

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

PRINCIPAL BENCH

EXCISE APPEAL NO. 52928 OF 2019

[Arising out of Order-in-Original No. UDZ-EXCUS-000-COM-0013-19-20 dated 24.09.2019 passed by the Commissioner, CG&ST, Udaipur]

M/S HINDUSTAN ZINC LTD.

Yashad Bhawan
Udaipur (Raj.)

...APPELLANT

Versus

**THE COMMISSIONER,
CENTRAL GOODS AND SERVICE TAX
COMMISSIONERATE,**

142-B, Sector-11, Hiran Magri
Udaipur (Raj.)

...RESPONDENT

APPEARANCE:

Shri B.L. Narasimhan and Shri Dhruv Tiwari, Advocates for the Appellant
Shri O.P. Bisht, Authorised Representative for the Department

WITH

EXCISE APPEAL NO. 52774 OF 2019

[Arising out of Order-in-Appeal No. 794(CRM)CE/JDR/2019 dated 04.09.2019 passed by the Commissioner (Appeals), CE&CGST, Jodhpur]

**THE COMMISSIONER
CENTRAL EXCISE & CGST
COMMISSIONERATE,**

Udaipur.

...APPELLANT

Versus

M/S ULTRATECH CEMENT LIMITED

(Unit: Aditya Cement Works),
Adityapuram
Sewa-Shambhupura, Chittorgarh

...RESPONDENT

APPEARANCE:

Shri O.P. Bisht, Authorised Representative for the Appellant
Shri B.L. Narasimhan and Shri Dhruv Tiwari, Advocates for the Respondent

CORAM:

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

DATE OF HEARING AND DECISION : 28.09.2020

FINAL ORDER No. 50855-50856 / 2020**JUSTICE DILIP GUPTA**

Excise Appeal No. 52928 of 2019 has been filed by M/s Hindustan Zinc Limited¹ to assail the order dated September 24, 2019 passed by the Commissioner, Central Goods and Service Tax Commissionerate, Udaipur ² by which CENVAT credit of Rs. 2,75,97,106/- has been disallowed with a direction for its recovery from the appellant with interest and penalty.

2. **Excise Appeal No. 52774 of 2019** has been filed by the Commissioner to assail the order dated September 4, 2019 passed by the Commissioner (Appeals), Central Excise and Central Goods and Service Tax, Jodhpur³ by which the order dated March 18, 2019 passed by the Joint Commissioner disallowing CENVAT credit of Rs. 1,83,23,753/- with interest and penalty has been set aside and the appeal has been allowed. In this appeal the respondent is M/s Ultratech Cement Limited, Chittorgarh⁴.

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, 2004⁶. 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

thermal plant wherein steam coal / steam non-coking coal falling under Chapter Heading 27.01 of the Customs Tariff Act, 1975⁷ 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

this order of the Commissioner that Hindustan Zinc has filed Excise Appeal No. 52928 of the 2019.

4. **Ultratech Cement** is engaged in the manufacture of clinker and cement falling under Chapter 25 of the First Schedule to the Excise Tariff Act. It availed the facility of CENVAT Credit on inputs, capital goods and input services under the CENVAT Credit Rules. It used steam falling under Chapter Heading 27.01 of the Customs Tariff Act as inputs in the kiln for manufacture of the final products. During the relevant period from January, 2013 to March, 2017, it paid additional duty of customs under section 3(1) of the Customs Tariff Act on importation of steam coal. It has been stated that such additional duty of customs was paid by availing the benefit of serial number 123 (serial number 121B w.e.f March, 2016) of the Customs Notification dated March 17, 2012, which prescribed a rate of 2% ad valorem. It also availed CENVAT credit of the additional duty of customs so paid under rule 3 (1)(vii) of the CENVAT Credit Rules. However, a show cause notice dated October 27, 2017 was issued, proposing to disallow the CENVAT credit amounting to Rs. 1,83,23,753/- for the reason that CENVAT credit of duty specified in the First Schedule to the Excise Tariff Act is 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 is only admissible for CENVAT credit. The additional duty of Customs paid @ 2% was not the duty of excise as specified in the Excise Tariff Act and so CENVAT credit of the additional duty of customs paid under the Customs Notification dated March 17, 2012 had wrongly been availed by the Ultratech. Further, the benefit

