M/S Vikram Cement vs Commissioner Of Central Excise,Indore on 24 August, 2005

Equivalent citations: 2005 AIR SCW 4542, 2005 (7) SCC 74, (2005) 187 ELT 145, (2005) 126 ECR 129, (2005) 6 SCJ 742, (2005) 6 SUPREME 131, (2005) 6 SCALE 744, (2005) 7 JT 637 (SC)

Bench: B.P. Singh, S.H. Kapadia

CASE NO.:
Appeal (civil) 1197 of 2005

PETITIONER:
M/s Vikram Cement

RESPONDENT:
Commissioner of Central Excise,Indore

DATE OF JUDGMENT: 24/08/2005

BENCH:
B.P. SINGH & S.H. KAPADIA

JUDGMENT:

JUDGMENT O R D E R WITH SLP (C) No.23205 of 2003, C.A. Nos.3422, 4120- 4122, 4149 to 4153, 7175-7189 of 2004, AND C.A. Nos. 1815, 1613, 2318-2320 of 2005.

In this group of civil appeals/special leave petition, question of admissibility of credit of the duty paid on "inputs" namely, explosives, lubricating oils and welding electrodes as also the question of admissibility of credit on "capital goods"

> namely, limestone crusher, mining equipment etc. under Cenvat Credit Rules, 2000, 2001 & 2002 arise for determination. Since common questions of law and fact arise for determination, the above civil appeals are clubbed together. For the sake of convenience, the facts in Civil Appeal No.1197 of 2005 are mentioned herein below.
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> Three show-cause notices dated 26.8.2000, 10.2.2003 and 29.1.2003 were issued by the department to the assessee proposing to disallow the credit on aforestated items on the ground that they were used for extraction of limestone in the mines and not within the factory in which cement (final product) was manufactured by the assessee. The assessee replied to each of the above three show-cause notices by which it submitted that the substantive definition of "input" as per clause (d) of rule 57AA of Central Excise Rules, 1944; rule 2(f) of the Cenvat Credit Rules, 2001 and rule 2(g) of Cenvat Credit Rules, 2002 was in pari-materia and was not different from the

> definition of "input" under erstwhile rules 57A and 57B of Central Excise Rules, 1944. According to the assessee, there was no difference between the Modvat scheme and the Cenvat scheme as far as the substantive definition of "input"

was concerned. According to the assessee, the Cenvat scheme was more broad-based as compared to the earlier Modvat scheme.

The assessees are engaged in the manufacture of cement and clinker falling under chapter 25 of Central Excise Tariff Act, 1985. They use explosives, welding electrodes, lubricating oil and crusher for extraction of limestone and crushing in the mines adjacent to the cement factory of the assessees. Being aggrieved by the order dated October 30, 2003 confirming the demand, the assessees preferred appeals to the Commissioner (Appeals).

By order dated 27.2.2004, the Commissioner (Appeals) took the view that the Cenvat credit was admissible only when the inputs or the capital goods were used by the manufacturer within the factory premises and since the above goods were used in the mines adjacent to the factory premises, the assessees were not entitled to the credit on the aforestated goods.

Aggrieved by the said order of the commissioner dated 27.2.2004, the assessees filed appeals before the Customs, Excise & Service Tax Appellate Tribunal, New Delhi. Following the judgment of the Division Bench of this Court in the case of Commissioner of Central Excise, Jaipur v. J.K. Udaipur Udyog Ltd. reported in 2004 (171) ELT 289, the tribunal held that input credit was not available for the reason that the above goods namely explosives, lubricating oil, welding electrodes & crusher were not used within the factory; that the same were used in the mines located outside the factory; and consequently, the appeals preferred by the assessee stood dismissed. Hence, these civil appeals.

In the civil appeals preferred by the assessees, a specific ground has been taken to the effect that the judgment of the Division Bench of this Court in J.K. Udaipur Udyog Ltd. (supra) was in conflict with a three-Judge bench decision of this Court in Jaypee Rewa Cement v. Commissioner of Central Excise, M.P. reported in 2001 (133) ELT 3. In the judgment of the Division Bench of this Court in J.K.. Udaipur Udyog Ltd. (supra), this Court took the view inter alia that the Modvat scheme was different and distinct from the Cenvat scheme whereas according to the assessees, there was no such difference except that Cenvat scheme covered inputs, capital goods and services and, therefore, the said Cenvat scheme was more broad-based. In this connection, it has been urged that even under rule 57J of the Modvat scheme, limestone (intermediate product) sent directly to a job worker attracted credit, which was continued under rule 57AB(1) of the Cenvat scheme.

The basic issue which arises for determination in these civil appeals is the correctness of the observation made vide para 9 of the Division Bench decision in J.K. Udaipur Udyog Ltd.(supra) which reads as under:-

> "The schemes for MODVAT and CENVAT Credits being different and in view of the definition of "input" given in sub-rule (d) of Rule 57AA of the Rules and the omission of a Rule similar to Rule 57J, the ratio of Jaypee Rewa Cement (supra) can have no

application here."

