IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

Date of Hearing/Decision: 12.02.2019

Excise Appeal No. E/53886, 53887, 53888 & 53889/2018

[Arising out of Order-in-Appeal No. 20-37(AG)/CE/JDR/2018 dated 24.1.2018 passed by the Commissioner , Central Excise & Central Goods and Service Tax, Jodhpur]

C.C.E. & S.T., Udaipur **…Appellant**

Vs.

Hindustan Zinc Ltd. **… Respondent**

Present for the Appellant : Mr.H.C. Saini, DR
Present for the Respondent : Mr.Dhruv Tiwari, Advocate

**Coram: HON'BLE MR ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)**

FINAL ORDER NOs.50356-50359/2019

Per : Bijay Kumar :

Present appeals are directed against the order of Commissioner (Appeals) bearing No. 20-37 dated 24.1.2018.

2. The facts in brief are that the assessee is engaged in the manufacture of Lead and Zinc concentrates. The Department observed that the Appellant is not making full payment of the value of the input services received by them from their contractor, and retaining the part payment of service provider on account of performance guarantee. Thus, it was alleged that the assessee has wrongly availed

the Cenvat Credit of Service Tax paid by them on the value of such services. Accordingly, various show cause notices initially were issued.

3. These show cause notices were initially adjudicated vide various orders confirming the demand of these show cause notices. Aggrieved thereof, the assessee filed an appeal before the Commissioner (Appeals), who vide the order under challenge allowed the appeal setting aside the order of original adjudicating authority. Being aggrieved the present appeals have been filed by the Department.

4. We have heard both the parties.

5. Ld. DR has impressed upon the grounds of appeal that the credit can be allowed only when the service recipient has made full payment of value of input services as well as of the Service Tax both within 3 months of the date of invoice/ bill or as the case may be, vide challan referred in Rule 9 of CCR, 2004. The order under challenge therefore was alleged as wrong. For this contention, emphasis is laid on Rule 4 (7) of Cenvat Credit Rules impressing upon that in cases where payment is not been made within the time stipulated in this rule needs to pay it back the Cenvat credit availed. The order under challenge is therefore prayed to be set aside. Appeal of Revenue is prayed to be allowed accordingly.

6. While rebutting, it is mentioned on behalf of the assessee that the matter in hand is no more *res-integra*. It has already been decided by this Tribunal in the case of appellant themselves vide the final order No.52278/2018-SM dated 20th June, 2018, wherein the assessee was held entitled to avail the credit of full Service Tax paid irrespective the amount payable to the service provider has been withheld. The Department's appeal is accordingly, prayed to be rejected. Ld. Counsel for the Assessee relied upon the following case laws:-

1. Commissioner of Central Excise & ST, Udaipur vs. M/s. Hindustan Zinc Ltd. in Appeal No.E/51137/2018 [Final Order No.52278/2018 SM dated 20.06.2018]

2. M/s. Hindustan Zinc Ltd. vs. CCE, Udaipur in Appeal No. E/54357/2015 EX[DB] [Final order No.56669/2017 dated 01.09.2017

3. M/s. Hindustan Zinc Ltd. vs. CCE, Udaipur in Appeal No. E/52258/2016 EX[DB] [Final order No.57461/2017 dated 25.10.2017.

4. CCE, Udaipur Vs. M/s Hindustan Zinc Ltd. Final Order No. 55702-55703/2016 dated 24.11.2016 read with Misc. Order No. 50480-50481/2017 dated 4.8.2017.

7. After hearing both the parties and perusing the record, we are of the opinion that the admitted fact remains is that the appellant had paid the Service Tax on the entire payment made to the contractor. In view of this admitted fact, Rule 3 of CCR comes into picture in accordance whereof the appellant can avail the cenvat credit on the amount which has already been paid by him. Simultaneously it is also admitted fact that certain percentage of the stipulated payment was withheld by the respondent on account of the performance guarantee. So the moot question to be adjudicated is as to whether the said retention prohibits the respondent from taking the Cenvat Credit in accordance of Rule 4 (7) of Cenvat Credit as is alleged by the Department.

8. For the purpose, we observe that Rule 4 (7) of CCR stands amended w.e.f. 1st April, 2011 and after the said amendment taking of Cenvat Credit is not linked with the payment of invoice to the service provider but it is linked with the invoice/bill/challan of input service. Though the grievance of the Department seems that irrespective, the payment was still to be made within 3 months, but we observe that since the respondent had paid the entire Service Tax on which they were liable for taking the credit i.e. on the amount as mentioned in the Bill/invoice,

they were entitled to avail credit. The circular No.122/03/2010- ST dated 30th April, 2010 further clarifies the situation that the Service Tax paid is allowed as credit. The relevant extract of the Circular is reproduced below:-

> *" (b) In the cases where the receiver of service reduces the amount mentioned in the invoice /bill/ challan and makes discounted payment, then it should be taken as final payment towards the provision of service. The mere fact that finally settled amount is less than the amount shown in the invoice does not alter the fact that service charges have been paid and thus the service receiver is entitled to take credit provided he has also paid the amount of service tax, (whether proportionately reduced or the original amount) to the service provider. The invoice would in fact stand amended to that extent. The credit taken would be equivalent to the amount that is paid as service tax. However, in case of subsequent refund or extra payment of service tax, the credit would also be altered accordingly."*

9. The circular therefore clarifies that the credit taken would be equivalent to the amount that is paid as Service Tax.

10. The original adjudicating authority had decided and confirmed the demand of show cause notice merely for want of the evidence that the entire payment of Service Tax was made within the period of 3 months from the date of issue of invoice/ bill /challan. At this stage of the order under challenge is perused. There is a clear recitation that irrespective of retention, the amount was paid at the end of stipulated period after the completion of the project. Till date, there is nothing on record to rebut the aforesaid findings.

11. We also have perused the decisions relied upon by the respondents. The perusal thereof makes it clear that the facts of the present cases are similar to those cases even the assessee is also the same. We have therefore, no hesitation to

follow the said decision. The relevant portion of the same is extracted herein below:-

> *"10. There is no dispute regarding the fact that though the respondent retained a part of the value of services, however, no part of the service tax reflected in the invoices was ever retained by the Respondent. Respondent has paid the service tax on entire invoice value, as evident from para 5.1 of the impugned order. The credit of full service tax paid by the service provider in respect of services provided would be available even if amount payable to the service provider has been withheld so long as the service tax paid by the service provider has not changed. Therefore, the credit is admissible to the respondent.*

12. In view of entire above discussion, the appeals filed by the Department stands dismissed.

[Pronounced in the Open Court]

(Anil Choudhary) Member (Judicial)	(Bijay Kumar) Member (Technical)

Ckp.