A.F.R.

Court No. - 35

Case :- CENTRAL EXCISE REFERENCE No. - 3 of 2012

Applicant :- CCE, Allahabad
Opposite Party :- M/S.Hi- Tech Carbon
Counsel for Applicant :- C.S.C.,Parv Agarwal
Counsel for Opposite Party :- Nishant Misra,R.P. Agrawal

Hon'ble Bharati Sapru,J.
Hon'ble Saumitra Dayal Singh,J.

(Per S.D. Singh)

This reference has been made under Section 35(H) of the Central Excise Act, 1994. It arises from the order of the Customs, Excise Service Tax Appellate Tribunal, New Delhi (hereinafter referred to as the Tribunal) dated 7.3.2003. The dispute pertains to the period April 1996 to August 1996. The reference itself was made on the following questions of law:-

> *"(i) Whether STEAM should not be treated as final product when it is not only manufactured through a conscious activity undertaken by the respondents but also requires several well defined steps to manufacture it?*
> *(ii)Whether the benefit of Rule 57-D (1) of the erstwhile Central Excise Rules, 1944 should be extended to STEAM by treating it as a by-product or whether the restriction envisaged under Rule 57-C should be applied for availing credit on inputs used in or in relation to the manufacture of STEAM by treating it as a final product as STEAM is exempted from duty?*
> *(iii) Whether for denial of credit under Rule 57-C of the erstwhile Central Excise Rules, 1944 the inputs must be directly linked to the final product?"*

The Tribunal by its final order dated 7.3.2003 had allowed the appeal filed by the assessee and held that the

'off gases' / 'lean gases' were a by-product obtained in the manufacture of Carbon Black from Carbon Black Feed Stock (CBFS in short). The Tribunal had relied upon Rule 57D(1) of the Central Excise Rules, 1944 (hereinafter referred to as the Rules) and held that credit shall not be denied to the assessee on any part of the input i.e. CBFS by attributing its utilization in manufacture of 'steam' cleared at nil rate of duty.

The assessee manufactured Carbon Black, that are goods classifiable under Chapter 28 of the First Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as the Tariff Act), using CBFS as raw material/input. In that process, RFO/LSHS/LDO/FO was used as fuel.

The assessee, subjected CBFS to process known as thermal cracking. It resulted in production of Carbon Black in particle form. However, in this process, 'off gases' also known as 'lean gases' emerged by way of technological necessity. Basically, those gases were crude hydrocarbon gases having high content of Carbon Monoxide. According to the assessee Carbon Monoxide being a hazardous gas, it could not be released freely into the atmosphere. Therefore, the assessee burnt the Carbon Monoxide content in the 'off gases' / 'lean gases' before releasing the same into the atmosphere.

The burning of Carbon Monoxide generated heat that could either be allowed to escape or be put to use, which the assessee did by generating 'steam' from de-

mineralised raw water treated with caustic soda and hydrochloric acid, by employing a boiler. The 'steam' so generated were then used, in part, to pre-heat CBFS (subjected to thermal cracking process to manufacture Carbon Black). The remaining quantities of 'steam' were sold to M/s Hindalco Industries Ltd., Renukoot, at nil rate of duty.

According to the Tribunal, in the above described second part of the activity conducted by the assessee, no part of the CBFS or any other input (that had gone into manufacture of Carbon Black), was used/consumed. The Tribunal thus concluded - mere fact of use of 'off gases' / 'lean gases' to generate heat that in turn was used to obtain 'steam' did not tantamount to utilisation of CBFS in the manufacture of exempted product i.e. steam. It would be useful to extract the finding of the Tribunal in this regard:

> *"No doubt the steam has been generated by the appellants as a conscious act but it cannot be claimed by the Revenue that any part of the inputs, that is CBFS or any other inputs which has gone into the manufacture of Carbon Black has been used in the manufacture of steam. For the purpose of applying the provisions of Rule 57 (C) or 57 CC, it is the pre-requisite that the inputs are used in the manufacture of products which are exempted from the whole of the duty of excise or is chargeable to nil rate of duty. The mere fact of using off gases in the generation of steam will not tantamount to using the modvatable inputs in the manufacture of exempted product that is steam."*

Thus the Tribunal held that for reversal of input credit utilisation under Rule 57C or 57CC of the Rules, it was a

pre-requisite that the input on which the input credit had arisen should have been used to manufacture the exempted product alongwith a dutiable product.