In this case, we are concerned with the period September, 2001 to October, 2002.

The Cenvat scheme which was in operation from 1.3.2002 was governed by Cenvat Credit Rules, 2002 inserted by notification no.5/2002-CE (N.T.), dated 1.3.2002. These rules replaced Cenvat Credit Rules, 2001 which held the field from 1.7.2001 to 28.2.2002. Prior to 1.7.2001, the Cenvat scheme was in vogue from 1.4.2000 to 30.6.2001 and the Modvat scheme was in force from 1.3.1986 to 31.3.2000.

The relevant provisions of the Modvat scheme during the period 1.3.1986 to 31.3.2000 were as follows:

"AA. CREDIT OF DUTY PAID ON EXCISABLE GOODS USED AS INPUTS:

RULE 57A : Applicability. (1) The provisions of this section shall apply to such finished excisable goods (hereafter, in this section, referred to as the final products) as the Central Government may, by notification in the Official Gazette, specify in this behalf for the purpose of allowing credit of any duty of excise or the additional duty under section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be specified in the said notification (hereafter, in this section, referred to as the specified duty) paid on the goods used in the manufacture of the said final products (hereafter, in this section, referred to as the inputs).

(2) The credit of specified duty allowed under sub-rule (1) shall be utilized towards payment of duty of excise leviable on the final products, whether under the Act or under any other Act, as may be specified in the notification issued under sub-

rule (1) and subject to the provisions of this section and the conditions and restrictions, if any, specified in the said notification.

(3) The Central Government may also specify in the said notification the goods or classes of goods in respect of which the credit of specified duty may be restricted.

(4) The credit of specified duty under this section shall be allowed on inputs used in the manufacture of final products as well as on inputs used in or in relation to the manufacture of the final products whether directly or indirectly and whether contained in the final product or not.

(5) Notwithstanding anything contained in sub-rule (1), the Central Government may, by notification in the Official Gazette declare the inputs on which declared duties of excise or additional duty (hereinafter referred to as declared duty) paid shall be deemed to have been paid at such rate or equivalent to such amount as may be specified in the said notification and allow the credit of such declared duty deemed to have been paid in such manner and subject to such conditions as may be specified in the said notification even if the declared inputs are not used directly by the

manufacturer of final products declared in the said notification, but are contained in the said final products.

Explanation. For the purposes of the sub-rule, it is clarified that even if the declared inputs are used directly by a manufacturer of final products, the credit of the declared duty shall, notwithstanding the actual amount of duty paid on such declared inputs, be deemed to be equivalent to the amount specified in the said notification and the credit of the declared duty shall be allowed to such manufacturer.

(6) Notwithstanding anything contained in sub-rule (1), the Central Government may, by notification in the Official Gazette, declare the inputs on which the duty of excise paid under section 3A of the Central Excise Act, 1944 (1 of 1944), shall be deemed to have been paid at such rate or equivalent to such amount as may be specified in the said notification, and allow the credit of such duty in respect of the said inputs at such rate or such amount and subject to such conditions as may be specified in the said notification :

> Provided that the manufacturer shall take all reasonable steps to ensure that the inputs acquired by him are goods on which the appropriate duty of excise as indicated in the documents accompanying the goods, has been paid under section 3A of the Central Excise Act, 1944 (1 of 1944).
>
> RULE 57B : Eligibility of credit of duty on certain inputs. (1) Notwithstanding anything contained in rule 57A, the manufacturer of final products shall be allowed to take credit of the specified duty paid on the following inputs, used in or in relation to the manufacture of the final products, whether directly or indirectly and whether contained in the final products or not, namely:-
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> (i) inputs which are manufactured and used within the factory of production;
>
> (ii) paints;
>
> (iii) inputs used as fuel;
>
> (iv) inputs used for generation of electricity or steam, used for manufacture of final products or for any other purpose, within the factory of production;
>
> (v) packing materials and materials from which such packing materials are made provided the cost of such packing materials is included in the value of the final product;
>
> (vi) accessories of the final product cleared alongwith such final product, the value of which is included in the assessable value of the final product:

Explanation. For the purpose of this sub-rule, it is hereby clarified that the term 'inputs' refers only to such inputs as may be specified in a notification issued under rule 57A.

(2) The manufacturer of the final products shall not be allowed to take credit of the duty paid on the following goods, namely:-

(i) machines, machinery, equipment, apparatus, tools, appliances or capital goods as defined in rule 57Q (other than those used as component parts in the manufacture of final products), used for any purpose in the factory;

(ii) packing materials in respect of which any exemption to the extent of the duty of excise payable on the cost of the packing materials is being availed of for packing any final products;

(iii) packing materials or containers, the cost of which is not included in the value of the final products under section 4 of the Act; and

(iv) crates and glass bottles used for aerated water.

RULE 57J. Credit of duty in respect of inputs used in an intermediate product. (1) Notwithstanding anything contained in these rules, the manufacturer shall be allowed to take credit of the specified duty paid on inputs described in column (2) of the Table below and used in the manufacture of intermediate products described in column (3) of the said Table received by the said manufacturer for use in or in relation to the manufacture of final products described in the corresponding entry in column (4) of the said Table:

TABLE S. No. Description of inputs Description of intermediate products Description of final products

1.

