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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/467 /2006.1144/2006 - EX[DB] Date **03/02/2012**

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

To :
C.C.E. JAIPUR II
N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME,
JAIPUR 302005.

C.C.E. JAIPUR II Appellant

Vs

HINDUSTAN ZINC LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No. A/74-75/ 2012 EX[DB]** dated 30-1-12 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
HINDUSTAN ZINC LTD.
PUTHOLI CHITTORGARH
RAJASTHAN

2. Adv. / Consult
MR.V. LAXMIKUMARAN
B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New Delhi
6. M/s Centax Publictions Pvt Ltd.,1512-B, Bhishm Pitamah marg,Opp. ICICI Bank of Defence Colony, New Delhi-3
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1. 2nd Floor.Vasant Arcade,Nelson Mandela Road, Vasant Kunj. New Delhi - 110070
12. Office Copy
13. Guard file
14. HINDUSTAN ZINC LIMITED
YASHAD BHAWAN. UDAIPUR. RAJASTHAN

Assistant Registrar
(Excise 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. III

DATE OF HEARING : 23/01/2012.
DATE OF DECISION : 23/01/2012.

Excise Appeal No. 467 of 2006

CCE, Jaipur – II Appellant

Versus

M/s Hindustan Zinc Ltd. Respondent

Excise Appeal No. 1144 of 2006

M/s Hindustan Zinc Limited Appellant

Versus

CCE, Jaipur – II Respondent

[Arising out of the Order-in-Appeal No. 830 (HKS)/CE/JPR-II/2005 dated 30/11/2005 passed by The Commissioner (Appeals-II), Customs & Central Excise, Jaipur.]

For Approval and signature :

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Sahab Singh, 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? : No
2. Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes
3. Whether their Lordships wish to see the fair copy of the order? : Seen
4. Whether order is to be circulated to the Department Authorities? : Yes

Appearance

Shri S.R. Meena, Authorized Representative (DR) – for the appellant

Shri B.L. Narsimhan, Advocate – for the Respondent.

CORAM : **Hon'ble Ms. Archana Wadhwa, Member (Judicial)**
Hon'ble Shri Sahab Singh, Member (Technical)

FINAL Order No. A/74-75/2012-EX(BR) Dated : ____________

Per. Sahab Singh :-

These are two appeals, one filed by M/s Hindustan Zinc Limited (appeal No. E/1144 of 2006) and second by the Revenue (appeal No. E/467 of 2006) against common order-in-appeal No. 830 (HKS)/CE/JPR-II/2005 dated 25th November 2005.

2. Brief facts of the case are that on the scrutiny of the records of the assessee i.e. M/s Hindustan Zinc Limited for the month of January 2004, it was found that they had wrongly taken Cenvat credit of Rs. 25,93,988/- vide inputs Cenvat credit entry No. 9201001833 against supplementary Invoice No. 8141 dated 31st December 2003 and credit of Rs. 16,95,232/- vide their Cenvat credit entry No. 9201001834 against the supplementary Invoice No. 2281 dated 13th December 2003 in contravention of Rule 3 of Cenvat Credit Rules readwith Rule 7 of the Cenvat Credit Rules. Both the invoices were issued by M/s Hindustan Zinc Limited (Jawar Mines) in respect of pre-deposit made on 26th

December, 2003 in terms of CESTAT Stay order No. 418/03/NB (A) dated 30th October 2003 by treating a pre-deposit as differential duty paid on clearances of lead and zinc concentrates made during the period August 1999 to March 2000. It was alleged by the Department that there is a short payment of Central Excise duty amounting to Rs. 42,89,220/- against the clearances of zinc, lead and other products during the month of January 2004 by way of utilizing the inadmissible Cenvat credit. Accordingly, a show cause notice was issued to the assessee on 3rd September, 2004 which was adjudicated by the Additional Commissioner vide his order-in-original No. 11/CE/JP-II/2005 dated 28th March 2005 confirming the duty and imposing the equivalent amount of penalty alongwith interest against the assessee. Assessee filed an appeal before the Commissioner, Central Excise (Appeals), who vide the impugned order upheld the confirmation of demand and set aside the imposition of penalty. The assessee has filed this appeal No. E/1144 of 2006 against the confirmation of demand whereas Revenue has filed this appeal No. E/467 of 2006 for setting aside the penalty by the Commissioner (Appeals). Since the order-in-appeal is common, both the appeals are being taken up together for decision.

3. Learned advocate appearing for the assessee submits that issue involved is whether pre-deposit made in pursuance of the CESTAT Stay order can be taken as the Cenvat credit after the supplementary invoices issued by the assessees in favour of the

recipient of the goods. He submitted that the issue has already been decided by this Tribunal vide CESTAT order No. 945-946/2011-EX dated 4th November 2011 in their own case in which it has been held by the Hon'ble Tribunal that there is no reason to deny the Cenvat credit of pre-deposit of the duty paid under Section 35F of the Central Excise Act. He, therefore, stated since the issue already stands covered by the CESTAT order appeal filed by them needs to be allowed and the appeal of the Revenue needs to be dismissed.

4. The learned DR appearing for the Revenue reiterated the finding of the lower authorities.

5. After hearing both sides, we find that the Commissioner (Appeals) in this case has held that amount deposited in terms of Section 35F of the Central Excise Act, 1944 as pre-deposit cannot be considered as payment of duty. He held that since the pre-deposit is not a duty question of taking of Cenvat credit of the pre-deposit does not arise. We find that in the assessee's own case, this Tribunal has already taken a view vide the order dated 4th November 2011 that the Cenvat credit of pre-deposit of duty paid under Section 35F of the Central Excise Act can be availed and the demand confirmed on this account is not sustainable. Following the decision of this Tribunal cited (supra), we set aside the impugned order and hold that the Cenvat credit of the pre-deposit made under Section 35F of Central Excise Act is

admissible to the appellant. Accordingly, we allow the appeal of the assessee and dismiss the Revenue appeal.

6. Appeals are disposed of in the above terms.

(Operative part of the order pronounced in the open court.)

(Archana Wadhwa)
Member (Judicial)

(Sahab Singh)
Member (Technical)

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