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

Appeal No. E/70 /2005 - EX[DB] Date 28/04/2009

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

To :
HINDUSTAN ZINK LTD.
RAJPURA- DARIBA MINES, P.O.DARIBA ,
DISTT.UDAIPUR(RAJ)
HINDUSTAN ZINK LTD. Appellant

Vs

C.C.E. JAIPUR II Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 275/2009- **EX[DB]** dated 22-4-09

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

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
C.C.E. JAIPUR II
N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME, JAIPUR 302005.
2. Adv. / Consult SH. B. L. NARASIMHAN, ADV,
B-6/10, S. J. ENCLAVE,
N. DELHI-29
3 C.D.R
4 ~~J.C.D.R~~.
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise. I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15 LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
16 Office Copy
17 Guard file
18. [illegible] RESIDENT

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. I

Excise Appeal No. 70 of 2005

[Arising out of Order-in-Appeal No. 641(RM)CE/JPR-II/2004 dated 7.10.2004 passed by Commissioner of Customs & Central Excise, Jaipur-II.]

For approval and signature:

Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : Yes

2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : No

3. Whether Their Lordships wish to see the fair copy of the Order? : Seen

4. Whether Order is to be circulated to the Departmental authorities? : No

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M/s. Hindustan Zinc Ltd. — Appellant

Vs.

Commissioner of Customs & Central Excise, Jaipur — Respondent

Appearance:

Mr. B.L. Narasimhan, Advocate for the Appellant
Mr. A.K. Rastogi, DR for the Respondent

CORAM:

Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

Date of Hearing/decision : 16.4.2009

FINAL **ORAL ORDER NO.** 275/09-EX

Per Justice R.M.S. Khandeparkar (for the Bench):

Heard.

2. The only issue which is sought to be raised in the matter is as to whether cement used as construction / building material in the mines can be eligible input for the purpose of availment of modvat credit under the provisions of MODVAT Credit Rules, 2004 in force during the year 1998 and whether on that account further availment of such modvat credit it would be contrary to the provisions of law and that therefore the party would be liable to pay penalty.

3. Learned Advocate for the appellant has fairly conceded that issue is no more res integra as High Court of Rajasthan in the case of Union of India vs. Hindustan Zinc reported in [2008 (225) ELT 183 (Raj)] has already decided the same, holding that, " the product in question i.e. cement cannot be considered as integrally connected material or product with the process of manufacturing of final product especially when the same is used only a building material for maintaining or repairing the premises i.e. mines in question. In our view, it cannot be said that the cement is used in relation to manufacturing of final product as the same was not used co-extensively with the process of manufacture of final product and hence it is not integrally connected with the manufacture for final product."

4. The High Court has further ruled that "the cement which is building/construction material and which is used in the mines as construction, repairing or maintaining the mines in a proper condition, is not eligible input for availment of Cenvat credit and no Cenvat credit is available on the same."

5. Provision~~s~~ of law stands well settled by the said decision of the Rajasthan High Court in the case of Hindustan Zinc and therefore, no fault can be found with the impugned order denying the claim of the appellant for availment of modvat credit in relation to cement used as construction or building material in mines as it is not eligible input for availment of modvat credit.

6. As regards the point relating to penalty, the impugned order imposes a penalty of Rs. 10,000/-. It is the contention of the respondent that there was no violation of provisions of law or improper availment of modvat credit by the appellant and therefore, no fault can be found. The appellant had submitted that for a considerable time, the order of the Tribunal on the said issue was in favour of the appellant. Besides that the matter relates to interpretation of provisions of law and considering the same, there was no occasion for imposition of penalty as the law on the point has been settled recently by the decision of the Hon'ble Rajasthan High Court. Since the issue relates to interpretation of provisions of law and the order favourable to the appellant issued by the Tribunal was in force for a considerable time, it cannot be said that appellant lacked bonafide in the matter of availing modvat credit in relation to the use of cement as input for construction /

building material in the mines. Since the law on the point has been recently settled by the Rajasthan High Court, it does not warrant imposition of penalty. In the result thereof, the appeal in relation to availment of modvat credit has to be rejected, while the appeal relating to imposition of penalty is to be allowed. Hence the appeal partly succeeds to the extent of imposition of penalty of Rs.10,000/- and the same is set aside while the order disallowing the modvat credit is confirmed.

7. It is found that penalty of Rs.10,000/- has already been deposited by the appellant, the same should be refunded to the appellant within six weeks. Appeal accordingly stands disposed of.

(Justice R.M.S. Khandeparkar)
President

(M. Veeraiyan)
Member(Technical)

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