IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH : KOLKATA

Excise Appeal No.66/2010

(Arising out of Order-in-Original No.42/Commissioner/09 dated-23/10/2009 passed by the Dy.Commissioner of Central Excise & Service Tax, Jamshedpur)

M/s.Tata Steel Ltd.

Applicant (s)/Appellant (s)

Vs.

Commr. of Central Excise & Service Tax,
JSR

Respondent (s)

Appearance:

Dr. Samir Chakraborty, Sr. Advocate &
Sri Abhijit Biswas, Advocate

for the Appellant (s)

Sri D.K.Acharya, Spl.Counsel

for the Respondent (s)

CORAM:

SHRI P.K. CHOUDHARY, HON'BLE JUDICIAL MEMBER
SHRI P. VENKATA SUBBA RAO, HON'BLE TECHNICAL MEMBER

Date of Hearing/Decision :- 26.06.2019

ORDER NO: FO/A/76193/2019

PER SHRI P.K.CHOUDHARY

By the impugned order, Central Excise duty demand of Rs.10,16,30,857/- has been confirmed upon the appellant under the Proviso to Section 11a(1) of the Central Excise Act, 1944 (in short, **"the Act"**) read with Rule 14 of the Cenvat Credit Rules 2004 (in short, "**Cenvat Credit Rules**"), alongwith interest thereon under Section 11AB of the Act. Penalty of Rs.10,16,30,857/- has also been imposed upon the appellant under Section 11AC of the Act (hereinafter referred to as "**the said order**"). The Commissioner has further directed appropriation of a sum of

Rs.4,40,44,492/- deposited by the appellant during the course of investigation against the said confirmed duty demand.

2. The issue involved in the instant appeal is whether the appellant, Tata Steel Ltd., was required to pay an amount equal to 8% or 10%, as applicable, of the total price of coal tar and coal gas, which comes into existence during the manufacture of coke at the time of their clearance from Tata Steel's steel plant at Jamshedpur, in terms of Rule 6(3)(b) of the Cenvat Credit Rules on clearances of the said goods during the period from June 2003 to August, 2007.

3. The facts of the case in brief are that in its steel plant, Tata Steel manufactures iron and steel products which are cleared upon payment of excise duty. For manufacture of such products, Blast Furnace and L.D. Converters are required and used. One of the essential raw materials used in or in relation to the manufacture of such duty paid steel materials is "coke". In the coke plant inside the steel plant, coal is carbonised to make coke. During the process of carbonisation, coal gas and coal tar are obtained as and by way of technological necessity. The coke obtained is transferred to the Blast Furnace/L.D. Converter whereas the coal tar and coal gas (hereinafter referred to as "**the said goods**") are cleared for sale to customers.

4. The case of the Revenue is that Tata Steel is engaged in the manufacture and clearance of the said goods, which are excisable goods classifiable under Chapter 27 of the Central Excise Tariff and were cleared at NIL rate of duty, in addition to other dutiable goods and that Tata Steel had availed cenvat credit of the duties paid on various common inputs used (upto September, 2005) and service tax paid on various common input services (from September, 2005), used directly or indirectly in or in relation to manufacture of both dutiable and the aforesaid exempted goods, and had utilised such credit for payment of duty on various dutiable final products but neither maintained separate account of such common inputs nor paid amounts equal to 8% or 10%, as applicable, of the total price of the exempted goods (excluding sales tax and other taxes), in terms of Rule 6(3)(b) of the Cenvat Credit Rules, inspite of the same being payable by it. On the aforesaid allegation, relying upon the decision of the Larger Bench of the Tribunal in Rallies India Ltd. Vs. Commissioner of Central Excise- 2007 (208) ELT 25 (T-LB), a

show cause notice was issued, which resulted in the impugned order.

