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

Excise Appeal No. 52028 of 2014

[Arising out of Order-in-Original No. JAI-EXCUS-002-COM-104-13-14 dated 02.1.2014 passed by the Commissioner of Central Excise, Jaipur]

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

Vs.

Commissioner of Central Excise **Respondent**
Jaipur II

Appearance:

Shri Hemant Bajaj, Advocate for the Appellants
Ms. Suchitra Sharma, Jt.CDR for the Respondent

CORAM:

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

Date of Hearing : 06.06.2017
Date of Decision : 30.06.2017

FINAL ORDER NO. 54383 /2017

Per: V. Padmanabhan:

The Appellant is *inter-alia*, engaged in the manufacture of Zinc, Lead and Sulphuric Acid Concentrates falling under Chapter 79, 78 & 28 of the First Schedule to the Central Excise Tariff Act, 1985 respectively. The Appellant is availing Cenvat Credit on inputs received from their 100% EOU unit (M/s HZL, Hydro1) as per provisions of the Cenvat Credit Rules, 2004.

2. During the relevant period, during the scrutiny of records of the Appellant, it was observed that the Appellant had availed excess Cenvat credit on inputs procured from a 100% EOU amounting to Rs.67,15,458/-.

3. Thereafter, the Appellant was issued with Show Cause Notice dated 12.10.2012 *inter alia,* on the following grounds:

(i) That in terms of Sl. No. 2 of Notification No. 23/2003-CE dated 31.03.2003, as amended vide Notification No. 48/2008-CE dated 05.12.2008, Cenvat Credit is restricted to an amount calculated as per formula specified under Rule 3(7)(a) of the Cenvat Credit Rules;

(ii) Rule 3(7) was amended vide Notification No. 48/2008-CE dated 05.12.2008 by substituting the expression *"X multiplied by (1+BCD/200) multiplied by (CVD/100)"* for the expression" X *multiplied by (1+BCD/400) multiplied by (CVD/100)";* and

(iii) The Appellant has wrongly taken Cenvat credit by contravening the provisions of Rule 3(1) of the Cenvat Credit Rules, 2004 which was not as per the formulae specified under Rule 3(7)(a) of the Credit Rules.

4. The learned Commissioner has passed the present order against the Appellant *inter alia*, on the following grounds:

1. From the Notification, it can easily be inferred that upto 06.09.2009 for determining the admissible Cenvat Credit on the goods procured from 100% EOU under Rule 3(7)(a) of the Cenvat Credit Rules, 2004, CVD was not inclusive of SAD. From 07.09.2009 by virtue of the said Notification, the SAD was included in the CVD and accordingly credit thereof will be available;
2. While recalculating the admissible amount of credit on the goods procured from 100% EOU, the assessee included the SAD in CVD and reversed only other duties leviable on removal of goods from the 100% EOU; and
3. Had they not included SAD in the CVD, there would have been no wrong availment of Cenvat credit. If a chart is prepared for Cenvat credit availed on goods procured from 100% EOU and admissible as per formula (wherein SAD is not includible in CVD upto 06.09.2009), it shows that the assessee has availed excess credit of Rs. 64,17,193/-. Even after reversing Rs. 28,67,231/-, still balance of Rs. 38,48,227/- is recoverable.

5. Being aggrieved by the impugned order, the Appellant has filed the present appeal against the impugned order, claiming that they were entitled to the credit of SAD as per Rule 3(7).

6. The dispute in the present case is whether additional duty paid under Section 3(5) i.e. SAD is includible in CVD in terms of Rule 3(7) of the Credit Rules and credit of same can be availed on inputs received from a 100% EOU unit.

7. The learned Commissioner in the impugned order has held that credit of SAD levied under Section 3(5) of the Customs Tariff Act is part of CVD and can be availed as Cenvat credit only with effect from 07.09.2009 i.e. the date of amendment in Rule 3(7) vide Notification No. 22/2009.

8. Appellant has submitted that even before the amendment, Cenvat credit will be admissible on the SAD portion. It is further submitted that both duties payable under Section 3(1) and 3(5) of the Customs Tariff Act are covered under the term 'additional duty of customs' and there is no justification for excluding SAD payable under Section 3(5) from it for the purpose of calculating eligible credit under Rule 3(7) of the Credit Rules.

9. Rule 3 of Cenvat Credit Rules, 2004 was amended vide Notification No. 13/2005-CE (NT) dated 01.03.2005 and specifically provides for Cenvat credit on additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act.

10. Reliance was placed on the decision of the Hon'ble Tribunal in the case of ***Sri Venkateshwara Precision Components v. CCE, Chennai, [2010 (258) ELT 553 (Tri.-Chennai.].*** We find that Tribunal in that case held as follows:-

> *In respect of inputs procured from 100% EOU, and Cenvat Credit Rules provides for taking credit based on a formula prescribed under Rule 3(7) of the Cenvat Credit Rules, 2004. The dispute is whether the term CVD used in the said sub-rule 3(7) refers only to additional duty leviable under Section 3(1) of the Customs Tariff Act or that the same also includes the additional duty leviable under sub-section 3(5) of the Customs Tariff Act. Undoubtedly, from 1-3-05, if the inputs were imported, the manufacturer would be eligible for cenvat credit of duties paid under Section 3(1) and Section 3(5) of the Customs Tariff Act, 1975. Under the circumstances, there is no warrant to treat the term CVD referred to in Rule 3(7) of the Cenvat Credit Rules as applicable only to additional duty leviable under Section 3(1) of the Customs Tariff Act. <u>The term CVD has not been specifically defined in the Cenvat Credit Rules, but it has been explained that "BCD & CVD denote ad valorem rates in per cent, of basic customs duty and additional duty of customs leviable". Therefore, taking into account that from 1-3-05, the additional duty levied under Section 3(5) has also been made eligible for credit, it would be proper to hold that the term CVD referred to in the formula would refer to both varieties of additional duties leviable under Section 3(1) and 3(5) of the Customs Tariff Act, 1975</u>. As per the General Clause Act, when the context requires the word used in singular can mean in plural and,*

therefore, the term CVD can mean the two CVDs. In view of the above, I hold that there is merit in the contentions of the Ld. Advocate for the appellants. Incidentally, the alternative submissions of the Ld. Advocate that in the facts and circumstances of the case, there is no justification for invoking extended period for demand and that there is no justification for imposing penalty are acceptable. However, as the appeal itself is allowed on merits, this finding has no significance to the relief being granted.

11. We also find that the above decision has been approved by Divisional Bench in the case of ***Jai Corp. Ltd. v Commissioner of Central Excise & ST, Vapi [2015 (317) ELT 489 (Tri-Ahmadabad)].*** Hence, the issue is no more res integra. Following the above decisions, we set aside the impugned order and allow the appeal.

(pronounced in the open Court on 30.06.2017)

(V. Padmanabhan)	**(Justice (Dr.) Satish Chandra)**
Member (Technical)	**President**

ss