IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 15 / 04 / 2026

JUDGMENT PRONOUNCED ON : 25 / 06 / 2026

CORAM:
THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN
AND
THE HONOURABLE MR. JUSTICE R.SAKTHIVEL

C.M.A. NO.3384 OF 2011
AND
M.P. NO.1 OF 2011 IN C.M.A. NO.3384 OF 2011

CMA NO.3384 OF 2011
M/s.TATA Refractories Ltd.,
(Now known as TRL Krosaki
Refractories Limited)
Rep. by its Associate Vice President (Taxation)
Mr.Manoj Kumar Patel
Belpahar, Jharsuguda – 768 218.
(Cause title amended vide Court
Order dated July 23, 2025 made in
CMA No.3384 of 2011 and
CMP No.17585 of 2025) … Appellant

Versus

The Commissioner of Central Excise
Salem
No.1, Foulks Compound,
Anaimedu, Salem – 636 001. … Respondent

PRAYER: Civil Miscellaneous Appeal filed under new Section 35G of the Central Excise Act, 1944, praying to set aside the Final Order No.E/451/2011 dated March 11, 2011 in Appeal No.E/1153/2004 passed by the Customs, Excise and Service Tax Appellate Tribunal.

For Appellant : Mr.Raghavan Ramabadhran

For Respondent : Mr.M.Santhanaraman
S.S.C. for GST & Customs

* * *

J U D G M E N T

R.SAKTHIVEL, J.

Feeling aggrieved by the Final Order No.E/451/2011 dated March 11, 2011 made by 'the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai' ['C.E.S.T.A.T.' for short], the respondent therein, namely 'M/s.Tata Refractories Limited, (Now known as TRL Krosaki Refractories Limited) Karuppur, Salem' ['T.R.L.' for short] has preferred this Civil Miscellaneous Appeal under new Section 35 (G) of the Central Excise Act, 1944.

FACTUAL MATRIX

2. Brief facts of the case necessary for the disposal of this Civil Miscellaneous Appeal are as follows:

2.1. T.R.L. is an assessee under the Central Excise Act, 1944. T.R.L. in its manufacturing unit at Salem, is engaged in the manufacture of 'Dead Burnt Magnesite' ['D.B.M.' for short], a non-dutiable good [nil-rate excise duty]. D.B.M. is manufactured in Salem unit by burning raw Magnesite in kiln fuelled by furnace oil, and then the same is sent to T.R.L.'s Belpahar unit at Odisha for production of refractory mortars / ramming mass, which

is in turn used to produce refractory bricks. Finally, refractory mortars / ramming mass and refractory bricks are sold to various customers as final goods. Both, refractory mortars / ramming mass and refractory bricks are excisable at the rate of 16%.

2.2. In 2001, the Central Government devised a scheme for availing credit of duties paid on various inputs used in the manufacture of excisable goods under MODVAT/CENVAT Schemes. The dispute in the matter on hand relates to CENVAT input credit availed by T.R.L. / assessee for the period between March 1, 2001 and February 28, 2002.

2.3. When T.R.L. claimed CENVAT input credit for the furnace oil used in the manufacturing process, 'the Office of the Superintendent of Central Excise, Salem-III Range, Salem Division' ['Department' for short], issued show-cause notice dated March 3, 2002, stating that T.R.L. contravened the provisions of Rule 57AD (1) of the erstwhile Central Excise Rules, 1944 [hereinafter, any reference to Rule 57AD or its sub-rules shall be construed as a reference to the corresponding provisions of the erstwhile Central Excise Rules, 1944] and Rule 6 of erstwhile CENVAT Credit Rules, 2001 and Rule 6 of the erstwhile Central Excise Rules, 2001, in so far as availing CENVAT input credit for the fuel -

furnace oil used in the manufacture of final non-dutiable good, namely D.B.M.

2.4. According to the Department, T.R.L. partially used the D.B.M. produced at Salem to manufacture dutiable final products namely monolithic (mortars) at the Salem manufacturing unit itself, and cleared the remaining D.B.M. as such to its Belpahar unit. The D.B.M. cleared as such from the Salem manufacturing unit being a non-dutiable final good, T.R.L. cannot claim CENVAT input credit in view of Rule 57AD (1) which stipulates that CENVAT input credit cannot be claimed on exempted goods or nil-rated goods. While T.R.L. has not distinguished the quantity of furnace oil consumed in the production of dutiable final goods namely monolithic (mortars) at Salem unit and that consumed in the production of D.B.M. cleared as such from the Salem unit, exception to Rule 57AD (1) provided under Rule 57AD (2), is for 'non-fuel inputs' only and therefore, not applicable to T.R.L. claiming CENVAT input credit on the fuel - furnace oil. Accordingly, the Department issued show-cause notice why an amount of Rs.52,51,685/-, being the ineligible CENVAT input credit availed by T.R.L. / assessee, shall not be recovered from them along with interest and penalty.

2.5. That being the contents of the show-cause notice, T.R.L. sent a reply dated May 2, 2002, stating that T.R.L., at the Salem unit, uses furnace oil captively for calcination of raw magnesite ore in the rotary kiln to manufacture both, exempted / nil excise rated final products (D.B.M.) and dutiable final products (ramming mass and mortars). According to T.R.L., D.B.M. is an intermediary product used for the manufacture of other dutiable products, and excess D.B.M. at the Salem unit is sent on stock-transfer basis to their Belpahar unit where they are captively used for manufacture of dutiable goods like refractory mortars / ramming mass and refractory bricks; this stock-transfer does not amount to sale. Further, fuel input is given an exception under Rule 57 AD (1) and (2), and therefore, there is no bar against T.R.L. from claiming CENVAT input credit on the furnace oil used for the manufacture of nil-rated D.B.M. which is stock-transferred as an intermediary product to its Belpahar unit.

