CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Excise Appeal No. 52423 of 2018 [DB]

[Arising out of Order-in-Original No. UDZ-EXCUS-000-COM-0002-18-19 dated 24.05.2018 passed by the Commissioner , Central Goods & Service Tax, Udaipur].

M/s.Hindustan Zinc Ltd. **...Appellant**
Yashad Bhawan,
Udaipur

VERSUS

Commissioner, Central Goods and Service Tax,...Respondent
142-B, Sector-11, Hiran Magri,
Udaipur

APPEARANCE:

Shri Amit Jain, Advocate for the Appellant
Shri R.K. Mishra, Authorised Representative for the Respondent

Coram: HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING : 01/07/2019
DATE OF DECISION: 01/07/2019

FINAL ORDER No. 50869/2019

RACHNA GUPTA :

Present is an appeal against the Order-in-Original No.0002-18-19 dated 24.05.2018. The appellants herein are engaged in manufacture of lead and zinc concentrates, zinc cathode and Sulfuric Acid. The Central Excise Commissionerate noticed that the appellant has availed the Cenvat Credit of Service Tax paid on the compensation granted to the service provider i.e. M/s. Furnace Fabrica (India) Limited, who under the contract dated 30 March, 2008 were providing services for building and bringing into commercial operations services as that of fabrication, installation errection and commissioning services for various plants & machineries. As per the contract, the appellant was to provide certain space and facility to the service provider for commencing and carrying out the work. However, due to certain circumstances, the said space and facility could not be provided within the period prescribed in the agreement as was executed between the two. Resultantly, the aforesaid compensation amounting to Rs.72,00,000/- was paid by the appellant to the service provider who had otherwise discharged his liability. However, the Department vide show cause notice No.6063 dated 15.11.2012 has proposed the cenvat credit of Rs.80,34,000/- as availed by the appellant during the period September, 2009 to May, 2010 to not to be allowed. Rather is proposed to be recovered from them alongwith the interest at the appropriate rate and proportionate penalty to be imposed. The said proposal has been confirmed vide the order under challenge. Being aggrieved, the appellant is before this Tribunal.

2. We have heard Mr. Amit Jain, learned Advocate for the Appellant and Mr. Mishra, ld. A.R. for the Department.

3. It is submitted on behalf of the appellant that there is no dispute raised by the Department with respect to the eligibility of such services under the definition of input service and on the credit availed by the appellant of the service tax paid for such services. The compensation paid, in the present case, is impressed upon to

be the enhanced value for the said services received. Also the service provider has already discharged the liability for the said amount received. No question arises for the Department to deny the Cenvat Credit for the same to be availed by the appellant. Ld. Counsel has relied upon the following case laws:-

1. **MDS Switchgear Ltd. v. CCE & Cus., Aurangabad reported in 2001 (132) ELT 405 (Tri.-Mumbai).**
2. **CCE & Cus. V. MDS Switchgtear Ltd. reported in 2008 (229) ELT 485 (S.C.)**
3. **CCE, Chennai-I vs. CEGAT, Chennai reported in 2006 (202) ELT 753 (Mad.)**

4. It is also impressed upon that the assessment cannot be re-opened at the end of the buyer of the recipient of the goods/services. Ld. Counsel relied upon the case law in the case of **Hindustan Unilever Ltd. v. Commissioner of CGST & CE., Kolkata South reported in 2018 – TIOL – 2490 – CESTAT-Kol. & Thysennkrupp Electrical Steel India Pvt. Ltd. v. CCE & Cus., Nashik reported in 2011 (273) ELT 132 (Tri. – Mumbai).** Finally, the show cause notice is alleged to be barred by time, as the Department was not entitled to invoke the extended period of limitation. Order, accordingly, is prayed to be set aside.

5. While rebutting these arguments, it is submitted on behalf of the Department that the compensation is an amount which is not the part of the contract between the parties, which was entered into for providing the impugned services. Hence, the same cannot be categorised as the eligible service. The Cenvat Credit has,

therefore been rightly denied. Impressing upon no infirmity in the order under challenge, the appeal is prayed to be dismissed.