All goods falling within the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than the following, namely:-

(i) goods classifiable under any heading of Chapter 24 of the Schedule to the said Act;

(ii) goods classifiable under heading Nos.36.05 or 37.06 of the Schedule to the said Act;

(iii) goods classifiable under sub-heading Nos.2710.11, 2710.12, 2710.13 or 2710.19 (except Natural gasoline liquid) of the Schedule to the said Act;

(iv) high speed diesel oil classifiable under heading No.27.10 of the Schedule to the said Act.

All goods falling within the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than the following, namely:-

(i) goods classifiable under any heading of Chapter 24 of the Schedule to the said Act;

(ii) goods classifiable under heading Nos.

36.05 or 37.06 of the Schedule to the said Act;

(iii) goods classifiable under sub-heading Nos.

2710.11, 2710.12, 2710.13 or 2710.19 (except Natural gasoline liquid) of the Schedule to the said Act;

(iv) high speed diesel oil classifiable under heading No.27.10 of the Schedule to the said Act.

All goods falling within the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than the following, namely:-

(i) goods classifiable under any heading of Chapter 24 of the Schedule to the said Act;

(ii) goods classifiable under heading Nos.36.05 or 37.06 of the Schedule to the said Act;

(iii) fabrics of cotton or man-made fibres falling within Chapter 52, Chapter 54 or Chapter 55 of the Schedule to the Act;

(iv) fabrics of cotton or man-made fibres falling within heading Nos.58.01, 58.02, 58.06 (other than goods falling within sub-

heading No.5806.20) 60.01 or 60.02 (other than goods falling within sub-heading No.6002.10) of the Schedule to the Act.

(2) The manufacturer of the final products shall take credit under sub-rule (1) only if the intermediate products are manufactured in a factory as a job work in respect of which the exemption contained in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No.214/86-Central Excises, dated the 25th March, 1986, has been availed of.

(3) The credit under sub-rule (1) shall be allowed only if the intermediate products received by the manufacturer of the said final products are accompanied by any of the documents as specified under rule 57G evidencing the payment of duty on such inputs.

AAAA. CREDIT OF DUTY PAID ON CAPITAL GOODS USED BY THE MANUFACTURER OF SPECIFIED GOODS:

RULE 57Q: Applicability. (1) The provisions of this section shall apply to goods (hereafter in this section, referred to as the "final products") described in column (3) of the Table given below and to the goods (hereafter, in this section, referred to as "capital goods"), described in the corresponding entry in column (2) of the said Table, used in the factory of the manufacturer of final products.

TABLE S. No. Description of capital goods falling within the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) and used in the factory of the manufacturer.

Description of final products

1.

2.

3.

4.

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11.

12.

All goods falling under heading Nos.82.02 to 82.11.

All goods falling under chapter 84 (other than internal combustion engines falling under heading No.84.07 or 84.08 and of a kind used in motor vehicles, compressors falling under heading No.84.14 and of a kind used in refrigerating and airconditioning appliances and machinery, heading or sub-heading Nos.84.15, 85.18, 8422.10, 8424.10, fire extinguishers falling under sub-

heading No.8424.80, 8424.91, 8424.99, 84.29 to 84.37, 84.40, 84.50, 84.52, 84.69 to 84.73, 84.76, 84.78, expansion valves and solenoid valves falling under sub-

heading Nos.8481.10 of a kind used for refrigerating and airconditioning appliances and machinery.

All goods falling under chapter 85 (other than those falling under heading Nos.85.09 to 85.13, 85.16 to 85.31, 85.39 and 85.40);

All goods falling under heading Nos.90.11 to 90.13, 90.16, 90.17, 90.22 (other than for medical use), 90.24 to 90.31 and 90.32 (other than of a kind used for refrigeration and airconditioning appliances and machinery);

Components, spares and accessories of the goods specified against S. Nos.1 to 4 above;

Moulds and dies;

Refractories and refractory materials;

Tubes and pipes and fittings thereof, used in the factory;

Pollution control equipment;

Grinding wheels and the like goods falling under sub-heading No.6801.10;

Goods falling under heading No.68.02; and Lubricating oils, greases, cutting oils and coolants.

All goods specified in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than the following, namely:-

(i) all goods falling under Chapter 24;

and

(ii) all goods falling under heading Nos.36.05 or 37.06.

(iii) ingots and billets of non-alloy steel falling under sub-heading Nos.7206.90 and 7207.90, manufactured in an induction furnace unit, whether or not any other goods are produced in such induction furnace, and hot re-rolled products of non-alloy steel falling under sub-heading Nos.7211.11, 7211.19, 7211.30, 7211.52, 7211.59, 7211.60, 7211.92, 7211.99, 7213.90, 7214.90, 7215.90, 7216.10 and 7216.90 on which duty is paid under section 3A of the Central Excise Act, 1944 (1 of 1944).