The Tribunal further reasoned that by insertion of Rule 57CC to the Rules there was no intention to deprive the assessee of benefit available under Rule 57D(1) of the Rules to a 'by-product', 'waste' or 'refuse'. Thus no part of input credit availed was to be disallowed.

Thus, essentially the Tribunal has reasoned that duty paid CBFS on which the input credit had arisen got consumed in the manufacture of Carbon Black. At the end of that manufacturing process, the assessee obtained 'off gases' / 'lean gases' as a 'by-product'. According to the reasoning of the Tribunal, the manufacturing process was complete at that stage with the manufacture of Carbon Black. 'Off gases' / 'lean gases' were generated as a 'by-product'.

The application of Rules 57C and 57CC was examined by the Tribunal in the context of the aforesaid manufacturing activity alone. According to the Tribunal the applicability of Rules 57C and 57CC did not arise as 'off gases' / 'lean gases' were a 'by-product' that emerged in the manufacture of Carbon Black. The fact that 'off gases' / 'lean gases' were thereafter used in the manufacture of product i.e. 'steam' (that was exempt from payment of excise duty), did not amount to use of modvatable input (i.e. CBFS) to manufacture such

'steam'. Therefore, the assessee was held entitled to benefit of Rule 57 D of the Rules despite insertion of Rule 57CC to the Rules.

At this stage, it would be useful to take note of the provisions of Rules 57C and 57CC (as amended w.e.f. 23.07.1996) and Rule 57D of the Rules. They are quoted herein below:-

> *"**Rule 57C- Credit of duty not to be allowed if, final products exempt:-** No credit of the specified duty paid on the inputs used [in the manufacture of a final product (other than those cleared either to a unit in a Free Trade Zone or to a hundred per cent Export-Oriented Unit)] [or to a unit in an electronic Hardware Technology Park or to a unit in Software Technology Parks] [or supplies to the United Nations or an international organisation for their official use or supplied to projects funded by them, on which exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 108/95-Central Excise, dated the 28th August, 1995] shall be allowed if the final product is exempt from the whole of the duty of excise leviable thereof or is chargeable to nil rate of duty.*
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> ***Rule [57CC. Adjustment of credit if final products are exempt:-** Where a manufacturer ordinarily uses the inputs on which the credit of duty has been availed in the manufacture of any product [other than those cleared either to a unit in a Free Trade Zone or to a hundred per cent Export-Oriented Unit or to a unit in an Electronic Hardware Technology Park or to a unit in Software Technology Parks or supplied to the United Nations or an international organisation for their official use or supplied to projects funded by them, on which exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 108/95-Central Excises, dated the 28th August, 1995 which is exempt from the whole of the duty of excise leviable thereon or is chargeable to nil rate of duty, the*

manufacturer shall pay an amount equivalent to twenty per cent of that value of such product at the time of clearance of the said product by adjustment in the credit account maintained under sub-rule (3) of rule 57G or sub-rule (5) of rule 57T or in the accounts maintained under rule 9 or sub-rule (1) of rule 173G or if such adjustment is not possible for any reason by cash recovery from the manufacturer availing of the credit under rule 57-A.

Explanation:- For removal of doubts it is hereby declared that the provisions of this rule shall apply notwithstanding the fact that the inputs on which credit has been taken are not actually used or contained in the products referred to in this 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*

(2) *Credit of specified duty allowed in respect of any inputs shall not be denied or varied on the ground that any intermediate products have come into existence during the course of manufacture of final products or such inputs are used in the manufacture of capital goods as defined in Rule 57 Q and that such intermediate products or capital goods, as the case may be, 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 used within the factory of production in the manufacture of a final product (other than those cleared either to a unit in a free trade zone, or to a hundred percent Export Oriented Unit or to a unit in an Electronic Hardware Technology Park or to a unit in Software Technology Park) or supplied to the United Nations or an international organization for their official use or supplied to projects funded by them, on which*

exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 108/95-Central Excise, dated the 28th August, 1995, which the duty of excise is leviable whether in whole or in part:
***Provided** further that such intermediate products are specified as inputs or as final products under notification issued under Rule 57A.*
***Provided** also that the credit of specified duty shall be allowed in respect of inputs which are used for generation of electricity or steam used for manufacture of final products or for any other purpose, within the factory of production.”*
(emphasis supplied)

Sri Parv Agarwal, learned counsel for the revenue has first relied on the declaration made by the assessee under Rule 173B(1) of the Rules to submit that the assessee had of it’s own declared 'steam' as other goods (final product) produced/manufactured and intended to be removed. Therefore, according to him it was an admitted case of the assessee that it had cleared 'steam' as a final product.