2.6. In short, according to the Department, D.B.M. cleared as such from T.R.L.'s Salem unit is a final good chargeable to nil rate of excise duty and therefore, no CENVAT input credit could be claimed on the furnace oil used in the manufacture of such D.B.M. Whereas, according to T.R.L., such D.B.M. is an intermediary good which is stock-transferred to the Belpahar unit where it is used in the manufacture of final dutiable

goods. The final goods thus being dutiable, CENVAT input credit can be claimed on the furnace oil used in the manufacture of such D.B.M.

2.7. Upon considering the show-cause notice and the reply, and upon conducting a personal hearing, the Assistant Commissioner of Central Excise, Salem Division *vide* Order-in-Original [Order Sl.No.92/2002(DC/SALEM)] dated August 6, 2004, disallowed the CENVAT credit of Rs.52,51,685/-, made a demand for interest, and also imposed a penalty of Rs.5,00,000/-.

2.8. Feeling aggrieved, T.R.L. preferred an appeal before the Commissioner of Central Excise (Appeals), Salem under Section 35B of the Central Excise Act, 1944. *Vide* Order dated June 10, 2004 (Order-in-Appeal Sl.No.280/2004-CE [SLM]), the appeal was allowed and the Order-in-Original passed in favour of T.R.L. was set aside.

2.9. Feeling aggrieved by the Order-in-appeal dated June 10, 2004, T.R.L. filed an appeal before the C.E.S.T.A.T., which *vide* Order dated March 11, 2011 [Final Order No.E/451/2011], partly allowed the appeal upholding the duty liability on T.R.L. of Rs.52,51,685/- together with interest, while holding that the penalty imposed on them is not justifiable.

2.10. Feeling aggrieved by the C.E.S.T.A.T.'s Order, T.R.L. has come up with this Civil Miscellaneous Appeal, which was admitted on November 23, 2011, on the following question of law:

> *"(i) Whether the Customs, Excise and Service Tax Appellate Tribunal is correct in holding that Cenvat Credit taken on fuel is required to be expunged even when the exempted intermediate product is used by the appellant in their factory at Belpahar, Orissa, for manufacture of dutiable goods that are ultimately cleared only on payment of Central Excise Duty ?"*

ARGUMENTS

3. Mr.Raghavan Ramabadhran, learned Counsel appearing for the appellant / T.R.L. would submit that D.B.M., a non-dutiable intermediary material, was manufactured in T.R.L.'s Salem unit and the same was stock-transferred to T.R.L.'s Belpahar unit at Odisha. There was no third party sale involved, but only stock-transfer. The stock-transferred D.B.M. was used in the manufacture of dutiable goods namely refractory mortars and refractory bricks, which are the final goods. D.B.M. was not cleared from the Salem unit as final product; it was cleared as an intermediary product which was used to produce refractory mortars and refractory bricks as the final products, which are dutiable in nature. Hence, T.R.L. is entitled to avail the credit of duty paid on inputs *i.e.,* furnace oil used in manufacture of D.B.M. which is in turn used to manufacture the final excisable goods,

under the erstwhile Central Excise Rules, 1944 and the CENVAT Credit Rules, 2001. The Tribunal failed to appreciate the fact that the entire D.B.M. is used only to manufacture excisable final goods.

3.1. As regards maintaining separate accounts in terms of Rule 57AD (2), firstly, any input used as fuel is exempted therefrom. Secondly, the final goods being dutiable as stated above, Rule 57AD does not come into picture. There is no need whatsoever to maintain separate accounts or pay 8% of the total price of final goods and in this regard reliance was placed on *Union of India -vs- Hindustan Zinc Limited*, reported in *(2015) 15 SCC 312*.

3.2. He would further submit that the decisions of the Hon'ble Supreme Court in *C.C.E. -vs- Gujarat State Fertilisers and Chemicals Limited*, reported in *(2008) 15 SCC 46* and in *C.C.E. -vs- Gujarat Narmada Fertilizers Co. Limited*, reported in *[2009 (240) ELT 661 (SC)]*, are not applicable to the facts of the present cases, as the final good in both the said cases is an exempted good (fertiliser), whereas in the instant case, the final goods being refractory mortars and refractory bricks are dutiable in nature. A reference was made to a larger bench of Hon'ble Supreme Court in view of an apparent conflict between the two afore-cited

Judgments. The decision of the larger bench is also not relevant as both the cases are factually deviant from the instant case.

3.3. He would further submit that the decision of Hon'ble Supreme Court in *C.C.E -vs- Ballarpur Industries Limited* reported in *[(2007) (215) ELT 489 (SC)]*, is not applicable to the instant case as it is concerned with determination of the price on stock-transfer of goods, whereas the case on hand is concerned with eligibility of CENVAT input credit on fuel used to manufacture an exempted intermediary good which is in turn used to manufacture dutiable final goods.

3.4. Accordingly, he would pray to allow the Civil Miscellaneous Appeal, set aside the Order of the C.E.S.T.A.T. and confirm that of the Commissioner of Central Excise (Appeals), Salem and thereby, enable T.R.L. to claim CENVAT input credit on the furnace oil used to manufacture D.B.M. at Salem unit which is in turn used to manufacture refractory mortars / ramming mass and refractory bricks at Belpahar unit.

