**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. I**

**DATE OF HEARING : 12/06/2017.**
**DATE OF DECISION : 15/06/2017.**

**Excise Appeal No. 59850 of 2013**

[Arising out of the Order-in-Original No. 32-41/2013/CE/JPR-II/Commr. dated 27/06/2013 passed by The Commissioner, Central Excise, Jaipur.]

CCE & ST, Udaipur — Appellant

Versus

M/s Hindustan Zinc Ltd. — Respondent

**Appearance**

Ms. Suchitra Sharma, Authorized Representative (Jt. CDR) – for the appellant.

Shri Amit Jain and Ms. Sukriti Das, Advocates – for the Respondent.

CORAM : **Hon'ble Shri Justice Dr. Satish Chandra, President**
**Hon'ble Shri B. Ravichandran, Member (Technical)**

Final Order No. 53984/2017 Dated : 15/06/2017

**Per. B. Ravichandran :-**

The Revenue is in appeal against order dated 27/06/2013 of Commissioner of Central Excise, Jaipur. The respondents are engaged in the manufacture of Lead, Zinc etc. They were also availing credit of duty paid on inputs and capital goods and tax paid on input services in terms of Central Excise Rules, 1944/

Cenvat Credit Rules, 2001/2002, as applicable during the relevant time. Mined ore is the source material which contains zinc and lead alongwith several other impurities. The ore is treated and put to various process to obtain zinc and lead concentrates. The respondent received such concentrate in their smelter units. During the process of refining the ore concentrate to obtain zinc and lead, silver crust emerges as a by-product which contains about 65-70% of lead, 10-15% of zinc, 5-7% of copper, 4-5% of silver and certain other impurities. Zinc and lead are recovered out of silver crust and thereafter silver emerges as a by-product during such elimination process. The silver so obtained was cleared by the respondent without payment of duty. The Revenue entertained a view that silver being an exempted product, the Cenvat credit attributable to inputs and input services used in the manufacture of such silver should be reversed in terms of provisions of Rule 57AD/Rule 6, as applicable during the relevant time.

2. Periodical show cause notices were issued to the respondent covering the period April 2000 to February 2003. The respondent of their own worked out the Cenvat credit attributable to the production of silver and reversed the same. An amount of Rs. 2,18,148/- was reversed on this account, during 2002-2003. Demand notices were adjudicated by the Original Authority who vide the impugned order dropped the proceedings against the respondent. He held that in terms of Rule 6 (2) of Cenvat Credit Rules, 2001, the inputs on which Cenvat credit has been availed

are common to both dutiable and exempted final products and it was not possible for the respondent to maintain separate account of inputs used for exempted goods. Applying the provisions of Section 69 to 72 of Finance Act, 2010 which introduced retrospective amendments regarding the option given to the assessees for reversal of proportionate Cenvat credit, the Original Authority held that the respondents are eligible for the said provision. It was also recorded that the amount of Cenvat credit reversed has been certified by Chartered Accountant and got verified from the Jurisdictional Deputy Commissioner who also agreed that reversal of these proportionate Cenvat credit has been done by the respondent. Accordingly, the Original Authority held that the demands issued to the respondent for recovery of 8% of value of silver is not sustainable.

3. Aggrieved by the above order, the Revenue filed this appeal. The learned AR elaborated the grounds of appeal. The main points canvassed by the Revenue, against the impugned order, are as below :-

(a) The Commissioner agreed in principle that silver is an exempted final product. However, the demands were dropped by extending the benefit of retrospective provisions introduced by Finance Act, 2010. In terms of the said provisions to avail the benefit the assessee was to apply to the Commissioner within six months from the date the Finance Bill 2010 received assent. The Bill became Act on 08/05/2010. The respondent applied to the Commissioner on 03/11/2010, but the same was received by the office of the Commissioner on 09/11/2010 which is one day after the due date ;

(b) the provisions of Finance Act, 2010 stipulates that the assessee shall pay the amount alongwith interest and make an application to the Commissioner within six months. In the present case, part of the payment of interest was made only after applied to the Commissioner, i.e. after six months ;

(c) the quantification of credit attributable to the input used in the manufacture of exempted goods (silver) in proportion of the weight of the exempted goods in total weight of raw material used, is not legal and proper. The proportion of Cenvat credit attributable to silver should have been based on the value of silver with reference to total value of all dutiable and exempted goods produced by the respondent. Reference was made to the CAS-4 Standards applied for arriving at the cost of production for captive consumption with reference to allocation of joint cost to joint products. Similar methodology for arriving at proportionate credit should be adopted based on value of final products emerging using the common inputs.

