

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

PRINCIPAL BENCH - COURT NO. 1

EXCISE APPEAL NO. 51311 OF 2019

(Arising out of Order-in-Original No. UDZ-EXCUS-000-COM-0076-0080-18-19 dated 26.02.2019 passed by the Commissioner, Central Goods & Service Tax Commissionerate, Udaipur)

M/s. Hindustan Zinc Ltd.

Zawar Mines
Udaipur (Raj.)

...Appellant

VERSUS

**Commissioner of Central Goods,
and Service Tax, Excise, Customs,
Udaipur**

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

...Respondent

WITH

EXCISE APPEAL NO. 51312 OF 2019

(Arising out of Order-in-Original No. UDZ-EXCUS-000-COM-0076-0080-18-19 dated 26.02.2019 passed by the Commissioner, Central Goods & Service Tax Commissionerate, Udaipur)

Hindustan Zinc Ltd.

Chandaria, Putholi,
Chittorgarh (Raj.)

...Appellant

VERSUS

**Commissioner of Central Goods,
and Service Tax, Excise, Customs,
Udaipur**

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

...Respondent

WITH

EXCISE APPEAL NO. 51313 OF 2019

(Arising out of Order-in-Original No. UDZ-EXCUS-000-COM-0076-0080-18-19 dated 26.02.2019 passed by the Commissioner, Central Goods & Service Tax Commissionerate, Udaipur)

Hindustan Zinc Ltd.

Chandaria, Putholi,
Chittorgarh (Raj.)

...Appellant

VERSUS

**Commissioner of Central Goods,
and Service Tax, Excise, Customs,
Udaipur**

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

...Respondent

WITH

EXCISE APPEAL NO. 51648 OF 2019

(Arising out of Order-in-Original No. UDZ-EXCUS-000-COM-0076-0080-18-19 dated 26.02.2019 passed by the Commissioner, Central Goods & Service Tax Commissionerate, Udaipur)

Hindustan Zinc Ltd.

Rajpura Dariba Mines
P.O.Dariba, Tehsil Railmagra,
Rajsamand(Raj.)

...Appellant

VERSUS

**Commissioner of Central Goods,
and Service Tax, Excise, Customs,
Udaipur**

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

...Respondent**AND****EXCISE APPEAL NO. 52703 OF 2019**

(Arising out of Order-in-Original No. UDZ-EXCUS-000-COM-0076-0080-18-19 dated 26.02.2019 passed by the Commissioner, Central Goods & Service Tax Commissionerate, Udaipur)

Hindustan Zinc Ltd.

Zawar Mines
Dist. Udaipur (Raj.)

...Appellant

VERSUS

**Commissioner of Central Goods,
and Service Tax, Excise, Customs,
Udaipur**

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

...Respondent**APPEARANCE:**

Shri B.L.Narasimhan with Shri Shashwat Arya, Advocates for the Appellant
Shri Om Prakash Bisht, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)

Date of Hearing: 24.08.2021
Date of Decision: 02.09.2021

FINAL ORDER No. 51785-51789 /2021

JUSTICE DILIP GUPTA:

These five Excise Appeals filed by **M/s. Hindustan Zinc Limited¹** seek to assail the order dated February 26, 2019 passed by the Commissioner of Central Goods and Service Tax, Commissionerate, Udaipur² adjudicating five show cause notices. The CENVAT credits availed by the appellant have been denied with a further direction for recovery of the same with penalty.

2. The issue involved in all the appeals is regarding admissibility of CENVAT credit of 1%/2% Additional Duty of Customs³ paid on the imported coal under Customs Notification No. 12/2012-Cus dated March 17, 2012, as amended on by Notification dated March 1, 2016.

3. The appellant is engaged in the manufacture of zinc and lead concentrates falling under Chapter 26 of the First Schedule to the Central Excise Tariff Act, 1985⁴ and avails facility of CENVAT credit on inputs, capital goods and input services as contemplated under the CENVAT Credit Rules, 2004⁵. For manufacture of the final products, the appellant consumes power generated from its captive thermal plant wherein steam coal/ steam non-cooking coal, falling under Chapter heading 27.01 of the Customs Tariff Act 1975⁶ is used as input.