3.5. In support of his contentions, he would rely on the following decisions:

(i) Judgment of the Hon'ble Supreme Court in *M/s.Swadeshi Polytex Ltd. -vs- Collector of Central Excise,* reported in *1990 (2) SCC 358;*

(ii) Judgment of the Hon'ble Supreme Court in *Escorts Ltd., -vs- Commissioner of Central Excise, Delhi,* reported in *2004 (171) E.L.T. 145 (S.C.);*

(iii) Judgment of the Hon'ble Supreme Court in *Collector of Central Excise -vs- Solaris Chemtech Limited,* reported in *2007 (214) E.L.T. 481 (S.C.);*

(iv) Judgment of the Hon'ble Supreme Court in *Commissioner of Central Excise, Vadodara -vs- Gujarat Narmada Valley Fertilizers Co. Ltd.,* reported in *2012 (286) E.L.T. 481 (S.C.);*

(v) Order of the Hon'ble Supreme Court in *Commissioner of Central Excise -vs- M/s.Sterling Gelatine;* made in *Civil Appeal Nos.3035-3036 of 2011 dated September 18, 2014;*

(vi) Judgment of the Hon'ble Supreme Court in *Union of India -vs- Hindustan Zinc Limited,* reported in *(2015) 15 SCC 312;*

(vii) Order of the Hon'ble Supreme Court in *Commissioner of Customs -vs- M/s.India Cements Limited,* reported in *2024 (8) TMI 394 – SC ORDER;*

(viii) Judgment of the Rajasthan High Court in *Commissioner of Central Goods and S.T., Jaipur -vs- Shree Cement Ltd.,* reported in *2018 (16) G.S.T.L. 196 (Raj.);*

(ix) Judgment of the Bombay High Court in *Rallis India Limited -vs- Union of India,* reported in *2009 (233) E.L.T. 301 (Bom.);*

(x) Judgment of the Gujarat High Court in *Commissioner of Central Excise and Customs, Vadodara – I -vs- Sterling Gelatin;* reported in *2011 (270) E.L.T. 200 (Guj.);*

(xi) Judgment of the Bombay High Court in *Oil and Natural Gas Corporation Ltd., -vs- Commissioner of Central Excise, S.T. & Customs, Raigad,* reported in *2013 (32) S.T.R. 31 (Bom.);*

(xii) Judgment of this Court in *M/s. India Cements Ltd., -vs- Commissioner of Customs, Central Excise & Service Tax, Tirunelveli,* bearing neutral citation in *2024/MHC/6057;*

(xiii) Larger Bench judgment of the CESTAT, West Zonal Bench, Mumbai in *Sterlite Industries (I) Ltd., -vs- Commissioner of*

Central Excise, Pune, reported in *2005 (183) E.L.T. 353 (Tri. – LB);*

(xiv) Judgment of the CEGAT, West Zonal Bench, Mumbai in *M/s.Ballarpur Industries Ltd., -vs- Commissioner of Central Excise, Nagpur,* reported in *2001 (138) E.L.T. 94 (Tri.-Mumbai);*

4. *Per contra*, Mr.M.Santhanaraman, learned Senior Standing Counsel [S.S.C.] for GST & Customs, would submit that D.B.M., an exempted good, when cleared as such from T.R.L., it obtains the nature of a final good, and CENVAT input credit cannot be claimed on final exempted goods or final goods chargeable to nil excise duty, in terms of the prohibition contained in Rule 57AD (1). Though Rule 57AD (2) carves out an exception to Rule 57AD (1), it is only in respect of non-fuel inputs used in the manufacture of both, dutiable and non-dutiable final products, and hence, does not apply to the facts of the instant case. Regardless of whether the final goods are non-dutiable, or both dutiable and non-dutiable, no input credit can be availed as long as the input claimed is in respect of fuel.

4.1. Further he would rely on the Judgment of Hon'ble Supreme Court [Full Bench, 3 Hon'ble Judges] in *Commissioner of Central Excise, Vadodara II -vs- Gujarat Narmada Valley Fertilizers Company Limited*, reported in *(2020) 18 SCC 557*, to contend that merely because the exception to Rule 57AD (1) *i.e.,* Rule 57AD (2) contains an exception to fuel, it cannot be said that fuel is excepted from the purview of Rule 57AD (1) as well and that consequently, CENVAT input credit can be availed on fuel used to manufacture even exempted final goods. To put it differently, it is wrong to assert that fuel is altogether excepted from the ken of Rule 57AD making CENVAT input credit available on fuel inputs even if the final goods are exempted ones.

4.2. He would point out that the definition of "input" under Rule 57AA (d) of the erstwhile Central Excise Rules, 1944, uses the term 'within the factory of production', and submits that final goods must be produced within the very same factory premises where input is utilised. When input is utilised in one location and dutiable final good is manufactured in some other location, in such circumstances, input cannot be claimed. In this case, the fuel-furnace oil being the input is utilised at the Salem unit, whereas the alleged final product is manufactured in Belpahar unit. Therefore, T.R.L. is not entitled to claim CENVAT input credit thereon.

