TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

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/1094/2008 – SM[BR]

Date 03/09/2010

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

To :
HINDUSTAN ZINK LTD
YASHAD BHAWAN UDAIPUR (RAJ.)
313001

HINDUSTAN ZINK LTD — Appellant

Vs

C.C.E. JAIPUR II — Respondent

I am directed to transmit herewith a certified copy of **Final order** No. 938 / 2010-SM[BR] dated 26.8.2010 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 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 Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
10 Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
11 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
12 LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
13 TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14 Office Copy
15 Guard file

Assistant Registrar
(SM Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-SM

Date of Hearing/Decision:11.08.2010

Excise Appeal No.E/1094/08-SM

[Arising out of Order-in-Appeal No.32(RKS)/CE/JPR-II/2008 dated 05.03.2008 passed by the Commissioner of Customs and Central Excise, Jaipur-II].

Hindustan Zinc Ltd. ...Appellant

Vs.

CCE, Jaipur-II ... Respondent

Present for the Appellant :Shri.B.L. Narasimhan, Advocate
Present for the Respondent:Shri.K.P.Singh, SDR

Coram: HON'BLE MR. D.N. PANDA, JUDICIAL MEMBER

Final **ORDER NO.** 938/2010 SM (BR) **DATED:11.08.2010**

PER: D.N.PANDA

This appeal is against disallowance of Cenvat Credit of Rs.15,328/- holding that when the landline telephone not been installed in the factory premises, the appellant is not entitled to cenvat credit of the service tax paid on such services. On the ground on which the disallowance has been made by the ld. Appellate Authority is that the input service was neither used for providing an output service nor used directly or indirectly in or in relation to manufacture of the final product. Except this ground, there is no evidence coming forward from the order of the authority below demonstrating their application of mind to examine relevant evidence, if any.

2. Ld. Counsel appearing on behalf of the appellant submits that not only cenvat credit was disallowed but also penalty was also imposed, reducing the sum of Rs.1,000/- for which the appellant has been aggrieved. Shri Narasimhan, ld. Counsel argues that when the broad definition of input services has been given by law and the landline telephone has been used for the purpose stated in the law, the disallowance was uncalled for. He relies on the decision of the Hon'ble High Court of Gujarat in the case of CCE vs. Excel Crop Care Ltd. reported in 2008 (12) S.T.R. 436 (Guj.) to submit that installation of telephone in the factory premises is not a material factor for disallowance.

3. Ld. DR vehemently objects the submissions of the ld. Counsel stating that ld. Commissioner (Appeals) was generous to allow the credit in respect of mobile phone service. The landline telephone installed in the residential premises of the appellant shall not be eligible to get the cenvat credit since this telephone was not used for the purpose stated by law. He further argues that the claim of input credit is not relating to any input service for which there should be disentitlement. When the telephone does not exists in the factory premises there shall not be any concession be given to the cenvat credit. He further argues that the judgement in the case of Commissioner of Central Excise vs. Excel Crop Care Ltd. reported in 2008 (12) S.T.R. 436 (Guj.) is altogether on

different premises. He further submits that residential telephones connected are no way concerned with the manufacturing activity nor that is directly or indirectly related to taxable activity, so also that has no bearing to the activities enumerated in the law.

4. Heard both sides and perused the records.

5. Certainly the amount disallowed is only Rs.15,328/-. The amount is immaterial but the cause of disallowance is material. When such an aspect could be appreciated the allegation in show cause notice was enquired. The show cause notice says that scrutiny of details of service tax credit on telephone and mobile phone services related to the period January 2006 to September 2006, Cenvat credit was taken wrongly on telephone services (Mobile phone and telephone not installed in the factory premises of the noticee) as input services as per details given in Annexure – "A" to the show cause notice. The show cause notice further exhibits that it was apparent to the authority that the cenvat credit was wrongly availed in regard to the service not used in or in relation to the final products. Therefore, there was a proposal in the show cause notice to raise the demand.

6. No where the show cause notice whispers whether the case was examined by Revenue in the light of the definition of input services in Rule 2(l) of Cenvat Credit Rules 2004 and the basis as well as the evidence available before it. So also the show cause notice does not exhibit whether any examination of the

telephone bills were done. There is no scrutiny about any of the calls to examine relevancy or relatability thereof to the activities enumerated in Rule 2 (l) of the Cenvat Credit Rules, 2004. Such a bald show cause notice cannot give rise to any adjudication.

7. Had the authorities gone to the Income-tax Authorities to find out the disallowance of expenditure, there would have been little basis for the Revenue to come out with a case to say that the calls were not in relation to the activities enumerated in Rule 2 (l) of Cenvat Credit Rules, 2004, That has not been done. So also any of the telephones to what extend used for any activities was not examined. Only a summary disallowance was proposed by show cause notice because law has prescribed admissibility of cenvat credit on taxable services. The authorities have also not examined whether the telephones were anyway directly or indirectly in or in relation to activities enumerated by law was used bringing any evidence to record. The show cause notice also depicts that it was apparent examination by the authority. It may be stated that what that may be apparent may not be real. Also it may be stated that suspicion shall not be substitute of evidence. When there is a total laxity in the examination, ~~of~~ contention of the ld. DR today although

Submission

being Revenue conscious, does not permit to sustain the orders of the authority below. No one can be dealt behind back, being the elementary principle of justice, this appellant appears to have been dealt in a negligible manner. Ld. DR submits that this decision may have a serious impact ~~deprecation~~ through out the country. Such a proposition cannot be accepted since decision in each case is on the facts and circumstances of each case and on the basis of the evidence on record. It is made clear that this order having been passed in peculiar circumstances of the case shall not be precedent for future. Accordingly, Revenue's should not have apprehension that it may lose its case before any Bench. With these words, appeal of the appellant is allowed.

[Dictated & Pronounced in the open Court].

(D.N.PANDA)
JUDICIAL MEMBER

Anita