IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

Appeal Nos. E/41435 to 41443/2017

(Arising out of Order-in-Original Nos. 1 to 22/2017 dated 29.3.2017 passed by the Commissioner of Central Excise, Chennai – I)

M/s. KCP Limited Appellant

Vs.

CCE, Chennai – II Respondent

Appearance

Shri C. Manickam, Advocate assisted by
Shri D. Senthil Nathan, Consultant for the Appellant
Shri A. Cletus, Addl. Commissioner (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing : 07.05.2018
Date of Pronouncement: 31.05.2018

Final Order Nos. **41661-41669 / 2018**

Per Bench

The present appeals are field against the order passed by the Commissioner of Central Excise, Chennai – I Commissionerate vide Order-in-Original Nos. 1, 2 and 4 to 10/2017 dated 29.3.2017 pursuant to the order passed by the Tribunal vide Final Order Nos. 41389 to 41410/2015 dated 15.10.2015.

2. Brief facts are that the appellants are manufacturers of machinery and parts for the sugar and cement industry falling under Chapter 84 of CETA, 1985. They are also engaged in execution of orders for installation of sugar plants located in Vietnam for which appellants export machinery and components of the sugar machinery manufactured in their factory along with bought out items on which central excise duty is paid by them. The appellants availed MODVAT/CENVAT credit on the bought out items (components, assemblies) and exported the same under bond as inputs / capital goods cleared 'as such'. The department was of the view that the bought out items such as components and assemblies procured from other manufacturers were not used for manufacture or even intended for use in manufacture within the factory of appellant and therefore appellants are not eligible to avail credit on bought out items which were merely exported as such. Accordingly, the following show cause notices were issued proposing to recover the alleged wrongly availed credit which after due process of law, the adjudicating authority dropped the demand in one show cause notice and in respect of other show cause notice culminated in setting aside demand by Commissioner (Appeals).

Sl. No.	**SCN Ref/ Date**	**Period covered**	**Amount**	**O-in-O Ref.**
1.	24/96 dated 29.3.1996	July 1994 to January 1996	67,67,684	15/97 dated 26.5.1997
2.	Nil/97 dated 3.3.1997	Aug. 1996 to Jan. 1997	18,81,113	19/97 dated 30.6.1997

2.1 The Commissioner had dropped the proceedings on the following findings:-

(a) The extended period was not invocable as the department had already issued two notices on the very same issue for the period June 1994 to August 1994 and later the credit was held to be eligible to the appellant as per the order passed by Commissioner (Appeals) in Order-in-Appeal No. 8/96 dated 12.1.1996.

(b) The Government's intention is to export goods and not taxes.

(c) The bought out inputs and capital goods are eligible for credit when these are intended to be used in the manufacture of the final product which is sugar plant in CDK condition.

(d) The Board's Circular 283/117/96-CX dated 31.12.1996 allowed inputs to be removed 'as such' either under bond or on claim for rebate of duty as in the case of final products. The relevant portion of Board Circular reads as under:-

> *"5. Accordingly, it is clarified that the MODVAT credit in RG 23A Part Ii account against the export of inputs as such under bond can be utilized in the same manner as it is provided for a final product under proviso to Rule 57F(4). Obviously, it follows from this that such inputs should be allowed to be exported under bond without any reversal of the credit"*

2.2 Aggrieved by the dropping of demand, the department filed two appeals E/1219/1998 and E/1379/1998 before the Tribunal. The Tribunal disposed the appeals vide Final Order

Nos.301 & 302/2003 dated 2.5.2003 reported in 2003 (161) ELT 589 (Tri. Chennai). The operative portion of the said order is reproduced as under:-

> *"8. In view of our above discussion, we are of the considered opinion that the bought out items, both inputs and capital goods in question, cannot be considered as eligible inputs/capital goods for availing Modvat credit and the sugar plant machinery on erection has to be considered as an immovable property and it cannot be considered as goods on erection. We, therefore, hold that the order of the Commissioner dropping the proceedings against the respondents is not legal and proper. Accordingly we set aside the impugned orders and remand the matter to the original authority for computing and confirming the amount of irregularly availed Modvat credit including imposition of appropriate penalty, after giving an effective opportunity of hearing to the appellants, in accordance with law. The appeals are thus allowed by remand. The cross-objections stand disposed of accordingly."*

2.3 In the above order, the Tribunal observed that Rule 57A and 57Q of erstwhile MODVAT Rules, specifically mention the words 'used within the factory / in his factory'. The bought out items were not used within the factory. The Board's Circular is with respect to utilization of credit and not eligibility to take MODVAT credit. The proceedings before Commissioner (Appeals) did not deal with issue of eligibility of credit but was with regard to eligibility on procedural lapses which was condoned. It was held that bought out items cannot be considered as eligible inputs or capital goods for availing credit and the sugar plant machinery on installation becomes immovable property and not goods. The Tribunal set aside the orders dropping the demand and the matter was remanded to the original authority for the limited purpose of computing and confirming the amount of irregularly availed MODVAT credit including imposition of appropriate penalty.

2.4 The appellants filed Civil Appeal No. 5509 & 5510/2003 before the Hon'ble Supreme Court against the said order of Tribunal. An interim stay was passed in the matter and the appeals were disposed by the Hon'ble Supreme Court on 3.9.2013 as reported in 2013 (295) ELT 353 (SC). The Hon'ble Supreme Court upheld the order passed by Tribunal. The relevant portion is reproduced as under:-

> *"24. It is also not in dispute that the appellant had purchased some machinery from others and such machinery had not even been unpacked by it and in the exact condition it had been transported along with the machinery manufactured by it to Vietnam. Thus, the appellant did not use the purchased machinery in its premises or in its factory and therefore, necessary condition incorporated in the Rules for availing credit of the MODVAT had not been complied with. To avail the MODVAT credit, the input on which excise duty is paid must be used in the manufacture of the final product in the factory of the assessee. The machinery purchased by the appellant had not even been tested or was not even unwrapped in the factory of the appellant. In case of such an admitted fact, it cannot be said that the machinery so purchased from others was used by the appellant in the manufacture of the sugar plant.*
>
> *25. In the instant case, the appellant had only acted as a trader or as an exporter in relation to the machinery purchased by it, which had been exported and used for setting up a sugar plant in a foreign country. In any case, it cannot be said to have manufactured that plant in its factory.*
>
> *26. Moreover, it is also clear that the appellant-assessee did not pay any excise duty on the sugar plant set up by it in Vietnam and therefore, there cannot be any question of availing any MODVAT credit.*