4.3. He would place reliance on the Judgment of Hon'ble Supreme Court in *Ballarpur Industries' Case* [cited *supra*], to contend that Rule 57AD is applicable to stock-transfers as well. He would contend that D.B.M., when cleared as such from Salem unit to Belpahar unit, it obtains the character of a final good and Rule 57 AD is applicable. As Rule 57 AD stipulates that no CENVAT input credit shall be availed in respect of inputs utilised for production of exempted or nil-rated goods, T.R.L. is not entitled to claim CENVAT input credit in respect of the furnace oil used for production of the nil-rated D.B.M.

4.4. He would submit that C.E.S.T.A.T. rightly dismissed the appeal and directed T.R.L. to repay the ineligible input credit obtained. There is no need to interfere with the same. Accordingly, he would pray to dismiss the Civil Miscellaneous Appeal and sustain the Order of C.E.S.T.A.T.

DISCUSSION

5. Heard on either side. Perused the materials available on record.

6. From the show-cause notice and the reply thereto, it can be seen that, admittedly, T.R.L. is involved in the manufacture of both excisable and exempted / nil-rated goods at their Salem unit. T.R.L. manufactures D.B.M. chargeable to nil-rate of excise duty by burning raw Magnesite in

rotary kiln fuelled by furnace oil in their Salem unit, which is then utilised in two ways. First, D.B.M. is used to manufacture Monolithic (mortars) which are final products excisable at the rate of 16%, at their Salem unit itself. Second, the remaining or excess D.B.M. is as such transported to their Belpahar unit where it is consumed in the manufacture of refractory mortars / ramming mass and refractory bricks which are final goods also excisable at the rate of 16%. There is no serious dispute with regard to the above facts.

7. The Department claims that when D.B.M. is cleared as such from T.R.L.'s Salem unit to their Belpahar unit, the transaction is analogous to a sale and D.B.M. is considered a final product. Being chargeable at nil-rate of excise duty, no input credit can be claimed on the final product - D.B.M. On the other hand, the contention of T.R.L. is that D.B.M. is merely sent to their Belpahar unit on stock-transfer basis. There is no third party or consideration involved. It does not amount to sale. The final product is not D.B.M; it is only an intermediary product which is used to manufacture the final dutiable products, namely refractory mortars / ramming mass and refractory bricks at their Belpahar unit. The final products thus being dutiable, input credit can be availed on the fuel - furnace oil used to ultimately manufacture them.

8. The question of law framed in the Civil Miscellaneous Appeal is *"Whether the Customs, Excise and Service Tax Appellate Tribunal is correct in holding that Cenvat Credit taken on fuel is required to be expunged even when the exempted intermediate product is used by the appellant in their factory at Belpahar, Orissa, for manufacture of dutiable goods that are ultimately cleared only on payment of Central Excise Duty?"*. The same can be conveniently answered by answering the following questions:

(i) Whether in the facts and circumstances of this case, the final product in respect of the CENVAT input credit on the fuel - furnace oil, would be the D.B.M. excisable at nil-rate itself or the dutiable products manufactured in T.R.L.'s Belpahar unit using D.B.M. ?

(ii) Whether the clearance of D.B.M. as such from T.R.L.'s Salem unit to their Belpahar unit amounts to stock-transfer or sale ?

(iii) Whether input can be availed when input is utilised in one location and dutiable final good is manufactured in some other location ?

9. For ready reference, Rule 57AD and Rule 6 of the CENVAT Credit Rules, 2001 are extracted hereunder:

"Rule 57AD. Obligation of manufacturer of dutiable and exempted goods.

(1) CENVAT credit shall not be allowed on such quantity of inputs which is used in the manufacture of exempted goods, except in the circumstances mentioned in sub-rule (2).

(2) Where a manufacturer avails of CENVAT credit in respect of any inputs, except inputs intended to be used as fuel, and manufactures such final products which are chargeable to duty as well as exempted goods, then, the manufacturer shall maintain separate accounts for receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable final products and the quantity of inputs meant for use in the manufacture of exempted goods and take CENVAT credit only on that quantity of inputs which is intended for use in the manufacture of dutiable goods. The manufacturer, opting not to maintain separate accounts shall follow either of the following conditions, as applicable to him, namely:-

(a) if the exempted goods are:

(i) final products falling under Chapters 50 to 63 of the Schedule to the Central Excise Tariff Act, 1985;

(ii) tyres of a kind used on animal drawn vehicles or handcarts and their tubes, falling within Chapter 40;

(iii) black and white television sets, falling within Chapter 85;

(iv) newsprint, in rolls or sheets, falling within Chapter heading No.48.01, the manufacturer shall pay an amount equivalent to the CENVAT credit attributable to inputs used in or in relation to the manufacture of such final products at the time of their clearance from the factory, or

(b) if the exempted goods are other than those described in clause (a) above, the manufacturer shall pay an amount equal to eight percent of the total price, excluding sales tax and other taxes, if any, paid on such goods, of the exempted final product charged by the manufacturer for the sale of such goods at the time of their clearance from the factory.

Explanation: The amount mentioned in (a) and (b) above shall be paid by the manufacturer by debiting the CENVAT credit or otherwise.

(3)……

(4)……."

"RULE 6. Obligation of manufacturer of dutiable and exempted goods.-

(1) The CENVAT credit shall not be allowed on such quantity of inputs which is used in the manufacture of exempted goods, except in the circumstances mentioned in sub-rule (2).

