CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SZB, CHENNAI

COURT : Division Bench 1

APPEAL No. E/41611/2017-DB

(Arising out of Order-in-Original No. 18/2017 (CE-Commr.) dated 29.03.2017 passed by the Commissioner of Central Excise, Salem).

M/s. JSW Steel Limited — Appellant
Pottenari, Mecheri
Mettur Taluk,
Salem-636 453.

Vs.

The Commissioner of Central Excise — Respondent
No. 1, Foulk's Compound,
Anai Medu,
Salem-636 001.

APPEARANCE

FOR APPELLANT : Shri M.S. Nagaraja, Advocate,
FOR RESPONDENT : Ms. Sridevi Taritla, ADC (AR)

CORAM

MS. SULEKHA BEEVI C.S., HON'BLE JUDICIAL MEMBER
Shri P. ANJANI KUMAR, HON'BLE TECHNICAL MEMBER

Date of Hearing: **13.01.2021**
Date of Decision: **13.01.2021**

FINAL ORDER No. 40716/2021

Per : Sulekha Beevi, C.S.

1.1 The appellant is engaged in the manufacture of Iron and Steel products and are availing the facility of Cenvat Credit of duty paid on inputs and capital goods under the provisions of Cenvat Credit Rules, 2004.

1.2 During the course of verification of the Cenvat credit availment and utilization it was noticed by department, that appellants have imported directly/received from other importers, 'Steam Coal' after paying additional duty@ 1% Adv. levied under sub-section (1) of Section 3 of the Customs Tariff Act, 1975. This imported coal was used by them for captive generation of electricity. As per the Notification No. 12/12-cus. dated 17.03.2012, additional duty of 1% Adv. is to be levied for imported steam coal. The appellant availed Cenvat credit of this additional 1% customs duty paid by them for the period from June 2012 to June 2013 and of 2% additional customs duty paid for the period from July 2013 to December 2015; and thus total amount of Rs. 18,61,68,847/-. The credit availed was utilised by them for payment of duty on clearance of their final product for the period from 01.06.2012 to 31.12.2015.

1.3 The department was of the view that on a harmonious reading of Clause (vii) with Clause (i) of sub-rule 1 of Rule 3 of Cenvat Credit Rules, 2004, there is a prohibition/restriction to avail Cenvat credit on this additional duty paid by appellant on imported steam coal. Show Cause Notice was issued proposing to disallow the credit and to recover the same along with interest and for imposing penalties. After due process of law, the original authority confirmed the demand along with interest and imposed penalties. Aggrieved by the said order, the appellants are now before this Tribunal.

2. On behalf of the appellant, learned Counsel Shri M.S. Nagaraja, appeared and argued the matter. The submissions are summarized as under:-

a. The appellants have imported 'Steam Coal' and discharged Customs duty under Notification No. 12/2012-Cus. dated 17.03.2012 (Sl. No. 123) as amended by Notification No. 12/2013-Cus. dated 01.03.2013. Appellants have paid the customs duty including the additional duty of customs (CVD) leviable under Section 3(1) of the Customs Tariff Act, 1975. In respect of Steam Coal, the effective rate of additional duty of customs was 1% under Notification No.12/2012-Cus. dated 17.03.2012 (Sl. No. 123). It was enhanced to 2% under amending Notification No. 12/2013-Cus. dated 01.03.2013. There were no conditions attached for availing concessional rate of additional customs duty. The appellant availed Cenvat credit of the additional duty of customs (CVD) paid by them.

b. The department has relied upon the Clause (i) & Clause (vii) of Rule 3 (1) of Cenvat Credit Rules, 2004, to deny the credit. He adverted to the relevant portion of the CCR, 2004, which is reproduced as under:-

> "**Rule 3. CENVAT Credit** (1) A manufacturer or producer of final products or a [provider of output service] shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of –
>
> (i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act;
>
> <u>Provided that Cenvat credit of such duty of excise shall not be allowed to be taken when paid on any goods-</u>
>
> (a) In respect of which the benefit of an exemption under Notification No. 1/2011-CE, dated the 1st March, 2-11 is availed or
>
> (b) Specified in serial numbers 67 & 128 in respect of which the benefit of an exemption under Notification No. 12/2012-CE, dated 17th March 2012 is availed;
> (ii)………………
>
> <u>(vii) the additional duty leviable under Section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v), (vi) and(vii);"</u>

