

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

EXCISE APPEAL NO: 86755 OF 2019

[Arising out of Order-in-Original No: 24/CEX/2018/C/NGP-I dated 26th November 2018 passed by Commissioner of CGST & Central Excise, Nagpur-I.]

Manikgarh Cement
P O Gadchandur, Chandrapur,
Maharashtra - 442908

... Appellant

versus

Commissioner of Central Excise
Nagpur - I
GST Bhavan, Telangkhedi Road, Civil Lines, Nagpur,
Maharashtra - 440001

... Respondent

APPEARANCE:

Ms Shamita J Patel, Advocate for the appellant
Shri Sanjay Hasija, Superintendent (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A / 85973 /2022

DATE OF HEARING: 29/04/2022
DATE OF DECISION: 21/10/2022

The issue in this appeal of M/s Manikgarh Cement, against order-in-original no. 24/CEX/2018/C/NGP-I dated 26th November

2018 of Commissioner of CGST & Central Excise, Nagpur-I, is the availment of MODVAT credit, under rule 57Q of erstwhile Central Excise Rules, 1944, of duty of ₹ 15,97,047/- charged on procurement of 'welding electrode' by them. Proceedings for recovery of the said credit was premised on the definition therein having excluded 'consumables', which the impugned goods were held to be, from the enumeration therein.

2. The dispute had been carried once before through the appellate hierarchy to the Hon'ble High Court of Bombay before being remanded back to the original authority for ascertaining the manner of use of the 'welding electrodes' to qualify as 'capital goods' as laid down by the Larger Bench of the Tribunal in *Jawahar Mills Ltd v. Commissioner of Central Excise, Coimbatore* [1999 (108) ELT 47 (Tribunal)]. The adjudicating authority had, in accordance with the directions of the Hon'ble High Court of Bombay, scrutinized the usage of the 'welding electrodes' in the factory and, placing reliance on circular no. 267/11/2010-CX dated 8th July 2010 of the Central Board of Excise and Customs (CBEC) which directed that credit shall not be admissible on 'input' used for repair and maintenance of 'capital goods', concluded by ordering recovery of the credit wrongly taken. It is also pointed out by Learned Authorised Representative that the definition of 'capital goods' in rule 57Q of Central Excise Rules, 1944 makes it abundantly clear that 'welding electrodes',

which erode upon usage, were not intended to be such within the scheme of credit.

3. According to Revenue, the decision of the Tribunal in *Kesar Enterprises Ltd v. Commissioner of Central Excise, Meerut-II [2015 (327) ELT 546 (Tri - Del)]*, that had been relied upon by the noticee, had been overruled by the Hon'ble Supreme Court. Notwithstanding a plethora of cases submitted by Learned Authorised Representative, including that of the Hon'ble High Court of Bombay in *Lloyd Metals & Engineers Ltd v. Union of India [2010 (252) ELT 355 (Bom)]*, Learned Counsel for appellant submits that the original authority had failed to place the decision of the Hon'ble High Court of Bombay in proper prospective and that the credit availed in January and February 1996 on the said 'electrodes' brought in to repair 'liner' deployed by the manufacturer used in the production process were, indeed, eligible.

4. In the fresh order it has been recorded that the original authority, after having examined the process of manufacture in detail, has found that the 'welding electrodes' are not 'capital goods' while it is the claim of the Learned Counsel for appellant that welding is necessary to keep the equipment in working condition and the sole alternative would have been to purchase a new machinery. According to him, it is not the intent of the law that a business decision on

deployment of new machines should be contingent upon interpretation of tax statutes and, therefore, the adjudicating authority was incorrect in arriving at the conclusion in the impugned order.

5. The question that arises is whether 'welding electrodes' are 'consumables' as held by the original authority or are used in the manufacture of excisable goods and, therefore, eligible for MODVAT credit as claimed by the assessee. The legal position is abundantly clear as, in the *Explanation* in rule 57Q, it is enumerated that

(1) "*capital goods*" means -

- (a) *machines, machinery, plant, equipment, apparatus, tools or appliances used for producing or processing of any goods or for bringing about any change in any substance for the manufacture of final products;*
- (b) *components, spare parts and accessories of the aforesaid machines, machinery, plant, equipment, apparatus, tools or appliances used for aforesaid purpose; and*
- (c) *moulds and dies, generating sets and weigh-bridges used in the factory of the manufacturer.'*

It is the claim of the appellant that within 'capital goods', which are eligible for availment of MODVAT credit, 'welding electrodes' are also found.

6. There is no doubt that ‘welding electrodes’ deplete by usage but with the material in the electrodes transferred to the ‘liner’ and the restoration renders it fit for continued production of cement. It has been held by the Hon’ble High Court of Bombay in *ACC Limited v. Commissioner of Central Excise, Pune – II* [2018 (361) ELT 433 (Bom.)] that

‘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. v. 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 Chhattisgarh 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 Chhattisgarh 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.’

7. MODVAT credit is available on procurement of goods that are ‘inputs’ with ‘capital goods’ being entitled to the extent of conformity with *Explanation* of that expression in rule 57Q of Central Excise Rules, 1944. Doubtlessly, there is no mention of ‘consumables’ in the said *Explanation* but neither is it certain that that ‘consumables’ has little to do with manufacturing process for depriving eligibility for MODVAT credit. It is not anybody’s case that ‘consumables’ cease

to exist over period of usage; it is merely that replenishment is required owing to the nature of the product. The common understanding of 'consumables' is that of depletion without transfer to the goods deployed for manufacture but there are a few, such as 'welding electrodes', which, upon such consumption, enhances the capital goods which are, undoubtedly, eligible for credit. Absence of 'welding electrodes' for deployment on 'liners', which are 'capital goods', impedes production and, therefore, its use is essential for production.

8. Proceedings of the original authority, based on the finding that the impugned goods are 'consumables' for the reasons stated therein, have ignored that the characteristics of 'consumables' does not attach to 'welding electrodes', and, therefore, the consequential recovery of MODVAT credit in the impugned order is incorrect. Accordingly, appeal is allowed and the impugned order is set aside.

(Order pronounced in the open court on 21/10/2022)

(C J MATHEW)
Member (Technical)