

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

PRINCIPAL BENCH – COURT NO. IV

**EXCISE Appeal No. 52097 of 2019**

(Arising out of Order in Appeal No. 398-400-CRM-CE-JDR-2019 dated 25.4.2019 passed by Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Jaipur)

**M/s. Hindustan Zinc Ltd.**

Rajpura Dariba Mines, Dariba  
District Rajsamand, Rajasthan

**...Appellant**

**Versus**

**Commissioner of Customs,  
Central Excise & Central GST, Udaipur**

142-B, Hiran Magri, Sector 11,  
Udaipur

**....Respondent**

**APPEARANCE:**

Mr. Hemant Bajaj, Advocate for the appellant

Mr. Pradeep Gupta, Authorised Representative for the Respondent

**CORAM : HON'BLE Ms. RACHNA GUPTA, MEMBER (JUDICIAL)**

Date of Hearing: **07.09.2020**

Date of Decision: **08.10.2020**

**FINAL ORDER No. 50852/2020**

**RACHNA GUPTA**

The present is an appeal against the Order-in-Appeal no. 398-400(CRM)/CE/JDR/2019 dated 25.4.2019 of Commissioner (A). The facts in brief for the impugned adjudication are:

That the appellant who is engaged in manufacture of Zinc / Lead / Bulk Concentrate Sulphuric Acid, Zinc Cathode had availed various services at Kandla Port as that of C&F, Testing, Sampling, etc. as were necessary in relation to the export of the aforesaid goods. The appellant accordingly availed the Cenvat Credit on such services. However, vide show cause notice no.

V(26)15/436/08/3687 dated 23.12.2008, Department formed an opinion that the appellant had wrongly taken the input service tax credit amounting to Rs.16,13,441/- in contravention of the provisions of Rule 3 & 4 of Cenvat Credit Rules 2004 (hereinafter referred as CCR Rules), during the period January 2008 to September 2008 on the aforesaid services provided to them at the Kandla port. Resultantly vide the said show cause notice the recovery of the credit availed along with the interest was proposed along with the proposal of the imposition of the penalty upon the appellant. The said proposal was initially confirmed vide order in original no. 15-17/2018-C.EX dated 29.8.2018. The said order was assailed before the Commissioner (A) who vide the order under challenge allowed the Cenvat Credit, of service tax paid on services provided at Kandla port during the period January 2007 to March 2008, on the ground that till 1.4.2008 the services from the place of removal were the input service eligible to credit. But disallowed the Cenvat credit taken during the period April 2008 to September 2008 on the ground that w.e.f. 1.4.2008 the services which are availed only upto the place of removal are input services eligible to credit. However, the appeal has been rejected. Being aggrieved, thereof, the appellant is before this Tribunal.

2. I have heard Shri Hemant Bajaj, learned Advocate for the appellant and Shri Pradeep Gupta, learned DR for the Respondent.

3. It is submitted that the services as that of CHA, C&F, testing, sampling etc. have been received by the appellant admittedly at Kandla port premises that too in relation to the export of

appellant's goods. Learned Counsel has placed reliance upon Rule 2(i) of CCR Rules to be read with Board Circular no. 996/6/2015-CX dated 28.2.2015, to impress upon that the port is the place of removal in case of exports and hence cenvat credit is admissible on all services as used upto the place of removal. It is submitted that the word "upto the place of removal" includes the place of removal as such which is the Kandla port in the present case. Hence the denial of Cenvat Credit by Commissioner (A) for the period beyond 1.4.2008 on the ground that the services availed at the port are beyond the place of removal is apparently a wrong finding. The learned counsel has impressed upon the meaning of "upto" as given in the Cambridge Advanced Learner dictionary to mean that something is less than or equal to but not more than the stated value, number or level. It is impressed upon that this definition is sufficient to hold that the phrase "upto the place of removal" would include the place of removal as well.

4. Learned counsel has relied upon various decisions including **Electrosteel Casting Ltd. v CCE, Kolkata III, 2019 (2) TMI 1023-CESTAT Kolkata, Bhushal Steel Ltd. v CCE, Raigad, 2018 (5) TMI 477-CESTAT, Mumbai and Mahle Engine Components India Pvt. Ltd. V CCE, Indore, 2018 (10) TMI 1204- CESTAT New Delhi** to impress upon that services such as CHA, C&F, etc in relation to export of goods are input services. Credit whereof is available to the manufacturer. In appellant's own case reported as **CCE, Jaipur v. Hindustan Zinc Ltd. 2012 (12) TMI 105-CESTAT-New Delhi**, the same has already been held.

