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

Appeal No. E/1795/2011-EX(DB)

[Arising out of Order-in-Original No. 125-126/2011/C.EX/JPR-II/Comm dated 30.03.2011, by the Commissioner of Customs, Central Excise & Service Tax (Appeals), Udaipur].

C.C.E. & S.T. Udaipur **....Applicants**

Vs.

M/s. Hindustan Zinc Ltd. **....Respondent**

Appearance:

Shri Yogesh Agarwal, DR for the Appellant
Shri Hemant Bajaj, Advocate for the Respondent

CORAM:
Hon'ble Shri. M. V. Ravindran, Member (Judicial)
Hon'ble Shri V. Padmanabhan, Member (Technical)

Date of Hearing: 02.03.2017
Date of Pronouncement: 09.05.2017

FINAL ORDER NO. 53183/2017-EX(DB)

Per M. V. Ravindran:

This appeal is directed against the order in original no. 125-126/2011/C.EX/JPR-II/Comm dated 30.03.2011.

2. Heard both the sides and perused the records.

3. The issue involved in this case is regarding the demand of reversal of Cenvat Credit availed on inputs and capital goods such as explosives, lubricants, detonators, components etc. provided to contractors for mine development work / ore productions.

4. During the period in dispute i.e. April 2008-May 2010 after availing Cenvat Credit on the inputs, capital goods, respondent outsourced the mining activity to various mining contractors for which purpose they supplied inputs and capital goods, such as explosives, lubricants, detonators, pipes, rods and other goods on which Cenvat Credit was availed. After carrying out the investigation, Revenue issued two show cause notices dated 06.11.2009 and 22.09.2010 directing the respondent to show cause as to why the demands cannot be raised on them for the improper availment of Cenvat Credit on the goods which are sold. The respondent filed the detailed submissions and contested the show cause notice denying all the allegation made therein. Adjudicating authority after following due process of law came to the conclusion that the proceedings initiated by the show cause notice are not correct and needs to be dropped; to come to such a conclusion, he held that a contractor was using the goods exclusively for the work of the respondent; there is no physical removal of goods from the factory i.e. mining and hence provisions of Rule 3(5) of Cenvat Credit Rules are not attracted; the reliance placed by the Revenue on the judgment of Hon'ble High Court of Rajasthan in the respondents own case in respect of sales tax is wrong; explosives and detonators which are purchased by the respondent cannot be sold by them to anyone and can be used only for mining activity undertaken by them; that the show cause notices itself admits that the goods have been used for undertaking mining activity on behalf of the respondent and no evidence has been provided in the show

cause notice that the cost of these items supplied by the respondent was even recovered from the contractors. Aggrieved by the said order revenue has preferred this appeal.

5. The grounds of appeal as submitted by the Ld. DR is on the capital goods such as explosives, detonators, lubricants pipes, rods, etc. are given to the outsourced contractor based on chargeable as well as non chargeable basis, physical attributes of transfers remain identical in as much, the contractor were given physical possession of these explosives, detonators, lubricants, pipes, rods, etc.; contractors were not hired labours of the assessee but were independent legal persons in as much as they are having seperate registration with various departmental authorities and having separate books of accounts, necessary machinery and expertise to perform work in the accounts of the respondent and the items which are given by the respondent were essential requirements for providing the services as contracted. It is his further submission that items being essential requirement for given development, these items are covered under provisions of rule 2(k)(ii) of Cenvat Credit Rules 2004 as inputs for availment of Cenvat Credit by the contractors and it cannot be availed by them as they are not undertaking any manufacturing activity. It is his submission that the appellant has never issued the above items for use in the production process of the finished goods.

6. Ld. Counsel supports the impugned order and submits that the adjudicating authority has correctly interpreted the provisions of

rule 3(5) as being not applicable in the absence of any physical removal of the goods. It is his submission that the items like explosives, detonators, lubricants, pipes, rods and other goods were within the mining area and procured by the appellant from the suppliers on payment of Central Excise Duty. He submits that the reliance is placed to the decision of the Tribunal in the case of ***Bhilai Steel Plant vide final order no. A/55927/2016-EX(DB)*** dated 20.12.2016 for the proposition that when the capital goods are not removed from the factory there is no requirement of payment of Cenvat Credit under Rule 3(4) of the Cenvat Credit Rule. He also relies on the judgment of the Tribunal in the case of ***Steel Authority Of India Ltd. Vs. CCE Bhubaneshwar 2016 (332) ELT 825 (Tri-Del)*** for the same proposition. He submits that in the case of ***L.G. Balakrishnan & Bros. Ltd. Vs. CCE 2016-TIOL-2356-CESTAT-MAD*** it was held that to invoke provisions of Rule 3(5) of Cenvat Credit Rules there is a need of physical removal of capital goods / inputs. It is his further submissions that the goods have been utilized within the factory of the respondent i.e. the mining area.

7. After considering the submissions made by both the sides and perusal of the records, we find that the issue boils down to only two conclusion whether the explosives, lubricants, detonators, pipes and rods on which Cenvat Credit was availed and supplied to various outsource companies who undertake the mining activities is correct or the respondent is required to discharge the Cenvat Credit on such goods.

8. We find that the adjudicating authority after recording the entire issue of how the contracts have been signed by the respondent with their clients for mining activity and also provision of rule 3(5) of the Cenvat Credit Rules recorded the following findings:

"5.8 I further find that recovery of credit already taken can be effected if the inputs are not used in or in relation to the manufacture of final products or are removed as such, or capital goods have not been utilized within the factory or have been removed as such; in these circumstances alone, the cenvat credit allowed can be recovered. The show cause notice itself admits that the goods have been used for undertaking mining activities on behalf of the assessee. As such there is no removal of inputs or capital goods and there is no question of any reversal under rule 3(5) of the Cenvat Credit Rules 2004. Therefore, credit cannot be denied in this case.

5.9 I further find in the show cause notice itself, it had been mentioned that the assessee were purchasing the goods in question and availing cenvat credit on such items and subsequently, supplying them to the service providers. The service providers in turn undertook mine development work at the mines of the assessee from these items; that when supply of the goods to the contractors on chargeable basis was under dispute with the sales tax authorities, the assessee has changed the terms and conditions of the agreement entered with the contractors and instead of adjusting the cost of explosives, detonators so supplied to the contractors on chargeable basis, it has been alleged in the SCN that the cost of these items was already deducted from the amount to be charged towards service provided by the contractors. For such an allegation in the SCN, no evidence has been given that the cost of these items was deducted to arrive at the amount to be paid to the service provider. Hence, I reject the allegation that amount to be paid to *the contractor for providing the services was arrived at after deducting the cost of explosives, detonators, pipes and tubes, etc. Since the assessee, after the decision of the Hon'ble High Court of Rajasthan, has changed the terms and conditions of the contract whereby inputs and capital goods required for rendering the services are supplied free of cost to the service provider.*

5.10 I have seen the copies of agreement relating to the period under dispute i.e. from April 2008 to May 2010 which revealed that during the impugned period the material, equipments, facilities, explosives and detonators were provided by the assessee free of cost to the contractors, for use in the work of their company. In view of the above, it cannot be said that the assessee has sold these items to contractors as there is evidence of free supply of these items by the assessee to the contractors during the period of dispute."

9. As against above reproduced factual findings by the adjudicating authority, revenue has not controverted the same effectively in as much there is no dispute as the fact that explosives, detonators, lubricants, pipes, rods and other goods are consumed within the mining area of the respondent. In the absence of any evidence to show that these goods were never used in the mining area of the respondent, the findings recorded by the adjudicating authority are correct and there is no need for interference in such reasoned order.

10. We are fortified in our view by the decision of the Tribunal in the case of ***Bhilai Steel Plant (Supra)*** wherein the bench held as under:

"After considering various case laws cited by both the sides we find that the Hon'ble Supreme Court has clearly held that

'removal' contemplates physical removal of goods from one place to another . Such a view has also been taken by the majority of the High Court as well as in several Tribunal decisions including in respect of another unit of respondent. Under the circumstances, we find no infirmity in the order passed by the ld. Commissioner who has held that no amount is required to be paid under Rule (4) on capital goods as there has been no removal and dropped the demand of central excise duty."

11. We also place reliance on the decision of the Tribunal in the case of ***Steel Authority of India Ltd. (Supra)*** wherein the Tribunal has held as under:

"Heard both the sides and examined appeal records carefully. The short point for decision is whether or not the appellants are eligible for concessions available for the goods manufactured / purchased by them when transferred to the power plant owned by another entity inside their factory premises. The Revenue held the view that this will amount to removal outside the factory and as such the liability arose. We find that the factory premises as licensed under Central Excise Provisions in respect of the appellants continued to be unaffected and no separate central excise license with de-marketed premises was given to the power plant separately. In such situation, the Revenue cannot take a stand that the power plant is another factory and not to be considered as within the factory of the appellant. The appellant's case is further strengthened in view of the fact that all the inputs transferred to the power plants by the appellant are fully utilized in or in relation to the manufacture of electricity which in turn is fully used captively by the appellants."

12. In view of the facts and circumstances of this case and authoritative judicial pronouncements we hold that the impugned

order is correct and legal and does not suffer from any infirmity. The appeal filed by the Revenue is rejected.

[Pronounced in the open Court on 09.05.2017]

(V. Padmanabhan)
Member (Technical)

(M. V. Ravindran)
Member (Judicial)

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