It is submitted by him that the conditions specified under proviso to Rule 3 (1) (i) and Rule 3 (1) (vii) of the CCR, 2004 are distinguishable and independent of each other. The restriction and prohibition to avail credit stipulated in proviso under Rule 3 (1) (i) is in respect of exemption availed under Notification No. 1/2011-CE dated 01.03.2011 at Sl. No. 67 and 128 under Notification No. 12/2012-CE dated 17.03.2012. These restrictions would apply only to coal procured indigenously on payment of concessional rate of <u>excise duty</u> as per the notifications issued under Section 5 of the Central Excise Act, 1944. The appellants have paid <u>additional duty of customs</u> under the Customs Tariff Act and availed the concessional rate of duty under the Customs Notification. The department has denied the credit stating that the additional duty of customs being equivalent to duty of excise being levied on any article imported into India is the duty of excise and therefore not eligible for credit as stipulated in Rule 3 (1) (i) of CCR, 2004.

c. It is explained by the Ld. Counsel that the term "equivalent to the duty of excise" specified for the purpose of levy of additional duty of customs is only a measure of collection and does not change the nature and character of duty paid on the imported goods from "customs duty" to "excise duty". Therefore, the provisions of Rule 3 (1) (vii) allows Cenvat Credit of the additional duty of customs available under Section 3 of the Customs Tariff Act, equivalent to the duty of excise duty under Notification No. 12/2012-Cus. dated 17.03.2012 as amended by Notification No. 12/2013-Cus. dated 01.03.2013.

d. When the language of the statute is clear and unambiguous, it has to be interpreted in its ordinary sense. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. He relied upon the following decisions.

1. *Baidyanath Ayurved Bhavan (P) Ltd. Vs. CCE*
   1999 (110) ELT 262 (SC)

2. *Shabana Abhraham Vs. CCE*
   2015 (322) EKT 371 (SC)

3. *Trutuf Safety Glass Industries Vs. CST*
   2007 (215) ELT 14 (SC)

e. The learned Counsel further submitted that the very same issue was considered by the Tribunal in the case of M/s. *Hindustan Zinc Ltd., Vs. CGST* as reported in 2020-TIOL-1545-CESTAT-DEL, held that the credit is eligible. Similar view was taken in the case of *Jaypee Sidhi Cement Plant Vs. CGST, Jabalpur* – 2019 (369) ELT (Tri.-Del.).

f. The learned Counsel argued the matter on the ground of limitation also. It is submitted by him that the department was well aware that the appellant was availing Cenvat credit and utilizing the same for payment of excise duty on finished goods. This fact was clearly reflected in the returns filed by them. In such circumstances, the department cannot allege suppression of facts on the appellants to invoke extended period of limitation. Further, the issue is interpretational one wherein litigations were pending before the Tribunal.

3. Learned AR, Ms. Sridevi Taritla, appeared for the Revenue. She reiterated the findings in the impugned order. She adverted to Rule 3 (1) (i) of Cenvat Credit Rules and submitted that there is an express prohibition to avail credit in respect of the Notification since additional excise duty is levied as equivalent to the duty of excise by virtue of Notification No.

12/12-CE dated 17.03.2012, and the prohibition would apply. She prayed to dismiss the appeal.

4. Heard both sides and perused the documents.

5.1 From the relevant provisions of law in Cenvat Credit Rules, 2004, as produced above, it can be seen that the prohibition is with respect to availing Cenvat credit of concessional duty of excise in respect of Notification No. 1/2011-CE dated 01.03.2011 and with respect to Sl. No. 67 & 128 of Notification No. 12/2012-CE dated 17.03.2012. It has to be borne in mind that the Notification No. 12/2012-CE dated 17.03.2012, is a central excise Notification issued under Section 5 of the Central Excise Act, 1944. Whereas, sub-clause (vii) of Rule 3 (1) speaks about additional duty of customs which is levied under Section 3 of Customs Tariff Act. The prohibition is with respect to concessional duty paid under Central Excise Notification whereas, in the present case, concessional rate of additional duty of customs is paid under Customs Notification dated 17.03.2012. To be more clear the additional duty of customs (CVD) is calculated as the equivalent excise duty payable on like article whereas it is levied and collected under Customs Tariff Act. The concession in rate of duty is given as per Customs Notification. The additional duty of customs being a 'customs duty' is not hit by the provision in Rule 3 (1) (i) of CCR, 2004.