5. Learned counsel further placed reliance upon the decision of Hyderabad Tribunal in the case of **Nagarjuna Agri Chem Ltd. v CCT, Vishakhapatnam 2019 (22) GSTL 96 (Tri-Hyd.)** where Cenvat Credit has been unequivocally allowed on all such services that were availed within the port premises prior to the export of goods. Learned Counsel also has submitted that the reliance of Commissioner (A) upon the Hon'ble Apex Court's decision in the case of **CCE & ST vs. Ultratech Cement Ltd. 2018 (9) GSTL 337 (SC)** is wrong in view of department's own circular no. 1065/4/18-CX dated 8.6.2018 wherein it has specifically been clarified that in the case of export, decision of **Ultratech Cement Ltd.** (Supra) is not relevant as the same was dealing with different facts i.e. about GTA services being availed beyond the place of removal w.e.f 1.4.2008.

6. Finally it is impressed upon that penalty is not imposable and that interest is not payable by the appellant for the reason that the appellant is legally entitled to avail the Cenvat Credit on the impugned services. Once the credit is admissible to him, the question of any penalty or interest does not arise. In view of these submissions the learned counsel has prayed for the order under challenge to be set aside and appeal in hand to be allowed.

7. While rebutting these arguments, it is submitted by the learned DR that there is no denial for port to be the place of removal in case of exports. However, for availing the Cenvat Credit only such services can be admissible for availing Cenvat Credit as are received upto the place of removal i.e. port. However,

para 8 of the impugned order is the sufficient clarification and a reasonable justification for denying the credit to the appellant after 1.4.2008. When the word "upto" was substituted in the definition of input services given under CCR Rules with earlier the word "from" the place of removal the scenario has altogether changed as all the services as availed by the appellant from the factory gate till the goods are cleared / exported used to be admissible for Cenvat Credit. However, post 1.4.2008, the services which are availed till the goods reach the port are only admissible to Cenvat Credit as "upto" means "to" but cannot mean "at" or "in" as has clearly been explained along with examples by learned commissioner in para 8 of the order under challenge.

8. Justifying the said reasoning and impressing upon that there is no ambiguity as is alleged, learned DR prays for the impugned appeal to be dismissed. Learned DR has relied upon the decision in the case of **Mahle Engine Components v Union of India, 2019-TIOL-2805-HC-MP-CX, CCE, Aurangabad v Roofit Industries Ltd. 2015 (319) ELT 221 (SC), CCE Nagpur v Ispat Industries Ltd. 2015 (324) ELT 670 (SC).**

9. After hearing both the parties the considered opinion of mine is as follows:

The availability of cenvat credit to the manufacture of goods floats from rule 3 (1)(2) of CCR Rules which provides that the manufacturer or producer of final product or provider of taxable service shall be allowed to take credit of any input service received by the manufacturer of final product or by the provider of output

service. This rule clarifies that to avail Cenvat Credit the services received by the manufacturer or by service provider should be such as may be covered under the definition of input service. Input service has been defined under rule 2(L) of CCR Rules as follows:

"input service" means any service,-

(i) used by a provider of taxable service for providing an output service; or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products **"upto the place of removal"**, and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal;

10. It is relevant to point here that the original definition of input services used the expression **"from the place of removal"**. It is w.e.f. 1.4.2008 that, the word "from" stands replaced by the word "upto". Thus it is only upto the place of removal that the input services availed are eligible for Cenvat Credit. This amendment no doubt had changed the entire scenario as the benefit which was earlier admissible even beyond the place of removal now gets

terminated at the place of removal and the availability of Cenvat Credit of input tax paid gets closed at that place.

11. The moot issue to be adjudicated herein is as to whether the services availed by a manufacturer at the port are the services availed by him upto the place of removal i.e. as to whether **"at the port"** is included in **"upto the port"**. For the purpose, definition of place of removal acquires importance. This definition has not been given in CCR Rules 2004. In terms of Rule 2 (F) CCR Rules, we can rely upon the Central Excise Act 1944 for the purpose. Section 4(3)(C) defines place of removal as follows:

"place of removal" means-

- i) A factory or any other place or premises of production or manufacture of the excisable goods;
- ii) A warehouse or any other place on premises wherein the excisable goods have been permitted to be deposited without.
- iii) A depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory.

