CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

EXCISE APPEAL NO. 51151 OF 2019

(Arising out of Order-in-Appeal No. 150(CRM)CE/JDR/2019 dated 15 February, 2019 passed by the Commissioner (Appeals), Central Excise & CGST, Jodhpur)

Commissioner, Central Excise & Central Goods & Service Tax ......**Appellant**
Udaipur

VERSUS

Hindustan Zinc Ltd. ......**Respondent**
Rajpura Dariba Mines, Dariba
Distt- Rajsamand (Rajasthan)

APPEARANCE:

Shri R.K. Mishra, Authorized Representative of the Respondent
Shri B.L. Narasimhan, Advocate for the Appellant

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 51647/2020

DATE OF HEARING/DECISION : 09.12.2020

JUSTICE DILIP GUPTA :

The Department has filed this appeal to assail the order dated Feb 15, 2019 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jodhpur[1] by which the appeal filed by the respondent – M/s Hindustan Zinc Ltd.[2] has been allowed and the order dated December 15, 2017 passed by the Joint Commissioner has been set aside. It needs to be noted that the Joint Commissioner had confirmed the demand raised under rule

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1. the Commissioner (Appeals)
2. the respondent

6(3) of the CENVAT Credit Rules 2004[3] for clearance of sulphuric acid from the factory of the respondent during the period from December, 2015 to March, 2016 for Rs. 72,93,931/.

2. The respondent is engaged, inter alia, in the manufacture of lead and zinc and is also availing CENVAT credit of duty paid on inputs and input services in terms of the provisions of the Credit Rules prevailing during the relevant period from December 2015 to March 2016.

3. The ore mined from the mine contains zinc and lead, along with several impurities. The ore has to be treated to obtain zinc and lead concentrates. In the smelting unit, the ore concentrate is fed in the Roaster plant for manufacture of zinc and lead. During the process of calcination of concentrated ore, sulphur dioxide gas emerges during the manufacture of zinc, which being hazardous, cannot be released in the atmosphere due to pollution control regulations. Thus, sulphur dioxide is converted into sulphuric acid.

4. The respondent claims to be clearing the finished goods (zinc and lead) on payment of duty. It further claims that during the relevant period, sulphuric acid was also cleared on payment of duty but some quantity of sulphuric acid was cleared to fertilizer manufacturers, after claiming exemption from payment of duty, under Entry No. 86 of the Notification dated March 17, 2012.

5. The Department entertained a view that sulphuric acid, cleared to the fertilizer units without payment of duty, is an exempted product and hence the respondent is liable to pay an amount in terms of rule 6(3)(i) of the Credit Rules.

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3. Credit Rules

6. Accordingly, a show cause notice dated May 15, 2017 was issued to the respondent proposing to recover an amount @6% of the value of sulphuric acid, in terms of rule 6(3)(i) of the Credit Rules.

7. A detailed reply was filed by the respondent stating, inter alia, that sulphuric acid arises as a by-product during the manufacture of zinc; that no inputs as well as input services were used in the manufacture of sulphuric acid and that all inputs and input services were consumed in the manufacture of dutiable final products; rule 6(3) of the Credit rules was not applicable in case of a by-product/waste emerging during the manufacturing process; and the issue raised in the show cause notice had been settled in favour of the respondent, in its own case, by the Supreme Cour in **Union of India vs. Hindustan Zinc Ltd.**[4], and also in cases of other assessees.

8. The relevant portion of the judgement of Supreme Court in **Hindustan Zinc** is reproduced below:

> "**3.** In all these appeals filed by the Revenue, it has taken the position with the common contention as to whether the Respondents are liable to pay 8% excise duty as an amount under Rule 57CC of the Central Excise Rules, 1944 or 57AD of the Central Excise Rules, 2000 or Rule 6 of the Cenvat Credit Rules, 2004 (hereinafter referred to as 'Rules') on the value of by-product namely sulphuric acid which was cleared to fertilizer plants under exemption in terms of the bonds executed by the fertilizer plants.
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> **22**. Elaborating this contention, the learned Solicitor General submitted that the words "final products" in the context of Modvat and Cenvat Credit have to be understood giving the meaning as assigned to it in the Modvat/ Cenvat Rules. Rule 57A inter alia states that the