4. The appellant, during the relevant period, paid CVD in terms of section 3(1) of the Customs Tariff Act on the importation of steam coal. The applicable entries, as amended under the Excise Notification No. 12/2012-CE dated March 17, 2012 and the Customs Notification

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1. the appellant
 2. the Commissioner
 3. CVD
 4. the Excise Tariff Act
 5. the Credit Rules
 6. the Customs Tariff Act

No.12/2012-Cus dated March 17, 2012, in terms of which CVD was paid, are as follows:

Period	Rate of CVD Paid	Under Entry No.	Notification
April 2012 to February 2013	1%	67	Notification No. 12/2012-CE, dated 17.03.2012
	1%	123	Notification No. 12/2012-Cus. dated 17.03.2012
March 2013 to February 2016	2%	122A/123	Notification No.12/2012-Cus. dated 17.03.2012 as amended by Notification No. 12/2013-Cus. dated 01.03.2013
March 2016 to June 2017	2%	121B	Notification No.12/2012-Cus. dated 17.03.2012, as amended by Notification No.12/2016-Cus. dated 01.03.2016

5. The appellant was also availing CENVAT credit of the CVD so paid, in accordance with the provisions of rule 3(1) (vii) of the Credit Rules. However, during the financial year 2012-13, the appellant made an inadvertent error while filing the Bill of Entries, whereby the relevant Notification entry for CVD was mentioned as Serial. No. **67** of Notification No. 12/2012-**CE** dated March 17, 2012, instead of declaring correctly as Serial No. **122A/123** of Notification No. 12/2012-**Cus** dated March 17, 2012.

6. The Anti-Evasion Team of Commissionerate visited the premises of the appellant on July 22, 2016 for scrutinizing its document. The Department recorded the statement of AGM (Finance) on July 22, 2016 and August 24, 2016. The relevant extracts of the statements are as follows:

- a. Coal is imported in terms of Customs Notification No. 12/2012-Cus. dated 17.03.2012 @1% CVD payment, whose CENVAT credit is availed.
- b. In case of short receipt of coal as per FIR No. 139, CENVAT credit was availed on actual receipted quantity, proportionately.

c. Appellant also identified sub-standard quantity of coal of 1075.52 MT for which CENVAT credit was availed. However, the matter is pending investigation. The appellant would reverse CENVAT credit, if it is found sub-standard upon completion of investigation.

7. Pursuant to the Department audit, for the CENVAT credit taken of CVD paid in terms of Excise Notification, the appellant suo-moto reversed under protest, partial CENVAT credit. Further, with respect to balance CENVAT credit of 1% CVD paid, the appellant paid additional CVD @5% under protest, while availing CENVAT credit of only 1% of CVD paid. Details of such payment made are as follows:

Unit	Credit Amount Reversed (in Rs.)	CENVAT Credit amount against which additional 5% payment made (in Rs.)
Zawar Mines	12,11,925	59,31,412
Chandaria Lead Zinc Smelter	97,22,067	1,35,54,929
Rajpur Dariba Mines	53,74,707	89,97,273

8. However, five show cause notices were issued to the appellant proposing to disallow CENVAT credit to the respective units of the appellant for the relevant period and for recovery of the same with interest. The show cause notices were issued on the allegation that for the Financial Years 2012-13, CVD was paid on imported steam coal under Serial No.67 of the Central Excise Notification No. 12/2012-CE. Therefore, in terms of proviso to rule 3(i) of Credit Rules, CENVAT credit was not permissible for such CVD paid. For the period from Financial Years 2013-14 to June 2014, CVD was paid in terms of Serial No.122A/123 of Customs Notification No. 12/2012-Cus. It was alleged that CVD paid @2% was not a duty of excise as specified in the Excise Tariff Act and therefore, CENVAT credit of CVD paid under

the Customs Notification No. 12/2012-Cus had been wrongly availed by the appellant. The extended period of limitation was also invoked in the show cause notices.

9. Replies were submitted by the appellant against each of the show cause notices. All the five show cause notices were adjudicated upon by the Commissioner by a common order dated 26.02.2019. The demands made in the show cause notices were confirmed in entirety for the following reasons:

- a.** The condition of no credit availment is under the Excise Notification No.12/2012-CE dated 17.03.2012 and not under the Customs Notification No.12/2012-Cus;
- b.** For the financial year 2012-13, the appellant paid duty under the Excise Notification. Thus, credit is not admissible;
- c.** For financial year 2013-14 onwards, the appellant paid duty under the Customs Notification and availed CENVAT credit in terms of rule 3(1) (vii). However, Clause (vii) is not independent of clause (i) of rule 3 (1) of the Credit Rules because credit under clause (vii) is admissible of CVD equivalent to duty of excise. Thus, the proviso to clause (i) is also applicable to clause (vii);
- d.** The domestic industry is not eligible to take the credit of 1% duty of excise paid under the Excise Notification No. 12/2012-CE on domestically procured coal. Thus, to provide a level playing field for the domestic industry, credit of CVD paid under the Customs Notification 12/2012-Cus cannot be allowed, as it shall be disadvantageous to the domestic industry;
- e.** The appellant has filed FIR, from which it is evident that there was short receipt of imported coal and also that the coal actually received by the Company was of inferior quality. CENVAT credit calculated in this regard to the tune of Rs.19,39,554/- already forms part of inadmissible CENVAT credit of Rs.5,32,24,752/-; and
- f.** The appellant made a conscious decision of taking inadmissible CENVAT credit and this was not an issue of a technical nature involving interpretation of Credit Rules. Thus, the extended period of limitation is invokable.