> *27. For the aforestated reasons as well as for the reasons stated by the Tribunal in the impugned order, we are of the view that the Tribunal had come to a correct conclusion and the conclusion so arrived at by the Tribunal does not require any interference.*
>
> *28. The appeals are, therefore, dismissed with no order as to costs."*

2.5 During the pendency of the proceedings before the Hon'ble Apex Court, 20 other show cause notices on the same issue for different periods was issued to the appellants and the matters were kept in call book. On receipt of judgment of Hon'ble Supreme Court, the adjudicating authority passed Order-in-Original No. 8 & 9/2014 dated 29.4.2014 confirming the demand in respect of the two show cause notices, which had been earlier remanded for recomputation by the Tribunal and appealed before the Hon'ble Supreme Court. In respect of the twenty subsequent show cause notices that had been transferred to call book, adjudication proceedings were completed whereby the demands were confirmed along with interest and also imposed penalties vide Order-in-Original Nos.11 to 30/2014 dated 29.5.2014. Against these orders (Order-in-Original No. 8 & 9/2014 dated 29.4.2014 and Order-in-Original Nos. 11 to 30/2014 dated 29.5.2014), the appellants approached the Tribunal and vide Final Order No.41389 to 41410/2015 dated 21.9.2015 the Tribunal after observing that the issue has reached finality by the decision rendered by Hon'ble Supreme Court, remanded the matter to adjudicating authority with specific directions. Pursuant to such order of remand by the Tribunal, the Commissioner passed the Order-in-Original which are now impugned in these appeals. Out of the 22 show cause notices (2 + 20), only 9 Orders-in-Original are taken up for disposal by this common order.

3. On behalf of the appellants, ld. counsel Shri C. Manickam assisted by ld. consultant Shri D. Senthil Nathan appeared and argued the matter. His submissions are summarized as under:-

i) Appellants had entered into contract with the Union of Sugarcane and Sugar Enterprises for the construction of a complete sugar plant in Vietnam. For the supply of complete plant, as a turnkey project, the appellants manufacture the core sugar machineries and on payment of applicable central excise duties, procure parts and components from domestic manufacturers. It is not possible to supply the sugar plant as a whole, therefore, all the core machineries manufactured by the appellants and also the bought out central excise duty paid items were exported vide many shipments. In this case, M/s.KCP had bought out certain items which are in the nature of inputs / capital goods supplied along with the core machines manufactured by the appellant. The inputs such as pumps, gear boxes, gears, pipes, tubes etc. are inputs even for the goods manufactured by the appellants and cleared by the appellants in the domestic market. These bought out items are definitely in relation to manufactured goods and are not unconnected items, which were exported along with the machines.

ii) Accordingly, the appellants had procured and received the said goods into the factory and stuffed into the container and send the same along with the machineries manufactured by them for export to Vietnam under bond. The fact of removal of such goods was informed on regular basis to the department by filing various declarations under Rule 57G/57T of Central Excise Rules, 1944, Classification Lists and Prices Lists under Rule 173B and 173C of Central Excise Rules, 1944. Further, all the exports were carried out only under the supervision of the Central Excise officers and accordingly, the AR4/ARE-1 forms were also signed by the Central Excise officers during each such clearance.

iii) The Commissioner (Appeals) in the first stage of appeal had clearly held that the credit is eligible. The Board Circular No.283/117/96 CX dated 31.12.1996 clarifies the same. The intention is to ensure that goods are exported and not taxes. Wherever taxes are suffered on the goods exported, it has to be returned to the assessee in accordance with provisions of law.

iv) The present dispute was first raised by the Department and the appellant was issued with the first Show Cause Notice No.Nil/95 dated 01.01.95, which was ultimately dropped vide Commissioner (Appeals) Order No.8/96 dated 12.01.96, which was not further appealed by the department and therefore, the issue had attained finality. Similarly, another show cause notice was issued vide O.C.No.58/95 dated 17.01.95, which was also dropped by Assistant Commissioner, Chennai – I Division, Chennai Commissionerate vide Order-in-Original No.46/95 dated 26.05.95 and since no further appeal was preferred by the Department, the issue had attained finality on all counts. The above referred two orders had determined and decided both substantive as well as procedural issues, which were subsequently accepted in Review as per the provisions of the Central Excise Act. Therefore, the revenue authorities are not entitled to issue show cause notice for the subsequent period. Moreover, the doctrine of *res judicata* mandates that a same dispute should not be repeatedly initiated on the same party.

v) However, M/s.KCP Limited was again issued a Show Cause Notice No.24/96 dated 29.3.1996 for the period July 1994 to Jan 1996 covering the periods already dealt under the earlier show cause notices, which itself is not legally sustainable in terms of the ratio of the Hon'ble Supreme Court in the case of M/s.Nizam Sugar factory reported in 2006 (197) ELT 465 (SC). Further, another demand was issued vide Show Cause Notice No.Nil/97 dated 03.03.97 covering the period from August 1996 to January 1997. Both these demands were dropped by the then Commissioner of Central Excise vide Order-in-Original No.15/97 dated 08.06.1997 & 19/97 dated 30.06.1997 both on merits well as on limitation.

vi) The respondent department reviewed the said dropping of proceedings vide O-in-O No.15/97 & 19/97 vide Review Order No.64-R/98 dated 03.03.98 by relying upon two judgments of the Hon'ble Supreme Court in the case of M/s.Mittal Engineering (1996 (88) ELT 622 SC) and M/s. Quality Steel Tubes (1995 (75) ELT 17 (SC) on the issue of immovable property but there was no contest on time bar. Whereas there were two more judgments in the case of M/s.Sirpur Paper Mills (1998 (97) ELT 3 (SC), which was the binding decision at the time of review and in the case of M/s.Solid and Correct Engineering Works (2010 (252) ELT 481 (SC)), which was contrary to the above Hon'ble Supreme Court judgments and specifically distinguished, before the Hon'ble Supreme Court judgment in the instant case was delivered. Therefore, it is stated that neither the grounds for review nor the decisions relied as a basis to review the order have any basis.