of concessional rate of excise duty under the Notification dated March, 2017 was available in respect of coal subject to the condition that no credit was availed under the CENVAT Credit Rules. The extended period of limitation was also invoked. The reply filed by Ultratech Cement did not convince the Joint Commissioner and so the demand made in the show cause notice was confirmed in its entirety. Ultratech Cement filed an appeal before the Commissioner (Appeals) who by order dated September 4, 2019 allowed the appeal and set aside the order passed by Joint Commissioner. It is against this order of the Commissioner (Appeals) that the Department has filed Excise Appeal No. 52774 of 2019.

5. It would, thus, be seen that the issue involved in both the appeals, namely, Excise Appeal No. 52928 of 2019 and Excise Appeal No. 52774 of 2019 are identical and are, therefore, both the appeals are being decided by this common order.

6. The submissions that have been made on behalf of Hindustan Zinc and Ultratech Cement are as follows:

- (i) CENVAT credit of additional duty of customs paid @ 2% ad valorem has been correctly availed in terms of rule 3 (1)(vii) of the CENVAT Credit Rules. In support of this contention, reliance has been placed to the following decisions of the Tribunal :

- a) **Jaypee Sidhi Cement Plant vs. Commr. of CGST, Cus. & C. Ex., Jabalpur⁹**
- b) **Hindalco Industries Ltd. vs. GST, Bhopal¹⁰**
- c) **C.C.E. & S.T. – Surat-I vs. M/s Aarti Industries Limited¹¹**
- d) **M/s Asahi Songwon Colors Limited vs. Commissioner of Central Excise & ST., Vadodara¹²**

(ii) The additional duty of customs paid under section 3 (1) of the Customs Tariff Act is not a duty of excise. It is a duty of customs and only the measure of the additional duty of customs under section 3(1) of the Customs Tariff Act, is equal to the duty of excise. Merely, on account of such measure, it would not partake the character of excise duty;

(iii) The additional duty of customs at concessional rate was paid under Customs Notification dated March 17, 2012 and the benefit of exemption under the said Notification was not availed. Thus, the restriction contained in proviso (b) to rule 3(1)(i) is not applicable. Infact, the Department has not disputed payment of duty under the said Customs Notification. The CENVAT credit availed of additional duty of customs paid under the Customs Notification during the relevant period is, therefore, admissible;

9. 2019 (369) E.L.T. 1673 (Tri. – Del.)

10. 2018 (363) E.L.T. 1085 (Tri. – Del.)

11. 2019 (3) TMI 240 (CESTAT Ahmedabad)

12. 2018 (9) TMI 159 (CESTAT Ahmedabad)

- (iv)** The findings recorded by the Commissioner are incorrect and the extended period of limitation was not invokable under section 11A(4) of the Customs Act; and
- (v)** Neither penalty could be imposed nor interest could be recovered.

7. Shri O.P. Bisht learned Authorized Representative of the Department has made the following submissions:-

- (i)** The CENVAT credit on duty paid on Coal is allowed to be taken in respect of duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under Excise Act. Though the additional duty of customs cannot be treated as duty of excise per se, but as per clause (vii) of sub-rule (1) of rule 3 of CENVAT Credit Rules, the CENVAT credit of the additional duty leviable under section 3(1) of the Customs Tariff Act is allowed equivalent to the duty of excise specified in clause (i) to (via) of sub-rule (1) of rule 3 of CENVAT Credit Rules;
- (ii)** It is, therefore, clear that the eligibility of credit of additional duty of customs under rule 3(1)(vii) is not determined with reference to the additional duty paid under the Notification dated March 17, 2012, but is determined only with reference to the excise duty specified under clauses (i), (ii), (iii), (iv), (v), (vi) and (via) of rule 3 (1);