10. Details of the demand confirmed and penalty imposed on the appellant for the period of dispute are as follows:

Appeal No.	E/51311/19	E/52703/19	E/51648/19	E/51648/19	E/51313/19
Unit	Zawar Mines	Chandaria Lead Zinc Smelter(CLZ)		Rajpura Dariba Mines	
Impugned Order	26.02.2019				
Show cause notice	01.05.2017	01.05.2017	27.07.2018	01.05.2017	05.09.2018
CENVAT Credit Demand (in Rs.)	5,32,24,752/-	23,47,64,043/-	7,83,55,643/-	10,24,52,194/-	4,59,31,082/-
Penalty (in Rs.)	5,32,24,752/-	23,47,64,043/-	70,00,000/-	10,24,52,194/-	40,00,000/-
Period of dispute	April 2012 to June 2016	April 2012 to June 2016	July 2016 to June 2017	April 2012 to July 2016	Aug 2016 to June 2017

11. Shri B.L. Narasimhan, learned counsel appearing for the appellant made the following submissions:

- (i) CENVAT credit of CVD paid @ 1% / 2% ad valorem has been correctly availed in terms of rule 3(1) (vii) of the Credit Rules. The present case is squarely covered by various decisions of Hon'ble Tribunal, including appellant's own case for subsequent period, in **Hindustan Zinc Ltd. vs. The Commissioner, Central Goods and Service Tax Commissionate⁷**;
- (ii) The impugned order has relied upon the First Information Report filed by the appellant where it has been alleged by the appellant that it suffered a loss of Rs. 10 crores. Using the same as a basis, demand of CENVAT credit of Rs. 19,39,554/- has been confirmed citing short receipt of inputs. However, no factual enquiry was done by the Department regarding actual quantification of short receipt of inputs. Therefore, demand of CENVAT credit without any factual or evidential basis and by merely relying on the

figure mentioned in First Information Report is unsustainable;

- (iii)** The extended period of limitation under section 11A(4) could not have been invoked; and
- (iv)** Penalty is not imposable and interest is not recoverable.

12. Shri Om Prakash Bisht, learned Authorised Representative appearing for the Department made the following submissions:

- (i)** The appellant has wrongly availed CENVAT credit of CVD paid on imported Steam Coal during the period April 2012 to June 2017, as it is in contravention of the provisions of rule 3 of the Credit Rules;
- (ii)** CENVAT credit is allowed to be taken in respect of duty of Excise specified in the First Schedule to the Excise Tariff Act leviable under Central Excise Act;
- (iii)** The credit of CVD paid under Notification No. 12/2012-**CU** dated March 17, 2012 in general is not allowed to be taken under Credit Rules, as CVD cannot be treated as duty of excise per se, but as per clause (vii) of sub-rule (1) of rule 3 of Credit Rules, CENVAT credit of the additional duty i.e. CVD leviable under section 3(1) of the Customs Tariff Act, is allowed equivalent to the duty of excise specified in clauses (i) to (via) of sub-rule (1) of rule 3 of Credit Rules. Thus, as regards CVD, CENVAT credit of CVD paid on imports is governed by rule 3(1)(vii) read with rule 3(1)(i) of the Credit Rules. This linkage is further qualified by proviso (b) to clause (i) of sub-rule (1) of rule 3 of Credit Rules, wherein, it has been stipulated that CENVAT

credit of such duty of excise shall not be allowed to be taken when paid on any goods in respect of which the benefit under Serial No.67 of Notification No. 12/2012-CE dated 17.03.2012 is availed;

(iv) Under the CENVAT credit scheme, rule 3(1)(vii) allows credit of the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act. Further, the proviso to the said rule provides that CENVAT credit of such duty of excise shall not be allowed to be taken when paid on any goods specified in serial number 67 in respect of which the benefit of an exemption under Notification No. 12/2012-C.E., dated March 17, 2012 is availed. It may be noted that serial number 67 relates to coal falling under heading 2701 with a rate of 1%. Thus, the downstream buyers of coal which is manufactured and cleared by availing of the benefit of exemption under Serial No. 67 of the Notification No. 12/2012-CE cannot take credit of such 1% excise duty paid. CENVAT credit cannot be taken on domestically produced coal, cleared at concessional rate of 2% by virtue of this proviso;

(v) The instant case is covered by the decision of Gujarat High Court in **Lonsenkiri Chemicals Industries vs. Commissioner of Central Excise Customs and Service Tax, Vadodara-I⁸**.

13. The submissions advanced by the learned Counsel appearing for the appellant and the learned Authorised Representative appearing for the Department have been considered.