vii) Notwithstanding the above, it is submitted that whether Sugar Plant is a movable or immovable property was not raised in the show cause notices at all. However, the Review Order and also in the Tribunal decision in 2003 dealt with the said issue, which amounts to travelling beyond the scope of the show cause notice and therefore, not binding. Therefore, the order passed by Tribunal dated 2.5.2003 is in the nature of denovo order. The present appeals filed by the appellant have to be decided on the applicability/non-applicability of the doctrine of movable/immovable property of the final goods.

viii) Furthermore, it is submitted that the Appellant M/s.KCP Limited specifically represented to the Board on the issue of eligibility / ineligibility of CENVAT credit on the said goods exported under Bond and in response to the said representation, the Board's Circular No.283/117/96-CX. Dated 31.12.1996 allowed inputs to be cleared as such either under bond or on claim for rebate of duty as in the case of final products. This circular was forwarded to the appellant by the Chief Commissioner vide D.O.C. No.IV/16/32/97-MZO dated 21.02.97 and a corresponding Trade Notice No.10/97 dated 27.01.97 was also issued in this regard. This aspect has not been adequately considered in any of the proceedings. Hence, the entire issues require re-consideration afresh for administration of justice.

ix) Even more, it is submitted that appellants are clearly entitled for MODVAT credit in terms of the deeming provision as though inputs/capital goods were manufactured in the same factory under Rule 57F (1)(ii) and Rule 57S (1)(ii) of Central Excise Rules, 1944 and also that we have filed various declarations mentioning that the items were meant for export and these items are specified items as mentioned in the Rules, which qualify as inputs and capital goods. Rule 57 (F)(1)(ii) / 57(S)(1)(ii) of the erstwhile Central Excise Rules, 1944, specifically deals with two dimensions of manufacturing and export of goods. As a conscious measure, the Government has encouraged availment of MODVAT Credit even the goods were "removed as such" with a deeming fiction "as if the goods were manufactured". Al the bought out items were brought into the factory. This aspect of "deeming legal fiction" has not been appreciated properly by the Tribunal during the earlier stages whereas the original adjudicating authority had clearly appreciated and mentioned this aspect in the Order-in-Original No.15 & 19/97, which had not been countered or disputed by the Respondent Department at any point of time later.

x) Time bar aspect and the wrong invocation of the extended period of limitation was never mentioned in the points indicated in the review order and consequently, the Tribunal and the Hon'ble Supreme Court also did not make any categorical observation or held any decision in this regard.

xi) The Appellant was issued with the first show cause notice No.Nil/95 dated 01.01.95, which was ultimately dropped vide Commissioner (Appeals) Order No.8/96 dated 12.01.96, which was not further appealed by the department and therefore, the issue had attained finality. Similarly, another show cause notice was issued vide O.C.No.58/95 dated 17.01.95, which was also dropped by Assistant Commissioner, Chennai I Division, Chennai Commissionerate vide O-in-O No.46/95 dated 26.05.95 and since no further appeal was preferred by the Department, the issue had attained finality on all counts. Irrespective of the acceptance of the above said cases on merits, the show cause notice is clearly time barred.

xii) The Order-in-Original No.15/97 had also clearly dropped the proceedings on merits as well as on limitation. On the limitation aspect, it had been stated that (Para 56) "It was not correct on the part of the department to invoke the extended time limit on grounds of collusion and suppression etc., in terms of proviso to Rule 57I and 57U. The two show cause notices issued by the Department also clearly smacks of the awareness on the part of the department and that the noticee were availing of MODVAT credit in respect of the impugned components and capital goods during the same period as is covered by the subject show cause notice. Besides, it is also pertinent to note that the goods in question were exported under bond following AR4 procedures which requires the signature of the proper officers of central excise. Thus, the allegation of suppression is clearly not sustained in the above facts and circumstances of the present case".

xiii) Thus, it is clear from the above that the Appellant had filed various classification lists, price lists, Rule 57G/57T declarations from time to time. Furthermore, the AR4s were duly signed by the jurisdictional central excise officers and the sealing of the containers were done by excise officers. Therefore, there cannot be any suppression of facts or willful misstatement and accordingly, the extended period of limitation cannot be invoked.

xiv) Further, during the second round of litigation before the Tribunal it was held that regarding time bar aspect is concerned, "we understand the difficulties experienced by the appellant that because it succeeded on that count before adjudicating authority in original adjudication, there was no necessity to argue on the same point before Tribunal. But we are helpless when neither there was any plea in this regard before the Tribunal nor there was decision by the Apex Court on that aspect. Therefore, subscribing to the view advanced by the Appellant, it is not possible at this stage after the order of the Tribunal merged with the order of the Apex Court. Accordingly, time bar plea is rejected" (Para 7.5) There was no prayer regarding the extended period of limitation by the Department. Regarding the observation, that there was no decision by the Hon'ble Apex Court, it is submitted that the Apex Court merely upheld the Tribunal order and did not go into the aspect of limitation. The Tribunal's order discussed about the merits of the case but did not go into the aspect of limitation as the departmental appeal did not carry any prayer on limitation. Therefore, the doctrine of merger does not apply for the issue of limitation and the appellant cannot be penalized for the failure of the respondent department to raise the point at the appropriate forum. However, the impugned Order-in-Original dated 29.03.2017 had discussed about the time bar aspect and held that reading Para 6.1 and 6.2 with Para 7.0 (c) and (d), it becomes clear that the department had entered a plea against dropping of the demand on the basis of time bar. This is contradictory to the Tribunal's order on the basis of which only the *denovo* adjudication had been made. Therefore, it is submitted that the extended period of limitation though confined only to the Show Cause Nnotice No.24/96 needs to be decided on the applicability of the time bar aspect.

xv) Further, the Commissioner in Para 4.2 of the order dated 29.03.2017 holds that "the judgment of the Hon'ble Supreme Court may be considered *sub silentio* on the issue of time bar in which case the issue is open to be re-examined in the remand proceedings. However, I find that it could have been possible to consider this only in the proceedings before my learned predecessor which culminated in the issue of Order-in-Original No.8 & 9/2014. Therefore, it is submitted while the impugned

Order itself had held that the issue is open to be re-examined in the remand proceedings, the Tribunal is requested to consider the same in the light of the submission made and the findings made by the Commissioner in his Order-in-Original No.15/97 dated 26.05.97.

xvi) A perusal of the said Review Order No.64-R/98 dated 03.03.98 reveals that it directs the Commissioner to apply to the Tribunal on the correct determination of the following points arising out of the Order (15/97 & 19/97).