5. Heard both sides at length and perused the appeal records.

6. It is the contention of the appellant that both coal tar and coal gas which came into existence during the course of manufacture of coke, which in turn is used in the manufacture of dutiable steel and steel products in the steel plant, are byproducts and that this fact has been acknowledged in the show cause notice and in the relied upon documents. The Ld.Counsel further contended that it is also evident from the technical dictionaries/literature on the subject that coal gas and coal tar are byproducts which arise during the course of making of coke from coal and are not final products. In support of this the appellant has relied upon the following:

(i) **Kirk-Othmer's 'Concise Encyclopedia of Chdmical Technology** wherein, dealing with **'coal gas'** it has been observed as follows:-

"COAL CONVERSION PROCESS

CARBONIZATION

Carbonization of coal is an old established industry by which coal is subjected to destructive distillation in a heated retort in the absence of air. Coke is the residue remaining upon devolatilisation of bituminous coal. **Coke is the main product,** although **tar,** light oil, ammonia liquor, **and, coke oven gas are also produced.** Coke is used principally as a fuel and reductant in the blast furnace for iron making. **The other products are further refined into commodity chemicals** such as ammonium sulphate, benzene, toluence, xylene, naphthalene, pyridine, phenanthrene, anthracene, creosote, road tars, roofing pitches, and pipeline enamels. The coke oven gas is a valuable heating fuel used mainly within steel plants."

(ii) "**The Columbia Encyclopedia**" wherein, dealing with 'coal gas' it has been observed as follows:-

"Coal gas, gas obtained in the destructive distillation of soft coal, **as a by-product in the preparation of COKE.** Its composition varies, but in general it is made up largely of hydrogen and methane with small amounts of other hydrocarbons, carbon monoxide (a poisonous gas), carbon dioxide, and nitrogen. It is used as a fuel and illuminant."

(iii) "**Wikipedia**" wherein, dealing with 'coal tar', it is observed as follows:

"**Coal tar** is a brown or black liquid of high viscosity, which smells of naphthalene and aromatic hydrocarbons. **Coal tar** is **among the by-products when coal is carbonized to make coke** or gasified to make coal gas. Coal tars are complex and variable mixtures of phenols, polycyclic atomic hydrocarbons (PAHs), and heterocyclic compounds."

6.1 The appellant further contends that this issue stands now fully settled by the decision of Hon'ble Supreme Court in the case of **Union of India** vs. **Hindustan Zinc Limited-2004 (303) ELT 321 (SC),** in appellant's favour. The appellant further submits that the decisions of the Supreme Court in **Hindustan Zinc Limited (supra)** and the Bombay High Court in the case of **Rallies India Limited (supra)** have since been followed in, inter alia, the following decisions:

(i) **Sai Sulphonate (P) Ltd.** Vs.**Commissioner of C.Ex.,-2017 (345) ELT 156 (T)**

(ii) **Salasar Sponge and Power Ltd. Vs. Commissioner of C.Ex., 2017 (47) STR 227 (T)**

(iii) **Commissioner of C.Ex. & ST** Vs. **Aarti Sponge & Power Ltd.-2016 (333) ELT 415 (T);**

(iv) **Commissioner of Central Excise** Vs. **Hi-Tech Carbon-2018 (17) GSTL 398 (AB)**

7. On behalf of the Revenue, besides reiterating the findings of the Commissioner, it has been contended that the expression "byproduct" has to be understood applying the principle of *ejusdem generis* and that on such interpretation it has to relate to material which are akin to "waste" and "refuse", contained in the phrase "waste, refuse or byproduct". According to learned Special Counsel, neither coal gas nor coal tar, which are both marketable commodities and regularly sold as such by the appellant is a byproduct. They are final products which are exempted from duty and therefore the provisions of Rule 6(3)(b) of the Cenvat Credit Rules are applicable, the appellant not having maintained separate account as per Rule 6(2) of the said Rules and the Commissioner has rightly held that the appellant is liable to make payment of an amount of 8% to 10% of the value of the said exempted goods.

8. Heard both sides and perused the appeal records.

9. We have considered the submissions made on behalf of both the parties. We find the issue involved in the instant case stands settled by the Hon'ble Supreme Court's decision in **Union of India** Vs. **Hindustan Zinc Limited (supra).** Therein the Supreme Court decided a batch of appeals preferred by the Union of India on the issue. One of the decisions which was affirmed by the Supreme Court in this case was the decision of the Bombay High Court in **Rallies India Limited Vs. Commissioner of Central Excise- 2009 (233) ELT 301 (Bom),** which had reversed the decision of the Larger Bench of the Tribunal in **Rallies India Ltd. Vs. CCE(supra)**, which was relied in issuing the show cause notice.

