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

BENCH-SM

COURT –III

Excise Appeal No.E/1196 to 1198/2007-EX [SM]

[Arising out of Order-in-Appeal No.70 (HKS) CE/JPR-II/2007 dated 14.02.2007 passed by the Commissioner (Appeals), Customs & Central Excise, Jaipur-II]

For approval and signature:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

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 should 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 Departmental authorities?	

Hindustan Zinc Limited …Appellant

Vs.

C.C.E., Jaipur-II … Respondent

Present for the Appellant : Ms. Sukriti Das, Advocate
Present for the Respondent: Mr.M.R. Sharma, D.R.

Coram: HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

Date of Hearing/Decision: 13.04.2016

FINAL ORDER NO. _56436-56438/2016_

PER: S.K. MOHANTY

These appeals are directed against the impugned order dated 14th February, 2007 passed by the Commissioner (Appeals-II), Customs and Central Excise, Jaipur, upholding disallowance of Cenvat Credit on cement in the adjudication order.

2. Brief facts of the case are that the appellant herein is engaged in the manufacture of Zinc Lead. The appellant has a concentration plant for concentration of the Zinc Ore procured from the mines. In the process of mining, when the ore is dug out, cavities are formed and for filling those cavities, the appellant uses cement slurry mixture. The appellant avails Cenvat credit of Central Excise duty paid on cement used for the said purpose under the head 'input'. Taking of cenvat credit on cement during the disputed period was disallowed by the Central Excise Department on the ground that cement cannot be considered as 'input' for the manufacture of final products.

3. Ms. Sukriti Das, the ld. Counsel appearing for the appellant submits that cement is used to prevent the mines from cavity, which results in continuous procurement of ore for feeding into the process of manufacture of the ultimate final product. Thus, in terms of broader definition of input contained in Rule 57 AA(d) of the erstwhile Central Excise Rules, 1944 and Rule 2 (g) of the Cenvat Credit Rules, 2002, Credit on

Cement is available to the appellant. The ld. Advocate relies on the recent judgment of Hon'ble Supreme Court in the case of Ramala Sahkari Chinni Mills Ltd. Vs. CCE, Meerut-I, reported in 2016 TIOL 20 (SC) CX-LB and also the judgment of Hon'ble Gujarat High Court in the case of Mundra Ports & Special Economic Zone Ltd. Vs. CCE & Custom reported in 2015 (39) STR 726 (Guj.) to state that that Central Excise duty paid on Cement is permissible as cenvat credit.

4. On the other hand, Shri M.R. Sharma the ld. D.R. appearing for the respondent submits that cement has not been used by the appellant in or in relation to manufacture of the final product, and thus, in terms of the definition of input, cement shall not be eligible for cenvat benefit. He further submits that in the case of the appellant itself, the Hon'ble Supreme Court and the Hon'ble Rajasthan High Court have held that cement being used as a construction material, credit should not be available to the appellant. In this context, he relies on the judgment of Hon'ble Supreme Court in the case of Hindustan Zinc Ltd. Vs. Union of India reported in 2015 (325) ELT A 155 (SC), Union of India vs. Hindustan Zinc Ltd. reported in 2008 (225) ELT 183 (Raj.) & Union of India vs. Hindustan Zinc reported in 2014 (305) E.L.T. 123 (Raj.).

5. I have heard the ld. Counsel for both the sides and perused the records.

6. On perusal of the definition of inputs contained in both the erstwhile Central Excise Rules, 1944 and the Cenvat Credit Rules, 2002, it reveals that though the definition is broad enough to take within its ambit, various materials for consideration as inputs, but in absence of use of particular goods either directly or indirectly in the manufacture of the final product, the Cenvat benefit is not available to the assessee. The nature of use of cement in this case shows that the same is neither used directly or indirectly in the manufacture of the final product and thus, the Cenvat credit is not available to the appellant. The judgment of the Hon'ble Supreme Court in the case of Ramala Sahkari Chinni Mills Ltd. (supra) relied on by the ld. Advocate is distinguishable from the facts of the present case inasmuch as in the said decided case, the issue involved was with regard to interpretation of the phrase "includes" and not in context with ascertaining the fact as to whether the goods are used in or in relation to manufacture of final product. On the contrary, I find support from the judgment relied on by the Ld. D.R. for Revenue, wherein in the case of appellant itself, it has been held that cement used for construction /repair or maintenance of mines not to be considered as input for the purpose of taking cenvat credit. Hence, Cenvat credit on Cement in this case is not available to the appellant. However, since the issue relates to interpretation of the provisions of cenvat statute, I am of the

view that Section 11AC of the Central Excise Act, 1944 cannot be invoked, justifying imposition of penalty. Inasmuch as the said provision has the applicability, in the eventuality, where the assessee is involved in the activities concerning fraud, collusion, wilful misstatement with intend to evade payment of duty. Thus, in absence of those ingredients, the penalty confirmed in the impugned order is liable to be set aside. However, considering the fact that in the case of the appellant itself, the Hon'ble Supreme Court and the Hon'ble Rajasthan High Court have held that cement shall not be considered as input for manufacture of the final product, I upheld the impugned order passed by the Commissioner (Appeals) to the extent of disallowance of modvat/cenvat credit on the disputed goods.

7. The appeals are disposed of in above terms.

[Dictated and Pronounced in the Open Court]

(S.K. MOHANTY)
MEMBER (JUDICIAL)

Anita