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4. 2014 (303) ELT 321(SC)

provisions of this Section shall apply to such finalised excisable goods (referred to in that section as final products). Again, Rule 2(c) of the Cenvat Credit Rules, 2002 defines "final products" as meaning excisable goods manufactured or produced from inputs except matches. Rule 2(h) of the Cenvat Credit Rules, 2004 defines "final products" as meaning excisable goods manufactured or produced from input, or using in input service. Thus, final products referred to in the aforesaid provisions can only mean to be excisable goods produced or manufactured. In the present set of cases, sulphuric acid, caustic soda flakes, trichloro ethylene and Phosphoryl A and Phosphoryl B are excisable goods manufactured and produced in India falling under different headings of the Central Excise Tariff Act. The submission was that if these products are exempt or subject to NIL rate of duty, then the inputs on which Modvat/Cenvat Credit are claimed used in the manufacture of the aforesaid final products will attract the rigor of Rule 57CC/Rule 6 of the Modvat/Cenvat Credit Rules.

23. In this very direction, his further submission was that the term "by-products" is not defined either in the Act or in the Rules. Dictionary meanings cannot be resorted to in this case as it would then mean that final products would be treated as by-products defeating the plain language of Rule 57CC and Rule 6 which are applicable to final products. The only test is "excisability of goods manufactured or produced" and only if the requirements of this test are satisfied, the goods can be 'final products' and never 'by-products'. On this basis, the learned Solicitor General submitted that even an admission made before the Tribunal in the Birla Copper case of the goods being a 'by- product', cannot be relied on by the respondent.

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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. 2337 of 2011) the Tribunal has decided the matter following the judgment in the case of Swadeshi Limited (supra). In that case, Ethylene Glycol was reacted with DMT to produce polyester and ethanol. Methanol was not excisable 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 facts and the law laid down in Swadeshi Polytex (supra). Therefore, this judgment is squarely applicable.
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> **26**. Furthermore, the provisions of Rule 57CC cannot be read in isolation. In order to understand the scheme of Modvat Credit contained in this Rule, a combined reading of Rule 57A, 57B and 57D alongwith Rule 57CC becomes inevitable. We have already reproduced Rule 57D above. It can be easily discerned from a combined reading of the aforesaid provisions that the terms used are 'inputs', 'final products', 'by-product', 'waste products' etc. We are of the opinion that these terms have been used taking into account commercial reality in trade. In that context when we scan through Rule 57 CC, reference to final product being manufactured with the same common inputs becomes understandable. This Rule did not talk about emergence of final product and a by-product and still said that Rule 57 CC will apply. The appellant seeks to apply Rule 57CC when Rule 57D does not talk about application of Rule 57CC to final product and by-product when the by-product emerged as a technological necessity. Accepting the argument of the appellant would amount to equating by-product and final product thereby obliterating the difference though recognised by the legislation itself. Significantly this interpretation by the Tribunal in Sterlite (supra) was not appealed against by the department."

9. However, the Joint Commissioner, by order dated December 15, 2017, confirmed the demand raised in the show cause notice with interest and penalty equal to the demand. The decision of the Supreme Court in **Hindustan Zinc** was held not to be applicable as it pertained to reversal of credit on inputs and could not be applied to input services.

10. Feeling aggrieved, the respondent filed an appeal before the Commissioner (Appeals) and by order dated February 15, 2019, the Commissioner (Appeals) allowed the appeal after placing reliance on the decision of the Supreme Court in **Hindustan Zinc** as well as

other decisions of the Tribunal. The relevant portion of the order passed by Commissioner (Appeals) is reproduced below :