4. The learned Counsel for the respondent strongly contested the grounds of appeal. He submitted that all the ore concentrates have been consumed in the manufacture of zinc and lead. There is no quantity of such inputs which are attributable to the manufacture of silver. As such, when they have consumed all the duty paid inputs and services, fully in the manufacture of their main final products, zinc and lead, there is no question of any inputs or services attributable to silver. Still, in order to close the matter without further dispute, the respondents reversed

proportionate credit attributable to the inputs used for such silver. They have produced the Chartered Accountant certificate in support of their calculation.

5. Regarding applicability of the retrospective scheme for reversal of proportionate credit, as introduced in the Finance Act, 2010 it is submitted that the respondents have reversed Rs. 2,18,148/- during the financial year 2002-2003 itself. The payment of differential interest due to difference in calculation as pointed out by Revenue has been made in terms of the provision of Finance Act, 2010. When they have paid the proportionate Cenvat credit in 2002-2003 itself, as admitted by the Revenue, the payment of differential interest after intimation to Revenue, cannot be held against them to deny the applicability of the provision of Finance Act, 2010. The learned Counsel relied on various decided cases in respect of respondent's own unit dealing with provision of Cenvat Credit Rules in respect of by-products manufactured by them.

6. We have heard both the sides and perused the appeal records. The Original Authority dropped the proceedings against the respondent having satisfied that the respondents were correctly entitled for the benefit extended by the Finance Act, 2010, with reference to procedure to be adopted by the assessees in terms of Rule 57AD/Rule 6 of Credit Rules. Admittedly, the respondents are engaged in the manufacture of non-ferrous metals namely zinc and lead. For this they receive

ore concentrates and used the same in the smelting furnace. During the course of process of refining the concentrate to obtain the base metals zinc and lead, silver crust emerges as a by-product. As already noted the said crust contains more than 80% of other base metals lead, zinc, copper and contains only about 4-5% of silver and other impurities. From this again, lead is recovered. After further processing, silver as a marketable product emerges. The said silver is cleared by the respondent without payment of duty. The respondent reversed Cenvat credit attributable to such silver based on quantities i.e. in proportion to the weight of raw material attributable to weight of final product – exempted and dutiable. The Revenue contended that the proportion of credit on raw material should be calculated based on the value of finished goods.

7. First of all, we note that the wordings used in Rule 57AD of Central Excise Rules, 1944 and Rule 6 of Cenvat Credit Rules, 2001 stipulate that the assessee, opting not to maintain separate account, can pay an amount equal to Cenvat credit attributable to inputs used in or in relation to manufacture of such final products, which are exempted from payment of duty. Section 70 and the 5$^{th}$ Schedule of Finance Act, 2010 talk about payment by manufacturer an amount equal to Cenvat credit attributable to the inputs used in or in relation to the manufacture of exempted goods. It is apparent that the legal provisions applicable to the facts of the present case are clear to the effect that Cenvat credit attributable to inputs used in or in relation to manufacture of

exempted goods is to be reversed. The relevant point to note here is that the Revenue itself categorically admitted in the appeal that it is not a case here, where common inputs are used both for the manufacture of dutiable and exempted goods in two separate processes. Segregation of quantity of inputs which is attributable to dutiable and exempted goods in an integrated process is not possible. The Revenue further admitted that quantification of proportionate quantity of input used in exempted goods is not possible in the case like the present one. However, after admitting these factual position, it is contended by the Revenue, that the criteria to find out proportionate quantity of input used in exempted goods should be based on value of exempted goods. We find no legal basis or logical reason for such a proposition. The Revenue drew a parallel from the CAS-4 Standard for costing used for ascertaining cost of production for captive consumption. Reference was made to joint cost etc. We find such reference to costing of captive consumption has no relevance to the issue at hand. We find no legal basis for the assertion made by the Revenue to arrive at the proportion of Cenvat credit to be reversed, should be based on value of exempted products.

8. It is to be noted here that he Board vide Circular dated 09/05/2008 clarified as below :-

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| 7. | What is the manner for calculation of CENVAT Credit | It is required to be done on the basis of actual consumption of inputs used and the quantification may be made |

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| | amount attributable to inputs used in or in relation to the manufacture of exempted goods. | based upon the stores/production records maintained by the manufacturer. Further, a certificate from Cost Accountant/Chartered Accountant giving details of quantity of inputs used in the manufacture of exempted goods, value thereof and CENVAT credit taken on these input may be submitted at the end of the year. |

9. The respondent received ore concentrates and used them fully in the manufacture of zinc and lead. Silver crust which was further put to process for recovery of base metal and silver, emerges as a by-product during the course of manufacture and refining of zinc and lead. In other words, all the inputs have been put to intended use and it is not the case that some portion of input is not put into use in the manufacture of zinc and lead. This position has been admitted by the Revenue also. If such is the case there can be no input which is solely attributable to the manufacture of small quantity of by-product namely, silver. The said silver is extracted as a by-product by the respondent whose intended/main manufacturing process is aimed at manufacture of non-ferrous metal like zinc and lead. The respondent also obtain various other by-products like sulphuric acid etc. In fact with reference to sulphuric acid emerging as a by-product, it was held in the respondent's own case that there is no need for reversal of Cenvat credit on proportionate basis in **Hindustan Zinc Limited vs. CCE, Jaipur – II** reported in **2004 (178) E.L.T. 255 (Tri. – Del.)**. Reference can also be made to the decision of Hon'ble Supreme Court in respondent's own case reported in **2014**

**(303) E.L.T. 321 (S.C.)**. The Hon'ble Supreme Court observed as below :-

> "26. Furthermore, the provisions of Rule 57CC cannot be read in isolation. In order to understand the scheme of Modvat credit contained in this Rule, a combined reading of Rules 57A, 57B and 57D along with Rule 57CC becomes inevitable. We have already reproduced Rule 57D above. It can be easily discerned from a combined reading of the aforesaid provisions that the terms used are 'inputs', 'final products', 'by-product', 'waste products', etc. We are of the opinion that these terms have been used taking into account commercial reality in trade. In that context when we scan through Rule 57CC, reference to final product being manufactured with the same common inputs becomes understandable. This Rule did not talk about emergence of final product and a by-product and still said that Rule 57CC will apply. The appellant seeks to apply Rule 57CC when Rule 57D does not talk about application of Rule 57CC to final product and by-product when the by-product emerged as a technological necessity. Accepting the argument of the appellant would amount to equating by-product and final product thereby obliterating the difference though recognised by the legislation itself. Significantly this interpretation by the Tribunal in *Sterlite* (supra) was not appealed against by the department.

10. In view of the above analysis of the legal position, we find that the necessity of the respondent to reverse the proportionate credit itself appears to be not sustainable. Even so, the respondents did reverse the proportionate credit attributable to the quantum of inputs that could be considered as used in the manufacture of silver. The quantity based proportion calculated

by the respondent is now being contested by the Revenue. The plea is that the final product value should form basis of such proportion. As already noted, we find no legal basis for such contention by the Revenue.

11. Regarding the applicability of the scheme introduced by Finance Act, 2010, we note that, admittedly the respondent reversed the proportionate credit of Rs. 2,19,391/- in the year 2002-2003 itself. They have also paid interest of Rs. 36,540/- on 04/11/2010. Later a differential interest of Rs. 16,579/- was paid on 13/01/2011. The Revenue contested the eligibility of the respondent to avail the scheme as per Finance Act, 2010. It is submitted that there was one day delay in filing application and there is a delay in paying differential interest. As noted already, the respondents have paid the proportionate service tax as arrived at by them during 2002-2003 itself and paid the interest before applying to the Commissioner in November 2010. As such, they have fulfilled the requirements regarding reversal as per the provision of Finance Act, 2010. The Revenue contended that though the respondents applied vide their communicated dated 03/11/2010, the same was received by the office of the Commissioner on 09/11/2010 only. No evidence of such receipt on 09/11/2010 was submitted in the appeal. Even otherwise, we find that the respondents fulfilled the condition as stipulated in the Finance Act, 2010 by reversing proportionate credit in 2002-2003 itself and by paying interest on the same. We also note that the Commissioner was to verify the correctness of amount paid

within a period of two months from the date of receipt of application and in case the amount so paid is less than the amount payable, he shall call upon the applicant to pay the differential amount alongwith interest which shall be paid within 10 days. Considering the legal provision, as mentioned in Section 70 of the Finance Act, 2010 and the facts of the present case, we find no infirmity in the finding recorded by the Original Authority.

12. In view of the above discussion and analysis, we uphold the original order and dismiss the appeal by the Revenue.

(Order pronounced in the open court on 15/06/2017.)

**(Justice Dr. Satish Chandra)**
**President**

**(B. Ravichandran)**
**Member (Technical)**

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