> "(a) Whether the order of the Commissioner holding the bought out items in question as "inputs/capital goods" in terms of Rule 57A/57Q of CER is correct, legal and proper.
>
> (b) Whether the Commissioner's findings that 'sugar plant' as a whole merits to be considered as a commodity and accordingly all bought out items used in erecting it qualify as 'inputs' and 'capital goods".
>
> (c) Whether after taking into consideration the facts stated above read with the facts given in Show Cause Notice, the order of the Commissioner is legal, correct and proper order and the Tribunal may remand the case back for de novo adjudication.
>
> (d) Whether by an order passed under Section 35 C of the Act, the Tribunal should modify or set aside the order passed by the Commissionerate on the points indicated and pass an order confirming the duty demanded in show cause notice and

imposing suitable penalty or pass such other order as may be deemed fit."

It is seen that there was a specific request for *denovo* adjudication and there was no specific prayer on the issue of time bar aspect which was decided by the Commissioner in his order in favour of the appellant and therefore, the issue had attained finality on that count.

xvii) This is further substantiated by the fact that the order of Tribunal in 2003 which is nothing but *de novo* Order specifically mentioned that the case was remanded for "computing and confirming the amount of irregularly availed credit including imposition of appropriate penalty, after giving an effective opportunity of hearing to the appellants, in accordance with law. The appeals are thus allowed by remand". Therefore, it is submitted that the issue of limitation is still open and the Tribunal is requested to specifically discuss and decide on this aspect considering the findings of the order No.15/97 & 19/97 on the issue of limitation. This plea of the appellant, if accepted, would amount to revision of the quantification of demands to the extent of Rs.4,12,953/- only and the remaining amount of Rs.63,54,731/- (out of Rs.67,67,884/-) being the demands covered under the extended period of limitation may be set aside.

xviii) This is the third round of litigation before the Tribunal by the appellant on the same issue covering a period of more than 19 years, and for the demand covering the earlier period i.e., April 1994, the appellant is now before the Tribunal after a period of 24 years, still searching for a reasonable legal solution, despite the issue being covered is simple in concept that taxes cannot be exported and were never intended to be exported as a matter of the policy of the Government, and CENVAT/MODVAT credit being a beneficial legislation intended to offset the cascading effect of taxes, needs to be interpreted in a reasonable and liberal manner, as held all along by various judicial forums.

xix) Despite this long period of litigation, after the second round of litigation before the Tribunal, the appellant has ended up getting only some relief in the form of lesser penalties and dropping of proceedings in obvious cases of overlapping demands, without getting any major relief from the original adjudicating authority on many issues like merits, limitation and non-sustainability of the penalties imposed even if it is lesser now.

xx) The basis and core issue of the case, which has not been addressed in any of the preceding rounds of litigation, is whether the taxes can be exported when there is nothing on record to deny that the duty paid goods have been exported. The exporters have been provided with various schemes to offset neutralization of taxes on export in the form of drawbacks, rebates and/or MODVAT credit. In the instant case, the appellants have preferred the mode of availing MODVAT credit and clearing goods for export under bond without payment of duty. The business practice of the appellant both for domestic and overseas supplied remains the same and in terms of practicality, the appellant had the best option of tax neutralization by availing MODVAT credit.

xxi) The appellants have bought out some items into their factory and sent for export along with other manufactured products of the appellant. The factual aspects regarding the essentiality of the said bought out items which were sent along with the core manufactured machines, without which the contract for which the appellant had entered into with the buyer in Vietnam cannot be completed, had been proven in terms of facts of the case. It is not only in terms of the business practice that is required to be followed in such cases but also in terms of the enormity and logistical requirements needed for execution of the erection of a sugar plant abroad, the said bought out items are required to be brought into the factory and therefore, they are definitely in the nature of inputs/capital goods as per the Notifications issued under Rule 57A of Central Excise Rules, 1944.

xxii) The crux of the Hon'ble Supreme Court's decision considering the exported goods as non-levy of excise duty, is not only erroneous because it considered non-payment as non-levy. The factum of exports being exempted and not non-levied had been conveniently ignored all along. Secondly, the finding that there is non-payment of duty on the said plant erected in Vietnam and therefore, there would not be any question with regard to getting credit on the duty paid on inputs, and that the above stated reason is quite sufficient for denying any MODVAT credit to the appellant, is not related to the facts of the case and the Tribunal being the last fact finding authority is requested to make a finding in this regard.

xxiii) Therefore, it is the submission of the appellant that this Hon'ble Supreme Court judgment can utmost be termed as an isolated observation without any basis considering the plethora of decisions by various judicial forums to the contrary and the settled position of law.

xxiv) Nevertheless, the appellant plead that when the appeal of the appellant had been dismissed and the Tribunal Order been upheld, it still remains the fact that the Tribunal had only remanded the case back for de novo adjudication. Therefore, it is still the request of the appellant that the appeal should be considered not only on limitation and non-imposition of penalties, but also on merits as well.

xxv) Finally on the issue of imposition of penalties, the original adjudicating authority had conceded that maximum penalty is not imposable for subsequent notices as M/s.KCP had availed the credit based on orders passed in their favour. However, he had proceeded to impose penalties to the tune of Rs.22,71,000/- out of which Rs.17,00,000/- had been imposed on the demand covered in Show Cause Notice No.24/96 dated 24.03.96 covering the extended period of limitation and Rs.3,05,000/- on these nine appeals. As already submitted that when the extended period of limitation is not sustainable, penalties are also not sustainable even to the extent of 25% as imposed by adjudicating authority in this case. It is also a known fact and settled position of law that on matters involving CENVAT credit, where the details have been declared in the statutory registers (RG23A part I & II, RG 23C part I & II, RT-12 returns etc.), the department cannot impose penalties. Furthermore, these are matters involving interpretational matters also as could be seen from the Board's circular in this regard on the basis of the representation made by the appellant as mentioned above. Accordingly, it is submitted that the penalties imposed on the Appellant to the tune of Rs.20,05,000/- is requested to be considered for setting aside in toto.

