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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
SINGLE MEMBER APPEAL BRANCH

Appeal No. E/1077 - 1078 / 2007 -SM[BR] Date 23/03/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi
To :

1. M/S HINDUSTAN ZINC LTD.
2. M/S HINDUSTAN ZINC LTD.
YASHAD BHAWAN, NEAR SWAROOP SAGAR,
UDAIPUR-313001 (RAJ.)
M/S HINDUSTAN ZINC LTD. Appellant

Vs

C.C.E. JAIPUR II Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 236 – 237 / 2009 -SM[BR] dated 27.2.2009

passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

**Copy to :**
1. Respondent
   C.C.E. JAIPUR II
   N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME, JAIPUR 302005.
2. Adv. / Consult
   MR.V. LAXMIKUMARAN
   B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

3 S.D.R
~~4 J.C.D.R.~~
5 Bar association. CESTAT. New Delhi
6 M/s. Deeparchi Publications. M-93. Marg. 46. Saket. New Delhi 110017
7 M/s Centax Publictions (P) Ltd.. 1512-B. Bhishm Pitamah marg. Opp. ICICI Bank of Defence Colony. New - 3
8 Excise & Customs cases. B-37. Sector -1. NOIDA - 201301 Gautam Budh Nagar. (U.P.)
9 Raghuraman's 44-B. Regal Flat.Shipra Suncity. Indirapuram - 201010.Ghaziabad. DT. U.P.
10 Nidheshak publications. I.P.Estate. new Delhi
11 Taxmann Allied Service Pvt Ltd.. 21/35. West Punjabi Bagh. New Delhi - 110026
12 Commercial Laws of India Pvt Ltd Post Bag No. 1033. No.70(Old No. 88). Thyagaraya Road. T. Nagar.Chennai
13 Taxindiaonline.com Pvt.Ltd. B-XI/8183.Vasant Kunj. New Delhi - 110070
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-1
15 Office Copy
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Assistant Registrar
(SM Appeal Branch)

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**West Block No. 2, R.K. Puram, New Delhi – 110 066.**
**Principal Bench, New Delhi**

**COURT NO. IV**
**Excise Appeal No. 1077-1078 of 2007 (SM)**

[Arising out of the Order-in-Appeal No. 52-53 (HKS) CE/JPR-II/2007 dated 06/02/2007 passed by The Commissioner (Appeals)-II, Central Excise, Jaipur. ]

For Approval and signature :
**Hon'ble Shri Rakesh Kumar, Member (Technical)**

| | | |
|---|---|---|
| 1. | Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? | : |
| 2. | Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? | : |
| 3. | Whether their Lordships wish to see the fair copy of the order? | : |
| 4. | Whether order is to be circulated to the Department Authorities? | : |

M/s Hindustan Zinc Ltd. — Appellant
[Shri Ravi Raghvan, Advocate]

Versus

CCE, Jaipur — Respondent
[Shri S. Gautam, Auth. Rep. (DR)]

CORAM : **Hon'ble Shri Rakesh Kumar, Member (Technical)**

**DATE OF HEARING : 27/02/2009.**

Final Order No. 236-237/09-SM(BR) Dated : 27.2.09

**Per. Rakesh Kumar** :-

The issue involved in these two appeals is as to whether the cement used for constructing supporting structure in underground cavities in the mines to prevent the caving in of the mines is to be treated as input eligible for Cenvat credit. The appellant had taken Cenvat credit amounting to Rs. 14,688/- during May 2005 to October 2005 period and amounting to Rs. 11,016/- during April 2005 period. The Assistant Commissioner vide orders-in-original dated 31/10/06 and 02/11/06 disallowed the Cenvat credit and confirmed the demands alongwith interest besides imposing penalty of Rs. 10,000/- and Rs. 11,016/- on them. The Commissioner (Appeal) vide the impugned order-in-appeal No. 52-53 (HKS)/CE/JPR-II/2007 dated 31/01/07 dismissed the appeals upholding the Assistant Commissioner's orders. It is against this order that these two appeals have been filed.

2. Heard both the sides.

2.1 Shri Ravi Raghvan, Advocate, the learned Counsel appearing for the appellant fairly stated that while earlier the

Tribunal in the appellant's own case vide final order No. 137-138/06-CX dated 30/01/06 had held that the appellant engaged in the amounting of zinc are eligible for Cenvat credit of duty on cement used for filling the cavities in the mines, but this judgment of the Tribunal on a reference appeal being filed before the Hon'ble Rajasthan High Court was set aside by Hon'ble Rajasthan High Court vide judgment reported in **2008 (225) E.L.T. 183 (Raj.)**, wherein the Hon'ble High Court held that construction material – cement used for construction and repair of mines is not eligible for Cenvat credit as input as it was not used directly or indirectly in the process of manufacture. He pleaded that in view of this, while not challenging the Cenvat credit demand, he prays for setting aside the penalty as the Cenvat credit had been taken during the period when there was dispute on this issue.

2.2 Shri S. Gautam, the learned Departmental Representative defending the impugned order pleaded that since the appellant have taken Cenvat credit on ineligible item and the Department's decision disallowing the Cenvat credit, has been confirmed by the Hon'ble Rajasthan High Court imposition of penalty has rightly upheld by the Commissioner (Appeal).

3. I have carefully considered the submissions from both the sides and perused the records. So far as the issue on merit is concerned, ~~the~~ in view of Hon'ble Rajasthan High Court judgement in the case of Union of India vs. Hindustan Zinc Ltd. (supra), I find no infirmity in the impugned order upholding the Cenvat credit demand and accordingly that part of the order is upheld. As regard the imposition of penalty, eligibility of ~~Cenvat~~ cement used in mines for constructing underground supporting structure, to prevent the caving in, for Cenvat credit, is a matter of interpretation and earlier the Tribunal had decided this issue in their favour. I am, therefore, of the view that the imposition of penalty is not justified in these circumstances. Accordingly, the imposition of penalty is set aside. The appeal ~~is~~ stand disposed of, as above.

(Dictated and pronounced in open court)

**(Rakesh Kumar)**
**Member (Technical)**

PK