- (iii) If clauses (i) and (vii) of sub-rule (1) of rule 3 of CENVAT Credit Rules are read harmoniously and conjointly, it is clear CENVAT credit in respect of additional duty of customs is allowed equal to the excise duty for the time being leviable on like goods, if manufactured in India. Thus, in respect of additional duty what is allowed to be taken as CENVAT credit to the amount equivalent to the duty amount equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (vi) and (via), irrespective of the fact that the amount paid as additional duty is in excess;
- (iv) Clause (i) read with clause (vii) of sub-rule(1) of rule 3 of CENVAT Rules clarifies that credit availment, in case of additional duty of customs paid on imported coal by availing concessional additional customs duty (S.No. 123 of Notification dated March 17, 2012), is not allowed as it is not equal to the duty of excise specified in the First Schedule to the Excise Tariff Act leviable under Excise Act; and
- (v) The findings of the Commissioner (Appeals) are not correct and the decisions relied upon are distinguishable. Infact, the issue is covered by the decision of the Gujarat High Court in **Lonsenkiri Chemicals Industries Versus Commissioner of Central Excise Customs and Service Tax, Vadodara-I**¹³.

¹³. 2018 (9) TMI 1439- Gujarat High Court

8. The submissions advanced by learned Counsel appearing on behalf of Hindustan Zinc and Ultratech Cement as also the learned Authorized Representative of the Department have been considered.

9. It is not in dispute that both Hindustan Zinc and Ultratech Cement paid additional duty of Customs under section 3 (1) of the Customs Tariff Act, after availing the benefit of the Customs Notification dated March 17, 2012 and that they also availed CENVAT credit of the additional duty of customs so paid under rule 3(1)(vii) of the CENVAT Credit Rules. This availment of CENVAT credit has been denied to them for the reason that the additional duty of customs paid @ 2% was not the duty of excise as specified in the Excise Tariff Act and so CENVAT credit of the additional duty of customs paid under the Customs Notification dated March 17, 2012 have been wrongly availed.

10. It would, therefore, be appropriate to reproduce the relevant portion of the show cause notice issued by the Department to Hindustan Zinc, and the same is reproduced below:

11. "Whereas, from the above, it transpires that the Cenvat credit on the coal imported by the assessee is available to the manufacturer under Cenvat Credit Rules, 2004 subject to the satisfaction of the conditions laid in Rule 3 of the Cenvat Credit Rules, 2004. The rule 3(1)(i) of Cenvat Credit Rules, 2004 speaks that the Cenvat Credit of duty of excise as specified in the first schedule to the Central Excise Tariff Act, 1985 read with any Notification issued under the Central Excise Act, 1944 is available to the assessee. Further, from the legal provisions as contained in Rule 3(1)(vii) of the Cenvat Credit Rules, 2004, it transpires that the assessee is eligible to take Cenvat Credit of the additional duty leviable under Section 3 of the Customs Tariff Act, 1975 equivalent to the duty of excise specified under clauses (i), (ii), (viii), (iv), (v), (vi), (vii) and (vii-a) of the Rule 3 ibid. The duty of excise on the coal imported by the assessee as specified in the first schedule to the Central Excise Tariff Act, 1985 is 6% and the effective rate is 1% or 2% vide Notification No. 12/2012-CE dated 17.03.2012, as amended, subject to the condition

stated therein. In this case, 2% Additional Duty on imported steam coal/bituminous coal as per Notification No. 12/2012-Cus dated 17.03.2012 as amended by Notification No. 12/2013-Cus dated 01.03.2013 has been paid by the assessee. Further, it is found that the said duty of 2% is not specified under Central Excise Tariff Act, 1985 read with any notification issued under Central Excise Act, 1944 or rules made there under, therefore the credit of said duty of 2% paid as Additional Duty of customs does not appear to be admissible to them.