(2) Where a manufacturer avails of CENVAT credit in respect of any inputs, except inputs intended to be used as fuel, and manufactures such final products which are chargeable to duty as well as exempted goods, then, the manufacturer shall maintain separate accounts for receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable final products and the quantity of inputs meant for use in the manufacture of exempted goods and take CENVAT credit only on that quantity of inputs which is intended for use in the manufacture of dutiable goods.

(3)……."

10. The main principle contained in Rule 57AD (1) and Rule 6 (1) of the CENVAT Central Rules, 2001 is that CENVAT input credit cannot be claimed on inputs utilised in the manufacture of exempted final goods except as provided under their respective sub-rule (2). Sub-rule 2 to either of the provisions provide a mechanism for non-fuel inputs when the finals goods produced are both dutiable and non-dutiable.

11. This Court would like to refer to the Judgment of Hon'ble Supreme Court in ***Escorts Limited Case*** [cited *supra*]. Facts of the case are captured in Paragraph Nos.2 and 3 of the Judgment passed therein, which read thus:

> *"2. Briefly stated, the facts are as follows:*
>
> *The appellants are manufacturers of tractors. They claimed MODVAT credit in respect of duties paid on inputs used in the manufacture of parts. Those parts were then cleared to another factory of the appellants, without payment of duty, by virtue of Notification No. 217/86-CE dated 2-4-1986. The parts were then used to manufacture tractors on which duty was paid.*
>
> *3. The respondent issued a show-cause notice on the ground that MODVAT credit was not admissible as the final goods i.e. the parts were cleared without payment of duty. The appellants claimed that the final products were not the parts but the tractors. The appellants claimed that duty was being paid on the tractor and, therefore, MODVAT credit was available under Notification No. 217/86-CE dated 2-4-1986."*

11.1. In the above factual matrix, the Hon'ble Supreme Court rendered the following findings:

> *"6. It is the contention of the respondent, which has been accepted by CEGAT, that Rule 57-C would become applicable as the parts are cleared from one factory to another without payment of duty. In our view, this reasoning cannot be accepted. The underlined portion of the notification, set out hereinabove, shows that the inputs may be used within the factory of production or in any other factory of the same manufacturer. Thus merely because parts are cleared from one factory of the appellants to another factory does not make the parts the final product. It is not denied that the parts, which are manufactured from the duty-paid inputs, are used in the manufacture of tractors and that the duty is being paid on the tractors.*
>
> XXX XXX XXX
>
> *8. It is to be seen that the whole purpose of the Notification and the Rules is to streamline the process of payment of duty and to prevent the cascading effect if duty is levied both on the inputs and the finished goods. Rule 57/D(2), which has been extracted hereinabove, shows that in the manufacture of a final product an intermediate product may also come into existence. Thus in cases where an intermediate product comes into existence, even though no duty has been paid on the intermediate product as it is exempted from whole of the duty or is chargeable to Nil rate of duty, credit would still be allowed so long as duty is paid on the final product.*
>
> *9. In cases of manufacturers like the Appellants, the final product is the tractor. The intermediate product would be parts which are manufactured for being used in the tractor. In such a*

case the parts would not be the final product. Thus Rule 57/C would have no application. The mere fact that the parts are cleared from one factory of the Appellants to another factory of the Appellants would not disentitle the appellants from claiming benefit of Notification No. 217/86-CE dated 2-4-1986. As stated above, the Notification itself clarifies that the inputs can be used within the factory of production or in any other factory of the same manufacturer.

10. Mr.Lakshmikumaran relied upon the decision of this Court in the case of CCE -vs- Hindustan Sanitaryware & Industries [(2002) 7 SCC 515 : (2002) 145 ELT 3] wherein, in respect of this very notification, this Court has held that so long as duty is paid on the final product, the mere fact that duty was not paid on the intermediate product would not disentitle the manufacturer from the benefit of Notification No. 217/86-CE dated 2-4-1986. In that case, the input was plaster of Paris, the intermediate product was moulds made out of the plaster of Paris, the final product was sanitaryware. In our view, the facts of that case are identical to the facts of the present case. The ratio laid down therein fully applies to this case."

11.2. *Escorts Limited Case* clarifies two important aspects with respect to the case on hand. One, merely because D.B.M. which is an intermediary product in the manufacture of certain final products, is cleared from one factory of T.R.L. to its another factory, it does not make it the final product for the purpose of availing input credit. Second, in cases where an intermediate product chargeable at nil-rate of excise duty comes

into existence during the process of manufacturing, credit would still be allowed so long as duty is paid on the final product.

11.3. While it was also held in *Escorts Limited Case* that the mere fact that the intermediary products are cleared from one factory of the manufacturer to their another factory would not disentitle them from claiming input credit, it was held primarily on the ground that the definition of "input" in the subject notification therein covered not just those inputs used 'within the factory of production' but also those used 'in any other factory of the same manufacturer'. But in the case on hand, "input" as defined under Rule 57 AA (d) of the erstwhile Central Excise Rules, 1944 covers only those used 'within the factory of production'. For ease of reference, said definition under Rule 57 AA (d) of the erstwhile Central Excise Rules, 1944 is extracted hereunder:

> ***"AA. CREDIT OF DUTY PAID ON EXCISABLE GOODS USED AS INPUTS OR CAPITAL GOODS***
>
> ***57 AA. Definitions. - For the purpose of this section,-***
>
> XXX XXX XXX
>
> *(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 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."

11.4. Nonetheless, this Court is of the view that the term 'within the factory of production' is to be interpreted liberally to include the Belpahar unit of T.R.L. as well. The same shall be reverted to for an in-depth discussion later in this Judgment.