12. This definition makes it abundantly clear that the place where sale takes place or from where the property in goods passes from the seller to the buyer is called the place of removal. Though this definition is not specific for the exports but the above interpretation is clearly applicable to exports as well. Applying the same it becomes clear that in case of export of goods the property in goods passes from manufacturer to the buyer only after shipping bill is

filed by the manufacturer, either by himself or through his representative, and there is a LeT export order issued. Since both these activities happen only at the port i.e. inside the port and not at the gate of the port, the port as such gets included in the word "upto". To technically clarify the silence in the provision about exports, the Board has also issued a circular no. 999/6/2015-CX dated 28.2.2015. The circular clarified that in case of exports for the purpose of Cenvat Credit of input services the place of removal is the port or the airport from where the goods are finally exported. But as argued by Id. DR, this clarification is also not sufficient to adjudicate the above moot issue. However, it is observed that there is no dispute to the fact that place of removal is such a place where the property in goods actually passes from seller to buyer. It becomes clear that any service availed by the manufacturer till the point his right in the goods / property is passed on by him to his buyer is the input service.

13. Section 23 of Sale of Goods Act answers as to when such right passes away by saying that when the seller delivers the good to a buyer or to a carrier or to other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer and does not reserve a right of disposal, he is deemed to have unconditionally appropriated the goods to the contract and therefore, in view of section 23 Sub section 1 of Sale of Goods Act the property in goods would thereupon pass to the buyer. Section 39 of the Act in addition provides that wherein pursuance of a contract of sale the seller is authorised or required to send the

goods to the buyer, delivery of the goods to a carrier whether named by the buyer or not, for the purpose of transmission to the buyer or delivery of the goods to a wharfinger for safe custody is prima facie deemed to be delivery of the goods to a buyer. Therefore, it appears that handing over of the goods to the carrier /transporter for the further delivery of the goods to the buyer with the seller not reserving the right of the disposal of the goods, would lead to passing of property from the seller to the buyer. As per the definition of place of removal as mentioned above, it generally happens at the factory gate or the warehouse or the depot of the manufacturer, hence any service availed by the manufacturer beyond this point will not be eligible for cenvat credit on input tax paid by him as has been held by Hon'ble Apex Court in the **Ultratech (Supra)**. However, in case of clearance of goods for exports, the place of removal may be a factory gate or warehouse or depot but only in a situation when manufacturer himself is not exporting his goods, but is selling them to the merchant-exporter. Manufacturer in such case will not be entitled for credit on the services if availed beyond his factory gate or warehouse or depot, or it may not be. But when the goods are to be exported by the manufacturer directly to his foreign buyer, the property in the goods shall not pass on from manufacturer exporter to his buyer till the goods have reached the port from where those have to be exported and till the shipping bill is filed by the manufacturer exporter and goods are handed over to the shipping line. It is still after LeT export order is issued that shipping line becomes

responsible to ship the goods to the foreign buyer and the exporter remains with no control over the goods once these are handed over to the shipping line. Once this is the clear interpretation of the relevant law of the subject where remains no ambiguity to hold that place of removal for goods to be exported is the port from where those are to be exported and word **“upto the place of removal”** includes the area till the manufacturer exporters hands over the goods to the shipping line after the LeT export order is issued. In no circumstance the handing over of the goods by the manufacturer exporter to shipping line can happen at the gate of the port, the manufacturer exporter has to enter the gates of the port and has to comply with all the formalities of filing shipping bills and of getting the LeT export order at the port i.e. beyond the gates thereof. Thus **“at the port”** becomes, the part of the phrase **“upto the place of removal”**.

14. Needless to say, eligibility to Cenvat Credit of such manufacturer shall be determined accordingly at the port. Though upto cannot extend beyond the port.

15. The decisions relied upon by the learned DR are not found applicable to the facts and circumstances of this case because in **Roofit industries (Supra)** the period of demand was till June 2000 i.e. much before the impugned amendment in the definition of the input services. The **Ultratech cement (Supra)** decision is about GTA services were availed by the manufacturer beyond a place whereas the property in goods was already transferred to the buyer at factory gate itself. Seen from both these decisions, there

is found no deviation from the fact that the relevant consideration to determine the place of removal is the place where the sale takes place i.e. place where property in goods passes from the seller to the buyer. As already held above,, in the present case, the property in the goods passed from the appellant to his buyer only at the port where they have obtained the Let export order and the services in question are such as were availed by the manufacturer prior getting the said order. Hence, the said services as that of CHA, CNF, testing and sampling etc. are eligible to be classified as the input services Resultantly the appellant is entitled to avail the cenvat credit for the tax paid on such input services. The observation of learned commissioner in para 8 of the order and the examples cited therein are therefore, held to be not applicable to the given facts, and circumstances. The findings are therefore held to be false. These are rather observed to be mere literature or language oriented than being technical in nature. The findings with respect to the period from April 2008 to September 2008 are therefore set aside. As a result thereof appeal in hand is allowed. Consequential benefits to follow.

(Order pronounced in the open court on 08.10.2020)

**(RACHNA GUPTA)**  
**MEMBER (JUDICIAL)**