CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI.

PRINCIPAL BENCH, COURT NO. II

Excise Appeal No. 52543 of 2018-SM

(Arising out of order in appeal No. 394(SRM)CE/JDR/2018 dated 5.4.2018 passed by the Commissioner (Appeals), Central Excise and CGST, Jodhpur).

M/s Hindustan Zinc Limited **Appellant**
Rajpura Dariba Mines, Dariba Distt, Rajasthan

VERSUS

Commissioner of Central Goods and Service Tax, **Respondent**
142-B, Sec-11, Hiran Magri, Udaipur.

APPEARANCE:

Ms. Sukriti Das, Advocate for the appellant
Sh. K. Poddar, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 51483/2019

DATE OF HEARING/ DECISION: 29.03.2019

ANIL CHOUDHARY:

The appellant is a manufacturer of lead & zinc concentrates, who are operating their captive mines for getting the ore, which is the essential raw material. The appellant has to operate the mines subject to permission of the Chief Inspector appointed by the competent Government for operating the mine periodically. Such permission under Regulation 107 (93) of the Metalliferous Mines Regulations Act, 1961 as amended, provides that no extraction or splitting or reduction etc. of blocks of minerals shall be commenced, conducted or carried out except with the prior permission in writing of the Chief Inspector and in accordance with such conditions as he may specify therein. Under the permission letter granted by the Chief Inspector, the appellant is required to fortify the walls of the mines, wherever the ore has been extracted, for doing further mining. For this fortification they require cement. The issue is to whether the input service received by the appellant for bringing cement to its mines, whether the same is an eligible input service.

2. In the order-in-original, the Assistant Commissioner was pleased to hold that credit of service tax paid on inward transportation of cement used in mines, is admissible to the appellant.

3. Being aggrieved, the Revenue preferred appeal before the learned Commissioner (Appeals), on the ground that cement is not an eligible input and accordingly appellant is not entitled to cenvat credit for inward transportation of cement. Reliance was placed upon order of Hon'ble Supreme Court dated 10 January, 2008 in SLP No. 2463/2007 and also on Notification No. 16/2007-CE dated 7.7.2009 which amended Explanation II to Rule 2(k) of Cenvat Credit Rules, by inserting the words "but shall not include cement, angles, channels, TMT bar and other items used for construction of factory shed, building or making of structures for support of capital goods". Reliance was further placed on the larger bench Ruling of this Tribunal in **Vandana Global vs. CCE, Raipur**. Learned Commissioner relying on the ruling of Hon'ble Supreme Court order dated 10 January, 2008, in SLP (supra) held that cement is not eligible input, the cenvat credit for its inward transportation is not allowable.

4. Being aggrieved, the appellant is before this Tribunal in the present appeal.

5. Learned Counsel for the appellant have relied on the Division Bench ruling of this Tribunal in their own case being Appeal No. E/52696/2015-

EX(DB), final order No. 53167 – 53172/2018 dated 26.10.2018, wherein this Tribunal considered the aforementioned ruling in SLP dated 10 January, 2018 reported as **2015 (325) ELT A115 (SC),** and observed that the same is not applicable in the facts and circumstances, as the SLP was dismissed mainly on the ground that the grounds of appeal taken before the Apex Court were not taken before the Tribunal, hence were not allowed to be taken for the first time in appeal even before the High Court. As the SLP has been dismissed *in liminie,* without going into the matters this Tribunal observed that there is no application for doctrine of merger. Further, this Tribunal categorically held that 'cement' is an eligible input under Rule 2(k), in the facts and circumstances of the case. In view of such finding by the Division Bench, the learned Counsel states that inward transportation of cement has to be considered as allowable service.

6. Learned Departmental Representative for Revenue relied upon the impugned order and placed reliance on ruling of Rajasthan High Court in **Union of India vs. Hindustan Zinc Ltd., -2014 (305) ELT 123 (Raj.)** wherein the revenue was in appeal against order of this Tribunal, where cenvat credit on cement used as construction/ building material in mines, was allowed. The Hon'ble High Court took notice that cement had been used as a construction material so as to provide safety to the roof of mining area. The issue framed was cement being a construction or building material, is not eligible as input for the purpose of availment of cenvat credit, relying on his earlier judgment dated 09.08.2007, reported as **2007 (218) ELT 503,** where the High Court has specifically held that cement being a building material used for the purpose of construction of building, cannot be said to be an input used in the manufacture of final product, hence, no cenvat credit is available on cement.

7. Having considered the rival contentions, I find that the earlier judgment of Hon'ble Rajasthan High Court was under the 2002 Cenvat Credit Rules. Thereafter, Cenvat Credit Rules, 2004 came into force and there have been several changes under the Cenvat Credit Rules, 2004, that came into effect in October, 2004. Under the Cenvat Credit Rules, 2004 inputs used directly or indirectly by a manufacturer in manufacture of taxable goods was allowable as an input or input service. Further, I find that, by Notification No. 16/2009-CE, the amendments in Explanation-II to Rule 2(k), the net effect is that cenvat credit on cement is not available if it is used for construction of factory shed, building or laying of foundation stone or making structure. I find that such are not the facts, as the appellant is using cement for fortifying, where the mining has already been done in or to do further mining, as required under the relevant mining regulation and safety standards. Further, I find that the use of cement for fortification of mining face (as required under the Mining Regulation) has not been the issue before the Apex Court or the High Court in the decision relied upon by Revenue. Thus, in view of the finding of Division Bench of this Tribunal holding that cement is an eligible input, in the facts and circumstances, I allow the appeal and set aside the impugned order and hold that the appellant is entitled to avail cenvat credit of inward transportation of cement used for mining purpose.

8. Thus, the appeal is allowed with consequential benefit.

(Dictated and pronounced in open Court).

(Anil Choudhary)
Member (Judicial)

Pant