12. Coming to the point on whether the clearance of D.B.M. as such from T.R.L.'s Salem unit to Belpahar unit is a stock-transfer or sale, there was no consideration of any sort involved in the clearance of D.B.M. from T.R.L.'s Salem unit in this case. Goods were merely shifted from one unit of the manufacturer to another unit of the very same manufacturer. Admittedly, the owners of the units are one and the same and the balance sheet is common for both. There is no sign of any trade whatsoever. Even

in the clearance bills, it has been specified as stock-transfers. Anything contrary, the same has to be brought up by the Department. Hence, this Court concludes that it is merely a stock-transfer, and not sale as alleged by the Department.

13. Mr.M.Santhanaraman, learned S.S.C., would rely on the Judgment of Hon'ble Supreme Court in *Ballarpur Industries Case* [cited *supra*], to contend that Rule 57AD applies to stock-transfer as well. The facts thereof, as set out in Paragraph Nos.2 to 6 thereat, reads thus:

> *"2. The issue which arises in this civil appeal is as to whether in the absence of any "sale", Rule 57-CC of the Central Excise Rules, 1944 would have any application or not. The contention of the assessee is that in the case of "stock transfer" there is no "sale" and, therefore, Rule 57/CC was not applicable. This contention has been accepted by the Tribunal, hence this civil appeal.*
>
> *3. The assessee is engaged in manufacture of paper falling under Chapter 48 of the Central Excise Tariff Act. The assessee is availing the benefit of MODVAT Scheme under Rule 57/A of the Central Excise Rules, 1944 (for short "1944 Rules"). The assessee is also manufacturing pulp falling under Chapter 47 of the Central Excise Tariff Act, which is chargeable to nil rate of duty. The said pulp is captively consumed for the manufacture of paper. According to the assessee, a small portion of the pulp is sent to the sister unit of the assessee at Asthi. According to the assessee, there was no sale of pulp as alleged by the Department. According to the*

assessee, a small quantity of pulp manufactured by the assessee was stock transferred to its sister unit at Asthi.

4. In this civil appeal, we are concerned with the period September 1996 to March 1999. During this period, the assessee had transferred approximately 41,000 MT of pulp to its sister unit and had paid duty at the rate of eight per cent of the cost price declared by them.

5. Three show-cause notices were issued by the Department dated 21-5-1999, 30-9-1999 and 18-11-1999 in which it was alleged that if comparable prices obtained by the sister units are taken into consideration then the total duty payable at the rate of eight per cent would work out to Rs 4.58 lakhs (approx.) whereas the assessee had paid duty of Rs 2.67 lakhs (approx.). Therefore, it was alleged that the assessee had evaded payment of duty to the tune of Rs 1.90 lakhs (approx.) and accordingly they were also liable to pay penalty under Rule 57/I(4) read with Rule 173/C of the 1944 Rules.

6. Vide reply dated 25-6-1999, the assessee contended that there was no sale of pulp, that it was the case of stock transfer of pulp which was consumed as raw material in the manufacture of paper by the sister unit of the assessee. According to the assessee, a major portion of the pulp manufactured by it was consumed by the assessee and a very small percentage was stock transferred to the sister unit, which consumed the transferred pulp in the manufacture of paper. According to the assessee, in their reply to show-cause notices, price declarations were filed for clearance of pulp to their sister unit at Asthi by way of stock transfer and, therefore, they adopted the rate of 8 per cent of the cost price for purposes of reversal of credit on inputs on which credit was taken. In this

connection, the assessee applied Rule 6(b)(ii) of the Central Excise (Valuation) Rules, 1975 (for short "the Valuation Rules, 1975"). According to the Department, the assessee should have taken into account 8 per cent of the selling price of pulp sold by the assessee's sister units in other States for reversal of modvat credit on inputs on which credit was taken by applying Rule 6(b)(i) of the Valuation Rules, 1975. If Rule 6(b)(i) was to apply then considering the sale price of pulp cleared in other States, the duty amount payable by the assessee herein, worked out to Rs 4,57,56,812/- whereas the assessee had paid an amount of Rs 2,67,32,851/-."

13.1. In this factual matrix, the Hon'ble Supreme Court set aside the Tribunal's finding that, said Rule 57CC as it stood then was not applicable as it was a case of stock-transfer with no sale involved. The Hon'ble Supreme Court *inter-alia* ruled that said Rule 57CC applies to cases of stock-transfer as well.

13.2. This Court is of the view that the reliance on *Ballarpur Industries Case* is misplaced as it is not applicable to the facts of the present case. No doubt that Rule 57CC is comparable to Rule 57AD. However, they both deal with exempted or nil-rated final goods. From *Escorts Limited Case* [cited *supra*], it is clear that D.B.M. is only an intermediate product and the final product are those manufactured in T.R.L.'s Belpahar unit, namely refractory mortars / ramming mass and

refractory bricks, which are excisable at the rate of 16%. Admittedly, the other product, namely Monolithics (mortars) manufactured in the Salem unit by utilising the D.B.M. manufactured therein using the fuel - furnace oil, is also excisable at the rate of 16%. That is to say, the final products manufactured by utilising the fuel - furnace oil are all excisable in nature. As they are all excisable in nature and there is no exempted or nil-rate excise duty final good in picture, Rule 57AD is not applicable to the facts of the instant case. Moreover, *Ballarpur Industries Case* is concerned primarily with determination of the price on stock-transfer of goods to a sister concern for the purpose of payment of the presumptive amount equivalent to the value of 8% of the final goods cleared, under Rule 57CC.

14. The Judgments of Hon'ble Supreme Court in *Swadeshi Polytex Case* and *Hindustan Zinc Case* [cited *supra*] are not squarely applicable to the facts of the instant case, as the said cases were primarily concerned with exempted / nil-rate waste by-products which were produced merely as a technical necessity.

15. So far it has been found that D.B.M. manufactured at T.R.L.'s Salem unit using the fuel - furnace oil is cleared from the Salem unit as an intermediary product on stock-transfer basis and utilised in the

manufacture of dutiable final goods at T.R.L.'s Belpahar unit. The next question is whether input credit can be claimed when input utilised in one location and the final dutiable product is manufacture elsewhere. For this we need to look into the relevant definition of "input" which is set out under Rule 57AA (d). The same has been already been extracted under Paragraph No.11.3 hereinabove. While the definition includes fuel as an input, it specifies that the input should be utilised to produce final good within the same factory of production. But in the instant case, the input which is the fuel - furnace oil is utilised in Salem unit to produce D.B.M., while the final dutiable product is manufactured in T.R.L.'s Belpahar unit using the said D.B.M. Hence, when interpreted in a literal and narrow manner, the fuel - furnace oil would not classify as an input for the final dutiable products manufactured at Belpahar unit. However, this Court is not inclined to interpret it a literal and narrow as the same would make an unnecessary and irrational distinction in the facts and circumstances of this case.

16. Had the final dutiable goods been manufactured at the Salem unit itself, furnace oil would have got snuggly slotted under the definition of "input" under Rule 57AA (d) of the erstwhile the Central Excise Rules, 1944 and CENVAT input credit could have been availed. But it is utilised

in T.R.L.'s Belpahar unit. It is to be noted that both the units belong to the same owner and it is stated in the reply statement to the show-cause notice that even the balance sheets are one and the same; only their physical location is different. The D.B.M. was not cleared to any third parties but to another unit of the same manufacturer for the purpose of further processing to make refractory mortars / ramming mass and refractory bricks which are dutiable final goods. If the expression "within the factory of production" is interpreted strictly and narrowly to mean that every stage of manufacture must take place within the same factory premises, anomalous consequences would follow. Assuming that T.R.L. had established another unit only a few kilometres away from its Salem unit and stock-transferred the intermediary product - D.B.M. thereto for further processing and manufacturing into final dutiable goods namely refractory mortars / ramming mass and refractory bricks, in such a situation, the entire manufacturing process would remain unchanged, the ownership of the goods would remain unchanged, and the final dutiable goods would continue to be manufactured by the same assessee / manufacturer - T.R.L. Yet, on a literal and narrow interpretation, input credit would have to be denied solely because the input was utilised in a different factory of the very same manufacturer which is just a few kilometres away. When both

the concerned units are owned by the same manufacturer and have a common balance sheet, if CENVAT input credit is to be denied on the mere ground that physical location of utilisation of the input and the physical location of manufacture of the final goods are different, then it would be detrimental to the very object of MODVAT and CENVAT Scheme which is to remove all the cascading effect of taxes by allowing manufacturers and service providers to claim credit for duties paid on inputs against their final output excise duty liability. Such a result would make the entitlement of credit depend not on the use of the input or its nexus with the final product, but merely on the physical distance between the very same manufacturer's facilities and also introduce an artificial distinction having no nexus with the object of the MODVAT / CENVAT scheme. Moreover, no prejudice or loss of due revenue would be caused to the Department by following the wider interpretation. Therefore, for the above reasons, in the facts and circumstances of this case, this Court holds that "within the factory of production" is to be given a wider interpretation to include T.R.L.'s Belpahar unit as well and consequently, CENVAT input credit cannot be denied for the fuel - furnace oil on the ground that it was utilised in T.R.L.'s Salem unit while the final product was produced in T.R.L's Belpahar unit.

17. If one is to argue that fuel as an input is outside the ken of Rule 57AD and thus, automatically CENVAT input credit is available to fuel inputs even when the final goods produced are non-dutiable, such an argument is liable to be rejected, as rightly contended by the learned S.S.C, in view of the ratio laid down in Judgment of Hon'ble Supreme Court in *Gujarat Narmada Valley Fertilisers Case* [Full Bench, cited *supra*]. Relevant extract reads thus:

> *"8. This Court in CCE -vs- Gujarat Narmada Fertilizers Co. Ltd. (2009) 9 SCC 101, after setting out the Central Excise Modvat Rules as they stood in 2000, together with the Cenvat Credit Rules, then went on to hold : (SCC pp. 107-08, paras 15-19)*
>
> > *"15. As can be seen from the submissions, the contention of the assessee is that exclusion of fuel inputs from the purview of sub-rule (2) of Rule 6 would mean that such inputs are also automatically excluded from sub-rule (1) whereas according to the Department sub-rule (1) is a general rule which provides, that except for the circumstances mentioned in sub-rule (2), Cenvat credit shall not be allowed on such quantity of inputs used in the manufacture of exempted goods and even though fuel-inputs are excluded from sub-rule (2), such inputs would still fall under sub-rule (1).*
> >
> > *16. In our view, sub-rule (1) is plenary. It restates a principle, namely, that Cenvat credit for duty paid on inputs used in the manufacture of exempted final*

products is not allowable. This principle is in-built in the very structure of the Cenvat scheme. Sub-rule (1), therefore, merely highlights that principle. Sub-rule (1) covers all inputs, including fuel, whereas sub-rule (2) refers to non-fuel inputs. Sub-rule (2) covers a situation where common cenvatted inputs are used in or in relation to manufacture of dutiable final product and exempted final product but the fuel input is excluded from that sub-rule. However, exclusion of fuel input vis-à-vis non-fuel input would still fall in sub-rule (1). As stated above, sub-rule (1) is plenary, hence, it cannot be said that because sub-rule (2) is inapplicable to fuel input(s), Cenvat credit is automatically available to such inputs even if they are used in the manufacture of exempted goods.