5.2 The very same issue was analysed by the Tribunal in the case of Hindustan Zinc Ltd., (supra). The relevant portion is reproduced as under:-

> "**3**. Hindustan Zinc is engaged in the manufacture of zinc and lead concentrates falling under Chapter 26 of the First Schedule to the Central Excise Tariff Act, 19855 and has been availing the facility of CENVAT credit on inputs, capital goods and input services under the CENVAT Credit Rules, 2004 6 . For manufacturing the final products, Hindustan Zinc consumed power generated from its captive 1 Hindustan Zinc 2 the Commissioner 3 the Commissioner (Appeals) 4 Ultratech Cement 5 the Excise Tariff Act 6 the CENVAT Credit Rules E/52928/2019 E/52774/2019 3 thermal plant wherein steam coal / steam non-coking coal falling under Chapter Heading 27.01 of the Customs Tariff Act, 1975 7 is used as input. During the relevant period, Hindustan Zinc paid additional duty of customs in terms of section 3(1) of the Customs Tariff Act on the importation of steam coal. It is stated that for payment of such additional duty of customs, the benefit under serial number 122 A/123 (serial number 121B w.e.f March 1, 2006) of the Customs Notification No. 12/2012-Cus dated March 17, 20128 , which prescribed a rate of 2% ad valorem was availed. Hindustan Zinc also availed CENVAT credit of the additional customs duty so paid under rule 3(1)(vii) of the CENVAT Credit Rules. However, a show cause notice dated July 8, 2019 was issued to Hindustan Zinc proposing to disallow CENVAT credit of Rs. 2,75,97,106/- for the relevant period from July 2016 to June 2017 and for recovery of the same with interest. The reason mentioned in the show cause notice was that CENVAT credit of duty specified in the First Schedule to the Excise Tariff Act was admissible under rule 3 of the CENVAT Credit Rules and so additional duty of customs equal to duty of excise leviable under the Excise Tariff Act read with any other notification was admissible for CENVAT credit. As the additional duty of customs paid at the rate of 2% was not the

duty of excise as specified under the Excise Tariff Act, CENVAT credit of additional duty of customs paid under the Notification dated March 17, 2012 was wrongly availed by Hindustan Zinc. The extended period was also invoked. The reply filed by Hindustan Zinc did not find favour of the Commissioner, who by order dated September 24, 2019 confirmed the demand made in a show cause notice in its entirety. It is against 7. the Customs Tariff Act 8. Notification dated March 17, 2012 E/52928/2019 E/52774/2019 4 this order of the Commissioner that Hindustan Zinc has filed Excise Appeal No. 52928 of the 2019.

16. A Division Bench of the Tribunal in Hindalco Industries Ltd. considered this precise issue and held that if additional duty of customs has been paid after taking into consideration the Customs Notification dated March 17, 2012, there would be no bar for availment of CENVAT credit in terms of rule 3(vii) of the CENVAT Credit Rules. The relevant paragraph of the decision is reproduced below: “5 On careful consideration of the submissions made by both the sides, I find that the sole reason to deny Cenvat credit to the appellant is that the authorities below has taken into consideration Notification No. 12/2012-CE., dated 17-3-2012. The authorities below have not considering the Notification No. 12/2012-Cus., dated 17-3-2012. If same is taken into consideration and duty paid under the said notification, there is no bar for availment of cenvat credit in terms of Rule 3 (vii) of Cenvat Credit Rules, 2004. Therefore, I hold that authorities below have applied wrong provision to deny Cenvat credit to the appellant. Therefore, Cenvat credit cannot be denied to the appellant. In that circumstance, I hold that the appellant has correctly availed the Cenvat credit of CVD paid E/52928/2019 E/52774/2019 14 on imported coal in terms of Rule 3(7) of Cenvat Credit Rules, 2004. Further, I find that the show cause notice has been issued by invoking extended period of limitation. As the Revenue itself has applied wrong provisions of law, therefore, the extended period of limitation is not invokable. In that circumstance, the impugned order is set aside."