9.1 Dealing with, inter alia, the contention raised in the instant case also by the learned Special Counsel on behalf of the Revenue, the Hon'ble Supreme Court in the above decision, at paragraphs 21 to 26 thereof, observed and held as follows:

"21. As already pointed out, argument of the learned Solicitor General was that Rule 57CC and Rule 6 of the Modvat/Cenvat Rules respectively require the literal rule of interpretation which needs to be applied, as the language of these was unambiguous in this behalf. We may record that as per the learned Solicitor General, the provisions of Rule 57CC or Rule 6 envisage common use of inputs in two final products i.e. one dutiable and other exempted from the applicability of the same. He submitted that when two final products emerge out of use of common inputs, one excisable and the other exempt, the provisions will apply. The question of intention of the assessee to manufacture the exempted product is not relevant. It may be intended or unintended but if what results in the course of a manufacturing process is a "final product" falling within the meaning of the said provisions, the provisions will apply in full with the attendant consequences. He also argued that Rule 57D uses the words 'waste and refuse' alongwith "by-products". The word 'by-product' will necessarily have to take its colour and meaning from the accompanying words "*waste and refuse".* "By-products" cannot, in any event, mean "final products". This Rule only means that Modvat Credit cannot be denied on the ground that in the course of manufacture, non excisable goods also arise.

22. Elaborating this contention, the learned Solicitor General submitted that the words "final products" in the context of Modvat and Cenvat Credit have to be understood giving the meaning as

assigned to it in the Modvat/Cenvat Rules. Rule 57A inter alia states that the provisions of this Section shall apply to such finalised excisable goods (referred to in that section as final products). Again Rule 2 (c) of the Cenvat Credit Rules, 2002 defines "final products" as meaning excisable goods manufactured or produced from inputs except matches. Rule 2(h) of the Cenvat Credit Rules, 2004 defines "final products" as meaning excisable goods manufactured or produced from input, or using in input service. Thus, final products referred to in the aforesaid provisions can only mean to be excisable goods produced or manufactured. In the present set of cases, sulphuric acid, caustic soda flakes, trichloro ethylene and Phosphoryl A and Phosphoryl B are excisable goods manufactured and produced in India falling under different heading of the Central Excise Tariff Act. The submission was that if these products are exempt or subject to *NIL* rate of duty, then the inputs on which Modvat/Cenvat credits are claimed used in the manufacture of the aforesaid final products will attract the rigor of Rule 57CC/Rule 6 of the Modvat/Cenvat Credit Rules.

23. In this very direction, his further submission was that the term "by-products" is not defined either in the Act or in the Rules. Dictionary meanings cannot be resorted to in this case as it would then mean that final products would be treated as by-products defeating the plain language of Rule 57CC and Rule 6 which are applicable to final products. The only test is "excisability of goods manufactured or produced" and only if the requirements of this test are satisfied, the goods can be 'final products' and never 'by-products'. On this basis, the learned Solicitor General submitted that even an admission made before the Tribunal in the Birla Copper case of the goods being a 'by-product', cannot be relied on by the respondent.

24. While pleading that the aforesaid interpretation to these Rules be accepted by this Court, submissionof Mr.Parasaram was that in such an eventuality the judgement in this case of Swadeshi Polytex Ltd. Vs. CCE; 1989 (44) ELT 794 was not applicable, nor was the judgement fin CCE v. Gas Authority of India Ltd. : 2008 (232) ELT 7 relied upon by the respondent. Likewise his submission was that judgement of the Bombay High Court in the case of Rallies India Ltd. v. Union of India ; 2009 (233) ELT 301 was erroneous wherein view taken is contrary to the aforesaid submission.

25. These arguments may seem to be attractive. However, having regard to the processes involved, which is already explained above and the reasons afforded by us, we express our inability to be persuaded by these submissions. We have already noticed above that in the case of Birla Copper (C.A. No.2337 of 2011) the Tribunal has decided the matter following the judgement in the case of Swadeshi Limited (supra). In that case, Ethylene Glycol was reacted with DMT to produce polyester and ethanol. Methanol was not excisable while Polyester Fibre was liable to excise duty. Credit was taken of duty paid on ethylene glycol wholly for the payment of duty on polyester. The department took a position that Ethylene Glycol was used in the production of Methanol and proportionate credit taken on ethylene glycol was to be reversed. This Court ruled that emergence of Methanol was a technological necessity and no part of ethylene glycol could be said to have been used in production of Methanol and indeed it was held that the total quantity of ethylene glycol was used for the production of polyester. The fact in all these appeals appear to be identical to the facts and the law laid down in Swadeshi Polytex (supra). Therefore, this judgment is squarely applicable.