(2)(i) The manufacturer of the final products shall be allowed credit of the duty of excise or the additional duty leviable under section 3 of the Customs Tariff Act, 1975 (51 of 1975) (hereinafter

referred to as "specified duty") paid on the capital goods.

(ii) The manufacturer availing of the credit may utilize the same for payment of duty of excise payable on the final products manufactured in his factory.

(3) Notwithstanding anything contained in sub-rule (1), the manufacturer of the final products shall be allowed credit of additional duty leviable under section 3 of the Customs Tariff Act, 1975 (51 of 1975) on goods falling under Chapter heading No.98.01 of the first schedule to the said Customs Tariff Act, to the extent of 75% of the said additional duty paid on such goods.

(4) A manufacturer of the final products purchasing capital goods from a unit situated in a Free Trade Zone or from a hundred per cent export-oriented undertaking or from a unit in an Electronic Hardware Technology Park or Software Technology Parks and using them in manufacture of final products, shall be allowed to take the credit of the specified duty paid on such capital goods only to the extent of duty which is equal to the additional duty leviable on like goods under section 3 of the Customs Tariff Act, 1975 (51 of 1975), equivalent to the duty of excise paid on such capital goods.

(5) The credit of the specified duty on capital goods (other than those capital goods in respect of which credit of duty was allowable under any other rule or notification prior to the Ist day of March, 1977 shall not be allowed if such capital goods were received in the factory before the Ist day of March, 1997.

(6) A manufacturer shall be allowed credit of specified duty paid on capital goods manufactured by him for the manufacture of final products in his factory.

(7) The credit of the specified duty on capital goods (other than those capital goods covered under S. Nos.5, 7, 10, 11 and 12 of column (2) of the Table below sub-rule (1) and received in the factory on or after the Ist day of January, 1996, shall not be taken on a date prior to the date on which such capital goods are installed or, as the case may be, used for manufacture of excisable goods, in the factory of the manufacture as certified by such manufacturer or a person designated by him for this purpose.

(8) Notwithstanding anything contained in sub-rule (7), a manufacturer intending to remove the capital goods from his factory for home consumption or for export, prior to their being installed or used, as the case may be, shall be allowed to take credit on the date on which such capital goods are so removed by him from his factory on payment of the appropriate duty of excise leviable thereon as provided in rule 57S.

RULE 57R. Credit of duty not to be allowed or denied or varied in certain circumstances and adjustment in duty credit. (1) No credit of the specified duty shall be allowed on capital goods which are used exclusively in the manufacture of final products other than final products which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearances made in a financial year which are exempt from the whole of the duty of excise leviable thereon or are chargeable to nil rate of duty except when the final product is either.

(i) cleared to a unit in a Free Trade Zone; or

(ii) cleared to a hundred per cent export-oriented undertaking; or

(iii) cleared to a unit in an Electronic Hardware Technology Park or Software Technology Parks;

(2) Credit of the specified duty allowed in respect of any capital goods shall not be denied or varied on the ground that any intermediate products have come into existence during the course of manufacture of the final product and that such intermediate products are, for the time being, exempt from the whole of the duty of excise leviable thereon or chargeable to nil rate of duty:

> Provided that such intermediate products are specified as final products in column (3) of the Table below sub-rule (1) of rule 57Q.
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> (3) The credit of the specified duty paid on the capital goods shall be allowed to a manufacturer if the capital goods are acquired by the manufacturer on lease, hire-purchase or loan agreement, from a financing company subject to the following procedure, namely:-
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> (i) The manufacturer shall file a declaration before the Assistant Commissioner of Central Excise as required under rule 57T;
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> (ii) The manufacturer availing credit of the specified duty paid on capital goods, who has entered into a financial arrangement, -
>
> (a) for financing the cost of such capital goods excluding the specified duty, shall produce a copy of the invoice referred to in rule 57T, evidencing payment of specified duty along with a copy of the agreement entered into by him with the said financing company; or
>
> (b) for financing the cost of such capital goods including the specified duty, shall produce a certificate from the financing company to the effect that the duty specified on such capital goods has been paid by the said manufacturer to such financing company, prior to payment of first lease rental instalment or first hire-purchase instalment or first instalment of re-payment of loan, as the case may be, along with a copy of the agreement entered into with the said financing company.
>
> (iii) The manufacturer and the financing company shall not claim depreciation under the Income-tax laws on that part of the value of capital goods which represents the amount of specified duty paid on such capital goods.
>
> (iv) The relevant documents required for the purpose of availing credit of the specified duty paid on such capital goods under rule 57T shall bear the name of the manufacturer along with that of the financing company.

(4) If a manufacturer of final products has taken credit on any capital goods and subsequently it so happens that any refund of the duty paid by the manufacturer of capital goods or importer of capital goods, as the case may be, is allowed to him for any reason, then the user manufacturer shall accordingly adjust the amount of credit in his credit account and if such adjustment is not possible for any reason, the user manufacturer shall pay the amount in cash equal to the amount of refund allowed to the manufacturer or, as the case may be, to importer of capital goods.

