CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. II

Excise Appeal No. 51659 of 2019 (SM)

[Arising out of Order-in-Appeal No.377 to 380 (CRM)/CE/JDR/2019 dated 16.04.2019 passed by the Commissioner (Appeals), Central Excise and Central Goods & Service Tax, Jodhpur.]

M/s. Hindustan Zinc Ltd. **Appellant**
Rajpura Dariba Mines,
Dariba, Rajsamand (Rajasthan).

VERSUS

Commissioner of Central Excise and Central Goods & Service Tax, **Respondent**
142 B, Sector-11, Hiran Magri,
Udaipur (Rajasthan).

APPEARANCE:

Shri Shashwat Arya, Advocate for the appellant.
Shri P. Juneja, Authorised Representative for the respondent.

CORAM: HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.51563/2021

DATE OF HEARING/DECISION:07.06.2021

ANIL CHOUDHARY:

Heard the parties.

2. The issue involved in this appeal is disallowance of cenvat credit with respect to outward transportation on FOR basis, being service tax paid on transportation from the factory to the port of export by road and secondly, disallowance of cenvat credit on landline phones connection provided at the residence of employees/officers of the assessee, M/s. Hindustan Zinc Ltd. is having their plant at Rajpura, Dariba, Rajsamand (Rajasthan). The assessee was engaged in the manufacture of Zinc/Lead & other metal concentrates and registered with the Department. In the course of inquiry by the Department with regard to cenvat credit on the above two issues, the appellant by their reply dated 4.3.2009 provided therein the appropriate details regarding cenvat credit. It appeared to Revenue that the

cenvat credit on the aforementioned two items have been wrongly taken in terms of Rule 3 read with Rule 2(l) of Cenvat Credit Rules, 2004. It also appeared to Revenue that the definition of 'input service' covers services tax availed by a manufacturer up to the clearance of final product from the place of removal only. Further, Rule 2 (l) further provides that words and expressions used in these Rules and not defined, but defined in Central Excise Act or Finance Act shall have the meanings assigned to them in those Acts. Further, 'place of removal' has been defined in Section 4 (c) of Central Excise Act, 1944, provides that 'place of removal' includes 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. The specific allegation of Revenue as given in para-5 of the show cause notice is as follows:-

> "As per the above definition in case the goods are cleared directly to the customer, the 'place of removal's factory gate. The outward transportation up to the place of removal is to be included 'input service' in the cases only where the goods are cleared through depot or other premises of the manufacturer. As such, for the direct clearances from the factory to the customer on FOR basis the credit of service tax paid on freight to outward transportation does not appear to be admissible as in the instant case the place of removal is factory gate only in terms of Section 4 of Central Excise Act, 1944 and the outward transportation beyond the place o removal i.e. from the factory does not come under the definition of 'input service' in terms of Rule 2(i) ibid. The place of removal in this case is factory gate as the goods were finally assessed at factory gate and central excise duty was paid on self-assessment basis."

3. Accordingly, show cause notice dated 7.4.2009 was issued for the period 30th April, 2008 to December, 2008 proposing to disallow the cenvat credit on the outward freight incurred by the appellant for transporting the

goods from the factory to the port of export for the purpose of export on FOR basis, and also for disallowing of cenvat-credit input tax on fixed land line phone at the residence of the employees/officers of the assessee. The appellant contested the show cause notice. At para-1.1 of the reply to the show cause notice, the appellant stated that they have sold their goods on FOR basis i.e. freight was paid by the appellant till the place of delivery i.e. customer's place in foreign country, and ownership got transferred to buyer at the destination i.e. in foreign country. Further, contended that it is an undisputed fact that the sale was on FOR destination basis and thus, the property in goods got transferred to buyer at destination, thus destination becomes place of removal. At best, in this case, the 'place of removal' prescribes such place to be the place of removal, from where the excisable goods are sold. The appellant also relied on the Master Circular of Board No.97/8/2007 dated 23.08.2007, wherein it has been specifically provided in para 6, wherein it was provided that in case of clearance of goods for export by manufacturer-exporter, shipping bill is filed by the manufacturer exporter and the goods are handed over to the shipping line. After Let Export Order issued, it is the responsibility of the shipping line to ship the goods to the foreign buyer, with the exporter having no control over the goods. In such a situation, transfer of property can be said to have taken place at the port where the shipping bill is filed by the manufacturer exporter and place of removal would be the Port/ICD/CFS. Further, providing that eligibility of cenvat credit shall be determined accordingly.

4. However, the Adjudicating Authority disallowed the credit as proposed observing that in spite of the cenvat credit for transportation by road from factory to port in the show cause notice, it can be alleged that the assessee has taken cenvat credit of service tax paid on outward transportation by road, (Goods Transport Agency Service) from the factory to customer's

place only. Further, observing that there is specific allegation that cenvat credit on GTA has been availed after removal of goods to customer's premises, not for export.

5. Being aggrieved, the appellant appealed before the Commissioner (Appeals), who also upheld the disallowance of credit relying on the order-in-original.

6. Ld. Counsel for the appellant has taken me through the facts, particularly the facts mentioned at page no.107 of the paper book, where they have annexed a certificate issued by the Unit Head of the appellant (A Public Sector Undertaking at the relevant time), who has certified that outward transport incurred during the relevant period from October, 2006 to December, 2008 for clearance of zinc concentrate in question, which is for the purpose of export clearance and not for the clearance in DTA. Further, he states that such contention along with other evidences produced before the Department or the court below have not been found to be untrue and by non-speaking cryptic order, the contention has been dismissed and the disallowance was confirmed and further, in view of the specific clarification of the Board dated 23.08.2007 and subsequently, the said clarification is repeated and re-iterated vide circular no.999/6/2015-CX dated 28.02.2015, regarding the 'place of removal' and accordingly, he prays for allowing their appeal.

7. Ld. Authorised Representative for the Department relies on the impugned order.

8. Having considering the rival contentions, I find that the show cause notice is vague as it does not contain any specific allegation whether the goods removed from the factory are by way of any clearance in DTA or for the purpose of export. Secondly, the contention made by the appellant in reply to the show cause notice as well as by way of certificate issue by the

Unit Head, M/s. Hindustan Zinc Ltd., certifying that the clearance were made to the port of export and the contention made by the appellant have not been found to be untrue, and still have been rejected without there being a contrary finding of fact. In this view of the matter, the ground regarding disallowance of credit on outward transportation is allowed.

9. So far the ground regarding disallowance of cenvat credit on charges on landline telephone is concerned, regarding fixing of land line at the residence of the employees/officers, I find that the appellant have not taken specific plea that the phones were provided at the residence of the key officers, which are required to be in touch with the Plant and affairs of the company. In this view of the matter disallowance of cenvat credit amounting to Rs.11,302/- is upheld. Accordingly, the appeal is allowed in part. The appellant shall be entitled to consequential benefit in accordance with law. The penalties imposition are set aside, there being no active case of mala fide conduct on the part of the appellant.

[order dictated & pronounced in open court]

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Ckp.