Then, relying on language of Rules 57C and 57CC, he submits, the assessee was not entitled to take benefit of entire entire amount of input credit arising on the CBFS against clearance of Carbon Black made by it for reason of 'steam' being exempt from duty. He further submits that from April 1996 to August 1996 by virtue of Rule 57CC, even if 'steam' were to be treated as not the final product, yet, 'steam' being 'any product' manufactured by the use of duty paid CBFS, the assessee could not have claimed input credit on the CBFS proportionate to the quantity of

CBFS utilised in the manufacture of such 'steam'.

He further submits, the assessee obtained 'steam' from 'off gases' / 'lean gases' that in turn had admittedly been obtained from duty paid CBFS. Also, because 'steam' was a final product and the assessee cleared it without payment of duty, therefore it became liable to proportionate reversal of input credit on CBFS utilised to manufacture 'steam'.

Responding to the aforesaid submissions, Sri Badri Lakshmikumaran and Sri Nishant Mishra, learned counsel for the assessee submit that the assessee had established it’s unit to manufacture only Carbon Black from CBFS and not to manufacture 'steam'. It had subjected the entire quantity of CBFS to thermal cracking process only to manufacture Carbon Black. No quantity of CBFS survived the thermal cracking process nor could it be identified as CBFS available for use to manufacture 'steam'. Also, 'steam' did not emerge upon production of Carbon Black or as part of that process of manufacture of Carbon Black.

Therefore, it has been first submitted that the applicability of the Rules 57C or 57CC had to be examined at this stage only. What followed thereafter was disconnected with the first part of activity conducted by the assessee and therefore it could not be looked into. The second part of the assessee's activity could not be treated as a continuation or part of the process of the

manufacture of Carbon Black from CBFS.

Then, it has also been submitted that 'off gases' / 'lean gases' obtained in the manufacture of Carbon Black from CBFS could not have been released in the atmosphere on account of environmental laws prohibiting release of Carbon Monoxide contained in untreated 'off gases' / 'lean gases'. This was a legal compulsion which the assessee was obliged to discharge. Therefore, the harmful Carbon Monoxide contained in 'off gases' / 'lean gases' had to be burnt. Such burning of 'off gases' / 'lean gases' generated heat. It was heat that was utilised by the assessee to run it’s boilers with cured / treated water to generate 'steam'.

Thus, it has been submitted, no part of CBFS was ever utilised to manufacture 'steam'. The process of burning Carbon Monoxide present in 'off gases' / 'lean gases' was a separate and independent process, totally disconnected with the process of manufacture of Carbon Black. It was complete one stage prior to utilisation of 'off gases' / 'lean gases' in the boiler established by the assessee. Therefore, the necessary pre-condition for application of the Rules 57C and 57CC never arose.

Reliance has also been placed by learned counsel for the assessee on the judgments of the Bombay High Court in the case of ***Rallis India Ltd. Vs. Union of India*** reported in ***2009 (233) E.L.T. 301 (Bom.)*** as affirmed by the Supreme Court in the case of ***Union of***

India Vs. Hindustan Zinc Ltd. reported in ***2014 (303) E.L.T. 321 (S.C.)***.

Having considered the arguments so advanced by learned counsel for the parties, we find there is no dispute as to the process adopted by the assessee to manufacture Carbon Black from CBFS or even as to the generation of 'steam' as noted above. The revenue's understanding appears to be, since the assessee obtained 'steam' and Carbon Black as ultimate final products and because it had used CBFS as an input, at the first stage, therefore, some part of CBFS must have necessarily been consumed in the manufacture of 'steam'.

This reasoning is flawed. It completely overlooks or discounts the fact that the manufacture of Carbon Black was complete at one stage prior to production of heat and that neither steam nor heat was produced in the manufacture of Carbon Black. In fact, admittedly only “lean gases” or “off gases” were released in the manufacture of Carbon Black from CBFS by way of technological necessity. These gases contained Carbon Monoxide. Upon burning Carbon Monoxide content in 'off gases' / 'lean gases' to render that 'waste' or 'refuse' or 'by-product' fit for release in the atmosphere, heat was obtained. Further, it was heat and not “off gases” or “lean gases” thus produced that was used to produce 'steam'.