(5) If a user manufacturer has taken credit on any capital goods and subsequently it so happens that any additional amount of duty is recovered from the manufacturer of such capital goods or importer of such capital goods, as the case may be, then the user manufacturer shall be allowed an additional credit equal to the amount of such additional amount recovered.

(6) The provisions of sub-rule (5) shall not apply in cases where the duty on capital goods has been short levied or short paid or has been erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any provisions of the Act or the rules made thereunder with the intent to evade payment of duty.

(7)(i) The additional credit as per sub-rule (5) shall be allowed by the proper officer on the basis of a certificate issued by the Superintendent of Central Excise having jurisdiction over the factory, or as the case may be, by the proper officer in the customs area, from where such capital goods were originally cleared.

(ii) The said certificate shall indicate full description of the capital goods, original duty paid and particulars of the documents under which the capital goods were cleared from the factory or, as the case may be, from the customs area and also the differential duty recovered from the manufacturer or the importer.

(8) No credit of the specified duty paid on the capital goods shall be allowed, if the manufacturer, claims depreciation under section 32 of the Income-tax Act, 1961 (43 of 1961), or as revenue expenditure under any other provisions of the said Income-tax Act, in respect of that part of the value of capital goods which represents the amount of specified duty on such capital goods."

As stated above, the Cenvat scheme was introduced from 1.4.2000 and has remained in force till date under Cenvat Credit Rules, 2001 followed by Cenvat Credit Rules, 2002, which reads as follows:-

"AA. CREDIT OF DUTY PAID ON EXCISABLE GOODS USED AS INPUTS OR CAPITAL GOODS:

RULE 57AA. Definitions. For the purpose of this section, -

(a) "capital goods" means

(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No.68.02 and sub-heading No.6801.10 of the First Schedule to the Central Excise Tariff Act, 1985;

(ii) components, spares and accessories of the goods specified at (i) above;

(iii) moulds and dies;

(iv) refractories and refractory materials;

(v) tubes and pipes and fittings thereof, used in the factory; and

(vi) pollution control equipment, used in the factory of the manufacturer of the final products.

Explanation.- For removal of doubts, it is hereby clarified that "capital goods" do not include any equipment or appliances used in an office.

(b) "exempted goods" means goods which are exempt from the whole of the duty of excise leviable thereon, and includes goods which are chargeable to "Nil" rate of duty;

(c) "final products" means excisable goods manufactured or produced from inputs, except matches;

(d) "input" means all goods, except high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not, and includes accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used for manufacture of final products or for any other purpose, within the factory of production, and also includes lubricating oils, greases, cutting oils and coolants.

Explanation.- The high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

RULE 57AB. CENVAT credit. (1) A manufacturer or producer of final products shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of, -

(i) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the said First Schedule), leviable under the Act;

(ii) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985, leviable under the Central Excise Act, 1944 in relation to the goods falling under sub-heading Nos.2401.90, 2404.40, 2404.50, 2404.99, 5402.20, 5402.32, 5402.42, 5402.43, 5402.52, 5402.62, 5703.90,

8415.00, 8702.10, 8703.90, 8706.21, 8706.39 and 8711.20 of the said First Schedule;

(iii) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978);

(iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957); and

(v) the additional duty leviable under section 3 of the Customs Tariff Act, 1975, equivalent to the duty of excise specified under clauses (i), (ii), (iii) and (iv) above, paid on any inputs or capital goods received in the factory on or after the first day of April, 2000, including, the said duties paid on any inputs or capital goods used in the manufacture of intermediate products, by a job-worker availing the benefit of exemption contained in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No.214/86-Central Excise, dated the 25th March, 1986, vide GSR No.547(E) dated the 25th March, 1986, and received by the manufacturer for use in or in relation to the manufacture of final products, on or after the first day of April, 2000.

Explanation.-For removal of doubts it is clarified that the manufacturer of the final products shall be allowed CENVAT credit of additional duty leviable under section 3 of the Customs Tariff Act, 1975 (51 of 1975) on goods falling under Chapter heading No.98.01 of the First Schedule to the said Customs Tariff Act.

(b) The CENVAT credit may be utilized for payment of any duty of excise on any final products manufactured by the manufacturer or for payment of duty on inputs or capital goods themselves if such inputs are removed as such or after being partially processed, or such capital goods are removed as such.

Provided that while paying duty in the manner specified under sub-rule (1) of rule 49 or sub-rule (1) of rule 173G, as the case may be, the CENVAT credit shall be utilized only to the extent such credit is available on the fifteenth day of a month for payment of duty relating to the first fortnight of the month, and the last day of a month for payment of duty relating to the second fortnight of the month or in case of a manufacturer availing exemption by notification based on value of clearances in a financial year, for payment of duty relating to the entire month.

Explanation.-When inputs or capital goods are removed from the factory, the manufacturer of the final products shall pay the appropriate duty of excise leviable thereon as if such inputs or capital goods have been manufactured in the said factory, and such removal shall be made under the cover of an invoice prescribed under rule 52A.

