CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

Excise Appeal No. 51535 of 2018-SM

(Arising out of order-in-appeal No. 164(AG)/ CE/JDR/2018 dated 16.03.2018 passed by the Commissioner (Audit), Central Goods and Service Tax, Udaipur).

M/s Hindustan Zinc Limited **Appellant**
Debari, Udaipur

Versus

Commissioner, Central Excise **Respondent**
142-B, Sector-11, Hiran Magri, Udaipur

Present for the Appellant: Shri Anurag Kapur, Advocate
Present for the Respondent: Sh. P. Juneja, Authorised Representative

Date of Hearing/ Decision: 28.02.2019

Coram:

Hon'ble Anil Choudhary, Member (Judicial)

Final Order No. 50405/2019

Per: Anil Choudhary:

The issue is whether the appellant a Public Sector Undertaking, has violated the provisions of Rule 7(d) of Cenvat Credit Rules, 2004 by distributing the cenvat credit of their Central Sales office an ISD and also by their Head Office at ISD, wherein 100% of the cenvat credit is transferred to the appellant unit located at Debari based zinc smelter. The Head Office distributed the cenvat credit for the month of April, 2012. It appeared to

Revenue that in view of the amended Rule 7 w.e.f. 01.04.2012, it was reintroduced in the following manner:-

> "(d) credit of service tax attributable to service used in more than one unit shall be distributed pro rata on the basis of the turnover during the relevant period of the concerned unit to the sum total of the turnover of all the units to which the service relates during the same period".

2. The objection of Revenue is that as compared to other manufacturing units of HZL the proportionate turnover of the appellant for the relevant period is 48.58% and accordingly the excess credit distributed is liable to be disallowed. Accordingly, show cause notice dated 29.01.2016, proposed to disallow cenvat credit amounting to Rs. 39,75,244/- alongwith interest and further penalty was proposed under Rule 15(2) of Cenvat Credit Rules, 2004. Further, penalty also proposed on the two ISD under Rule 15(A) of the Cenvat Credit Rules, 2004. The appellant contested the show cause notice stating that Rule 7(d) provides for suggested manner of distribution, there was no illegality in distributing the credit, and more so when the whole credit distributed is attributable to service used wholly in a unit, the credit under Rule 7(c) can be wholly distributed such unit. The appellant further contended that the services of their CSA Debari / ISD have been wholly received in the Debari unit and as such there is no legality in the distribution of the credit. Further, clause (b) is not attracted so far CSA Debari is concerned. So far the Head Office is concerned, in view of the intention of the legislature in using the word 'may' for manner of distribution, is only a suggestion and not binding on the appellant. Further, the Revenue states Rule 7(c) w.e.f. 01.04.2016, vide Notification No. 13/2016-CE(NT), wherein the 'may' was replaced with the word 'shall', thus, making it mandatory w.e.f.

01.04.2016, but distributed the cenvat credit in the manner specified in Rule 7 of Cenvat Credit Rules. Learned Counsel further relied on the decision of Bombay High Court in **The Commissioner, Central Tax Pune-I Commissionerate vs. M/s Oerlikon Blazers Coating India P. Ltd.** reported in **2018-TIOL-2688-HC-MUM-CX .** Under the facts and circumstances of the case and taking notice of the provisions of Rule 7 both prior to 1.4.2012 and after 1.4.2012 have observed as follows:

> "9. From reading of the above Rules both pre and post amendment, it would be noticed that both provisions give an option to the assessee concerned whether to distribute input services tax available to it amongst its other manufacturing units which are providing output services. This is evident from the use of word "may distribute the CENVAT credit" is found in Rule 7 both prior and also post 2012. Thus, from the reading of the Rules, the option was available to the assessee whether to distribute the CENVAT credit or not. In fact, our attention is invited to Rule 7 of the CENVAT Credit Rules, 2004 as substituted w.e.f. 1.4.2016. Therefore, on plain reading of Rule 7 as existing both pre and post amendment 2012 covering period involved in these proceedings, the respondent – assessee was entitled to utilise the CENVAT credit available at its Pune unit.
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> 10. In any event, the Tribunal, on facts found that the entire exercise would be revenue neutral. This is so as the distribution of Cenvat Credit to the various units would result lesser service tax being paid by cash on their activity of coating as they would have utilised the cenvat credit available for distribution.
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> 11. In this view of the matter, the question of law as proposed does not give rise to any substantial question of law as the entire exercise would be revenue neutral. Thus, making the entire exercise academic. Therefore, the question is not entertained."

3. Learned Departmental Representative for the Revenue relied on the impugned order and draws my attention to the finding of the Commissioner (Appeals) wherein he observed that credit of service tax attributable to services used in more than one unit shall be distributed pro rata on the basis of the turnover during the relevant period of the concerned unit, to the sum

total of the turnover of all the units to which the service relates during the same period. Further, Commissioner in regard to revenue neutrality has observed that the said contention is not acceptable that units are paying service tax through PLA and hence they are entitled to take credit of the cenvat distribution.

4. Having considered the rival contentions and following the decision by the Bombay High Court in the case of **M/s Oerlikon Blazers Coating India P. Ltd** (supra) I hold that the unit has not done any illegality in distributing more credit to a particular unit, as Rule 7 provides 'may' which has been amended subsequently w.e.f. 1.4.2016 to the effect 'shall' distribute. Further, I find that on the issue of Revenue neutrality also, the show cause notice is bad in law. I accordingly, set aside the impugned order and allow the appeal with consequential benefit, in accordance with law.

(Dictated and pronounced in open Court).

(Anil Choudhary)
Member (Judicial)

Pant