IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-SM

COURT – IV

Excise Appeal No. E/52859/2018 [SM]

[Arising out of Order-in-Appeal No. 495-CRM-CE-JDR-2018 dated 28/05/2018 passed by the Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Udaipur]

Hindustan Zinc Ltd **...Appellant**

Vs.

C.E. & S.T., Udaipur **...Respondent**

Excise Appeal No. E/51143/2018 [SM]

[Arising out of Order-in-Appeal No. 63-64/CRM/ST/JDR/2017-18 dated 31/01/2018 passed by the Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Udaipur]

C.E. & S.T., Udaipur **...Appellant**

Vs.

Hindustan Zinc Ltd **...Respondent**

Present for the Appellant : Ms. Sukriti Das, Advocate
Present for the Respondent: Mr. K. Poddar, DR

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing: 26.11.2018
Pronounced on : 06.12.2018

FINAL ORDER NO. 53359-53360/2018

PER: RACHNA GUPTA

Both these Appeals involving three SCNs are taken together for the issue being common, the period of demands being successive, and the Order-in-Original also being common. However, the Order of Commissioner (Appeals) with respect to 2 Show Cause Notices dated 31.01.2018 has allowed the Appeal of the assesse against whereof the

Department is before this Tribunal in Appeal vide Appeal No. 51143. The third SCN is decided by Commissioner(Appeals) vide Order dated 28.05.2018 vide which the Appeal of assessee is rejected against which the assesse is in Appeal before this Tribunal vide Appeal No. 52859.

2. The facts relevant for the adjudication of both the Appeals are that the appellants are engaged in manufacture of zinc, lead concentrates zinc cathode and sulphuric acid and even availed cenvat credit of these service tax. Department during the audit of the Company's record for the period w.e.f. March 2012 to June, 2012, July 2012 to November 2012 and January 2013 to September 2013 have observed that the appellants are availing cenvat credit of service tax on the services used for construction of secured landfill and jarofix storage pond and other allied works for disposal of industrial waste and polluted water. Department holding that these services are not the input service due to no nexus with the manufacture and clearance of the final product of appellant alleged that the cenvat credit availed by the appellant amounting to Rs. 17,68,674/-, Rs. 12,92,931/- and Rs. 17,59,151/- for the period as above respectively. Resultantly, the SCNs dated 06.03.2013, 01.08.2013 and 20.01.2014 respectively were issued to the appellants. Proposing the recovery of the aforesaid amount of cenvat credit availed by them alongwith the interest on the appropriate rate and the proportionate penalties. Three of these SCNs were initially adjudicated vide Joint Commissioner vide its Order No. 5-7

dated 19.01.2015 vide which the entire proposed demand was confirmed. Being aggrieved the appellant/ assesee preferred Appeal before Commissioner(Appeals) who vide Order dated 28.05.2018 has confirmed the findings of Order-in-Original as far as SCNs dated 06.03.2013 and 20.01.2014 for the period March 2012 to June 2012 and January 2013 to September 2013 respectively are concerned. However, with respect to SCN dated 01.08.2013 for the intervening period w.e.f. July 2012 to November 2012 the demand as confirmed has been dropped and Appeal has been allowed. Resultantly, the present respective Appeals are before this Tribunal i.e. by the appellant (52859/2018) as well as by the Department (51143/2018).

3. I have heard Ms. Sukriti Das, Ld. Advocate for the appellant and MR. K. Poddar, Ld. DR for the Department.

4. It is submitted on behalf of the appellant that the issued involved in the present Appeals already stands decided in favour of the assesse rather in their own case. Reliance has been placed upon the Final Order No. 52328/2018 dated 19.06.2018 of this Tribunal in the case **CCE, Udaipur Vs. Hindustan Zinc Ltd**. It is submitted that the credit has been availed on the services in relation to secured landfill and jarofix storage pond for disposal of hazardous industrial waste. The same is essentially, integrally connected with the manufacturing process and as such qualify to be an eligible input in terms of Rule 2(l) of Cenvat Credit Rules, 2004.

Reliance has also been placed upon the **Final Order No. 53167-53172/2018 dated 26.10.2018** vide which 6 Appeals of the present assessee itself were decided in favour of the assessee. Resultantly, the Appeal as filed by the assessee with respect to two SCNs is hereby prayed to be allowed and simultaneously the Appeal filed by the Department with respect to the remaining third SCN is prayed to be dismissed.