17. This decision of the Tribunal was subsequently followed by the Tribunal in Jaypee Sidhi Cement Plant and the relevant portion of the decision is reproduced below : "4. It is submitted on behalf of the appellant that adjudicating authority below has wrongly made applicable the Notification No. 12/2012- C.E., dated 17-3-2012 to the facts and circumstances on a wrong presumption that the levy of CVD in dispute is since equal to the Excise duty leviable on the similar goods and manufactured in India, that the benefit of Customs Notification No. 12/12 has wrongly been denied vide Order. Learned Counsel has relied upon the decision of this Tribunal in the case of M/s. Hindalco Industries Ltd. vs. GST, Bhopal as was pronounced in Appeal No. E/50179/2018-SM vide Final Order No. 50876/2018, dated 8-3-2018 [2018 (363) E.L.T. 1085 (Tri.-Del.)]. Reliance has also been placed on another decision of the Tribunal in the case of Asahi Songwon Colors Ltd. v. CCE & ST, Vadodara Appeal No. E/10635/2017-SM vide Final Order No. A/11585/2018 (Ahmd.), dated 9-7-2018. Therefore, the order in challenge is prayed to be set aside and appeal is prayed to be allowed. 5. Learned Departmental Representative justified the orders. 6. After hearing both the parties and perusing the record, we are of the opinion as follows: It is admitted that the appellants have imported coal consequent thereto they have paid 1%/2% on CVD in addition to Basic customs duty. The CVD has been paid at the said exempted rate taking the benefit of Sl. No. 123 of Customs Notification No. 12/2012-Cus., dated 17-3-2012. It is apparent from the order in challenge that Department has denied the payment of CVD on exempted rate and the availment of Cenvat credit thereupon relying upon the S. No. 67 of Excise Notification No. 12/2012, dated 17-3-2012. 7. Perusal of both these notifications reveals that the Customs notification is applicable to the imported coal whereas the Excise Notification is applicable to the domestically manufactured goods. The Condition No. 25 of Excise notification which denies availment of Cenvat credit on imports of coal manufactured by the supplier of coal, as has been taken the basis in the order-in-original, shall therefore be applicable for domestically manufactured goods only and not on the imported coal. Perusal of Excise Notification No. 67 further reveals that no such condition is applicable in case of import of coal. 8. The narrow compass of the adjudication, therefore, remains as to whether under Customs notification against S. No. 67 i.e., while importing the coal, the appellants were entitled to avail the Cenvat credit on the amount of CVD paid. E/52928/2019 E/52774/2019 15 The Cenvat credit is applicable as per Rule 3(1) of the Cenvat Credit Rules, 2004. Clause 7 thereof entitles the appellants to avail the Cenvat credit in the given circumstances. The said Rule itself clarifies that the Cenvat credit of duty of excise is not allowed to be taken when paid on any goods specified under S. Nos. 67 and 128 of Excise Notification No. 12/2012, dated 17-3-2012. Admittedly, the notification relied upon by the department for denying the impugned benefit to the appellant is Customs Notification No. 12/2012, dated 17- 3-2012. The restriction of Rule 3 is not applicable to the said notification. Above all, the Hon'ble Supreme Court in the case of SRF Ltd. v. CC Chennai (2015 (318) E.L.T. 607 (S.C.)) has held that Excise Notification No. 12/2012 is applicable only in respect of any digged or manufactured coal and not in respect of imported coal. The import whereof is allowed to have exempted rate of CVD vide Customs Notification No. 12/2012-Cus. 9. In view of the entire above discussion, we are of the firm opinion that the adjudicating authority has committed a legal error while denying the benefit of reduced CVD on imported coal while placing reliance upon the Excise notification for manufacture of coal." (emphasis supplied)

21. This decision of the Gujarat High Court in Lonsenkiri Chemicals Industries was also distinguished by the Tribunal in Aarti Industries Limited and the relevant portion is reproduced below: "As regard, the judgement cited by the Ld. AR in the case of Lonsenkiri Chemicals Industries (supra), I find that in the said case Cenvat Credit was availed on the CVD paid under the Notification No. 12/12-CE which was barred from availing the Cenvat Credit in terms of Rule 3(1) proviso (a) and (b) whereas in the present case in Rule 3(1) there is no bar provided for CVD paid under Notification No. 12/12-Cus., therefore, the judgement of Hon'ble High Court in Lonsenkiri Chemicals Industries (supra) is not applicable to the facts of the present case."

22. The Commissioner, therefore, committed an illegality in denying the benefit of CENVAT credit to Hindustan Zinc.

5.3 From the facts discussed above, as well as the decisions relied upon by the learned Counsel for the appellants, we have no hesitation to hold that the issue stands covered by the above decision of the Tribunal. Following the same, we hold that the disallowance of Cenvat credit is against the provisions of law. The impugned order cannot sustain and is set aside.

6**.** The appeal is allowed with consequential reliefs, if any.

(Operative part of the Order pronounced in the Open Court on 13.01.2021)

(**SULEKHA BEEVI C.S.)**
MEMBER JUDICIAL

(P. ANJANI KUMAR)
MEMBER TECHNICAL

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