26. Furthermore, the provisions of Rule 57CC cannot be read in isolation. In order to understand the scheme of Modvat Credit contained in this Rule, a combined reading of Rule 57A, 57B and 57D alongwith Rule 57CC becomes inevitable. We have already reproduced Rule 57D above. It can be easily discerned from a combined reading of the aforesaid provisions that the terms used are 'inputs', 'final products', 'by-product', 'waste products' etc. We are of the opinion that these terms have been used taking into account commercial reality in trade. In that context when we scan through Rule 57CC, reference to final product being manufactured with the same common inputs becomes understandable. This Rule did not talk about emergence of final product and a by-product and still said that Rule 57 CC will apply. The appellant seeks to apply Rule 57CC when Rule 57D does not talk about application of Rule 5 87CC to final product and by-product when the by-product emerged as a technological necessity. Accepting the argument of the appellant would amount to equating by-product and final product thereby obliterating the difference through recognised by the

legislation itself. Significantly, this interpretation by the Tribunal in Sterlite (supra) was not appealed against by the department."
The aforesaid observations of the Apex Court completely answers the issue raised by the Revenue herein as to what is a "by-product". The stand taken by the Revenue and in the impugned order that coal gas and coal tar are not by-products, therefore cannot be accepted.

9.2 In paragraphs 17 to 19 of the judgment it has been further observed by the Hon'ble Supreme Court as follows:
"17. In these circumstances the position taken now by the appellant that sulphuric acid cannot be treated as a by-product cannot be countenanced. Mr.S.K.Bagaria, learned Senior Counsel appearing for the respondent while explaining the manufacturing process in detail, also pointed out that the ore concentrates (Zinc or Copper) are completely utilised for the production of zinc and copper and no part of the metal, zinc or copper forms part of the sulphuric acid which is cleared out. It was submitted that the extraction of zinc from the ore concentrate will inevitably result in the emergency of sulphur dioxide as a technological necessity. IT is not as though the Respondents can use lesser quantity of zinc concentrate only to produce the metal and not produce sulphur dioxide. In other words, a given quantity of zinc concentrate will result in emergency of zinc sulphide and sulphur dioxide according to the chemical formula on which respondents have no control.
18. On these facts this court is inclined to accept the version of the respondents that the ore concentrate is completely consumed in the extraction of zinc and no part of the metal is forming part of sulphuric acid.
19. Once we proceed keeping in mind the aforesaid factual, technological and commercial position available on the records, it has to be accepted that the respondents have consumed the entire quantity of zinc concentrate in the production of zinc."

9.2.1 On application of the afore quoted observation of the Hon'ble Supreme Court to the instant case, we find that herein also it is an undisputed fact that the entire quantity of coal is completely utilised for production of coke and no part thereof forms a part of the coal gas or coal tar, which inevitably comes into existence as a technological necessity. Here also the appellant cannot use lesser quantity of coal only to produce coke and not produce coal gas or coal tar. Hence, it has to be concluded that the appellant has consumed the entire quantity of coal in the production of coke. Further, merely because coal tar is recovered by a recovery process in the coke plant, from the mixtures of the several by products which arise in the course of production of coke from coal, as and by way of technological necessity, the same cannot and does not become a final product. It would be not out of place to mention that not every coke oven plant is capable of recovering coal tar/coal gas in the process.

10. Respectfully following the above decision of the Hon'ble Supreme Court, which as discussed above, fully applies to the instant case, we are of the view that the provisions of Rule 6(3)(b) of the Cenvat Credit Rules are inapplicable to the instant case and, consequently, the appellant is not required to make payment of any amount contrary to what has been held in the impugned order.

11. The impugned order, therefore, cannot be sustained and is set aside and the appeal filed by the appellant is allowed, with consequential relief.

(Operative part of the order already pronounced in the Court)

Sd/-	sd/-
(P.Venkata Suba Rao)	(P.K.Choudhary)
Member(Technical)	Member(Judicial)

k.b/-