(2) Notwithstanding anything contained in sub-rule (1)-

(a) credit of duty in respect of inputs or capital goods produced or manufactured-

(i) in a free trade zone and used in the manufacture of the final products in any other place in India; or

(ii) by a hundred per cent export-oriented undertaking or by a unit in an Electronic Hardware Technology Park or Software Technology Parks and used in the manufacture of the final products in any place in India, shall be restricted to the extent which is equal to the additional duty leviable on like goods under section 3 of the Customs Tariff Act, 1975 paid on such inputs;

(b) credit in respect of-

(i) the additional duty of excise under section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978);

(ii) the additional duty of excise under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957); and

(iii) the additional duty under section 3 of the Customs Tariff Act, 1975, equivalent to the duty of excise specified under clauses (i) and (ii) above shall be utilized only towards payment of duty of excise leviable under the said Additional Duties of Excise (Textiles and Textile Articles) Act, or under the said Additional Duties of excise (Goods of Special Importance) Act, on any final products manufactured by the manufacturer or for payment of such duty on inputs themselves if such inputs are removed as such or after being partially processed.

(c) CENVAT credit of the duty paid on the inputs shall not be allowed in respect of texturised yarn (including draw-twisted or draw-wound yarn) or polyesters falling under heading No.54.02 of the said First Schedule, manufactured by an independent texturiser, that is to say, a manufacturer engaged in the manufacture of texturised yarn (including draw-twisted or draw-wound yarn) of polyesters falling under heading No.54.02, who does not have the facility in his factory (including plant and machinery) for manufacture of partially oriented yarn of polyesters falling under sub-heading No.5402.42 of the said First Schedule.

(d) credit, in respect of additional duty leviable under section 3 of the Customs Tariff Act, 1975 (51 of 1975), paid on marble slabs or tiles falling under sub-heading No.2504.21 or 2504.31 respectively of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) shall be allowed to the extent of thirty rupees per square metre.

Explanation.-Where the provisions of any other rule or notification provides for grant of partial or full exemption on condition of non-availability of credit of duty paid on any input or capital goods, the provisions of such other rule or notification shall prevail over the provisions of the rules made under this section.

RULE 57AC. Conditions for allowing CENVAT credit. (1) The CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacture.

(2) (a) The CENVAT credit in respect of capital goods received in a factory at any point of time in a given financial year shall be taken only for an amount not exceeding fifty per cent of the duty paid on such capital goods in the same financial year.

(b) The balance of CENVAT credit may be taken in any financial year subsequently to the financial year in which the capital goods were received in the factory of the manufacture, provided that the capital goods (other than components, spares and accessories, refractories and refractory materials and goods falling under heading No.68.02 and sub- heading 6801.10 of the First Schedule to the Central Excise Tariff Act) are still in the possession and use of the manufacturer of final products in such subsequent years.

(c) CENVAT credit may also be taken in respect of such capital goods as have been received in the factory, but have not been installed, before the Ist day of April, 2000 subject to the condition that during the financial year 2000-2001, the credit shall be taken for an amount not exceeding fifty per cent of the duty paid on such capital goods.

Illustration.- A manufacturer received machinery on April 16, 2000 in his factory. CENVAT of two lakh rupees is paid on this machinery. The manufacturer can take credit up to a maximum of one lakh rupees in the financial year 2000-2001, and the balance in subsequent years.

(3) The CENVAT credit in respect of duty paid on the capital goods shall be allowed to a manufacturer even if the capital goods are acquired by the manufacturer on lease, hire purchase or loan agreement, from a financing company.

(4) The CENVAT credit in respect of capital goods shall not be allowed in respect of that part of the value of capital goods which represents the amount of duty on such capital goods, which the manufacturer claims as depreciation under section 32 of the Income-tax Act, 1961 (43 of 1961).

(5)(a) The CENVAT credit shall be allowed even if any inputs or capital goods as such or after being partially processed are sent to a job worker for further processing, testing, repair, re-conditioning or any other purpose, and it is established from the records, challans or memos or any other document produced by the assessee availing the CENVAT credit that the goods are received back in the factory within 180 days of their being sent to a job worker. If the inputs or the capital goods are not received back within 180 days, the manufacturer shall pay an amount equivalent to the CENVAT credit attributable to the inputs or capital goods by debiting the CENVAT credit or otherwise. However, the manufacturer can take the CENVAT credit again when the inputs or capital goods are received back in his factory.

(b) CENVAT credit shall also be allowed in respect of moulds and dies sent by a manufacturer of final products to a job worker for the production of goods on his behalf and according to his specifications.

(6) The Commissioner of Central Excise having jurisdiction over the factory of the manufacturer of the final products who has sent the inputs or partially processed inputs outside his factory to a job

worker may, by an order in each removal of such inputs or partially processed inputs, and subject to such conditions as he may impose in the interest of revenue including the manner in which duty, if leviable, is to be paid, allow finished goods to be cleared from the premises of the job worker.