Clearly, 'steam' is a final product. Question no. 1 is

answered accordingly.

As noted above, the entire process beginning from thermal cracking of CBFS to generation of steam as has been found to have been adopted by the assessee was in two parts. In the first part, the assessee subjected CBFS to process of thermal cracking. It only produced Carbon Black in particle form and 'off gases'/'lean gases'. The entire quantity of CBFS on which input credit had been availed was subjected to thermal cracking and no part of CBFS remained unused or unutilized at the end of that process.

Thus, upon completion of the first part of the process the assessee had available with it, on one hand Carbon Black that was admittedly a final product and also a dutiable item. On the other hand, certain gases that were not intended to be manufactured being 'off gases' / 'lean gases' came into existence by way of technological necessity in the process of manufacture of Carbon Black. These gases have been categorised as 'by-product' by the Tribunal.

In the first instance 'off gases' / 'lean gases' appear to be a 'waste' or 'refuse'. However, in the present case, the Tribunal has found them to be a 'by-product'. In any case being hazardous to the environment (on account of high content of Carbon Monoxide), they could not be freely released into the atmosphere. The assessee burnt the Carbon Monoxide present in 'off gases' / 'lean gases'

before releasing the same in the atmosphere.

The language of Rules 57C and 57CC of the Rules is clear. Those Rules would operate to disallow input credit to a manufacturer in specified situations involving manufacture of goods in which duty paid input had been used to manufacture goods that were either exempt from duty payment or liable to clearance at nil rate of duty.

For Rule 57C to apply it must be shown that the goods so cleared were 'final product' (other than a 'final product' as had been excluded under that Rule) that were either exempt from payment of duty or chargeable to nil rate of duty. On the other hand Rule 57CC applies to a situation where using a duty paid input, 'any product' (other than such products as have been excluded under that Rule) is cleared by an assessee and such a 'product' is either exempt from the whole of duty of excise or is chargeable to nil rate of duty.

Thus, two things must be established before a disallowance of input credit may be made under Rules 57C or 57CC. First, 'use' of the duty paid input 'in the manufacture of' a 'final product' or 'any product' as the case may, must be established. Then such 'final product' or 'other product' must itself either be exempt from payment of excise duty or be chargeable at nil rate of duty. In the instant case there is no doubt that 'steam' was exempt from payment of duty. However, it remains to be seen whether it was a final product obtained from duty

paid input.

As to the scheme of the Rules, upon a co-joint reading of Rule 57C and Rule 57CC and Rule 57D it thus emerges that full input credit is to be availed by the assessee in cases covered under Rule 57D that is where the 'waste', 'refuse', 'by-product' or 'intermediate product' emerges but at the same time is chargeable to nil rate of duty or is exempt from payment of duty.

In the instant case, the Tribunal has correctly examined the issue on facts and thereafter found that 'off gases'/'lean gases' were the 'by-product' in the manufacture of Carbon Black by subjecting CBFS to thermal process.

No challenge having been raised in the present appeal to the aforesaid finding of the Tribunal that 'off gases'/'lean gases' were a 'by-product' obtained in the manufacturing of Carbon Black from CBFS, there is no room or basis to apply either Rule 57C or Rule 57CC of the Rules in view of such finding of fact recorded by the Tribunal.

Then, it is seen assessee engaged a boiler plant to burn Carbon Monoxide content in 'lean gases'/'off gases' to generate heat. The heat was then utilized in that boiler machinery to generate 'steam' from water. The 'steam' so generated was partially captively utilized as also partially cleared to M/s Hindalco Industries Ltd., Renukoot.

The 'off gases'/'lean gases' itself arose because of

technological necessity, upon CBFS being subjected to thermal cracking process to produce Carbon Black. However, for that process to be complete there was no requirement to burn 'off gases'/'lean gases'. The process to manufacture Carbon Black was complete before the 'off gases'/'lean gases' were burnt. The second process involving burning of 'off gases'/'lean gases' was therefore, totally separate and disconnected with the first, as emerges from the order of the Tribunal.

Then in the second process, 'off gases'/'lean gases' were burnt to generate heat and it was heat that was used to manufacture 'steam'. 'off gases'/'lean gases' did not contain 'steam' and they could not produce steam on their own. They had to be burnt to produce the heat that in turn was used to generate 'steam' from water.