4. Against this, the ld. AR Shri A. Cletus supported the findings in the impugned order. He submitted that the issue whether appellants are eligible to avail credit on the bought out

items as inputs and capital goods was decided by the Tribunal vide Final Order dated 2.5.2003. The Tribunal after confirming the disallowance of demand of credit had remanded the matter only for the requantification of credit and for imposing revised appropriate penalty. The contention of the ld. counsel that such order of Tribunal is a denovo order is without basis and not in accordance with any provisions of law. This Tribunal order was maintained by the Hon'ble Supreme Court as the Civil Appeals filed by appellants were dismissed. The Tribunal order therefore has merged with the Hon'ble Supreme Court's order and the appellant cannot now contend that the Tribunal failed to appreciate the law correctly or that the issue on limitation was not addressed.

4.1 The Tribunal as well as Hon'ble Supreme Court has considered the issue on merits in detail. The bought out items were neither used nor required to be used in the factory of appellant for the manufacture of final product. These were exported in the same condition, as received. Therefore, did not conform to definition of inputs under Rule 57A of erstwhile Central Excise Rules, 1944. Even after subsequent amendments and introduction of the new CENVAT Credit Rules, 2002/2004, the scenario has not changed. The Commissioner has discussed this in detail in para 4.3 of the impugned order.

4.2 Appellants are not eligible to avail credit on traded goods in the erstwhile MODVAT regime or the changed CENVAT credit scheme. Similarly certain items declared as capital goods after reaching factory are exported without being used in the factory. Such goods are capital assets only for sugar factory in Vietnam and not for appellant's factory.

4.3 He referred to the Tribunal's Final Order No. 41389 to 41410/2015 dated 21.9.2015 and submitted that the Tribunal was convinced that the issue stands settled by the decision of the Hon'ble Supreme Court. Regarding the issue of limitation also the Tribunal in the said order had observed that the issue of time bar cannot be considered since the order of Tribunal has merged with the Hon'ble Supreme Court wherein there is no observation of the said issue. He referred to para 7.5 of the impugned order and submitted that the appellant therefore cannot raise the issue of limitation, at this stage. The Tribunal had then remanded the matter with specific directions to look into the pleas whether appellant is eligible for depreciation on capital goods, whether the periods are overlapping and for requantifying after addressing these pleas raised by appellant. The Tribunal had made clear that the Hon'ble Supreme Court's judgment applies on all fours to the case. Thus, the remand being for limited purpose, the appellant cannot ask for reconsideration of the issue on merits or on limitation in these appeals.

5. Heard both sides.

6. We have given our anxious consideration to the submissions made by both sides and perused the records carefully.

6.1 The issue is whether appellants are eligible for MODVAT / CENVAT credit on the bought out items which were later exported as such being parts / components / assemblies of Sugar Plant Machinery to be installed at Vietnam.

6.2 The department contends that the issue stands covered by the judgment of the Hon'ble Supreme Court in appellant's own case as reported in 2013 (295) ELT 353 (SC). The ld. counsel counters this by arguing that the Final Order of the Tribunal which was appealed before the Hon'ble Supreme Court did not consider the facts fully and therefore such order of Tribunal is only a denovo order and therefore the issue has not attained finality. He has relied upon the judgment in the case of Mt. Chauli alias Subhadra Devi Vs. Mt. Meghoo and Others – AIR (32) 1945 Allahabad 268 to argue that being an order of remand, the earlier order of Tribunal cannot be considered to have decided the issue on merits. We fail to understand the logic or basis of such an argument. The operative potion of the Tribunal Final Order reported in 2003 (161) ELT 589 has been already reproduced by us. It is clear from such order that the Tribunal had given a reasoned decision that appellant is not eligible for credit. Only for limited purpose of quantification and imposing penalty, the matter was remanded. The appellants preferred appeal before the Hon'ble Supreme Court against such Final Order, and vide judgment reported in 2013 (295) ELT 353 (SC), the Hon'ble Supreme Court had maintained the decision of the Tribunal. The relevant portion of the Hon'ble Supreme Court's judgment is reproduced as under:-

> *"3. The appellant-assessee entered into a contract with M/s Vina Sugars, Vietnam for supply and installation of a sugar plant at Vietnam with a capacity of 1250 TCD (Tons crushed per day). For the said purpose, the appellant had manufactured certain machines in its own factory which were to form part of the sugar plant and certain machinery, including electric cables etc., which were necessary for the plant were purchased by the appellant from other dealers-manufacturers and the said machines-equipments-cables etc., which had been purchased from others, along with appellant's manufactured items, had been put in a container and the containers were transported to Vietnam so that the different parts of the machinery can be assembled and the plant can be set up at Vietnam.*
>
> *4. In the course of its business, the appellant had availed the MODVAT credit on certain goods under the provisions of Rule 57Q of the Central Excise Rules, 1944 (hereinafter referred to as 'the Rules') declaring them as 'capital goods' which had been purchased by the appellant from other manufacturers-dealers in the country and had sent to Vietnam along with other parts of machinery manufactured by the appellant.*
>
> *5. The respondent-department was of the view that the MODVAT credit availed by the appellant on goods, parts of machinery & cables etc. purchased by it from local market and transported in a container along with other parts of machinery manufactured by it was not justified for the reason that the appellant had wrongly described such parts-equipments-cables etc. as 'capital goods' though the said goods were not covered under the definition of 'capital goods' under the provisions of Rule 57Q of the Rules. The department was of the view that none of such purchased items had been used by the appellant in its factory premises in relation to manufacture of the final product manufactured by the appellant.*

6. For the afore-stated reasons, show cause notices dated 29-3-1996 and 3-3-1997 were issued to the appellant, which had been dropped on considering the reply of the appellant. Upon review of the orders whereby the show cause notices had been dropped, the Central Board of Excise and Customs directed the Commissioner to file an appeal before the CEGAT and therefore, the Commissioner filed the appeals.