6. After hearing both the parties, we are of the opinion that the issue is no more *res-integra*. Hon'ble Apex Court in the case of **CCE vs. MDS Switch Gear Ltd. reported in 2008 (229) ELT 485** has affirmed the decision of Hon'ble Tribunal observing that the recipient is entitled to the credit of duty "paid". In this case the allegation against the assessee was that the semi-finished goods received from their sister concern was over-valued in order to pass on Modvat credit. The Department denied the credit taken at the recipient's end. However, the Hon'ble Tribunal held in favour of the assessee and also observed that there was no loss of revenue vide its decision reported as **MDS Switchgear Ltd. v. CCE, reported in 2001 (132) ELT 405 (Tri.-Mumbai**). Hon'ble Supreme Court upheld the judgment of Hon'ble Tribunal.

7. Department also in a Circular No. 1014/2 dated 1st February, 2016 has clarified that the Cenvat Credit of CVD paid voluntarily is admissible, as it is a settled position that a buyer is entitled to avail cenvat credit of duty paid by the supplier. Similar is the situation in the present case as far as the impugned compensation is concerned. The Tribunal in a recent decision in the case of **CCE, Delhi-II vs. Welspring Universal reported in 2018 (359) ELT 635** has decided the issue of admissibility of Cenvat Credit once the duty/tax has been paid by the supplier of the goods/the service provider in favour of the assessee. We have no reason to differ from the afore discussed settled proposition of law. Accordingly, we

hold that the Cenvat Credit cannot be denied once the duty stands paid. We are further also of the opinion that the assessment cannot be re-opened at the end of the recipient of the goods / services. Compensation herein is otherwise opined to be as good as the escalated price in the supplementary invoice.

8. We draw our support from the decision of Mumbai Tribunal in the case of Thyssenkrupp Electrical Steel India P. Ltd. vs. CCE & Cus., Nasik reported in 2011 (273) ELT 132 (Tri.- Mumbai) wherein it is held as follows:-

> *"On careful examination of the submissions made by both the sides I find that the only dispute is that whether the appellants are entitled to take CENVAT credit on the strength of supplementary invoices which has been raised on them by their supplier as per the agreement or not? On perusal of the agreement, I find that while fixing the price, there was an agreement between the supplier and the appellants that a minimum quantity of cracked ammonia gas will have to be lifted on a price so fixed, but there was further a clause that if the appellants failed to lift the required quantity, the price of the cracked ammonia gas will be changed and extra amount for that shall be charged from the appellants for which these supplementary invoices has been raised on the appellants on which proper duty has been paid by the supplier. It is not disputed that the appellants are entitled to take credit of the proper duty paid invoices as held by the Hon'ble Apex Court in the case of MDS Switchgear Ltd. (supra) as the supplementary invoice has been raised for the minimum agreed quantity by the appellant is nothing but the escalated amount of the goods received by them. Therefore, the appellants are entitled to take the credit on the strength of the supplementary invoices. As the appellants have succeeded on merits, the limitation aspect will not be seen. With these observations, the appeals are allowed with consequential relief, if any, by setting aside the impugned order."*

9. In view of the above discussion, we are of the opinion that there is no apparent *mensrea* on the part of the appellant to evade any duty rather the fact remains is that the duty stands already

paid. The Cenvat Credit thereof cannot be disallowed. In such circumstances, the show cause notice should not have been issued or if issued, it should have been within one year of the fact being into notice of the Department. The Department in the present case has invoked the extended period of limitation alleging suppression or misrepresentation on part of the appellant. As already held that there is absence of malafide intent/*mensrea*, the Department is held not entitled to invoke the said extended period of limitation. Seen from that angle, the impugned show cause notice even suffers on limitation aspect.

10. In view of entire above discussion, the order under challenge is held as not sustainable. Accordingly, the same is set aside. Consequent thereto, the appeal stands allowed.

[Dictated and pronounced in the open Court]

(**BIJAY KUMAR)**
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita