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/52942/2018 [SM]

[Arising out of Order-in-Appeal No. 536(CRM)/CE/JDR/2018 dated 05.06.2018 passed by the Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Jodhpur]

Hindustan Zinc Ltd. **...Appellant**

Vs.

C.C.E., Udaipur **...Respondent**

Present for the Appellant : Mr. Hemant Bajaj, Advocate
Present for the Respondent: Mr. K Poddar, DR

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

Date of Hearing: 27.11.2018
Pronounced on : 06.12.2018

FINAL ORDER NO. 53362/2018

PER: RACHNA GUPTA

Present is an Appeal directed against the Order of Commissioner(Appeals) bearing No. 536 dated 05.06.2018. The factual matrix relevant for the purpose, in brief, is as follows:-

The appellant herein are engaged in manufacture of lead and zinc concentrates and are availing cenvat credit of excise duty paid on inputs/ capital goods as well as service tax paid on input services. Department on the basis of an observation while scrutinising their records alleged that the appellants have wrongly availed the cenvat credit on service tax amounting to

Rs. 75,104/- on Rs. 7,29,165/- which was recovered against liquidated damages from the service provider during the period w.e.f. April 2010 to December 2010 in contravening of Rule 3(1) & 4(7) of Central Excise Rules, 2004 (CCR hereinafter). Resultantly, a Show Cause Notice dated 28.04.2011 was issued to the appellant proposing the recovery of Rs. 75,104/- being the proportionate cenvat credit pertaining to the amount adjusted from the invoices as liquidated damages. The interest in terms of Rule 14 of CCR and Section 11AB of Central Excise Act, 1944 (The Act hereinafter) with the penalties under Rule 15(1) of CCR were proposed. The said proposal of demand was confirmed vide the original Adjudicating Authority/ Assistant Commissioner vide its Order No. 25 dated 30.09.2011. Being aggrieved, an Appeal was preferred before Commissioner(Appeals) who vide the Order under challenge has upheld the order of Assistant Commissioner while rejecting the Appeal. Being aggrieved, the appellant is before this Tribunal.

2. I have heard Shri Hemant Bajaj, Ld. Advocate for the appellant and Shri K. Poddar, Ld. DR for the Department.

3. It is submitted on behalf of the appellant that the amount adjusted towards liquidated damages is in consideration of deficiency in the service and has been so accounted in the books of account of the appellant. It is impressed upon that the Department has wrongly alleged and confirmed that the credit attributable to liquidated damages is

not admissible to the appellant. Ld. Counsel has placed his reliance upon a Circular No. 122/3/2010-ST dated 30.04.2010 to impress upon that when the entire service tax amount on the invoices has been paid by the service provider to the exchequer the service provider is entitled to avail cenvat credit of the said service tax paid. It is submitted that despite the Circular was brought to the notice of Adjudicating Authorities below as is otherwise apparent from the grounds of Appeal before the Commissioner(Appeals) the impugned Order is miserably silent qua the said Circular. It is submitted that violation of Rule 4(7) of CCR has wrongly been alleged.

3.1 Appellant further submitted that the eligibility to take cenvat credit on the amount of service charges adjusted as liquidated damages has already been settled in appellant's own case for the earlier period of 2006-07 to 2009-March 2010 vide the Final Order No. 55702-55703/2016 dated 24.11.2016. The period in dispute is the immediate subsequent period i.e. w.e.f. April 2010 to December 2010. It is further impressed upon that for the period subsequent to the period in dispute even the Commissioner has dropped the demand. Even Circular No. 877/15/2008 dated 17.11.2008 as has been relied upon by the Commissioner(Appeals) in support of the appellant's case.

3.2 The Ld. Counsel has also impressed upon that the entire demand is otherwise Revenue neutral in nature on the ground that the cenvat credit sought to be denied by the Department is equal to the tax paid i.e. if the cenvat credit is denied no tax

would be payable. The demand for this reason is also not sustainable. Finally, impressing upon the confirmation of recovery of interest and imposition of penalty it is submitted that the only dispute raised by the Department is regarding the availment of cenvat credit at the time when certain portion of service tax was retained by the appellant. The question of levy of interest does not at all arise. There is nothing on part of the part of the appellant which may reflect any intent of the appellant to evade duty. Rather the tax stands already paid against the credit availed. Question of imposition of penalty does not at all arises. The Ld. Counsel has relied upon various decision of this Tribunal such as:

- **CCE, Jaipur-II Vs. Hindustan Zinc Ltd., 2014 (34) STR 440 (Tri.–Del.)**
- **Hindustan Zinc Ltd. Vs. C.C.E., Udaipur, Final Order No. 56669/2017 dated 01.09.2017**
- **C.C.E., Udaipur Vs. M/s Hindustan Zinc Ltd., Final Order No. 53278-53281/2018 dated 30.10.2018**
- **V.G. Steel Industry Vs. C.C.E., 2012 (27) STR 94 (P&H)**
- **C.C.E., Ahmedabad-III Vs. Nahar Granites Ltd., 2014 (305) ELT 9 (Guj.)**
- **Kohinoor Printers Pvt. Ltd. Vs. C.C.E., Pondicherry, 2015 (321) ELT 456 (Tri.-Chen.)[Affirmed by Hon'ble Madras High Court at 2015 (321) ELT 448 (Mad.)]**

4. While rebutting these arguments, Ld. DR has impressed upon that the liquidated damages as retained by the appellant in the present case are in the nature of permanent deduction from the invoice amount arising on account of non performance of the service up to the standards stipulated

between the service provider and the service recipient herein. Hence, the final payment of the bill will only be after deducting the said liquidated damages. Resultantly, the authorities below have rightly confirmed the violation of Rule 4(7) of CCR on the part of the appellant. As per Circular 877 dated 17.11.2008 it is clear that if the duty is reduced that the reduced excise duty would only be available as credit. The aspect of permanent deduction is impressed upon as a distinguishing fact of the present case than that of the decisions relied upon by the appellant. While finally justifying the Order, it is submitted that there is no infirmity of the opinion of Commissioner (Appeals) that the input service credit taken by the appellant to the extent of service tax payable on the amount retained by them on account of liquidated damages is not allowable to them. The Appeal is accordingly prayed to be dismissed.

