IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi

PRINCIPAL BENCH
COURT NO. II

Excise Appeal No. 53552 of 2018

[Arising out of the Order-in-Appeal No. BHO-EXCUS-001-APP-093-18-19 dated 29/05/2018 passed by The Commissioner (Appeals), CGST & Central Excise, Bhopal (M.P.).]

The Commissioner, **Appellant**
Central Goods Service Tax
& Central Excise,
G.S.T. Bhawan,,
Napier Town,
Jabalpur – 482 001.

VERSUS

M/s Jaypee Bela Plant **Respondent**
Village – Madhepur, Jaypee Puram,
J.P. Nagar, Nawbashta,
Rewa (M.P.) – 485 772.

Appearance

Shri R.K. Mishra, Authorized Representative (DR) – for the appellant.

Shri Anurag Kapur, Advocate – for the Respondent.

CORAM : **Hon'ble Shri Anil Choudhary, Member (Judicial)**
Hon'ble Shri C.L. Mahar, Member (Technical)

Final Order No. 53595/2018 Dated : 13/12/2018

DATE OF HEARING/DECISION : 13/12/2018.

C.L. MAHAR :-

The brief facts of the case are that this is an appeal filed by the Department against the order of the Commissioner (Appeals) dated 29 May 2018. The respondent/assessee is engaged in manufacture of cement and cement clinker falling under Chapter 25 of the Central Excise Tariff Act, 1985. The respondent assessee clears their final product namely cement/clinkers on

payment of appropriate central excise duty and on payment of VAT/CST. The Department has undertaken an audit of the financial records of the respondent for the period January 2014 to March 2015 wherein it was observed by the visiting officers that the respondent were charging and collecting VAT at the applicable rates in their invoices from their buyers, however, it was also noticed that as per the provisions of Madhya Pradesh Industrial Policy, 2004, the Madhya Pradesh Government refunded 75% of VAT back to the appellant. It has been the contention of the Department that the respondent have received back 75% of VAT paid by them as refund during financial year 2014-2015 and 2015-2016 sanctioned under Madhya Pradesh Investment Promotion Assistant Scheme. It has been the contention of the Department that as per the provisions of Central Excise Act under Section 4 the deduction of VAT from the transaction value is only admissible if the amount of the VAT/ Sales tax collected is actually paid to the State Government and therefore the amount of the VAT received by the respondent as refund from the State Government need to added to the transaction value of their product for charging of central excise duty as per the provision of Section 4 (3) of the Central Excise Act, 1944. A show cause notice dated 21 August 2017 came to be issued whereunder central excise duty amounting to Rs. 1,40,77,491/- has been demanded from the appellants as per the provision of Section 11A (4) of the Central Excise Act, 1944, the penal provisions under Section 11AC and interest as per the provision of Section 11AA has also invoked. The matter has been adjudicated by the learned Commissioner vide his order dated 31 February 2018 whereunder a central excise duty amounting to Rs. 1,25,23,226/- has been confirmed and equal amount of penalty has also been imposed. The respondent/assessee has approached the Commissioner (Appeals) against the above-mentioned order-in-original and learned Commissioner (Appeals) has allowed the respondent/assessee’s appeal following the judgment of this Tribunal in the case of **M/s Pioneer**

Engineering Industries vs. Commissioner of Central Excise, Indore in Central Excise appeal No. 51973 of 2017, the decision of **M/s Pioneer Engineering Industries** was based on the decision of this Tribunal in the case of **Shree Cement Ltd.** final order No. 51427-51514 of 2018 dated 11 April 2018.

2. The Department feeling aggrieved of Commissioner (Appeals) order in appeal No. 809/CE/2018 dated 29 May 2018 has filed the present appeal.

3. We have heard both the sides and have also perused the record of the appeal.

4. It is a matter of record that the issue under this appeal is no longer res-integra as it has already been decided by this Tribunal in the case of **Shree Cement Ltd. vs. Commissioner of Central Excise, Alwar** reported in **2018 (1) TMI 915 (CESTAT – New Delhi)**. The relevant extract of the above decision are reproduced here below :-

> "9. In the present case we know that for the initial period the assessees are required to remit the VAT recovered by them at the time of sale of the goods manufactured. A part of such VAT is given back to them in the form of subsidy in Challan 37 B. Such Challans are as good as cash but can be used only for payment of VAT in the subsequent period. In terms of the scheme of the Government of Rajasthan payment of VAT using such Challan are considered legal payments of tax. In view of the above, Revenue is not correct in taking the view that VAT liability discharged by utilizing such subsidy challans cannot be taken as VAT actually paid.
>
> 10. It is pertinent to reproduce the observations of the Tribunal in the Welspun Corporation Ltd**.** case
>
> > "5.1 The Respondent company opted for "Remission of Tax Scheme" and was thus eligible for the Capital subsidy in the form of remission of Sales Tax subject to the conditions to be fulfilled…. The subsidy in the form of remission of sales tax was in fact a percentage of capital investment… Separate assessment orders were thus issued by the assessing officer of the sales tax department from time to time towards the incentive scheme amount. The Competent Authority was required to necessarily pass order for remission of such tax separately for each tax period. The remission of tax is thus directly related to capital investment in fixed asset. There was no option to claim exemption from payment of sales tax.

> The quantum of remission was based upon the investment made in the fixed assets. The condition of the remission amongst others included to remain in production, employment of certain percentage of persons in assessee unit, and numerous other conditions as brought out in Para 9 of the impugned Order-in-Appeal.
>
> 11. By following the decision of the Tribunal in the Welspun Corporation Ltd**.** case we conclude that there is no justification for inclusion in the assessable value, the VAT amounts paid by the assessee using VAT 37B Challans.
>
> 12. In the result, the impugned orders are set aside and the appeals are allowed".

5. As the facts of the present case are similar to the one decided in **M/s Shree Cement Ltd. vs. Commissioner of Central Excise, Alwar** (supra). Following the above decision, we find that there is no merit in the appeal of the Department and, hence, same is dismissed.

(Operative part of the order pronounced in open court.)

(Anil Choudhary)
Member (Judicial)

(C.L. Mahar)
Member (Technical)

PK