7. It was mainly submitted in the appeals on behalf of the department that the goods in respect of which the MODVAT credit was availed by the appellant, were not capital goods as per the provisions of Rule 57Q of the Rules. It was also submitted that such goods were not used in the factory premises of the appellant in any manufacturing process and therefore, the said goods were not capital goods as claimed by the appellant. It was also the case of the department that the said goods had been exported by the appellant along with parts of machinery manufactured by the appellant in a container and the said parts i.e. the parts purchased by the appellant had been exported in the same condition i.e. even without opening the packages or testing them. Thus, the role of the appellant was merely like a trader who had purchased certain goods including parts of machinery, cables, etc., from dealers in our country and thereafter exported the same in the exact condition in special containers along with the machinery manufactured by it.

8. The department was also of the view that the parts of machinery which had been exported by the appellant could not have been said to be in Completely Knocked Down condition because the parts manufactured by the appellant and the parts purchased by the appellant from other dealers in the country had never been assembled in the appellant's factory and they were exported in the same condition as stated hereinabove and it was also pertinent to note that the parts so purchased were packed in such a way so as to keep the parts in good condition even after it is transported from India to Vietnam by sea.

9. The department was also of the view that the parts so purchased by the appellant could not have been treated even as 'inputs' as the said parts had not been used by the appellant in the process of manufacturing the machinery. The appeals were heard by the CEGAT and ultimately the CEGAT allowed the appeals by remanding the cases to the original authority for computing and confirming the amount of the MODVAT credit irregularly availed by the appellant and also for imposition of appropriate penalty after affording effective opportunity of hearing to the appellant in accordance with law.

10. Being aggrieved by the afore-stated orders passed by the CEGAT in Final Order Nos. 301 & 302 of 2003 [2003 (161) E.L.T. 589 (Tri.-Chen.))], the present appeals have been filed by the appellant.

11. The learned senior counsel appearing for the appellant had submitted that the impugned orders passed by the CEGAT are bad in law as the CEGAT did not appreciate the facts and law correctly.

12. He had submitted that the MODVAT credit availed by the appellant was just and proper and therefore, there was no question of re-calculating or recovering the amount of the MODVAT credit availed by the appellant.

13. He thereafter submitted that upon correct interpretation of Rule 57Q read with Rule 57A of the Rules, the goods in respect of which the MODVAT credit was availed by the appellant were 'capital goods'. The reason for making such a submission was that the appellant was to set up a sugar plant at Vietnam and for that purpose parts of machinery including electric cable etc. were purchased by the appellant and along with parts of machinery manufactured by the appellant, the parts so purchased by the appellant had been put in one container which had been then transported to Vietnam by sea so as to enable the appellant to set up a sugar plant there.

14. He had further submitted that the parts of machinery so purchased were to form part of the entire plant, which was set up by the appellant at Vietnam and therefore, it was to be treated as inputs or part of capital goods and therefore, the appellant had rightly claimed and availed the MODVAT credit.

15. He had further submitted that the entire sugar machinery plant was to be sent to Vietnam in Completely Knocked Down condition. After receipt of the complete machinery in Vietnam, the plant was to be set up and therefore, even the machinery which had been purchased by the appellant from other manufacturers or dealers and which had been transported to Vietnam by sea was part of the inputs. In the circumstance, without considering whether the plant set up in Vietnam was movable or immovable, the respondent authorities ought to have given the benefit of the MODVAT credit to the appellant.

16. According to the learned counsel for the appellant, the whole sugar machinery was cleared from the factory in unassembled or dis-assembled condition. In view thereof, it was not open to the respondent Authorities to contend that parts of machinery which had been purchased by the appellant from other manufacturers would not form part of the inputs.

17. To substantiate his submissions, the learned counsel had cited several judgments.

18. The learned Additional Solicitor General appearing for the Revenue had repeated all submissions made before the Tribunal and therefore, I do not repeat the same here.

19. Upon hearing the learned counsel appearing for both sides and upon perusal of the relevant facts and legal position, we are of the view that the Tribunal had rightly come to the conclusion that the appellant was not entitled to the MODVAT credit as prayed for.

20. We find much substance in what has been observed by the Tribunal while coming to the conclusion that the MODVAT credit could not have been granted to the appellant.

21. It is pertinent to note that the most important object concerning grant of the MODVAT credit is to see that cascading effect of the duty imposed on the final product cleared at the time of sale is removed. If some duty is levied on the inputs, raw materials, etc., and if the final product is also dutiable, then the duty levied on inputs i.e. raw materials is to be reduced from the duty ascertained on the final product. Thus, there are two conditions for getting the MODVAT credit benefit :

(i) On the raw materials i.e. on the inputs, the manufacturer must have paid duty and such raw material must have been used in the process of manufacturing the final product in his factory or premises.

(ii) Excise duty must have been levied on the final product. If there is no duty levied on the final product, there would not be any question of grant of any relief because in that case there would not be any cascading effect on the duty imposed.

22. Looking at the above stated clear legal position, one may see here that no duty was paid by the appellant on the final product i.e. on the sugar plant which had been set up in Vietnam. For time being, let us forget the fact whether the plant is movable or immovable - the fact remains that no duty was paid on the said plant and therefore, there would not be any question with regard to getting credit on the duty paid on the inputs, especially when the appellant had not used the machinery manufactured by other manufacturers in its factory premises while manufacturing machinery which had been transported along with machinery manufactured by the appellant in a common container which had been sent to Vietnam by sea.

23. In our opinion, the above stated reason is quite sufficient for denying any MODVAT credit to the appellant. While dealing with a similar issue, this Court had observed in para no.15 of the judgment delivered in the case of Madras Cements Ltd. v. CCE, 2010 (6) SCC 606 = 2010 (254) E.L.T. 3 (S.C.) as under :

"15. In order to avail of MODVAT/CENVAT credit, an assessee has to satisfy the assessing authorities that the capital goods in the form of components, spares and accessories had been utilized during the process of manufacture of the finished product. Admittedly, in this case the appellant was not able to identify the machinery for which the goods in question had been used. In the absence of such identification, it was not possible for the assessing authorities to come to a decision as to whether MODVAT credit would be given in respect of the goods in question."

Looking to the above legal position, in our view, the impugned orders passed by the Tribunal cannot be said to be incorrect.

24. It is also not in dispute that the appellant had purchased some machinery from others and such machinery had not even been unpacked by it and in the exact condition it had been transported along with the machinery manufactured by it to Vietnam. Thus, the appellant did not use the purchased machinery in its premises or in its factory and therefore, necessary condition incorporated in the Rules for availing credit of the MODVAT had not been complied with.