(7) Where any inputs are used in the final products which are cleared for export under bond or used in the intermediate products cleared for export, the CENVAT credit in respect of the inputs so used shall be allowed to be utilized by the manufacturer towards payment of duty of excise on any final products cleared for home consumption or for export on payment of duty and where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitations as may be specified by the Central Government by notification in the Official Gazette. No refund of credit shall, however, be allowed if the manufacturer avails of drawback allowed under the customs and Central Excise Duties Drawback Rules, 1995, or claims a rebate of duty under rule 12, in respect of such duty."

From the above quoted rules, we find that the definitions of the words "input" under the erstwhile Modvat scheme stood scattered under rules 57A & 57B whereas under the Cenvat scheme, the definition of the words "input" and "capital goods"

have been consolidated.

The relevant provisions of Cenvat Credit Rules, 2001 are as follows:

"Rule 2. Definitions. In these rules, unless the context otherwise requires, -

(b) "capital goods" means,-

(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No.68.02 and sub-heading No.6801.10 of the First Schedule to the Tariff Act;

(ii) components, spares and accessories of the goods specified at (i) above;

(iii) moulds and dies;

(iv) refractories and refractory materials;

(v) tubes and pipes and fittings thereof;

(vi) pollution control equipment; and

(vii) storage tank, used in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office,

(d) "final products" means excisable goods manufactured or produced from inputs, except matches;

(f) "input" means all goods, except high speed diesel oil and motor spirit, commonly known as petrol used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not, and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used for manufacture of final products or for any other purpose, within the factory of production.

Explanation 1. The high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

Explanation 2. Inputs include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer;

(g) "manufacture" or "producer" in respect of goods falling under Chapter 62 of the said First Schedule shall include a person who is liable to pay the duty of excise leviable on such goods under sub-rule (3) of rule 4 of the Central Excise (No.2) Rules, 2001.

To the same effect are the Cenvat Credit Rules, 2002:

"Rule 2. Definitions. In these rules, unless the context otherwise requires, -

(b) "capital goods" means,-

(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No.68.02 and sub-heading No.6801.10 of the First Schedule to the Tariff Act;

(ii) pollution control equipment;

(iii) components, spares and accessories of the goods specified at (i) and (ii) above;

(iv) moulds and dies;

(v) refractories and refractory materials;

(vi) tubes and pipes and fittings thereof; and

(vii) storage tank, used in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office,

(e) "final products" means excisable goods manufactured or produced from inputs, except matches;

(g) "input" means all goods, except high speed diesel oil and motor spirit, commonly known as petrol used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not, and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used for manufacture of final products or for any other purpose, within the factory of production.

Explanation 1. The high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

Explanation 2. Inputs include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer;

(h) "manufacture" or "producer" in respect of goods falling under Chapter 61 or 62 of the First Schedule to the Tariff Act shall include a person who is liable to pay the duty of excise leviable on such goods under sub-rule (3) of rule 4 of the Central Excise Rules, 2002."

Mr. Lakshmikumaran, learned counsel for the assessee submits that explosives, lubricating oils, welding electrodes and crushers are used by the assessee in the manufacture of an intermediate product (limestone) which in turn is used in the manufacture of the final product (cement) and, therefore, the said items were eligible for credit in terms of rule 57A and rule 57B of the Modvat scheme as laid down by a three-Judge bench decision in the case of Jaypee Rewa Cement (supra). He submits that the explosives, lubricating oil and welding electrodes constituted "inputs" in terms of rule 57B(1)(i) of the Modvat scheme; that, under rule 57A(4), modvat credit was admissible on inputs used in the manufacture of final products as well as on inputs used in or in relation to the manufacture of the final product, whether directly or indirectly and whether contained in the final product or not; that the explanation contained in rule 57A was meant to enlarge the meaning of the word "input" and it did not in any way restrict the use of the input within the factory premises nor did it require the inputs to be brought into the factory premises at any point of time. In this connection, reliance was placed on the three-Judge bench decision in the case of Jaypee Rewa Cement (supra). Learned counsel further submits that the definition of the word "input" under clause (d) of rule 57AA of the Cenvat Scheme, 2000 was in pari-materia to the definition of "input" under the erstwhile rule 57A and rule 57B of the Modvat Scheme and, therefore, the decision of the three-Judge bench of this Court in the case of Jaypee Rewa Cement (supra) on the point of admissibility of credit in respect of explosives used for mining of limestone (intermediate product) outside the cement factory of the assessee was applicable with equal force to the instant case involving the question of admissibility of Cenvat credit in respect of the same goods used for the same purpose. In this connection, it was further submitted that the essential condition to be satisfied for the purposes of taking credit under both the Schemes was that the input should have been used in or in relation to the manufacture of final product. Learned counsel submits that the said condition finds place in rule 57B of the Modvat scheme as well as in clause (d) of rule 57AA of the Cenvat scheme followed by rule 2(f) of the Cenvat Credit Rules of 2001 followed by rule 2(g) of the Cenvat Credit Rules of 2002 and, therefore, it was submitted that the Cenvat scheme was in

pari-materia to the Modvat scheme and to that extent, the decision of the Division Bench in the case of J.K. Udaipur Udyog Ltd. (supra) needed reconsideration. Learned counsel submits that the goods mentioned in clauses (i) to (vi) of rule 57B(1) as it then stood, also had to satisfy the test embodied in the substantive part of the definition in rule 57(B)(1), namely, of it being used in or in relation to the manufacture of final product. According to the learned counsel, explosives, lubricating oil and welding electrodes fell in the substantive part of the definition of rule 57B(1) and even if they are to be treated as falling part within the inclusive part in clauses (i) to

(vi) of rule 57B(1), still they have to comply with the basic test of being used in or in relation to the manufacture of final product.

