IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Excise Appeal No. 77135/2018

(Arising out of Order-in-Appeal No.52/CE/RKL-GST/2018 dated-22/03/2018 passed by the Commissioner (Appeals), GST, CX & Customs, Bhubaneswar)

M/s. Mahanadi Coalfields Ltd.

Applicant (s)/Appellant (s)

Versus

Commr. of CGST & C. Ex., BBSR

Respondent (s)

Appearance:

Sri Rajeev Agarwal, C.A. for the Appellant (s)

Shri A. Roy, Supdt. (A.R.) for the Respondent (s)

CORAM:

SHRI P.K. CHOUDHARY, HON'BLE JUDICIAL MEMBER

Date of Hearing :- 03.06.2019 ***Date of Pronouncement***:19/06/2019

ORDER NO: F.O. /75606/2019

PER SHRI P.K. CHOUDHARY

The facts of the case in brief are that the appellant is engaged in the production of coal and is a 100% subsidiary of Coal India Limited. The appellant is discharging Central Excise Duty on coal removed from the mines and availing CENVAT credit as per the CENVAT Credit Rules, 2004 ('CCR'). In the course of audit conducted by the Department for the period 2012-13, the availment of CENVAT credit on the amount withheld from the invoices of service providers (contractors) towards "penalty for deficiency of services and price fall clause" was disputed. The appellant accordingly reversed the CENVAT credit of Rs. 4,13,859/- on 30.09.2013 with interest of Rs. 15,940/-

for the alleged contravention of second proviso to Rule 4(7) of the CCR.

2. Thereafter, a Show Cause Notice (SCN) dated 08.07.2016 was issued. The Adjudicating Authority confirmed the demand for Rs.4,13,859/- by way of disallowance of CENVAT Credit with penalty of Rs.2,06,930/- under section 11AC of the Central Excise Act and applicable interest. In appeal, the aforesaid demand was upheld by the Ld. Commissioner (Appeals). Hence, the present appeal before the Tribunal.

3. Sri Rajeev Kr. Agarwal, CA, appeared on behalf of the appellant and Sri A. Roy, Ld. DR, appeared on behalf of the Revenue.

4. The Ld. Consultant for the appellant submitted that the appellant has withheld only a portion of the basic amount charged on the invoice whereas the service tax amount (as charged on the invoices raised by the service providers) has been duly paid to the service providers. The amount of service tax originally charged by the service providers has not been varied or modified, while making retention of the basic invoice amount. The entire service tax charged on the invoice has been paid to the service providers. He further submitted that in their case, there would be no applicability of the Rule 4(7) of the CCR, inasmuch as that the restrictions contained in the above provisions would only apply when both the value of service and service tax charged on the invoice have not been paid to the service provider. He also stated that it is not the case where the assessee has availed CENVAT credit of the service tax which has not been deposited to the Government treasury. Credit has been availed of the tax amount which has been paid to the exchequer. He further submitted that the various Benches of the Tribunal have consistently held that CENVAT credit cannot be disallowed by invoking provisions of Rule 4(7) of the CCR when merely a certain portion of the invoice amount has been retained for contractual reasons. He relied upon the following decisions of Tribunal in case of Hindustan Zinc Ltd. vs. CCE, Udaipur, vide Final Order no. 56669/2017 dated 01.09.2017 as well as several other decisions in support of his contentions. He also contested the demand on time bar. He further submitted that the appellant being a PSU, cannot have any reason to suppress the facts with intent to evade payment of duty and therefore penalty U/S 11AC of the C. E. Act,1944 cannot be imposed on them.

5. Sri A. Roy appearing for the Revenue while supporting the impugned order submitted that since payments have not been made to the service providers, the appellant would not be entitled to CENVAT credit proportionate on the amount withheld. He submitted that the appellant has violated the provisions of Rule 4(7) and therefore the duty demand and penalty both are rightly imposed on them.

6. Heard both sides and perused the appeal records.

7. On perusal of the decisions relied upon by the appellant, I find that the issue is no longer *res-integra.* The Delhi Bench of this Tribunal in the case of Hindustan Zinc Ltd. vs. CCE, Udaipur, vide Final Order no. 56669/2017 dated 01.09.2017 has observed as below:

> *"5. The facts of the case are not in dispute. We note that the original authority after referring to the above mentioned circular of the Board distinguished the same and disallowed the credit of service tax attributable to consideration not paid by the appellant. We note, in the present case, the appellants retained a portion of the consideration towards service rendered by the service provider in terms of contract towards performance guarantee. We note, the Board's clarification is applicable to the facts of the present case. Identical set of facts came up for decision before the Tribunal in many cases. In appellant's own case the matter has been decided holding that no reversal of credit under Rule 14 can be ordered in such situation. The reference can be made to the following decision:-*
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> 1. *Hindustan Zinc Ltd. vs. CCE, Jaipur-II, Final Order No.A/53738/2016-EX[DB].*
> 2. *CCE, Jaipur-II vs. Hindustan Zinc Ltd.- 2014 (34) STR 440 (Tri.:-Del.)*
> 3. *CCE & ST, Udaipur vs. Hindustan Zinc Ltd. Final Order No. 55702-55703/2016 dated 24.11.2016.*
> 4. *Hindustan Zinc Ltd. vs. CCE, Jaipur, Final Order No. A/58300/2013 dated 07.11.2013.*
> 5. *Hindustan Zinc Ltd. vs. CCE, Jaipur-II Final Order No.52976/2017 dated18.04.2017.*

> *Following the ratio of the settled cases as above, we find the impugned order is not sustainable. Accordingly, the same is set aside. The appeal is allowed."*

8. I also note that the above decision has been further followed by the Delhi Bench while passing Final Order no. 57461 dated 25.10.2017 pertaining to the period in dispute from April 2014 to September 2014, as reported in Hindustan Zinc Ltd vs. CCE, Udaipur reported in 2017 – TIOL-4243-CESTAT-TIOL. Same views have also been taken in the case of Hindustan Zinc Ltd. -v- Commissioner of Central Excise 2014 (34) S.T.R. 440 (Tri - Del.). Further, in the case of Reliance Infrastructure Ltd. vs. CCE, Noida 2017 (6) GSTL 51 (Tri-All), it is noted that where the assessee had although reversed the credit amount, before issuance of show cause notice since disputed by the Department by invoking Rule 4(7) in identical facts, the Allahabad Bench held that the assessee was legally entitled to avail CENVAT credit.

9. By following the decisions of the co-ordinate Benches referred above, I find that the legal position stands settled in favour of the appellant and against the Revenue. I accordingly hold that the objection raised by the Department is not sustainable and the appellant is legally entitled to CENVAT credit.

10. In view of the discussions, the impugned orders are set aside and the appeal filed by the appellant is allowed with consequential relief.

(Pronounced in the Court on 19/06/2019)

Sd/-
P.K. CHOUDHARY
(JUDICIAL MEMBER)

k.b/-