12. From the above, it appears that the assessee has wrongly availed total Cenvat credit amounting to Rs. 2,75,97,106/- (As per Annexure 'A') in contravention of the provisions of Rule 3 of Cenvat Credit Rules, 2004. The said wrongly availed Cenvat credit, which was otherwise not admissible to them, is liable to be recovered from the assessee along with interest under rule 14 of Cenvat Credit Rules, 2004 read with Section 11A(4) and Section 11AA of the Central Excise Act, 1944 and Section 174 of the Central Goods and Service Tax Act, 2017."

11. The Commissioner has, by the impugned order, not accepted the explanation offered by Hindustan Zinc for the following reasons:

25. "The notices have basically contended that they rightly availed Cenvat credit of the additional duty of customs paid @ 2% in terms of S. No. 122A or 123 of Notfn. No. 12/2012-Customs dated March 17, 2012, as amended by Notfn. No. 12/2013-Cus dated March 1, 2013, as there is no such restriction or barring of credit in rule 3(1)(vii) similar to the restriction or barring in rule 3(1)(i)(b) of CCR, 2004. Their contention is that they have taken credit of CVD as applicable under S.No.122A or 123 of 12/2012-Customs dated 17.12.2012 and not S. No. 67 of notification 12/2012-CE dated 17.03.2012. I do not agree with their contention because of the specific wording of the clause (i) and (vii) of sub rule 3(1) of CCR, 2004.

From the perusal of the said sub rule it is clear that credit of the CVD paid by assessee is admissible as Cenvat credit. However, such right to availment of credit is no unfettered. The said credit available is equivalent to the duty of Excise specified under clauses (i), (ii), (viii), (iv), (v), (vi), (vii) and (via). The wording of this clause clearly specifies that it allows the credit only of the additional duty leviable under section 3 of the Customs Tariff Act, **equivalent to the duty of Excise specified under clauses (i), (ii), (viii), (iv), (v), (vi), (vii) and (via)**. Clause (vii) is not independent of clause(i) and thus the proviso provided under clause (i) is also applicable to credit of CVD under clause (vii). If there was any other intention of Legislature they would not have specifically mentioned "**equivalent to the duty of Excise specified under clauses (i), (ii), (viii), (iv), (v), (vi), (vii) and (via)**". Thus, the notices are not legible to avail the credit of CVD equivalent to duty of excise if it is not eligible in clause (i).

Any other meaning would be unfair for the local coal producers vis a vis imported coal, as if stand taken by notices is accepted, credit would not be available on indigenously

procured coal but would be available on imported coal. This could never be the intention of legislature and therefore I do not find any substance or basis in the contention of the notices."

12. It would be appropriate to reproduce rule 3 of the CENVAT Credit Rules and it is as follows:

"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: :

Provided that CENVAT credit of such duty of excise shall not be allowed to be taken when paid on any goods-

- (a) in respect of which the benefit of an exemption under Notification No. 1/2011-C.E., dated the 1st March, 2011 is availed; or
 - (b) specified in serial numbers 67 and 128 in respect of which the benefit of an exemption under Notification No. 12/2012-C.E., dated the 17th March, 2012 is availed.
- (ii) the duty of excise specified in the Second Schedule to the Excise Tariff Act, leviable under the Excise Act;
- (iii) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978);
- (iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);
- (v) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001);
- (vi) the Education Cess on excisable goods leviable under section 91 read with section 93 of the Finance (No. 2) Act, 2004 (23 of 2004);
- (via) the Secondary and Higher Education Cess on excisable goods leviable under section 136 read with section 138 of the Finance Act, 2007 (22 of 2007);
- (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 (via):"

13. A bare perusal of rule 3(1)(i) indicates that a provider of output service shall be allowed to take CENVAT credit of the duty of excise specified in the First Schedule to the Excise Tariff Act specified in the

First Schedule to the Excise Tariff Act, leviable under the Excise Act subject to the two conditions mentioned in proviso (a) & (b). However, rule 3(1)(vii) provides that a provider of output service shall be allowed to take credit of 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 (via).