5. Ld. DR while justifying the order of Commissioner (Appeals) dated 28.05.2018 and feeling aggrieved of order of commissioner(Appeals) dated 31.01.2018 has impressed upon that the construction of secured landfill and jarofix storage pond and other allied works is civil structure or the part thereof and as such is clearly excluded from the definition of input services in terms of Rule 1(A)(a) of CCR, 2004 as has been rightly been appreciated by Commissioner(Appeals) in its order dated 28.05.2018. It is submitted that in the prior decision of the same Commissioner on the same issue, the Commissioner has committed error while ignoring the exclusion part of the definition of inputs and has committed error while holding this construction as an integral part of the process of the manufacture. Resultantly, the Appeal of the assessee is prayed to be dismissed and that of Department is prayed to be allowed.

6. After hearing both the parties, my opinion is as follows:-

The moot question to be decided is as to whether the cenvat credit on services used for construction of secured landfill and

jarofix storage pond and allied works for disposal of industrial waste and polluted water is admissible to the asseesse who otherwise is engaged in manufacture of lead and zinc concentrates, zinc cathode and sulphuric acid. For the purpose the definition of input services in Section 2(l) is relevant, the same reads as follows:-

> *As per Rule 2(l) of the Credit Rules, "input service" means any service –*
>
> *(i) Used by a provider of taxable service for providing an output service; or*
>
> *(ii) Used by the manufacturer, whether directly or indirectly, in or in relation to the final products and clearance of final products upto the place of removal,*
>
> *And included services used in relating to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place inward transportation of inputs or capital goods and outward transportation upto the place of removal; but excludes;*
>
> *(A) Service portion in the execution of works contract and construction service including service listed under clause (b) of Section 66E of the Finance Act (hereinafter referred as specified service) in so far as they are used for –*
>
> *(a) Construction or execution of works contract of a building or a civil structure or part thereof, or laying of foundation or making of structures for support of capital goods,*
>
> *Except for the provision of one or more of the specified services; or*
>
> *(B) Services provided by way of renting of a motor vehicle in so far as they relate to a motor vehicle which is not a capital goods; or*
>
> *(BA) services of general insurance business, servicing, repair and maintenance, in so far as they relate to a motor vehicle which is not a capital goods, except when used by---*
>
> *(a) A manufacturer of a motor vehicle -------manufactured by him; or*

(b) A provider of output service as specified in sub clause (105) ------ insured or reinsured by him or

(C) Such as those provided in relation to outdoor catering, beauty treatment------ for personal use or consumption of any employee]

7. The word in or in relation to manufacture of final product as has used in the aforesaid definition had initially been explained by Hon'ble Apex Court in the case **Collector of Central Excise Vs. Rajasthan State Chemical 1991(55) ELT 444 (S.C.)** though the aforesaid definition is into force w.e.f. 01.04.2011 however pre-amended definition also used the words directly or indirectly in or in relation to the manufacture of final products. The Hon'ble Apex Court had widened the scope of the said definition. The Hon'ble Apex Court in another case **JK Cottons Spinning and Weaving Mills Co. Ltd. Vs. Sales Tax Officer, Kanpur 1991 (91) ELT 34** has held that:

"The expression "in the manufacture of goods" should normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. Where any particular process is so integrally connected with the ultimate production of goods that but for that process, manufacture or processing of goods would be commercially inexpedient, goods required in that process, would, in our judgment, fall within the expression "in the manufacture of goods." In that case Hon'ble Apex court even went to the extent of holding that:

the use of electrical equipments, like lighting, electrical humidifiers, exhaust fan etc. were also taken to be necessary

equipment, to effectively carry on the manufacturing process. This was the observation of the Hon'ble Apex court even at the time when scope of definition of input was very restricted. Further, we observe that even prior to this, in the case of **Collector of Central Excise Calcutta Vs. East and Paper Industries Ltd. 1989 (43) ELT 201** the Hon'ble Apex Court has held, "Where any particular process is so integrally connected with the ultimate production of goods that, but for that process, manufacture or processing of goods would be commercially inexpedient, articles required in that process, would fall within the expression in the manufacture of goods."

8. This Tribunal also in final order 56900/2017 dated 28.09.2017 has relied upon the decision of **Fertilizer Cooperation Ltd. Vs. CCE Ahmadabad 1996 (86) ELT 177(SC)** while quotiong as follows:

"2. The primary contention of the revenue in this case is that the items are not used in or in relation to the manufacture of final product. The first of the items is Hydrochloric Acid (HCL). According to the department, HCL was used to treat the effluent which was a wastage obtained and hence it was not used in or in relation to the manufacturing process. This issue is no longer res integra as it has already been considered by the Supreme Court in the case of Indian Farmers Fertiliser Co-operative Ltd. v. C.C.E., Ahmedabad, 1996 (86) E.L.T. 177 (S.C) = AIR 1996 SC 2542. In that case raw naptha was obtained at the concessional rate and used for producing ammonia which in turn was used partly, directly in the urea plant and partly, indirectly in the production of urea by being employed in off-site plants, namely,

water treatment plant, steam generation plant, inert gas generation plant and effluent treatment plant, all of which were part of the integral process of the manufacture of urea. After taking into consideration the earlier judgment in the case of C.C.E., Calcutta-II v. M/s. Eastend Paper Industries Ltd. AIR 1990 SC 1893, J.K. Cotton Spinning and Weaving Mills Co. Ltd. v. Sales Tax Officer, Kanpur, AIR 1965 SC 1310, C.C.E., New Delhi v. M/s. Ballarpur Industries Ltd.- 1989 (43) E.L.T. 804 (S.C.) = AIR 1990 S.C. 196 and Deputy CST v. Thomas Stephen & Co. Ltd., 1988 (34) E.L.T. 412 (S.C.) = AIR 1988 S.C. 997 in paragraph 9, the Supreme Court held as follows : 9. That leaves us to consider whether the raw naphtha used to produce the ammonia which is used in the effluent treatment plant is eligible for the said exemption. It is too late in the day to take the view that the treatment of effluents from a plant is not an essential and integral part of the process of manufacture in the plant. The emphasis that has rightly been laid in recent years upon the environment and pollution control requires that all plants which emit effluents should be so equipped as to rid the effluents of dangerous properties. The apparatus used for such treatment of effluents in a plant manufacturing a particular end product is part and parcel of the manufacturing process of that end product. The ammonia used in the treatment of effluents from the urea plant of the appellants has, therefore, to be held to be used in the manufacture of urea and the raw naphtha used in the manufacture of such ammonia to be entitled to the said exemption.

9. For the present case, it is an undisputed fact that the cenvat credit is taken by the assesse on the services used

for construction of secured landfill i.e. for stabilisation of hazardous waste as that of jarofix being a toxic affluent. Since the activity is for securing the landfill from which the final product has to be extracted it is definitely the part and parcel of their manufacturing activity i.e. of extraction of lead and zinc from these mines. Otherwise also this construction is meant for disposal of industrial waste i.e. it is an activity of pollution control and as such is statutory requirement for any manufacturing unit generating waste. To my opinion this activity is essential, though indirectly, for the manufacture of final product of the assesse and as such qualifies eligibility of being called as input service.

10. Resultantly, I hold that Commissioner(Appeals) has committed an error while denying cenvat credit for the period March 2012 to June 2012 and January 2013 to September 2013 while adjudicating 2 SCNs dated 06.03.2013 and 20.01.2014 vide its Order dated 31.01.2018. The same Commissioner vide his subsequent order dated 28.05.2018 adjudicating SCN dated 01.08.2013 issued upon the same assesse for the same adjudication but for the intermediary period i.e. July 2012 to November 2012 has set aside the demand confirmed by the original Adjudicating Authority. Commissioner(Appeals) has rather appreciated the fact that Hon'ble Supreme Court "has explained that the apparatus used for such treatment of affluents in a plant manufacturing a particular end product

is part and parcel of the manufacturing process of that end product."

11. Both the decisions are absolute contradictory but have been announced within a time span of 5 months without any relevant change in the statute qua the given issue that too by the same Adjudicating Authority Commissioner(Appeals) being a senior competent officer is burdened with responsibility and cautious duty of adjudication hence cannot be allowed to be so casual especially about his adjudicating duties. It is therefore directed that the impugned order be specifically brought to the notice of the concerned Commissioner(Appeals) [Mr. CR Meena] so as to bring the noticed contradiction in his 2 decisions and he being observed casual requiring him to be absolutely careful in the future. The case law as relied upon by the Department i.e. **Hindustan Zinc Ltd. Vs. Deputy Commissioner, Udaipur 2008 (230) ELT 38 (Rajasthan)** is held to be not applicable to fact and circumstances of the present case.

12. As a result of entire above discussion, the Appeal of the assessee s hereby allowed while that of the Department is hereby dismissed.

[Pronounced in the open Court on 06.12.2018]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

D.J.