Therefore, it would be too far fetched and fanciful to reason that 'steam' was generated by using CBFS as an input when (i) no part of CBFS was burnt to generate 'steam'; (ii) the entire quantity of CBFS was subjected to thermal cracking to produce Carbon Black only; (iii) the process of thermal cracking of CBFS did not result in generation of steam but only in the manufacture of Carbon Black as the 'final product' and 'off gases'/'lean gases' as a 'by-product'; (iv) 'off gases'/'lean gases' were burnt in a separate process. It generated heat (v) the heat so generated was in turn utilised to generate 'steam'.

Thus, in view of the above, there never arose a

situation to apply Rule 57C or 57CC of the Rules. Those Rules would be of relevance when two products emerge from a single process (upon utilisation of a duty paid input), one of which is either exempt from duty payment or is cleared at nil rate of duty.

We also find that Bombay High Court in the case of ***Rallis India Ltd. Vs. Union of India(supra)*** had dealt with a similar controversy. In that case that assessee had engaged in the manufacture of Gelatin from animal bones of bovine animals. In that process the assessee treated animal bone containing both organic material (protein) as also inorganic material phosphorus with hydrochloric acid. Upon such process the organic substance namely protein being insoluble in water resulted in 'Ossien' while inorganic substance being water soluble, formed the “mother liquor/phosphoryl liquor”.

Insoluble 'Ossien' was further processed to manufacture Gelatin which was cleared on payment of excise duty while inorganic substance/'mother liquor' being waste liquid was to be thrown away.

'Mother liquor' being hazardous to environment, (like 'lean gases'/'off gases' in the instant case), the Pollution Control Board had required it to be treated before it's discharge. Accordingly, the assessee in that case set up a separate plant and use the 'mother liquor' to manufacture Phosphoryl A–Phosphoryl B that were exciseable goods under falling Chapter Heading 23.02 of

the Central Excise Tariff Act, but which at that time were wholly exempt from payment of duty.

In the aforesaid factual background, the revenue proceeded to disallow 8% of input credit credit on inputs (Hydrochloric Acid) utilised by the assessee to manufacture Gelatin on the reasoning that some part of that input had got utilised to manufacture exempted goods namely Phosphoryl A – Phosphoryl B. We note, in that case also the revenue had relied on the provisions of 57C and 57CC. The Bombay High Court held as below:-

> *"25. There is no merit in the above contention of the revenue. Under the input credit Scheme, credit of duty paid on inputs can be availed only if such inputs are used in the manufacture of dutiable final product. Where a manufacturer uses common inputs to manufacture both dutiable final product as well as exempted final product, then such manufacturer is required to reverse the credit to the extent the input is used in the manufacture of the exempted final product. Where separate account was not maintained or could not be maintained so as to ascertain the quantity of inputs used in the manufacture of exempted final product, there used to be difficulty in reversing the credit of duty taken on inputs used in the manufacture of exempted final product. To obviate this difficulty Rule 57CC was introduced. As per Rule 57 CC, where a manufacture manufacturing both dutiable final product as well as exempted final product fails to maintain separate account of inputs used in the manufactured, then, he is required to pay 8% of the value of the exempted final product at the time of its clearance from the factory.*
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> *26. In the present case, the mother liquor arising in the manufacture of gelatin is admittedly a waste on which no excise duty is payable. In spite of the fact that no excise duty is payable on the clearance of waste mother liquor, in view of Rule*

57D, the petitioner is entitled to avail entire credit of duty paid on HCL, which is used as input in the manufacture of gelatin. In other words, in the present case, the petitioner is not required to reverse the credit of duty on HCL at the time of clearance of the waste mother liquor and consequently there would not be any obligation to pay presumptive amount under Rule 57CC for not maintaining separate account.

27. The fact that the waste mother liquor arising in the manufacture of gelatin was further processed to manufacture exempted phosphoryl 'A' and 'B' would not attract Rule 57CC, because, if Rule 57 CC was not applicable at the time of clearance of the waste mother liquor arising in the manufacture of dutiable gelatin, then the said rule cannot be applied merely because mother liquor was further processed to manufacture exempted final product, namely phosphoryl 'A' & 'B'. In other words, liability to pay the presumptive amount under Rule 57CC would arise only if the waste mother liquor is held to be a final product. It is not even the case of the revenue that the waste mother liquor arising in the manufacture of gelatin is a final product. Therefore, in the facts of the present case, if Rule 57CC was not applicable at the time of clearance of waste mother liquor, then Rule 57CC would not apply at the time of clearance of the exempt phosphoryl 'A' & 'B' manufactured out of waste mother liquor."