14. The Commissioner has mixed up rule 3(1)(i) and rule 3(1)(vii) of rule 3 of the CENVAT Credit Rules. It is for this reason that the conditions specified in rule 3(1)(i) have also been imported into rule 3 (1)(vii) of the CENVAT Credit Rules. In the first instance, Hindustan Zinc had not paid duty of excise specified in the First Schedule of the Excise Tariff Act, nor it had availed the benefit of the Central Excise Notification dated March 1, 2011 or that specified in serial numbers 67 and 128 in respect of which the benefit of an exemption under Central Excise Notification dated March 17, 2012 had been availed. In fact, Hindustan Zinc had paid additional duty of customs by availing the benefit under serial number 122A/123 of the Customs Notification dated March 17, 2012. It is because of this misreading of rule 3(1) of the CENVAT Credit Rules that led the Commissioner to commit an error.

15. The Regional Advisory Committee of Hyderabad Zone, in its meeting held on February 9, 2015 considered this very issue at point No. 1 and concluded that CENVAT credit of additional duty of customs paid on imported goods under Customs Notification dated March 17, 2013 (and not under Central Excise Notification) is available for credit. The relevant portion of the minutes is reproduced below:

“MINUTES OF THE MEETING OF THE REGIONAL ADVISORY COMMITTEE, HYDERABAD ZONE HELD ON FEBRUARY 09, 2015.

Point No. 1 – Credit on imported coal:-

Many manufactures are importing steam coal on payment of duties. As per Customs Notification No. 12/2012-Cus. They are availing concessional CVD @ 2%. Audit is of the view that since CVD has been paid @ 2% on imported coal, the credit under Cenvat Credit Rules, is not available. Audit is taking a view that CVD in lieu of Excise duty and if 2% duty has been paid on imports the credit is not admissible because a manufacturer who is procuring coal domestically where excise duty has been paid @ 2%, the credit is not available.

Board has issued a circular No.41/2013-Cus. dated 21.10.2013 where it has been clarified that 2% of CVD is “general applied” rate and therefore it is industry’s view that credit of CVD is available as per rule 3(1) (vii) of CENVAT credit rules. Please clarify.

Reply:

Since the subject goods were levied at reduced rate of 2% CVD on their importation in terms of section 3 of Customs Tariff Act, 1975 read with Notification issued therein i.e under Notification No. 12/2012-Cus. dated March 17, 2013 (and not under Notification No. 1/2011 CE) which was not excluded from the purview of Rule 3 of CENVAT credit rules, 2004, it appears that the CENVAT credit of CVD paid on imported coal (i.e. 2% adv.) under Notification No. 12/2012-Cus. dated 17.03.2013 is eligible for credit.”

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 has applied wrong provision to deny Cenvat credit to the appellant. Therefore, Cenvat credit cannot be denied to the appellant. In that circumstances, I hold that the appellant has correctly availed the Cenvat credit of CVD paid

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 circumstances, 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 reveal 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.

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)

18. The same view was taken by the Tribunal in **Asahi Songwon Colors** and the relevant paragraph is reproduced below:

"From the above Rule, it is observed that even if any duty is paid by availing exemption Notification No. 12.2012-CE dated 17.03.2012, the same will not be available as Cenvat credit for the user of the goods. **In the present case, admittedly, the appellant have imported Coal and CVD of 2% is leviable in terms of Customs Notification No. 12/2012-Cus. There is no restriction provided in Rule 3 as regards duty paid under Customs notification. This restriction is applicable only in case of indigenous goods on which the excise duty @ 2% was paid availing Notification No. 12/2012-CE, which is not a case here. Therefore, the appellant is entitled for Cenvat credit in respect of CVD paid under Notification No. 12/2012-Cus.** Moreover, since the Notification No. 12/2012-CE is applicable only in respect of indigenously manufactured coal and not in respect the imported coal as held by the Hon'ble Supreme Court in the case SRF Limited vs. CC, Chennai- 2015 (318) ELT 607 (SC). Therefore, even if the importer wants to avail the exemption of Notification No. 12/2012-CE for payment of CVD, the same will not be available to the importer. Therefore, in any case, in the case of import the Notification No. 12/2012-CE is not relevant."