> "8. I have carefully gone through the case records, grounds of appeal as well as submission made during the course of personal hearing. **I find that main issue to be decided in this case are whether by product namely sulphuric acid emerges in appellant factory is covered under the definition of 'excisable goods' as per provisions of Section 2(d) of CEA, 1944, (ii) whether the 'sulphuric acid' qualifies as exempted goods under Rule 2(d) of Cenvat Credit Rules, 2004 and whether Rule 6 of the Cenvat Credit Rules, 2004 is applicable in the instant case or not?**
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> As per the above definition of exempted goods, goods should be excisable goods. In this regard, the adjudicating authority observed in OIO that in the budget of 2018, the definition of 'excisable goods' in clause (d) of Section 2 of the Central Excise Act, 1944 was amended by adding an explanation that for the purposes of this clause, "goods" include any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable.
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> **In view of the above the adjudicating authority found that any by-product, though emerges due to technological necessity would be included in the definition of 'goods', hence fall within the ambit of term 'final product'. Therefore, Rule 6 would become applicable automatically.**
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> In the light of above, I find that from decision of the Hon'ble Supreme Court and above circular, it is clear that sulphuric acid emerged in factory of appellant was not a manufactured product and the judgment applies to both periods before and after the insertion of explanation in Section 2(d) of Central Excise Act, 1944 by Finance Act, 2008.
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> **Since sulphuric acid emerged in factory of appellant was not a manufactured product as discussed above even after 01.03.2008, the same is not covered under definition of 'excisable goods' as provided in Section 2(d) of CEA, 2004 accordingly it was not covered under the definition of 'exempted goods' as provided in Rule 2(d) of Cenvat Credit Rules, 2004.**
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> **11. I find that the adjudicating authority also tried to differentiate the case dealt by the Hon'ble Supreme Court**

> in the case of UOI vs HZL reported at 2014 (303) ELT 321 (SC), **by deciding that the Sulphuric acid is a distinct product and manufacture from the by product i.e sulphur dioxide as such the same is neither a waste product nor a by product, and the appellant have separate plant and process to manufactured the Sulphuric acid.** In this regard, I observe that the Hon'ble Supreme Court in the above cited case and after examining the manufacture process of the appellant held that Sulphuric acid is a by-product…."
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> **I therefore find that there is no dispute left regarding treating the Sulphuric acid as a by-product, hence finding of adjudicating authority on this account is not correct and same is set aside."**
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> **(emphasis supplied)**

11. What is important to note is that for the demands raised under rule 6(3)(i) of the Credit Rules in respect of sulphuric acid for the earlier period, the Suprement Court in **Hindustan Zinc** held that sulphuric acid is a by- product and there is no necessity to maintain separate records for the zinc concentrate used in the production of sulphuric acid and that rule 57CC does not talk about emergence of final product and a by-product.

12. The judgment of the Supreme Court in **Hindustan Zinc** was subsequently followed by the Tribunal in several cases, including that of the respondent in **Hindustan Zinc Ltd. vs CCE&ST, Udaipur[5].** The relevant portion of the order passed by the Tribunal is reproduced below :

> **"6.** We have perused the impugned order, which tried to distinguish the said decision of the Apex Court to the present facts. **The observation of the Commissioner is that ratio of the Apex Court is applicable to the common inputs and not to the common input service. We find no legal or factual justification for such conclusion.** We note that the Original Authority has fallen in error in attempting to distinguish the ratio, where no such distinction is available. **The ratio is squarely applicable to both the common inputs and**

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5. (Excise Appeal Nos. 50357-50362/2017 & 50366/2017 (DB) decided On 29.12.2017

> **common input services as the Apex Court was examining the applicability of the provisions of Rule 57 CC with reference to the payment of a percentage of amount on exempted goods.** The ratio is clear and we do not find any difference in applying the same to the present case."
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> **(Emphasis Supplied)**

13. In this view of the matter when the Tribunal rejected the contention of the Department regarding the distinction made between 'input' and 'input service', it is not possible to accept the submission made by the learned authorized representative of the Department that the judgement of the Supreme Court in **Hindustan Zinc Ltd**. would not be applicable to the present case since it relates to 'input services' and not 'inputs'.

14. There is, therefore, no error in the order dated Feb 15, passed by the Commissioner (Appeals). The appeal filed by the Department deserves to be dismissed and is **dismissed**.

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Babita/Jb