Then, Bombay High Court further held as below:-

"31. The Larger Bench of the Tribunal has held that Rule 57D referred to waste, scrap and by-products which are not exerciseable at all. In this connection, the Larger Bench has referred to the instances of the floor sweepings arising in the manufacture of biscuits, waste and scraps arising in the manufacture of iron products and hydrogen arising as a by-product in the manufacture of oxygen by the process of electrolysis of water. We find it difficult to accept the above finding. What Rule 57D provides is that where modvated input is used in the manufacture of dutiable final product and waste, refuse or by-product arise in that

process, then, even if the modvated inputs are contained in the waste, refuse or by-product and whether or not excise duty is payable on such waste, refuse or by-product, the manufacturer would not be denied full credit of duty paid on inputs used in the manufacture of dutiable final product. Rule 57CC applies only if the modvated inputs are used in the manufacture of both dutiable final product and exempted final product and the manufacturer has not maintained separate accounts so as to ascertain the quantum of inputs used in the manufacture of exempted final products. Therefore, the floor sweeping/waste and scrap/hydrogen arising in the manufacture of biscuits/iron products/oxygen, respectively would be governed by Rule 57CC if they are exempted final products and would be governed by Rule 57D if they are merely waste, refuse of by-product arising in the manufacture of dutiable final product. In the present case, mother liquor arising in the manufacture of dutiable gelatin, is not an exempted final product and, therefore, the petitioner was not liable to reverse any credit of duty availed on input or alternatively pay the presumptive amount under Rule 57CC.

32. The argument of the revenue that by demanding presumptive amount at 8% of the price of phosphoryl 'A' and 'B' at the time of its clearance from the factory, the input credit is neither denied nor varied cannot be accepted because, the liability to pay presumptive amount under Rule 57CC arises only in cases where the manufacturer is unable to reverse the credit on input used in the manufacture of exempted final product. In the present case, mother liquor arising in the manufacture of dutiable gelatin is a waste and not an exempted final product. Therefore, in the light of Rule 57-D the petitioner was entitled to the entire credit availed and there was no obligation to reverse credit or pay presumptive amount under Rule 57CC was not applicable at the time of clearance of the waste mother liquor arising in the manufacture of gelatin, then the said Rule cannot be made applicable merely because the said waste mother liquor was utilized in the manufacture of

exempted final product viz. phosphoryl 'A' and 'B'."

Then, in the case of ***Union of India Vs. Hindustan Zinc Ltd.*** reported in ***2014 (303) E.L.T. 321 (S.C.)***, the Supreme Court specifically affirmed the judgment of the Bombay High Court in the case of ***Rallis India Ltd. Vs. Union of India(supra).*** The Supreme Court held as below:-

> *"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. 2347 of 2011) the Tribunal has decided the matter following the judgment in the case of Swadeshi Ltd. (supra). In that case, Ethylene Glycol was reacted with DMT to produce polyester and Ethanol. Methanol was not exciseable while polyester fibre was liable to excise duty. Credit was taken of duty paid on ethylene glycol wholly for the payment of duty on polyester. The department took a position that ethylene glycol was used in the production of methanol and proportionate credit taken on ethylene glycol was to be reversed. This Court ruled that the emergence of methanol was a technological necessity and no part of ethylene glycol could be said to have been used in production of methanol and indeed it was held that the total quantity of ethylene glycol was used for the production of polyester. The fact in all these three appeals appear to be identical to the fact and the law laid down in Swadeshi Polytex (supra). Therefore, this judgment is squarely applicable."*
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> *(emphasis supplied)*

Thus, applying the law laid down by the Supreme Court, we hold 'off gases'/'lean gases' having been obtained by way of a technological necessity and their

use to generate heat that was employed by the assessee to generate 'steam' from water rendered Rule 57C and 57CC wholly inapplicable to the facts of the present case despite the fact that steam was a final product.

Accordingly, for reasons given above question nos. 2 and 3 are answered accordingly, against the revenue and in favour of the assessee. The reference is answered accordingly. No order as to costs.

Order Date :- 30.11.2017
Lbm/-