the Schedule to the Central Excise Tariff Act, 1985. The assessee supplied the explosives manufactured by it to M/s. Hindustan Copper Ltd. and M/s. Hindustan Zinc Ltd. , the public sector undertakings owned by the Government of India which, in turn, were using the explosives for blasting mines to extract copper, zinc and lead ores

which are further used in the manufacture of zinc and lead concentrates. In terms of the proviso to the notification, the benefit of the notification is available in the event of use of the items specified in the notification elsewhere than in the factory of production provided the procedure set out in Chapter X is followed.

The benefit of the notification was denied to the assessee on the ground that activity of mining did not constitute the process of manufacture. Explosives were used for blasting of mines to obtain zinc and lead ore from the mines. The use of explosives in mines does not constitute manufacture of zinc and lead concentrate but only helps in the extraction of zinc and lead ores from the mines. This finding was recorded on the basis of the decision of the five Members Bench of the Tribunal in Jaypee Rewa Cement's case (supra). The said order of the five Members Bench of the Tribunal was challenged before this Court. The decision of the Tribunal was reversed by this Court in Jaypee Rewa Cement v. Commissioner of Central Excise, M.P. [2001 (8) SCC 586] and it was concluded 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. It was further held that since the duty had been paid on the explosives, the manufacturer would be entitled to claim MODVAT credit as the explosives were used for the manufacture of the intermediate product, namely, limestone which, in turn, was used for the manufacture of cement.

The point in issue in the present case was again raised and considered in the context of this very exemption Notification (No. 191/87-CE) by the Tribunal in Commissioner of Central Excise, Jaipur v. Hindustan Zinc Ltd. [2001 (127) ELT 438 (T-Del.)]. The Tribunal relying upon the judgments of this Court in Indian Copper Corporation v. Commissioner of Commercial Taxes [1965(16) STC 259 (S.C.)] and Indian Farmers Fertilizers Cooperative Ltd. v. C.C.E. [1996 (86) RLT 177] , held that the explosives used for blasting ores in the mines are used in the manufacture of zinc concentrates and copper concentrates respectively and, therefore, eligible to the benefit of exemption in terms of Notification No. 191/87-CE.

Aggrieved against the aforesaid order of the Tribunal, the revenue sought a reference to the High Court of Judicature for Rajasthan at Jodhpur under Section 35H(1) of the Act on the following question of law said to be arising from the order of the Tribunal:

"Whether the explosive used for blasting of mines for obtaining ores and not in the manufacture of Zinc, are eligible for exemption under Notification No.191/87, dated 4-8-1987?"

A Division Bench of the High Court in Union of India v. Hindustan Zinc Ltd. [2002(142) ELT 289(Raj.)], after taking into account the judgment rendered by this Court in Jaypee Rewa Cement Case (supra), held "..... Thus, there can be no escape from the conclusion that extraction of Zinc and lead ore is an important and integrated process in the manufacture of Zinc and Lead concentrates. Thus, the explosives used in

mining operation are to be treated as used in manufacture of Zinc concentrates for the purpose of satisfying the conditions of Notification No.

191/87." The High Court found that no referable question arose from the order of the Tribunal and, accordingly, dismissed the reference petition.

Admittedly, the decision of the High Court rejecting the reference petition, was not questioned by the revenue before this Court. Revenue having accepted the principle laid down by the High Court in Hindustan Zinc case (supra), cannot be permitted to agitate the same question in view of the decision of this Court in Birla Corporation Ltd. v. Commissioner of Central Excise [2005 ELT 266 para 5] which was followed subsequently in the case of M/s. Vishal Malleables Limited v. Commissioner of Central Excise, Vadodara [C.A. No. 2363/2001 decided on 19th January, 2006].

The revenue having accepted the principle laid down in Hindustan Zinc case (supra) to the effect that extraction of zinc and ore is an important and integrated process in the manufacture of zinc and lead concentrates and therefore the explosives used in mining operation are to be treated as used in the manufacture of zinc concentrates for the purpose of satisfying the conditions prescribed in Notification No.191/87, cannot be permitted to take a stand other than the principle laid down in the said case.

This apart, the view taken by the High Court in Hindustan Zinc case (supra) is in line with the principle laid down by a three-Judge Bench of this Court in Jaypee Rewa Cement v. Commissioner of Central Excise, M.P. [2001 (8) SCC 586] and reaffirmed in Vikram Cement v. C.C.E.,

Indore.[2006(2) SCC 351], with which we respectfully agree.

For the foregoing reasons, the appeals are accepted. The impugned judgment is set aside and the assessee is held to be entitled to the benefit of the exemption Notification No. 191/87-CE dated 4th August, 1987 superseded by Notification No.7/94-CE dated 1st March, 1984. No costs.

..J.

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(ASHOK BHAN)

New Delhi;
..J.
March 30, 2006.

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(LOKESHWAR SINGH PANTA)