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/50876/2018-EX [SM]
Excise Appeal No.E/50986/2018-EX [SM]

[Arising out of Order-in-Appeal No. 07-08-CRM-CE-JDR-2017-18 dated 02/01/2018 passed by the Commissioner (Appeals), CGST & CENTRAL EXCISE-JODHPUR]

HINDUSTAN ZINC LTD ...Appellant

Vs.

C.G.S.T., C.C & C.E-JODHPUR ... Respondent

Present for the Appellant : Mr.Anurag Kapur, Advocates
Present for the Respondent: Ms.Tamanna Alam, D.R.

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

Date of Hearing/Decision: 30/11/2018

Final ORDER NO. 53452-53453/2018

PER: RACHNA GUPTA

The Appellant is engaged, *inter alia*, in the manufacture of Lead and Zinc Concentrates, falling under Chapter 26 of the First Schedule to the Central Excise Tariff Act, 1985, and is also availing Cenvat credit on various inputs, capital goods and input services in terms of the provisions of the Cenvat Credit Rules, 2004 (**Credit Rules**).

2. A Show Cause Notice dated 13.10.2014 was issued to the Appellant alleging that the cement used in mine for filling

the pits after extraction of ore cannot be treated as 'inputs' as there is no relation with the manufacture or clearance of the final product, therefore the Cenvat credit on cement is not admissible and the same is recoverable along with interest and penalty. Similarly, the Appellant were issued another Show Cause Notice dated 24.04.2015 alleging that the Appellant was not entitled to the benefit of credit, as its activity had no relation with the manufacture and clearance of the final product. The demand was raised proposing to recover the inadmissible credit availed, along with interest and penalty.

3. Against the aforesaid SCN's, and replies were filed by the Appellant. A common Order-in-Original(hereinafter called as OIO) dated 07.01.2016 was passed by the Ld. Additional Commissioner, who confirmed the demand proposed in the SCN's, along with recovery of interest and imposition of penalty.

4. Aggrieved by the order of the Ld. Additional Commissioner, the Appellant filed two separate appeals before Commissioner (Appeals), Jodhpur. The appeals filed by the Appellant were adjudicated upon vide Order-in-Appeal dated 02.01.2018 (**'impugned order'**) as passed by the Ld. Commissioner (Appeals), Jodhpur. Ld. Commissioner (Appeals), has upheld the OIO. Hence the appeal before this Tribunal.

5. I have heard Mr.Anurag Kapur, ld. Advocate for the Appellant and Ms. Tamanna Alam, ld. D.R. for the Department.

6. It is submitted on behalf of appellant that the present issue has been decided in favour of the Appellant in its own case by the Hon'ble Tribunal vide **Final Order No. 53167-53172/2018 dated 26.10.2018,** by holding that cement used in mines for filing pits for extraction of ore qualifies as an 'input' under Rule 2(k) of the Credit Rules and the benefit of credit is admissible to the Appellant. Accordingly, it is submitted that benefit of Cenvat credit ought to be extended to the Appellant in the instant case also. Without prejudice to above, it is submitted as follows:

7. Reliance is placed upon the decision of the Hon'ble Tribunal in the case of **Prism Cement Ltd. v. CCE & ST, Jabalpur, 2016 (338) ELT 593 (Tri.-Delhi) and decision in** Appellant's own case, **the Hon'ble Tribunal vide Final Order No. 56292/2017 dated 14.08.2017 & Final Order No. 57168/2017 dated 13.10.2017**

8. Ld. DR while justifying the order has prayed for dismissal of appeal.

9. After hearing both sides the findings are as follows:-

To decide the impugned controversy definition of input is relevant:-

Section 2 (k) [(k) "input" means –

(i) all goods used in the factory by the manufacturer of the final product; or

(ii) (ii) any goods including accessories, cleared along with the final product, the value of which is included in the value of the final product and goods used for providing free warranty for final products; or

(iii) all goods used for generation of electricity or steam [or pumping of water] for captive use; or

(iv) all goods used for providing any [output service, or];

(v) [all capital goods which have a value upto ten thousand rupees per piece.] but excludes

(A) light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol;

(B) any goods used for –

(a) construction of a building or a civil structure or a part thereof; or

(b) laying of foundation or making of structures for support of capital goods, except for the provision of any taxable service specified in sub-clauses (zn), (zzl), (zzm), (zzq), (zzzh) and (zzzza) of clause (105) of Section 65 of the Finance Act;

…;

…;

(F) any goods which have no relationship whatsoever with the manufacture of a final product.

10. The department has relied upon 2 k(iv) (F) clause of the definition that goods which have no relationship whatsoever with the manufacture of a final product are not the input. Therefore, it becomes necessary to understand as to whether the cement herein has any relation with the manufacture of final product or not (extraction of ore in present case).

11. For the purpose the Metalliferous Mines Regulations Act, 1961 (as impressed) are looked into Regulation 107(93) reads as follows:

> *1 (3) No extraction or splitting or reduction of pillars or blocks of minerals shall be commenced, conducted or carried out except with the prior permission in writing of the Chief Inspector and in accordance with such conditions as he may specify therein. An application for such permission shall be accompanied by an up-to-date plan of the area where the pillars or blocks of mineral are proposed to be extracted or reduced, showing the proposed extent of extraction or reduction, the manner in which such extraction or reduction is proposed to be carried out, the thickness and other characteristics of the mineral deposit, the rate and direction of general dip and of the pitch of the vein, the nature of hangwall, and footwall, the stopping width, the depth of the workings, and such other particulars as the Chief Inspector may require. A copy of the application and the plan shall simultaneously be sent to the Regional Inspector.*
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> *(3-A) The operations of extraction, splitting and reduction of pillars or blocks of mineral shall be commenced, conducted or carried out in such a manner as to prevent, as far as possible, the extension of a collapse in the stoped-out area over-riding the pillars or blocks of minerals that have not been extracted].*

