UNION OF INDIA & ORS. A

v.

M/S. HINDUSTAN ZINC LTD.

(Civil Appeal No. 8621 of 2010)

MAY 06, 2014 B

[ANIL R. DAVE AND A.K. SIKRI, JJ.]

Central Excise Rules, 1944:

r.57CC r/w rr.57A, 57B and 57D – Adjustment of Modvat/ Cenvat credit on inputs used in exempted final products and maintenance of separate inventory and accounts of inputs by the manufacturer – Sulphuric acid, caustic soda, trichloro ethylene, Phosphoryl A and Phosphoryl B, cleared by assessees to fertilizer plants in terms of bonds executed by latter – Held: Technologically, commercially and in common parlance, sulphuric acid is treated as a by-product in extraction of non-ferrous metals by companies not only in India but all over the world –The facts regarding caustic soda, trichloro ethylene, Phosphoryl A and Phosphoryl B are identical – No doubt, r.57CC requires an assessee to maintain separate records for inputs which are used in the manufacture of two or more final products one of which is dutiable and the other is non-dutiable – But in the case of the respondents, the entire quantity of zinc concentrate has indeed been used in the production of zinc and no part can be traced in the sulphuric acid – It is for this reason, respondents maintained the inventory of zinc concentrate for the production of zinc and, therefore, there was no necessity and indeed it is impossible, to maintain separate records for zinc concentrate used in the production of sulphuric acid – Therefore, High Court has rightly held that requirements of r.57CC were fully met in the way in which respondents were maintaining records and inventory and the mischief of C D E F G

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A *recovery of 8% under r.57 CC on exempted sulphuric acid is not attracted – Notification No. 6/2002-CE.*

Constitution of India, 1950:

Art. 226 – Alternative remedy and maintainability of writ B *petition – Writ petition filed challenging show cause notice issued alleging violation of r. 57CC of Central Excise Rule – Held: It was not merely the validity of show cause notice which was questioned – In the writ petition even the vires of r. 57 CC were challenged – That was a reason because of which the* C *writ petitions were entertained, and rightly so, it is a different matter that while interpreting the rule, the High Court chose to read down the said rule and to give an interpretation which would save it from the vice of unconstitutionality – Central Excise Rules, 1944 – r. 57CC.*

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The instant appeals, filed by the revenue, arose out of the judgments of the High Court and the Tribunal allowing the claim of the respondents-assessees that they were entitled to Modvat/Cenvat Credit on inputs E **used in producing sulphuric acid, caustic soda flakes, *trichloro ethylene, Phosphoryl A and Phosphoryl B* which they cleared to fertilizer plants under exemption in terms of bonds executed by fertilizer plants in terms of Notification No. 6/2002-CE.**

F **The questions for consideration before the Court were: as to the entitlement of the respondents/ assessees to Modvat/Cenvat Credit for the use of inputs in the manufacture of final products which are exempt or subject to NIL rate of duty; and the requirement of the** G **assessee to maintain separate accounts with respect to inputs used in dutiable goods as well as exempted goods and the liability arising on the failure of the assessee to maintain such separate accounts.**

H **Allowing the appeals, the Court**

HELD: 1.1. The respondent in CA Nos. 8621-8630/2010 claimeed Modvat Credit on duties paid on inputs used at smelter by it vis-a-vis the part of sulphuric acid produced by it in its sulphuric acid plant and sold to IFFCO, a manufacturer of fertilizer, entitled to avail concession of acquiring sulphuric acid used by it as an input in manufacture of fertilizers on payment of duties in terms of the exemption notifications issued from time to time. So far as the sulphuric acid is concerned; as an end product it is chargeable to duty under tariff head 28. The rate of duty provided under the Tariff Act is 16% ad valorem. There is no exemption as such to the manufacturer from the payment of duty on manufacture of sulphuric acid when removed. Under General Exemption No. 66 issued under sub-s. (1) of s.5A of the Central Excise Act the Central Government has exempted exciseable goods of the description specified in (3) of the table appended to the said Exemption Order. In so far as sulphuric acid which is used in the manufacture of fertilizers is concerned, nil duty is provided subject to condition No. 5 mentioned in Annexure appended to General Exemption No. 66. [para 10-11] [299-G-H; 300-A-C]

1.2. Sulphuric acid is indeed a by-product. In fact, it is so treated by the respondents in their balance sheet as well as various other documents which were filed by them in the courts below. It is also a common case of the parties that Hindustan Zinc Limited and Birla Copper were established to produce zinc and copper respectively and not for the production of sulphuric acid. Emergence of sulphur dioxide in the calcination process of concentrated ore is a technological necessity and then conversion of the same into sulphuric acid as a non-polluting measure cannot elevate the suiphuric acid to the status of final product. Technologically, commercially and in common parlance, sulphuric acid is treated as a by-product in extraction of non-ferrous metals by

companies not only in India but all over the world. That is the reason why the department accepted the position before the Tribunal that sulphuric acid is a by-product. In the circumstances the position taken by the appellant before this Court that sulphuric acid cannot be treated as a by-product cannot be countenanced. [para 16-17] [304-B-F]

2.1. Rule 57CC of the Central Excise Rules, 1944 requires an assessee to maintain separate records for inputs which are used in the manufacture of two or more final products one of which is dutiable and the other is non-dutiable. In that event, r.57 CC will apply. But in the case of the respondents, it is not as though some quantity of zinc ore concentrate has gone into the production of sulphuric acid, that applicability of r.57 CC can be attracted. On the other hand, the entire quantity of zinc ore concentrate has indeed been used in the production of zinc and no part of it can be traced in the sulphuric acid. It is for this reason, the respondents maintained the inventory of zinc concentrate for the production of zinc and, therefore, there was no necessity and indeed it is impossible, to maintain separate records for zinc concentrate used in the production of sulphuric acid. [para 20] [305-D-H; 306-A]

2.2. Therefore, the High Court has rightly held that the requirements of r.57CC were fully met in the way in which the respondents were maintaining records and inventory and the mischief of recovery of 8% under r.57 CC on exempted sulphuric acid is not attracted. [para 20] [306-B]

2.3. In the case of Birla Copper (C.A. No. 2337 of 2011), the manufacturing process of copper from the copper ore concentrate is similar to that of zinc and the emergence of sulphuric acid as a by-product was conceded by the department before the Tribunal. Birla

Copper were selling the by-product sulphuric acid to various industries on payment of duties and clearing the sulphuric acid without payment of duty to the fertilizer plants based on the bonds executed by the latter. The Tribunal has decided the matter in favour of the assessee following the judgment in the case of *Swadeshi Limited.* The facts in other appeals regarding caustic soda flakes, trichloro ethylene, Phosphoryl A and Phosphoryl B appear to be identical to the facts and the law laid down in *Swadeshi Polytex.* Therefore, this judgment is squarely applicable. [para 4,22 and 25] [306-A-C; 308-E]

Swadeshi Polytex Ltd. v. CCE; **1989 (44) ELT 794 - relied on.**

2.4. Furthermore, the provisions of r.57CC cannot be read in isolation. In order to understand the scheme of Modvat Credit contained in this Rule, a combined reading of rr.57A, 57B and 57D alongwith r.57CC becomes inevitable. It can be easily discerned from a combined reading of these provisions that the terms used are 'inputs', 'final products', 'by-product', 'waste products' etc. These terms have been used taking into account commercial reality in trade. In that context in terms of r.57 CC, reference to final product being manufactured with the same common inputs becomes understandable. [para 26] [308-F-H; 309-A]

CCE v. *Gas Authority of India Ltd.;* **2008 (232) ELT 7 – relied on.**

3. As regards the plea of alternative remedy and non-maintainability of the writ petition filed by Hindustan Zinc Limited before the High Court, though it was filed at show cause stage, it was not merely the validity of show cause notice which was questioned. In the writ petition even the vires of r. 57 CC were challenged. That was a reason because of which the writ petitions were entertained, and

A **rightly so, it is a different matter that while interpreting the rule, the High Court chose to read down the said rule and to give an interpretation which would save it from the vice of unconstitutionality. Moreover, other statutory appeal filed by the Department is against the order of**
B **CESTAT, which involves the same question. [para 28] [309-F-H]**

Sterlite Industries India Ltd. v. CCE **2005 (191) ELT 401;** *Binani Zinc Ltd. v. Commissioner of Central Excise, Cochin* **2005 (187) E.L.T. 390 (Tri. - Bang.); and** *Rallis India Ltd.* v.
C *Union of India*; **2009 (233) ELT 301 – cited.**

Case Law Reference:

2005 (191) ELT 401	**cited**	**para 4**
2005 (187) E.L.T. 390		
D **(Tri. - Bang.)**	**cited**	**para 6**
1989 (44) ELT 794	**relied on**	**para 24**
2008 (232) ELT 7	**relied on**	**para 24**
2009 (233) ELT 301	**cited**	**para 24**

E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8621 of 2010.

From the Judgment and Order dated 23.01.2007 of the High Court of Judicature for Rajasthan at Jodhpur in Civil Writ Petition No. 6776 of 2005.

F WITH

Civil Appeal No. 1181 of 2012

Civil Appeal No. 2337 of 2011

Civil Appeal Nos. 5322, 8622, 8623, 8624, 8625, 8626, 8627,
G 8628, 8629, 8630 and 8631 of 2010.

K. Swami, Sunita Rani Singh, Sunita Rao, B.K. Prasad, B.V. Balaram Das, Anil Katiyar, B. Krishna Prasad, Arvind Kumar Sharma for the Appellants.

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S.K. Bagaria, Alok Yadav, Praveen Kumar, Sunaina Kumar, M.P. Devanath, Manish Bishnoi, Abhay A. Jena, Anuj Dhir, Ranjit Raut, Bina Gupta, Nitish Massey, Sanjeev K. Kapoor for the Respondent. A

The Judgment of the Court was delivered by B

A.K. SIKRI, J. 1. All these appeals raise identical question of law, which has arisen in almost similar circumstances. In fact, the issue involved was decided by the High Court in a batch of Writ Petitions filed by M/s. Hindustan Zinc vide judgment dated 23.1.2007 against which SLP under Article 136 C of the Constitution was filed in which leave has been granted. In other case, same issue is decided by the CESTAT against which statutory appeal is preferred. That is precisely the reason that all these appeals were bunched together and collectively heard. D

2. At the outset, the controversy involved may be reflected by pointing out that the questions for consideration are as to the entitlement of the Respondents/ assessees to Modvat/ Cenvat Credit for the use of inputs in the manufacture of final products which are exempt or subject to nil rate of duty and the E requirement of the assessee to maintain separate accounts with respect to inputs used in dutiable goods as well as exempted goods and the liability arising on the failure of the assessee to maintain such separate accounts. In Civil Appeal Nos. 8621-8630 of 2010, we are concerned with sulphuric acid. F In Civil Appeal No. 8631 of 2010, it is caustic soda flakes and trichloro ethylene. In Civil Appeal No. 2337 of 2011, the product is again sulphuric acid and in the case of Civil Appeal No. 5322 of 2010 and the other connected matter of M/s Rallis India Ltd, it is Phosphoryl A and Phosphoryl B. The issue is as to whether G the Assessees (respondents) are entitled to Modvat/ Cenvat Credit on inputs used in the manufacture of the aforementioned exempted (or subject to NIL rate of duty) final products.

3. In all these appeals filed by the Revenue, it has taken H

A the position with the common contention as to whether the Respondents are liable to pay 8% excise duty as an amount under Rule 57CC of the Central Excise Rules, 1944 or 57AD of the Central Excise Rules, 2000 or Rule 6 of the Cenvat Credit Rules, 2004 (hereinafter referred to as 'Rules') on the value of B by-product namely sulphuric acid which was cleared to fertilizer plants under exemption in terms of the bonds executed by the fertilizer plants.

4. At this stage we would describe the manufacturing process in all three cases and the facts leading to the filing of C the present appeal.

Hindustan Zinc Ltd. (C.A. No. 8621-8630/2010)

(i) Hindustan Zinc Ltd. obtained zinc ore concentrate from D the mines on the payment of excise duty which is used as an input for the production of zinc. Zinc ore is predominantly available as Zinc Sulphide (ZnS).

(ii) When ZnS is heated (calcined) at high temperature in the presence of oxygen, zinc oxide (ZnO) and sulphuric acid E are produced. Zinc Oxide is further oxidised to produce zinc. Sulphur obtained as a technological necessity is a pollutant and is, therefore, converted into sulphur dioxide in the presence of catalysts like Vanadium Pentaoxide & Hydrogen Peroxide. Sulphuric acid is converted into sulphur and the respondent F does not take any Cenvat Credit on the inputs used after the emergence of sulphur dioxide. The sulphuric acid produced as a by-product is sold on payment of excise duty to various industries. Some quantities of sulphuric acid are sold to fertilizer plants in terms of notification No. 6/2002-CE on the G execution of bonds by the fertilizer plants to the satisfaction of the excise authorities. The said sulphuric acid is used for the production of zinc.

(iii) The excise department took a view that in terms of Rule 57 CC of the Rules, the respondents were obliged to H

maintain separate accounts and records for the inputs used in the production of zinc and sulphuric acid and in the absence of the same the respondents were obliged to pay 8% as an amount on the sale price of sulphuric acid to the fertilizer plants in terms of Rule 57 CC. The respondent defended the more by contending that the very purpose of the grant of exemption to sulphuric acid was to keep the input costs at the lowest for the production of fertilizers during the relevant period. Fertilizers themselves were wholly exempted from the payment of excise duty because the government wanted the farmgate price to the farmer should be at the lowest. In fact, the government grants subsidies to the fertilizer plants for the difference between the cost of production and sale price determined by the government. It was their defence that any duty demand on the sulphuric acid will defeat the very purpose of grant of exemption and make the fertilizer cost higher than the desirable level. In such a scenario, such higher cost will have to be compensated by the government as subsidy.

(iv) Respondent challenged the show cause notices by filing writ petitions under Article 226 before the Rajasthan High Court, primarily challenging the vires of Rule 57 CC on the ground that the Central Government by subordinate legislation, can not fix rates of duties which is the prerogative of the Parliament under Section 3 of the Central Excise Act, 1944 read with Central Excise Tariff Act, 1975. Other contentions regarding the vires of Rule 57 CC were also raised. As an alternative, it was pleaded that even if Rule 57 CC is to be held as intra vires, the demand raised in the show cause notices will not survive on proper interpretation of Rule 57CC of the Rules and hence is to be quashed. The High Court decided the petition in favour of the respondents on the interpretation of Rule 57CC and Rule 57D itself, without going into the question relating to the vires. Department is in appeal before this Court against this judgment.

A **Birla Copper (C.A. NO. 2337/2011)**

(i) The manufacturing process of copper from the copper ore concentrate is similar to that of zinc and the emergence of sulphuric acid as a by-product was conceded by the B department before the Tribunal. Here again, Birla Copper were selling the by-product sulphuric acid to various industries on payment of duties and clearing the sulphuric acid without payment of duty to the fertilizer plant based on the bonds executed by the fertilizer plants. The Tribunal in this case C decided the matter in favour of the respondent following its own judgment in the case of Sterlite Industries India Ltd. v. CCE reported as 2005 (191) ELT 401. In that case Sterlite was also a manufacturer of copper and a competitor for Birla Copper using the same process and the Tribunal held that excise duty was not payable under 57 CC on the sulphuric acid cleared to D fertiliser plants in view of this court's decision in the case of Swadeshi Polytex Ltd. v. CCE reported as 1989 (44) ELT 794. The Tribunal also in the case of Sterlite (supra) held that 57 CC will apply only when same inputs are being used in manufacture of two or more final products, one of which is exempt from E payment of excise duty and the assessee was not maintaining separate account and separate inventory. In this case, the Tribunal held that sulphuric acid was not a final product but only a by-product and hence Rule 57 CC will not apply, particularly when we read the same in the light of Rule 57D. Department's F appeal is against this order of the Tribunal. Significantly, the department has not disputed the emergence of sulphuric acid as a by-product. We are also informed that the Department did not file any appeal challenging the decision of Sterlite (supra) and the same has been accepted by the Department. In the G present appeal, the contention of the Department is that the Sterlite (supra) will apply for the period prior to 1.4.2000 when Rule 57 D was in force and post 1.4.2000, the Rule was deleted.

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Rallis India Ltd. (C.A. No. 5322/2010)

(i) Rallis India is engaged in the manufacture of Gelatin for use in pharmaceutical industry for manufacture of capsules. Gelatin is produced by reacting Hydrochloric Acid with bovine animal bones. During the reaction, the bone converts into ossein which in turn is used to produce gelatin. The inorganic substances like phosphorous etc. are washed with water which is called mother liquor, spent liquor or phosphoral liquor. When these by-products and waste products are cleared without payment of duty, the Excise Department demanded duty @ 8% in terms of Rule 57 CC. Here again, whether the mother liquor is a waste product or by-product was not disputed by the Department before the Tribunal or before the Bombay High Court. The Tribunal decided the matter against the assessee by interpretating Rule 57 CC. The same was challenged before the Bombay High Court, which has reversed the decision of the Tribunal. The Department is in appeal against the decision of the High Court.

The aforesaid narration discloses the identity of the issue in the three set of appeals. Henceforth, in our discussion, reference would be to the Hindustan Zinc Ltd., as the respondent.

5. The respondent herein is a Public Limited Company and it was disinvested in April, 2002. The respondent is engaged in the manufacture of non-ferrous metals like zinc, lead as well as Sulphuric Acid and Copper Sulphate. The said products are chargeable under Chapter Sub-heading No. 2807.00, 7901.10 and 2833.10 respectively of the First Schedule to the Central Excise Tariff Act, 1985 respectively among their other products. A show cause notice was issued on 15.3.2005 to the assessee respondent for recovery of Rs. 48,39,883/- under Rule 12 of the erstwhile CENVAT Credit Rules, 2002 and Rule 14 of CENVAT Credit Rules 2004 read with Section 11(e) of the Central Excise Act, 1944 along with interest and penal provisions.

A 6. The respondent filed Writ Petition No. 6776 of 2005 before the High Court, Jodhpur challenging the constitutional validity of Rule 6 of the Cenvat Credit Rules, 2004 as well as the impugned show cause notice dated 15.3.2005. The respondent submitted in the said writ petition that Sulphur B Dioxide Gas is produced during the manufacture of Zinc and lead and due to environmental control requirements, they are prohibited from releasing the same in the air. Therefore, Sulphur Dioxide is used for manufacture of Sulphuric Acid which is the input for manufacture of non-ferrous metals like zinc C and lead cannot be considered as common inputs for manufacture of Sulphuric Acid in as much as Sulphur is the only component in concentrate which goes into manufacture of Sulphuric Acid. Further, the respondent contended that Rule 6 of the Cenvat Credit Rules is beyond the power of Central D Government and hence ultra vires the provisions of the Act. The constitutional validity of Rule 57CC of the erstwhile Modvat Credit Rules was also challenged. It was stated that the Tribunal in the judgment in the matter of Binani Zinc Ltd. v. Commissioner of Central Excise, Cochin – 2005 (187) E.L.T. E 390 (Tri. - Bang.) has held that Rule 57CC does not make any distinction between exempted final product and exempted bye-product and hence, no useful purpose would be served by approaching the Tribunal.

7. The appellant contested the said Writ Petition by way F of counter affidavit in which the appellant submitted that the respondent - assessee was not maintaining separate inventory and account for the receipt and use of inputs in relation the manufacture of final product i.e. Sulphuric Acid cleared at Nil rate of duty as required in terms of provisions of Rule 6(2) of G the Rules. That it was mandatory to follow the provisions of the Rules if common inputs were used for the manufacture of dutiable final product and exempted goods. It was also contended that assuming without admitting that Sulphuric Acid is by-product, it was mandatory to reverse an amount equal to H 8% of the value of exempted goods as the words used in the

provisions of Rule 6 of the Rules "is exempted goods and not exempted final product". By way of preliminary submission, it was pleaded that the Writ Petition is pre-mature and the assessee had not even replied to the show cause notice. A

8. The High Court after examining the manufacturing process as well as Rule position, came to the conclusion that prohibition against claiming Modvat Credit on exempted goods or subject to nil rate of duty applies in case where such exemption from payment of duty or nil rate of duty on end product is predictably known at the time the recipient of inputs is entitled to take credit of duties paid on such inputs. The fact that due to subsequent notification or on contingency that may arise in future, the end product is cleared without payment of duty due to exemption or nil rate of duty does not affect the availing of modvat credit on the date of entitlement. If on the date of entitlement, there is no illegality or invalidity in taking credit of such modvat/ Cenvat Credit, the right to utilize such credit against future liability towards duty become indefeasible and is not liable to be reversed in the contingency discussed above. B C D

9. On these findings, the High Court has allowed the Writ Petitions filed by the respondent-Hindustan Zinc. In the process there is a detailed discussion of the relevant rules explaining the scheme contained therein; on the aspect of payment of 8% excise duty under Rule 57 CC of Central Excise Rules, 1944, 57AD of the Central Excise Rules, 2000 and Rule 6 of the Cenvat Credit Rules, 2004. E F

10. From the aforesaid narration, it becomes apparent that the respondent wants to avail Modvat Credit on duties paid on inputs used at smelter by it vis-a-vis the part of sulphuric acid produced by it in its sulphuric acid plant and sold to IFFCO, a manufacturer of fertilizer, who is entitled to avail concession of acquiring sulphuric acid used by it as an input in manufacture of fertilizers on payment of duties in terms of the exemption notifications issued from time to time. So far as the sulphuric G H

A acid is concerned, as an end product it is chargeable to duty under tariff head 28. The rate of duty provided under the Tariff Act is 16% ad valorem. There is no exemption as such to the manufacture from the payment of duty on manufacture of sulphuric acid when removed. Under general exemption No. 66
B issued under sub-section 1 of Section 5A of the Central Excise Act the Central Government has exempted exciseable goods of the description specified in (3) of the table appended to the said Exemption Order.

C 11. In so far as sulphuric acid which is used in the manufacture of fertilizers is concerned, nil duty is provided. However, table indicates that it is subject to condition No. 5. Condition No. 5 is mentioned in Annexure appended to General Exemption No. 66 which reads as under:-

D "5. Where such use is elsewhere than in the factory of production the exemption shall be allowed if the procedure laid down in the Central Excise (Removal of Goods at Concessional Rate of Duty for manufacture of Excisable goods) Rules, 2001, is allowed."

E 12. The appellant contends that clearance of sulphuric acid as a by-product to fertilizer plants attract nil rate of duty in terms of notification no. 6/2002-CE, though on the basis of bonds posted by the fertilizer plants, but nonetheless, the goods are cleared under total exemption or nil rate of duty and hence
F 57CC is attracted. It is their contention that Rule 57 D has no application.

13. Since the answer depends on the question as to whether Rule 57CC applies or Rule 57D is attracted, as well
G as on the correct interpretation of these Rules, we reproduce these rules, at this juncture:-

Rule 57CC -

H "Adjustment of credit on inputs used in exempted final products or maintenance of separate inventory and

accounts of inputs by the manufacturer, (1) Where a manufacturer is engaged in the manufacture of any final product which is chargeable to duty as well as in any other final product which is exempt from the whole of the duty of excise leviable there on or is chargeable to nil rate of duty and the manufacturer takes credit of the specified duty on any inputs (other than inputs used as fuel) which is used as ordinarily used in or in relation to the manufacture of both the aforesaid categories of final products, whether directly or indirectly and whether contained in the said final products or not, the manufacture shall, unless the provisions of sub-rule (9) are complied with, pay an amount equal to 8% of the price (excluding sales tax and other taxes, if any, payable on such goods) of the second category of final products charged by the manufacturer for the sale of such goods at the time of their clearance from the factory.

The amount mentioned in sub-rule(1) shall be paid by the manufacturers by adjustment in the credit account maintained under sub-Rule(7) of Rule 57G or in the accounts maintained under Rule 9 or sub-Rule 173G and if such adjustment is not possible for any reason, the amount shall be paid in cash by the manufacturer availing of credit under Rule 57A.

The provisions of sub-rule(1) shall not apply to final products falling under Chapter 50 to 63 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986).

(4) The provisions of sub-rule (1) shall also not apply to-

(a) Articles of plastics falling within Chapter 39;

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

A (c) Black and white television sets, falling within Chapter 85 and

(d) News print, in rools or sheets, falling within Chapter heading No. 48.01; which are exempt from the whole of
B the duty of excise leviable thereon or chargeable to nil rate duty.

(5) In the case of final products referred to in sub rule (3) or sub-rule(4) and excluded from the provisions of sub-rule(1), the manufacturer shall pay an amount equivalent
C to the credit of duty attributable to inputs contained in such final products at the time of their clearance from the factory.

The provisions of sub-rule (1) shall also not apply to final products which are exported under bond in terms of the
D provisions of Rule 13.

The provisions of sub-rule (1) shall apply even if the inputs on which credit has been taken are not actually used or contained in any particular clearance of final products.

E If any goods are not sold by the manufacturer at the factory gate but are sold from a depot or from the premises of a consignment agent or from any other premises, the price (excluding sales tax and other taxes, if any, payable) at which such goods are ordinarily sold by the manufacture
F from such depot or from the premises of a consignment agent or from any other premises shall be deemed to be the price for the purpose of sub-Rule (1).

In respect of inputs (other than inputs used as flue) which are used in or in relation to the manufacturer of any goods,
G which are exempt from the whole of the duty of excise leviable thereon or chargeable to nil rate of duty, the manufacturer shall maintain separate inventory and accounts of the receipt and use of inputs for the aforesaid

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purpose and shall not take credit of the specified duty paid on such inputs." A

Rule 57D -

"Credit of duty not to be denied or varied in certain circumstances – (1) Credit of specified duty shall not be denied or varied on the ground that part of the inputs is contained in any waste, refuse or by-product arising during the manufacture of the final product, or that the inputs have become waste during the course of manufacture of the final product, whether or not such waste or refuse or by-product is exempt from the whole of the duty of excise leviable thereon or chargeable to nil rate of duty or is not specified as a final product under Rule 57A." B C

14. Mr. Parasaran, the learned Solicitor General, opened his submissions by challenging the very approach of the High Court in entertaining the writ petitions as according to him, stage therefor had not ripened. His contention in this behalf was that merely a show cause notice was issued and no final decision was taken on the said show cause notice. However, instead of showing cause, writ petitions were filed seeking quashing of the show cause notice which should have been dismissed as premature. He referred to certain judgments of this court as well, wherein it is held that High Court, normally, should not entertain writ petition questioning the validity of the show cause notice. D E F

15. On merits, the learned Solicitor General argued that the interpretation furnished by the High Court to Rule 57CC of the Modvat Rules and Rule 6 of CENVAT Rules, respectively was not correct. The High Court was required to apply literal rule of interpretation when the language of these rules is clear and unambiguous. G

16. Before we advert to the interpretations of the aforesaid provisions and to discuss the argument of the Union of India H

A as to whether literal interpretation is to be given to Rule 57CC, it would be necessary to understand the properties of sulphuric acid. From what is explained above including the use of sulphuric acid for the production of zinc, it becomes apparent that sulphuric acid is indeed a by-product. In fact, it is so treated
B by the respondents in their balance sheet as well as various other documents which were filed by the respondents in the courts below. It is also a common case of the parties that Hindustan Zinc Limited and Birla Copper were established to produce zinc and copper respectively and not for the production
C of sulphuric acid. It was argued by the learned Counsel for the respondents, which could not be disputed by the learned Solicitor General, that emergence of sulphur dioxide in the calcination process of concentrated ore is a technological necessity and then conversion of the same into sulphuric acid
D as a non-polluting measure cannot elevate the sulphuric acid to the status of final product. Technologically, commercially and in common parlance, sulphuric acid is treated as a by-product in extraction of non-ferrous metals by companies not only in India but all over the world. That is the reason why the
E department accepted the position before the Tribunal that sulphuric acid is a by-product.

17. In these circumstances the position taken now by the appellant that sulphuric acid cannot be treated as a by-product cannot be countenanced. Mr. S.K. Bagaria, learned Senior
F Counsel appearing for the respondent while explaining the manufacturing process in detail, also pointed out that the ore concentrates (Zinc or Copper) are completely utilised for the production of zinc and copper and no part of the metal, zinc or copper forms part of the sulphuric acid which is cleared out. It
G was submitted that the extraction of zinc from the ore concentrate will inevitably result in the emergence of sulphur dioxide as a technological necessity. It is not as though the Respondents can use lesser quantity of zinc concentrate only to produce the metal and not produce sulphur dioxide. In other
H words, a given quantity of zinc concentrate will result in

emergence of zinc sulphide and sulphur dioxide according to the chemical formula on which respondents have no control.

18. On these facts this court is inclined to accept the version of the respondents that the ore concentrate is completely consumed in the extraction of zinc and no part of the metal is forming part of sulphuric acid.

19. Once we proceed keeping in mind the aforesaid factual, technological and commercial position available on the records, it has to be accepted that the respondents have consumed the entire quantity of zinc concentrate in the production of zinc.

20. Let us now examine the position contained in Rule 57 CC on the touchstone of the aforesaid position. No doubt, Rule 57CC requires an assessee to maintain separate records for inputs which are used in the manufacture of two or more final products one of which is dutiable and the other is non-dutiable. In that event, Rule 57 CC will apply. For example, a tyre manufacturer manufactures different kinds of tyres, one or more of which were exempt like tyre used in animal carts and cycle tyre, where car tyres and truck tyres attract excise duty. The rubber, the accelerators, the retarders, the fillers, sulphur, vulcanising agents which are used in production of tyres are indeed common to both dutiable and exempt tyres. Such assesses are mandated to maintain separate records to avoid the duty demand of 8% on exempted tyres. But when we find that in the case of the respondents, it is not as though some quantity of zinc ore concentrate has gone into the production of sulphuric acid, applicability of Rule 57 CC can be attracted. As pointed out above, the entire quantity of zinc has indeed been used in the production of zinc and no part can be traced in the sulphuric acid. It is for this reason, the respondents maintained the inventory of zinc concentrate for the production of zinc and we agree with the submission of the respondents that there was no necessity and indeed it is impossible, to

A maintain separate records for zinc concentrate used in the production of sulphuric acid. We, therefore, agree with the High Court that the requirements of 57CC were fully met in the way in which the Respondent was maintaining records and inventory and the mischief of recovery of 8% under Rule 57 CC on
B exempted sulphuric acid is not attracted.

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

G 22. Elaborating this contention, the learned Solicitor General submitted that the words "final products" in the context of Modvat and Cenvat Credit have to be understood giving the meaning as assigned to it in the Modvat/ Cenvat Rules. Rule 57A inter alia states that the provisions of this Section shall apply to such finalised excisable goods (referred to in that
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section as final products). Again, Rule 2(c) of the Cenvat Credit Rules, 2002 defines "final products" as meaning excisable goods manufactured or produced from inputs except matches. Rule 2(h) of the Cenvat Credit Rules, 2004 defines "final products" as meaning excisable goods manufactured or produced from input, or using in input service. Thus, final products referred to in the aforesaid provisions can only mean to be excisable goods produced or manufactured. In the present set of cases, sulphuric acid, caustic soda flakes, trichloro ethylene and Phosphoryl A and Phosphoryl B are excisable goods manufactured and produced in India falling under different headings of the Central Excise Tariff Act. The submission was that if these products are exempt or subject to NIL rate of duty, then the inputs on which Modvat/ Cenvat Credit are claimed used in the manufacture of the aforesaid final products will attract the rigor of Rule 57CC/ Rule 6 of the Modvat/ Cenvat Credit Rules.

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

24. While pleading that the aforesaid interpretation to these Rules be accepted by this Court, submission of Mr. Parasaran was that in such an eventuality the judgment in the case of *Swadeshi Polytex Ltd.* v. *CCE*; **1989 (44) ELT 794** was not applicable, nor was the judgment in *CCE* v. *Gas Authority of India Ltd.*; **2008 (232) ELT 7** relied upon the by the

A respondent. Likewise his submission was that judgment of the Bombay High Court in the case of *Rallis India Ltd.* v. *Union of India*; 2009 (233) ELT 301 was erroneous wherein view taken is contrary to the aforesaid submission.

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

F 26. Furthermore, the provisions of Rule 57CC cannot be read in isolation. In order to understand the scheme of Modvat Credit contained in this Rule, a combined reading of Rule 57A, 57B and 57D alongwith Rule 57CC becomes inevitable. We have already reproduced Rule 57D above. It can be easily G discerned from a combined reading of the aforesaid provisions that the terms used are 'inputs', 'final products', 'by-product', 'waste products' etc. We are of the opinion that these terms have been used taking into account commercial reality in trade. In that context when we scan through Rule 57 CC, reference to

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final product being manufactured with the same common inputs becomes understandable. This Rule did not talk about emergence of final product and a by-product and still said that Rule 57 CC will apply. The appellant seeks to apply Rule 57CC when Rule 57D does not talk about application of Rule 57CC to final product and by-product when the by-product emerged as a technological necessity. Accepting the argument of the appellant would amount to equating by-product and final product thereby obliterating the difference though recognised by the legislation itself. Significantly this interpretation by the Tribunal in Sterlite (supra) was not appealed against by the department.

27. We are also unable to agree with the submission of the learned Solicitor General that judgment in GAIL's Case is not applicable. Significantly, the question as to whether Rule 57 CC will apply when by-products are cleared without payment of duty came for discussion in that case. It was held that so long as the lean gas was obtained as a by-product and not as a final product, Rule 57 CC will not apply. We are, therefore, of the view that the respondent's case is squarely covered by the judgment in GAIL's case.

28. At the stage we should deal with the argument of non maintainability of the writ petition filed by Hindustan Zinc Limited before the High Court. No doubt, it had filed writ petition at show cause stage. However, it was not merely the validity of show cause notice which was questioned. In the writ petition even the vires of Rule 57 CC were challenged. That was a reason because of which the writ petitions were entertained, and rightly so, it is a different matter that while interpreting the rule, the High Court chose to read down the said rule and to give an interpretation which would save it from the vice of unconstitutionality. Moreover, other statutory appeal filed by the Department is against the order of CESTAT, which involves same question. Matter is argued in appeal before us also at

A length and we are deciding the same on merits. For all these reasons the argument of alternate remedy has to be discarded.

29. As a result of aforesaid discussion, we find no merit in these appeals and dismiss the same with costs.

B Rajendra Prasad Appeals allowed.