19. Learned Authorized Representative of the Department has, however, placed reliance upon the decision of the Gujarat High Court in **Lonsenkiri Chemicals Industries.**

20. This decision is clearly distinguishable on facts. The appellant therein had availed the benefit of serial numbers 67 and 128 of the Central Excise Notification dated March 17, 2012. It is for this reason that the High Court held that because of the condition set out in proviso (b) of rule 3(1)(i) of the CENVAT Credit Rules that the appellant would not be entitled to avail CENVAT credit. The relevant portion of the judgment of Gujarat High Court is reproduced below:

- "2. The appellant imports coal on which ordinarily countervailing duty in the nature of excise duty would be payable. However, by virtue of notifications 1 of 2011 dated 01.03.2011 and Sr. No. 67 and 128 of exemption notification 12 of 2012 dated 17.03.2012, the assessee would either pay duty at the reduced rate or Nil rate of duty. In this context, the question of allowing the assessee to claim CENVAT credit arose. The Revenue authorities and the Tribunal held that by virtue of proviso to rule 3(1) of CENVAT credit Rules, 2004, ('the Rules' for short) in view of the benefit availed by the assessee and the said exemption notifications, CENVAT credit would not be allowable. It is this view which the assessee has challenged before us. *****
3. It is not in dispute that the assessee has availed of the benefit of exemption notification 1 of 2011 and also the benefits under Sr. 67 and 128 of exemption notification 12 of 2012. In that view of the matter, the above noted proviso of the Rules, would disentitle the assessee from claiming CENVAT credit. Counsel for the assessee however submitted that this proviso refers to CENVAT credit of "such duty of excise". In the present case, what the assessee has paid was the countervailing duty. The same may have been computed in terms of excise duty payable on local manufacturers, nevertheless, the same cannot be treated as duty of excise perse. He however candidly a greed that facility for getting CENVAT credit in the case of the present assessee flows from rule 3 of the Rules. As per subrule (1) of rule 3, a manufacturer or producer of a final product or a provider of output service would be allowed to take the CENVAT credit on the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act. Sub rule (1) rule 3 which gives the concession of availment of CENVAT credit of the duty paid, also uses the same expression "duty of excise" as is used in the proviso which restricts or limits the right of availment of such facility under certain circumstances. The expression "duty of excise" used in clause (i) of subrule (1) of rule 3 and the above noted proviso to the said rule, must receive same interpretation. The term "duty of excise" cannot have different connotations for the purpose of subrule (1) of rule 3 and for the purpose of proviso to the rule 3. Thus, if we accept the contention of the counsel for the assessee that the countervailing duty would not be included in the expression "duty of excise" for the purpose of the said rule, the assessee's very foundation of claiming the benefit of CENVAT credit would disappear."

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.

23. On the other hand, the Commissioner (Appeals), in the matter of Ultratech Cement, after considering the provisions of rule 3 of the CENVAT Credit Rules and the decision of the Tribunal in **Hindalco Industries Limited** and the **Minutes of the Meeting of the Regional Advisory Committee of Hyderabad Zone held on February 9, 2015**, held that Ultratech Cement was justified in taking the CENVAT credit. The Commissioner (Appeals) also found that the judgment of the Gujarat High Court in **Lonsenkiri Chemicals Industries** would not be applicable to the facts of the case and in this connection placed reliance on the decision of the Tribunal in **Aarti Industries Limited**.

24. For the reasons also discussed above, there is no error in the order passed the Commissioner (Appeals) in the matter of Ultratech Cement.

25. Thus, for all the reasons stated above, Excise Appeal No. 52928 of 2019 filed by Hindustan Zinc is **allowed** and the order dated September 24, 2019 passed by the Commissioner is set aside. Excise Appeal No. 52774 of 2019 filed by the Commissioner is **dismissed**.

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.L. MAHAR)
MEMBER (TECHNICAL)

Babita