CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. 1

Date of hearing/decision: 18.04.2017

Excise Appeal No. 1228 of 2011
(Arising out of order-in-original No. 08/2011/C.Ex/JPR-II-COMM dated 22.02.2011 passed by the Commissioner (Appeals)-II, Central Excise, Jaipur-II)

M/s Hindustan Zinc Limited Appellant

Vs.

CCE, Jaipur-II Respondent

Appearance:

Sh. Anurag Kapoor, Advocate for the appellant
Sh. Dharam Singh, AR for the Revenue

Coram:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Final Order No. 52976 / 2017

Per: Justice (Dr.) Satish Chandra:

The present appeal is filed against the order-in-original No. 08/2011/C. Ex/JPR-II-COMM dated 22.02.2011 passed by the Commissioner (Appeals)-II, Central Excise, Jaipur-II).

2. The brief facts of the case are that the appellant is engaged in the manufacture of lead and zinc. The appellant has awarded contracts to various prestigious companies for erection, installation, commissioning works etc. in relation to various projects. In all the cases, the agreements provided that a certain percentage of the stipulated payment would be withheld on account of performance guarantee. This payment would be made at the end of the stipulated period after the successful execution of the contract. Thus, from

each of the progressive bills raised by the contractors during the execution of the contract, the appellant deducted 5% - 10% as retention amount and made the balance payment of 90% to the contractors. However, it is pertinent to note that the service tax reflected on the invoice was fully paid by the contractor to the exchequer. Further, the appellant paid the full amount of service tax to the contractors at the time of retaining the amounts and took the cenvat credit of the entire service tax so paid. The retained amounts were paid at the end of the stipulated period after completion of the project. The department, however, invoked the provisions of Rule 4(7) of the Cenvat Credit Rules, 2004, which reads as under:

> "7. *The Cenvat credit in respect of input service shall be allowed, on or after the day which payment is made of the value of input service and the service tax paid or payable as indicated in invoice, bill or, as the case may be, challan referred to in rule 9*.

3. With this background, we heard Shri Anurag Jain, ld. Advocate for the appellant and Shri Dharam Singh, ld. AR for the Revenue.

4. After hearing both sides and on perusal of record, it appears that the issue has come up before the Tribunal in favour of the assessee's in their own case in Appeal No. E/1364/2010-EX (DB) vide Final Order No. 53738/2006-EX(DB) dated 22.09.2016, wherein the Tribunal has observed that:

> *"We noticed that the very same issue was the subject matter of clarification by the Board vide circular dated 30.04.2010. In para 5(b), the situation as per the present case was also covered. It was clarified that in case of any amount retained or discounted after the invoices were issued, the credit need not be changed and full credit of service tax paid to the service tax paid to the service provider will be eligible for credit. It is clarified that the invoice would in fact stand amended to that extent in the appellant's own case (supra) the*

Tribunal referred to the said circular and on a similar set of facts upheld the credit availed by the appellant.

5. Hence, following the ratio of the above mentioned decision passed by the Tribunal (supra), the appeal is allowed.

6. In view of the above settled position, we find that the impugned order is without merit, and accordingly, the same is set-aside. The appeal is allowed.

(Dictated and pronounced in the open Court).

(V. Padmanabhan)
Member (Technical)

(Justice (Dr.) Satish Chandra)
President

Pant