To avail the MODVAT credit, the input on which excise duty is paid must be used in the manufacture of the final product in the factory of the assessee. The machinery purchased by the appellant had not even been tested or was not even unwrapped in the factory of the appellant. In case of such an admitted fact, it cannot be said that the machinery so purchased from others was used by the appellant in the manufacture of the sugar plant.

25. In the instant case, the appellant had only acted as a trader or as an exporter in relation to the machinery purchased by it, which had been exported and used for setting up a sugar plant in a foreign country. In any case, it cannot be said to have manufactured that plant in its factory.

26. Moreover, it is also clear that the appellant-assessee did not pay any excise duty on the sugar plant set up by it in Vietnam and therefore, there cannot be any question of availing any MODVAT credit.

27. For the aforestated reasons as well as for the reasons stated by the Tribunal in the impugned order, we are of the view that the Tribunal had come to a correct conclusion and the conclusion so arrived at by the Tribunal does not require any interference.

28. The appeals are, therefore, dismissed with no order as to costs."

6.3 It is very much clear from the judgment of the Hon'ble Supreme Court that the issue was considered on merits and the same was held against the appellant. Pursuant to this judgment, the two matters remanded by Tribunal as well as show cause notices which were kept in call book were taken up for adjudication. The Commissioner then passed Order-in-Original No. 11 to 30/2014 dated 29.5.2014 and Order-in-Original Nos. 8 & 9/2014 dated29.4.2014. The appellant had filed appeals before the Tribunal which was disposed vide Final Order Nos. 41742 to 41761/2014 dated 18/21.9.2015. The relevant portion of the Tribunal order is reproduced as under:-

"7.1 We are in full agreement with Revenue on the point that the matter has reached its finality by the decision of the Apex Court as reported in 2013 (295) ELT 353 (SC) and

order of Tribunal reported in 2003 (161) ELT 589 (Tri. – Chennai) has merged therein. Material facts of the case as has been noticed by the Apex Court has been recorded in different paragraphs of the reported judgment. Only one thing that comes up for consideration is whether the appellant has maintained any record under the law to show the nature of goods bought out and filed before statutory authority in that regard. Tribunal had directed in its order to compute the irregular MODVAT credit availed. This implies that the MODVAT credit relating to input as well as capital goods is to be ascertained in accordance with law for right application of law. We are not able to see from record whether the goods are capital goods or input since the appellant is held to be trader of the bought out items by the Apex Court in para 25 of the reported judgment.

7.2 CBE&C while permitting filing of appeal had observed that the appellant was a merchant exporter as is apparent from para 2 of the reported decision of the Tribunal. Be that as it may, if the bought out goods have entered into statutory record as is pleaded by learned counsel either as input or capital goods that needs verification to segregate and ascertain value of each type of goods and MODVAT credit availed on each such category of goods can be ascertained for proper application of law in Rule 57F and 57I as well as Rule 57S and 57U of MODVAT Rules. Since the exercise expected by Tribunal from Revenue while passing final order as reported above was to apply Rule 57A, 57F and 57I and Rule 57Q, 57S as well as 57U of the Central Excise Rules, 1944 to the given case, it would be fair for Revenue to segregate the credit recorded under Rule 57F and Rule 57S of the Central Excise Rules, 1944 respectively for the material period to apply law relating to the recovery under Rule 57I and 57U as well as applicability of penal provision if any under Rule 57I and 57S of Central Excise Rules, 1944. Therefore, adjudicating authority is directed to afford reasonable opportunity of hearing to the appellant within three months from the receipt of this order for segregation of the input credit and capital goods credit if any availed verifiable from statutory record and verify the concerned declarations filed in that regard before the jurisdictional authority. If such detailed exercise is done, the authority may precisely work out the respective credits for applicability of the law distinctly appearing in two different Rules i.e., Rule 57I and Rule 57S of the Central Excise Rules, 1944.

7.3 It was brought to the notice of the Bench by the learned counsel that there was sufficient amount of input and capital goods credit in the statutory record of the appellant and there was no utilization of credit availed in respect of bought out items exported. This being a matter *of record, such plea shall be examined by the adjudicating authority to ascertain the quantum of the credit utilized by the appellant for the reason that Rule 57I and Rule 57U intend to disallow unutilized credit and utilized credit to be recovered. Accordingly, there shall be recovery of utilized credit with interest thereon in accordance with law.*

7.4 So far as the allegation of violation of Rule is concerned, we noticed that the penal provisions in Rule 57I through sub-rule (4) and in Rule 57U through sub-rule (5), were incorporated after 23.6.1996. This being the cut-off date there shall be no penalty for the period prior to that date is leviable in the course of re-adjudication under Rule 57I and Rule 57U respectively. If any other penal provision is attracted, appellant is entitled to reasonable opportunity of defense before imposition if any. After hearing the assessee extensively on the above aspects as directed above, appropriate reasoned and speaking order shall be passed by the learned adjudicating authority.

7.5 So far as time-bar is concerned, we understand the difficulties expressed by the appellant that because it succeeded on that count before adjudicating authority in original adjudication, there was no necessity to argue on the same point before Tribunal. But we are helpless when neither there was any plea in this regard before the Tribunal nor there was decision by the Apex Court on that aspect. Therefore subscribing to the view advanced by the appellant is not possible at this stage after the order of Tribunal merged in the order of Apex Court. Accordingly, time bar plea is rejected.

7.6 Appellant lastly pleaded that it is entitled to rebate. But such plea fails when the inputs were not used in manufacture but were exported as traded goods and even unpacking the same but dispatched as was received from suppliers. Appellant also pleaded that the appellant being found to be merchant exporter by the CBE&C in its review direction, the authority below in the course of readjudication may consider the benefit available to appellant in that regard. We do not consider any such benefit shall be available which was not the claim of appellant till today.

7.7 Since plea of purchase of capital goods came before us we make it clear that the goods were only conceived by appellant as capital goods without being installed by the appellant in its factory nor used in manufacture since those were not even unpacked as has been recorded by Apex Court. Therefore, learned adjudicating authority shall also examine whether any depreciation was claimed by appellant on the bought out claiming to be capital goods. If claimed that shall be dealt in accordance with law.