8. 2018 (9) TMI 1439- Gujarat High Court

14. In order to appreciate the submissions advanced on behalf of the parties, it would be appropriate to reproduce rule 3 of the 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) (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):"

15. 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 leviable under the Excise Act subject to the two conditions mentioned in proviso (a)

and (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).

16. The Commissioner has mixed up rule 3(1)(i) and rule 3(1)(vii) of rule 3 of the 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 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 Credit Rules that led the Commissioner to commit an error.

17. It needs to be noted at this stage that with regard to the period from April 2012 to February 2013, though the appellant had paid CVD in terms of Excise Notification No. 12/2012 dated March 17, 2012 and availed CENVAT credit, but the CENVAT credit availed was either reversed or additional payment of 5% duty was made while availing CENVAT credit of only 1%.

18. 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."

19. A Division Bench of the Tribunal in **Hindalco Industries Ltd. vs. GST, Bhopal⁹**, 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 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 invocable. In that circumstances, the impugned order is set aside."

20. This decision of the Tribunal was subsequently followed by the Tribunal in **Jaypee Sidhi Cement Plant vs. Commr. of CGST, Cus. & C. Ex., Jabalpur¹⁰**, 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)

21. The same view was taken by the Tribunal in **Asahi Songwon Colors Limited vs. Commissioner of Central Excise & St., Vadodara¹¹**, 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."

(emphasis supplied)

22. In the earlier decision, rendered in **Hindustan Zinc** in the own case of the appellant, the order dated September 24, 2019 passed by

11. 2018 (9) TMI 159 (CESTAT Ahmedabad)

the Commissioner disallowing CENVAT credit with a direction for its recovery with interest and penalty was assailed. 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 was 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, 2012, 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 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 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 Customs Notification dated March 17, 2012 was wrongly availed by Hindustan Zinc. 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.

23. The provisions of rule 3 of the Credit Rules and the three decisions rendered by the Tribunal in **Hindalco Industries Ltd.,**

Jaypee Sidhi Cement Plant and Asahi Songwon Colors Limited

were examined by the Tribunal and after distinguishing the decision of the Gujarat High Court in **Lonsenkiri Chemicals Industries**, which decision had also subsequently been distinguished by the Tribunal in **C.C.E. & S.T.- Surat-I vs. M/s. Aarti Industries Limited**¹², the Tribunal concluded that if additional duty of Customs was 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 Credit Rules.

24. The reasons stated in the earlier show cause notice dated July 08, 2018 issued to the appellant for the earlier period and the reasons assigned by the Commissioner in the order dated September 24, 2019 are the same as in the present show cause notice and the order passed by the Commissioner. This would be clear from paragraph 9 of the earlier decision rendered by the Tribunal. The said paragraph 9 is reproduced below:

"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."

25. Thus, in view of the aforesaid decision of the Tribunal in the appellant's own case, it has to be held that the Commissioner committed an illegality in disallowing CENVAT Credit of 1%/2% CVD paid on the imported coal under the Customs Notification No.

12/2012-Cus dated March 17, 2012, as amended on by Notification dated March 1, 2016.

26. There is one further aspect that needs to be examined. The Commissioner has also taken into consideration the fact that for the Financial Year 2012-13, the appellant had paid duty under the Excise Notification because of which credit was not admissible.

27. The appellant has stated that though the appellant had taken CENVAT credit of CVD paid in terms of the Excise Notification, but the appellant subsequently suo moto partially reversed CENVAT credit and with respect to the balance CENVAT credit of 1% CVD paid, the appellant paid additional CVD at the rate of 5% under protest but availed CENVAT credit of only 1% of CVD paid. Though this fact was pointed out by the appellant, but the Commissioner failed to consider this aspect.

28. Another reason stated by the Commissioner is that the appellant had filed a First Information Report from which it was evident that there was short receipt of imported coal and also that the coal actually received was of inferior quality. Thus, CENVAT credit calculated in this regard to the tune of Rs. 19,39,554/- formed part of the inadmissible CENVAT credit of Rs. 5,32,24,752/- for the zavar mines.

29. The appellant has clearly stated that no factual enquiry was done by the Department regarding actual quantification of short receipt of inputs and the figure mentioned in the First Information Report has only been relied upon. It also needs to be noticed that the appellant has stated that it would reverse CENVAT credit, if it is established after investigation that sub standard 1074.52 metrics tones quantity of coal, for which CENVAT credit was availed, was supplied.

30. Thus, for all the reasons stated above, the order dated February 26, 2019 passed by the Commissioner adjudicating the five show cause notices deserves to be set aside and is set aside. The appeals are, accordingly, allowed.

(Order pronounced on **02.09.2021**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.J. MATHEW)
MEMBER (TECHNICAL)