17. The cumulative reading of sub-rules (1) and (2) makes it abundantly clear that the circumstances specified in sub-rule (2), which inter alia requires separate accounting of inputs, are not applicable to the fuel input(s). However, the said sub-rule (2) nowhere says that the legal effect of sub-rule (1) will stand terminated in respect of fuel inputs which do not fall in sub-rule (2). In other words, the legal effect of sub-rule (1) has to be applied to all inputs including fuel inputs, only exception being non-fuel inputs, for which one has to maintain separate accounts or in its absence pay 8%/10% of the total price of the exempted final products.

18. Therefore, sub-rule (1) shall apply in respect of goods used as "fuel" and on such application, the credit will not be permissible on such quantity of fuel which is used in the manufacture of exempted goods. In our view, the above aspect has not been properly appreciated by the Gujarat High Court in Gujarat Narmada [CCE -vs- Gujarat Narmada Fertilizers Co. Ltd., 2005 SCC OnLine Guj 487 : (2006) 193 ELT 136] .

19. For the above reasons, we find merit in the Department's civil appeals."

9. Thus, the finding of this Court restates an important principle under the Cenvat Credit Rules, and which is inbuilt in the structure of the Cenvat Credit Scheme, which is that Cenvat credit for duty paid on inputs used in the manufacture of exempted final products cannot be allowed. It is only a reflection of this larger principle which is contained in Rule 6. When Rule 6(1) says that the Cenvat credit shall not be allowed on such quantity of inputs which is used in the manufacture of exempted goods, it relies upon the definition of "inputs" contained in these Rules which certainly include LSHS and steam and electricity that are produced in the manufacturing process utilising LSHS. The exception that is contained in sub-rule (2) refers to all inputs except inputs intended to be used as fuel which then results in the manufacture of final products which are both chargeable to duty as well as exempted goods. What is clear is that the exception to sub-rule (1) which is contained in sub-rule (2) itself contains an exception, namely, inputs intended to be used as fuel. This being the case, the moment it is found that inputs

are intended to be used as fuel, such inputs go outside the ken of sub-rule (2) of Rule 6. When this happens, the exception contained in sub-rule (2) does not come into effect at all as a result of which sub-rule (1) must be applied on its own terms."

18. In view of the foregoing narrative, this Court holds that T.R.L. is entitled to claim CENVAT input credit in respect of the fuel - furnace oil consumed in the manufacture of D.B.M. being excisable at nil-rate, as the final product is not D.B.M. but the refractory mortars / ramming mass and the refractory bricks manufactured at Belpahar unit. The final products being excisable in nature, the bar under Rule 57AD (1) does not apply, as it is applicable only when the final products are exempted or nil-rated. The question of law framed is answered as follows: C.E.S.T.A.T. is not correct in holding that CENVAT Credit taken on fuel is required to be expunged when the exempted intermediate product (D.B.M.) is used by the T.R.L. in their factory at Belpahar, Orissa, for manufacture of dutiable goods (refractory mortars / ramming mass and refractory bricks) that are ultimately cleared only on payment of Central Excise Duty, in view of the detailed discussion above. Accordingly, the C.E.S.T.A.T.'s Order dated March 11, 2011 is liable to be set aside, and though this Court does not agree with the reasons assigned by the Commissioner of Central Excise (Appeals), Salem for arriving at the final decision in Order-in-Appeal

dated June 10, 2004, the final decision holds good and hence, the Order-in-Appeal is liable to be restored.

19. This Court has paid its due consideration to the other case laws relied on either side. There is either no quarrel with them, or they are not applicable to the facts of the instant case.

CONCLUSION:

20. The Civil Miscellaneous Appeal is allowed. The Final Order No.E/451/2011 dated March 11, 2011 made by C.E.S.T.A.T. is set aside. The Order-in-Appeal (Sl.No.280/2004-CE [SLM]) dated June 10, 2004 passed by the Commissioner of Central Excise (Appeals), Salem in favour of T.R.L. is restored. Consequently, connected Miscellaneous Petition is closed.

[DR. G.JAYACHANDRAN, J.] **[R.SAKTHIVEL, J.]**

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Index : Yes
Speaking Order : Yes / No
Neutral Citation : Yes / No
JRS/TK

DR.G.JAYACHANDRAN, J.
AND
R.SAKTHIVEL, J.

JRS/TK

To

1.Customs, Excise & Service Tax Appellate Tribunal
South Zonal Bench
26, 1st Floor, Haddows Road,
Shastri Bhavan Annex,
Chennai.

2.The Commissioner of Central Excise
Salem
No.1, Foulks Compound,
Anaimedu, Salem – 636 001.

PRE-DELIVERY JUDGMENT MADE IN C.M.A. NO.3384 OF 2011

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