Learned counsel next submits that rule 57J of the Modvat scheme has been incorporated in rule 57AB of the Cenvat scheme under which a manufacturer of an intermediate product like limestone can be equated to a job worker. In this connection, reliance was placed on the Circular of CBEC dated 29.8.2000 to show that Cenvat is really in substance an extension of the Modvat scheme.

Learned counsel further urged that applying the test of functional integrality, the assessee was entitled to credit in respect of "inputs" as the mining area and the cement factory were totally inter-dependent on each other. It was urged that a captive mine always supports the manufacturing of cement and, therefore, the mining operations formed part of the manufacturing activity. In this connection, learned counsel submits that the condition of "use" within the factory of production in section 2(g) is applicable only in respect of goods, like furnace oil, used for generation of electricity, which in turn is required to be used for producing the final products or for any other purposes within the factory of production. Learned counsel submits that production of captive input like electricity under rule 2(g) has to be used in the manufacture of final product or for any other purposes within the factory of production. Learned counsel submits that the electricity produced captively has got to be used in the manufacture of final product and only to that extent, credit would be admissible on the input (furnace oil). However, the words "any other purpose" have been introduced in rule 2(g) so that the generated electricity could also be used for lighting godown, storerooms etc. which may not strictly come within the ambit of the word "factory". Learned counsel submits that if the last five words of section 2(g), "within the factory of production", are left out then the result would be that the assessee would generate higher amount of electricity than that required for production and sell the same in the market. Therefore, the words "within the factory of production" must be read with the words preceding thereto, namely, "generation of electricity to be used for manufacture of final product or for any other purpose".

On the question of "capital goods", we find that rule 2(b) of Cenvat Credit Rules gives a specific definition of the term "capital goods". It is not an inclusive definition with the result that any exercise to treat an item as "capital goods" by adopting any interpretative process will be futile. An item can be treated as "capital goods" under Cenvat Credit Rules only if it satisfies that the goods fell under one of the specified chapters or headings of the Tariff or it is a spare part, component or accessory or that it falls under one of the specified items. Further, the said goods must be used in the factory of the manufacturer of the final product. The new rule 2(b) of the Cenvat Credit Rules is preceded rule 57AA (a) read with the explanation which in turn was preceded by rule 57Q(1).

Learned counsel submits that rule 57Q of the earlier Modvat scheme came up for consideration in the case of Jaypee Rewa Cement (supra) which has not taken into consideration the concept of captive production of an intermediate product like limestone used in the manufacture of cement which concept is now recognized under rule 2(b) of the Cenvat Credit Rules.

Per contra, learned counsel appearing on behalf of the department submits that in order to apply Cenvat credit on inputs under rule 57AA, the inputs should have been used in the factory of production of the final product (cement) and as explosives, lubricating oil and welding electrodes were used at off-factory premises, credit was not available to the assessee. Learned counsel for the department invited our attention to the definition of the word "input" in clause (d) of rule 57AA and submitted that the definition of the word "input" in the Cenvat scheme warranted user of the input in the factory of the production of the final product, namely, cement. It was submitted that the decision of three-Judge bench in Jaypee Rewa Cement (supra) was good in respect of admissibility of modvat credit on explosives, lubricating oil and welding electrodes as "inputs" under rule 57A and 57B of the Modvat scheme but it was not applicable on the said goods under rule 57AA(d), and that similarly the assessee was not entitled to credit on capital goods like crushers under rule 57AA(a) equal to rule 2(b) of the Cenvat scheme. Learned counsel further submits that explosives were used in mining operations; that, mines were licensed under Mining Act whereas the factory of the assessee was licensed under the Factories Act and, therefore, it cannot be said that the mines and factory were inter-dependent. Learned counsel urges that there was no functional integrality between the mines and the factory and, therefore, the assessee was not entitled to claim Cenvat credit on explosives under rule 57AA(d) or under rule 2(f) of Cenvat Credit Rules, 2001 or under rule 2(g) of Cenvat Credit Rules, 2002.

In the light of the provisions of the Cenvat scheme vis-`- vis Modvat scheme reproduced hereinabove, we are of the view that the observations made in paragraph 9 of the decision of the Division Bench, quoted above, in the case of Commissioner of Central Excise, Jaipur v. J.K. Udaipur Udyog Ltd. reported in 2004 (171) ELT 289 needs reconsideration. We are, therefore, of the view that this case requires consideration by a larger bench. The papers may be placed before the Hon'ble Chief Justice of India for further directions.