> *7.8 We make it clear that our decision on the re-adjudicated order No. 8/2014 and 9/2014 dated 29.4.2014 appealed is within the four of the Apex Court judgment. We hope that the appellant shall cooperate with the adjudicating authority producing the statutory record and copies of declaration for his verification and segregate the goods supported by declarations verifiable from statutory record as directed herein before. The authority granting fair opportunity of hearing shall within three months from the last date of hearing shall pass appropriate order.*
>
> *7.9 The appellant is also directed to make an application to the adjudicating authority to fix the hearing as soon as it receives the copy of this order and provide all mathematical calculations as well as evidence in support of its calculation for the convenience of examination by learned adjudicating authority without seeking any adjournment.*
>
> *xxxx xxxx xxxx xxxxx*
>
> *9. Learned counsel says that Order-in-Original No. 11/2014 dated 29.5.2014 has overlapping demand which arose out of Order-in-Original No. 8/2014 dated 29.4.2014. This factual aspect shall be examined by the adjudicating authority in the course of adjudication. We also make it clear that in this batch of appeals, the order relating to predeposit passed as stated above, shall equally apply and no refund shall be granted to the appellant till the result of re-adjudication."*

6.4 As seen above, the Tribunal had remanded the matter for limited purpose of requantifying after looking into the pleas raised by appellant. The Tribunal had categorically held that the issue stands decided by the judgment of the Hon'ble Apex Court. Thus, the remand order being for limited purpose, the appellant cannot again reagitate the issue at this stage. On perusal of the impugned order, we find that the Commissioner has fully considered the directions of remand by the Tribunal.

6.5 The ld. counsel has contended that the remand order of the Tribunal as reported in 2003 (161) ELT 569 (Tri. Chennai) has got merged with the Hon'ble Supreme Court's judgment in appeal as reported in 2013 (295) ELT 353 (SC) and hence can be considered only as a denovo order. However, on perusal of the Supreme Court's judgment, we find that the Supreme Court had taken note of the arguments made by Senior Advocate for the appellant in paragraphs 9 to 17 therein. The argument of the ld. counsel that appellant had filed appeal only against denovo order in the Supreme Court is also not supported by facts. Para 1 of the Supreme Court's judgment (supra) it clearly indicates that the appeal has been filed *"Being aggrieved by the Final Order No. 301 & 302/2003 dated 2.5.2003 (2003 (161) ELT 569 (Tri Chennai) …… the instant two civil appeals have been filed by the appellant-assessee ……"*. In para 11, the Hon'ble Apex Court has observed that *"The ld. Senior Advocate appearing for the appellant had submitted that the impugned orders passed by CEGAT are bad in law as the CEGAT did not appreciate the facts and law correctly"*.

6.6 Indubitably, the appellants have exported the entire Sugar Plant to Vietnam with core machineries manufactured by the appellant along with other bought out duty paid items brought into the factory; thereafter both categories of goods cleared and agglomerated together for the purpose of export. There is also no allegation that the combined value of both manufactured as well as bought out items have not been included in the export price declared by the appellants. There also appears to be no dispute that the assemblage of goods at the point of export was an *omnium gatherum* gathered of both self-manufactured and bought out items, all duty paid by the respective manufacturers, which was intended to constitute a complete sugar plant in Vietnam. The show cause notice dated 29.3.1996 at para 2.0, also narrates that the disputed bought out goods were *"used only for receipt and export, as such"*.

6.7 We also have no quarrel with the contention of the ld. counsel that taxes cannot be exported; that it is not the intention or policy of the Government otherwise; that in such cases where the manufacturer procures some of the parts from other manufacturers and removes them along with the remaining self-manufactured goods, the clearances for all practical purposes has to be treated as effected from factory gate. We do take cognizance of the Ld. Advocate's submission that in response to a representation from these appellants, the CBEC vide Circular dated 31.12.1996, allowed inputs to be cleared as such either under bond or under claim for rebate for duty as in the case of final products. We are also aware that the Tribunal in Thermax Bobcock & Wilcox Ltd. – 2005 (182) ELT 336 (Tri. Mum) had inter alia held that pressure parts of Boiler removed in several consignments should be regarded as Boiler in incomplete form and classifiable as Boiler, which decision was upheld by the Hon'ble Supreme Court in 2015 (320) ELT 32 (SC). This decision has also been followed by the Tribunal subsequently in Commissioner of Central Excise Vs. BHEL – 2009 (247) ELT 263 (Tri. Chennai) and Thermax Ltd. – 2016 (337) ELT 456 (Tri. Mum.). The same ratio has also been followed in Flat Products Equipments (I) Ltd. – 2011 (272) ELT 104 (Tri. Mum.) where in fact the Tribunal had addressed similar issue of piecemeal export of voluminous size machinery and admissibility of credit on bought out items included therein.

7. Notwithstanding all these factoids, the undeniable fact is that the earlier order of this Bench, in the appellant's own case had concluded, "*that bought out items both inputs and capital goods in question cannot be considered as eligible capital goods for availing MODVAT credit …..*". The remand directions given by the Tribunal in that order dated 2.5.2003 was only for '*computing and confirming the amount of irregularly availed MODVAT credit …. etc.*" based on the above conclusion reached by them. This decision has been upheld by the Hon'ble Supreme Court reported in 2013 (295) ELT 353 (SC). On the subsequent occasion, when the same matter came up to this Tribunal, vide Final Order dated 21.9.2015, the Tribunal had once again gone into this issue and inter alia held that the matter has reached finality by the decision of the Hon'ble Supreme Court. Judicial propriety requires us to follow the Hon'ble Apex Court view in

the appellant's own case as reported in 2013 (295) ELT 353 (SC). Such conduct is enjoined on us by the principle of '*stare decisis*' namely, 'to stand for things decided'. Hence as a lower court, we are definitely required to follow the precedent on an issue, when it is already decided by Apex Court, as it has been in this case.

8. Viewed in this light, we find no grounds to interfere in the impugned order. The appeals filed by assessee are dismissed.

(Pronounced in open court on 31.05.2018)

(**Madhu Mohan Damodhar**)
Member (Technical)

(**Sulekha Beevi C.S.**)
Member (Judicial)

Rex