12. The said provisions originate from the Mines Act, 1952. Perusal of record shows that there has been a permission under the aforesaid regulation in favour of the appellant vide which the appellant was permitted to conduct stopping operations of the ore block by making use of impugned

cement and the method of extraction shall be by VRM Stopping method post filled by mill failing mixed with cement in the ratio as prescribed therein. The permission specifically recites that extraction of ore from the proposed area shall be commenced only after proper settlement and consolidation of the fill of stopped out ore block, immediately below the proposed ore block. Perusal of these clauses in the permission by the mines department in favour of the appellant makes it abundantly clear that filling of the open ore pits with cement was a mandatory prerequisite for the appellant to extract ore. As already observed above it was a statutory requirement as well in view of the regulation 107 (3).

13. Further, it has been the settled law that:

> *"all goods used in the factory of the manufacturer of final product, other than the goods itemized in the excluded category mentioned therein, are eligible for consideration as input for the purpose of taking Cenvat credit. Thus, an assessee only needs to prove that the goods were received in the factory and that the same are not covered by any of the exclusions, since the definition of input is very wide intending to take within its ambit all goods used in the factory of the manufacturer of final product. Undisputedly, in the present case, cement has been used within the mining area, thus qualifies for cenvat credit. In support of this, reliance is placed upon the decision of the Hon'ble Tribunal in the case of Prism Cement Ltd. Vs. CCE & ST, Jabalpur, 2016 (338) ELT 593 (Tri.–Del.)".*

14. Thus, I opine that the cement used herein is something which has relation, though indirectly, with the extraction of ore

thus it qualifies for input as defined under Rule 2(k), prevailing during the relevant period.

15. Hon'ble Apex Court in the 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:*
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> > *"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 of scope of definition of input was very 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."

16. This Tribunal also in final order No.56900/2017 dated 28.09.2017 has relied upon the decision of **Fertilizer Cooperation Ltd. Vs. CCE Ahmadabad 1996 (86) ELT 177 (SC)** has quoted 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., Ahmadabad, 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 naphthaused 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."*

17. Following these earlier decisions and keeping in view the above discussion, I am of the opinion that without filling of the ore pits the appellant was statutorily, not in position to extract the ore, i.e. the final product thus, the use of cement was very much in relation to the manufacture, which was extraction of ore in the impugned cases. Therefore, I hold that the appellant is entitled to treat the same as input. The clarification to this effect is rather available in circular no. 943/4/2011-CX dated 29.04.2011, the relevant extract thereof is as follows:

S. No.	Issue	Clarification
1.	Can credit of capital goods be availed of when used in manufacture of dutiable goods on which benefit under Notification 1/2011-C.E. is availed or in provision of a service whose part of value is exempted on the condition that no credit of inputs and input services is taken?	As per Rule 6(4) no credit can be availed on capital goods used exclusively in manufacture of exempted goods or in providing exempted service. Goods in respect of which the benefit of an exemption under Notification No. 1/2011-C.E., dated the 1st March, 2011 is availed are exempted goods [Rule 2(d)]. Taxable services whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken, are exempted services [Rule 2(e)]. Hence credit of capital goods used exclusively in manufacture of such goods or in providing such service is not allowed.
2.	How is the "no relationship whatsoever with the manufacture of a final product" to be determined?	Credit of all goods used in the factory is allowed except in so far as it is specifically denied. The expression "no relationship whatsoever with the manufacture of a final product" must be interpreted and applied strictly and not loosely. The expression does not include any goods used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not. Only credit of goods used in the factory but having absolutely no relationship with the manufacture of final product is not allowed. Goods such as furniture and stationary used in an office within the factory are goods used in the factory and are used in relation to the manufacturing business and hence the credit of same is allowed.
3.	Is the credit of input services used for repair or renovation of factory or office available?	Credit of input services used for repair or renovation of factory or office is allowed. Services used in relation to renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, are specifically provided for in the inclusive part of the definition of input services.
4.	Does the expression "in or in relation" used in Rule 6 override the definition of "input" under Rule 2(k) for determining the eligibility of Cenvat credit?	The definition of "input" is given in Rule 2(k) and Rule 6 only intends to segregate the credits of inputs used towards dutiable goods and exempted goods. While applying Rule 6, the expression "in or in relation" must be read harmoniously with the definition of "inputs".

18. Resultantly, I hold that the adjudicating authority below has committed an error while denying the credit on cement used by appellant in filling pits for making area fit for ore extraction. The authority as relied upon in the case of Hon'ble Rajasthan High Court and as also been impressed upon by the ld. DR are opined to be not applicable to the present case, it being prior to the amendment in the definition of the inputs. The decision of Hon'ble Apex Court in appellants own case **Hindustan Zinc Ltd. Vs. Union of India 2015 325 ELT A155 (SC)** is also not applicable for the present case because that case was dismissed mainly on the ground that the grounds taken before the Hon'ble Apex Court were not taken before CESTAT, hence, were not allowed to be taken for the first time in appeal, even before the High Court. Here I draw my support from the decision of Hon'ble Supreme Court in the case of **Kunhammed vs. State of Kerala 2001 (129) ELT 11 (S.C.)** wherein it was held that refusing of special leave to file appeal by a speaking or non speaking order does not attract the doctrine of merger.

19. As a result of entire above discussion, I hereby set aside the impugned order under challenge. Resultantly, both the appeals stand allowed.

[Operative part pronounced in the Open Court]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita