CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI.

PRINCIPAL BENCH, COURT NO. II

Excise Appeal No. 50328 of 2018

(Arising out of Order-in-original No. UDZ-EXCUS-000-COM-0017-17-18 dated 31.10.2017 passed by the Commissioner, Central Goods & Service tax, Udaipur).

M/s Hindustan Zinc Limited **Appellant**
Chanderia Lead Zinc Smelter
Village – Putholi
Distt-Chittorgarh (Raj.)

Versus

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

APPEARANCE:

Sh. Hemant Bajaj, Advocate for the appellant
Sh. H. C. Saini, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 51081/2019

DATE OF HEARING: 05.04.2019
DATE OF DECISION: 05.04.2019

ANIL CHOUDHARY:

The appellant is registered with Central Excise Department being manufacturer of Zinc, Lead ingots, Sulphuric Acid, Copper Sulphate Solution etc. and paying the excise duty on such products.

2. During the financial year 2013-14, the appellant has availed cenvat credit on the strength of invoices issued by head office as an Input Service Distributor (ISD) in terms of rule 7 of Cenvat Credit Rules, 2004. On the basis of the appellant's records, audited by AG audit, it has been alleged in the show cause notice dated 03.03.2017, that cenvat credit had not been distributed properly on pro-rata basis, which resulted into distribution of excess credit to the appellant unit. In the notice, the Commissioner has proposed to recover the said amount with interest as well as imposition of penalty. In order-in-original No. UDZ-EXCUS-00-COM-0017- 17-18 dated 01.11.2017 the commissioner has confirmed the said demand with interest and imposed the penalty, rejecting the appellant's contentions. Aggrieved from the said order dated 01.11.2017, the appellant has preferred this appeal.

3. In the course of hearing, the learned Advocate for the appellant has submitted that the cenvat credit had been correctly distributed. In any case, there is no loss of revenue to the Department being it is a revenue neutral excise and, its case is squarely covered in its favour by the decisions of this Hon'ble Tribunal in its own case vide Final Order No. 50405/2019 dated 28.02.2019. In this case, the Hon'ble Tribunal has held that proportionate distribution of credit was not mandatory prior to amendment (w.e.f. 01.04.2016) in rule 7 of Cenvat Credit Rules, 2004, by following the ratio of **CCE vs. M/s Oerlikon Blazers Coating India Pvt. Limited -2018 – TIOL-2688-HC-MUM-CX**. He has also submitted that the entire demand is barred by limitation because any malafide intention cannot be attrib uted to the appellant when the entire exercise is revenue neutral. For the same reason, penalty also cannot be imposed on it.

4. The learned Departmental Representative has reiterated the findings given in the impugned order.

5. We have considered the submissions made by both the sides and perused the records.

6. We find force in the appellant's submission that a similar dispute has been decided in its favour through Final Order No. 50405/2019 dated 28.02.2019 passed in the appellant's own case, **Hindustan Zinc Limited vs. CCE** by following the ratio of the Hon'ble Bombay High Court's decision in **CCE vs. M/s Oerlikon Blazers Coating India Pvt. Limited** (supra). The relevant part of the order dated 28.02.2019 is reproduced below:

> "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 Pvt. Limited (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".

7. In view of the aforesaid orders, the impugned order dated 01.11.2017 is not sustainable.

8. Moreover, on being enquired about the status of the audit para, the ld. Departmental Representative has placed the correspondence between the jurisdictional Commissioner and Deputy Director, Central Revenue in respect of audit memo bearing No. SOF-08/ST/2014-15 on record in the course of hearing. The show cause notice dated 03.03.2017 was issued to the appellant on the basis of said audit para. From the perusal of these documents, we have noticed that the Deputy Director, CRA-II has

communicated to the Jurisdictional Commissioner through its letter dated 08.05.2018 that the audit para has been dropped. When the audit memo itself has been dropped, the present proceeding which has been originated from the said audit memo has become *non-est*.

9. In view of the aforesaid discussions, the appeal is allowed with consequential relief, if any, in accordance with law.

(Operative part of the order pronounced in open Court).

(Anil Choudhary)
Member (Judicial)

(Bijay Kumar)
Member (Judicial)

Pant