5. After hearing both the parties and perusing the record including the Order under challenge I opine to first have a glance on the statutory provision the violation whereof has been alleged. Rule 3(1) of CCR reads as follows:-

> ***Rule 3 CENVAT credit –*** *(1) A manufacturer or producer of final products or a provider of taxabe service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of –*
> *(i) to (x) -------*
> *[Provided that the CENVAT credit shall be allowed to be taken of the amount equal to central excise duty paid on the capital goods at the time of debonding of the unit in terms of the para 8 of notification NO. 22/2003-Central Excise, published in the Gazette of India, part II, Section 3, sub-section (i), vide number G.S.R. 265(E), dated the 31st March, 2003]*

Paid on –

(i) Any input or capital goods received in the factory of manufacture of final products or premises of the provider of input service on or after the 10th day of September, 2004; and

(ii) -----

Rule 4 reads as follows:-

> ***Rule 4 Conditions for allowing CENVAT credit** – (1) The CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs in the factory or the manufacturer or in the premises of the provider of output service.*

Rule 4(7) reads as follows:-

> *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 is indicated in invoice, bill or, as the case may be, challan referred to in rule 9.*

Section 67 of the Finance Act, 1994 is relevant for valuation of taxable services for charging service tax which reads as follows:

67 Valuation of taxable services for charging service tax

(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall –

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) -----

(iii) -----

6. The bare reading of these provisions makes it clear that the provider of taxable service is allowed to take the credit of the amount paid on input services received, i.e. the gross amount charged as consideration for the purpose of services and such credit shall be allowed on or after the day which the

payment is made of the value of input services. This value has to be computed in accordance of the various sub-rules of Section 67 vide which valuation is the cost incurred by the service provider and charged.

7. Now coming to the Circular as relied upon by the appellant i.e. bearing No. 122 of 34/2010 I observe that Circular is about clarification regarding availment of credit on input services. More specifically about a doubt raised as to whether the receiver of input service can take credit only after the full value i.e. indicated in the invoice / bill/ challan rest by the service provider and also the service tax payable thereon has been paid and as to whether when the service receiver does not pay the full invoice value and the service tax indicated thereon due to some reasons the following clarification has come up for which the said Notification:

> *5b) In the cases where the receiver of service reduces the amount mentioned in the invoice/ bill/ challan and makes discounted payment, then it should be taken as final payment towards the provision of service. The mere fact that finally settled amount is less than the amount shown in the invoice does not alter the fact that service charges have been paid and thus the service receiver is entitled to take credit provided he has also paid the amount of service tax, (whether proportionately reduced or the original amount) to the service provider. The invoice would in fact stand amended to that extent.* ***The credit taken would be equivalent to the amount that is paid as service tax.*** *However, in case of subsequent refund or extra payment of service tax, the credit would also be altered accordingly.*

8. The order under challenge is silent about Circular despite it was duly brought to the notice of the adjudicating authority

below and despite the fact that it covers the issue involved herein. The authority below has opted to rely upon Circular No. 877 dated 17.11.2008. The perusal thereof shows that it is about clarification regarding reversal of cenvat credit in case of trade discount. This perusal itself is sufficient to hold that the Circular is not applicable to the facts in hand. The Commissioner(Appeals) has wrongly placed reliance on the said Circular. Further perusal even of this Circular shows that it contains following clarification:

> *In view of above, it is clarified that in such cases, the entire amount of duty paid by the manufacturer, as shown in the invoice would be available as credit irrespective of the fact that subsequent to clearance of the goods, the price is reduced by way of discount or otherwise. However, if the duty paid is also reduced, alongwith the reduction in price, the reduced excise duty would only be available as credit. It may however be confirmed that the supplier, who has paid duty, has not filed/ claimed the refund on account of reduction in price.*

9. Thus irrespective that this Circular is about the excise duty but the intention of the Revenue herein is also same as in Circular No. 122 i.e. irrespective the price is reduced subsequent to raising the invoice the credit can still be availed on the duty paid in accordance of the amount shown in the invoice. This finding is opined to be sufficient to hold that the findings of Commissioner(Appeals) are erroneous on the face of it. There has been plethora of decisions of this Tribunal as has been relied upon by the appellant, even in their own case vide which the issue in hand is held to no more be *res integra*. Rather the Hon'ble Apex Court also in case of **C.C.E., Bholpur Vs. Ratan Melting & Wire Industries 2008 (12) STR 416**

has held that there is nothing in Circular No. 122 dated 30.04.2010 which is contrary to provisions of Finance Act, 1994 or of the Rules made there under. The same is absolutely binding on the Departmental authorities as being not contrary to law. This Tribunal in the case **Commissioner, Jaipur Vs. Hindustan Zinc Ltd. 2014 (34) STR 440** has appreciated that it is not the Department's case that the amount withheld was never paid or that the service provider subsequently sought and obtained refund of service tax amount. When the service tax paid by the provider has not varied, cenvat credit cannot be reduced, no question of denying availment at all arises. In view of the said adjudications, I hereby set aside the impugned order. Resultantly Appeal stands allowed.

[Pronounced in the open Court on 06.12.2018]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

D.J.