IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO.

APPEAL No.ST/86874/2018

(Arising out of Order-in-Appeal No.NGP/EXCUS/000/APPL/742/17-18 dated 12/02/2018 passed by the Commissioner (Appeals), GST &CentralExcise, Nagpur)

Mineral Explorations Corporation Ltd., : **Appellant**

VS

CCE & ST, Nagpur : **Respondent**

<u>Appearance</u>

Shri.Shailendra Jain, CA for Appellant
Shri.S.B. Mane, Asst. Comm.(A.R) for respondent

CORAM:

Hon'ble Shri S K Mohanty, Member (Judicial)

Date of hearing :17/01/2019
Date of decision:17/01/2019

ORDER NO. A/86802 / 2019

1. Heard both sides and perused the records.

2. Confirmation of service tax demand under Rule 4 (7) of the Cenvat Credit Rules, 2004 is the subject matter of present dispute. In this case, the appellant had deducted certain amount from the bills of the service provider as penalty, owing to the reason that there was delay in execution of the assignedservice. Besides, the appellant also retained some amount as security deposit against the performance guarantee to be provided by the service provider. The department objected to such deduction on the ground that the appellant should

only eligible for Cenvat Credit if the entire amount of value of taxable service along with service tax thereon is paid by the appellant to the service provider.

3. The issue arising out of the present dispute is no more *res integra* in view of the decision of the Tribunal in the case of *CCE, Jaipur-II Vs. Hindustan Zinc Ltd. - 2014 (34) STR 440 (Tri-Del)*, wherein it has been held that withholding of payment to service provider as performance guarantee cannot be governed under the provisions of Rule 4 (7) of the Cenvat Credit Rules, 2004. The relevant paragraphsin the said orderare extracted herein below:

> *"6. The stand of the respondent is that the service providers had paid service tax on the entire invoice value, even though full payment had not been made by the respondent to the service providers and a part of the invoice value had been retained as performance guarantee. This position is not disputed by the department. The point of dispute is as to whether in such a situation, in view of the provisions of Rule 4(7) of the Cenvat Credit Rules, full amount of Cenvat credit would be available to the respondent or they would be eligible only for the proportionate amount of Cenvat credit to the extent the payment against the invoices presented by the service providers had been made. On this point, the Board in its Circular dated 30th April 2010 has clarified as under :-*
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> *"3. As per sub-rule (7) of Rule 4 of the Cenvat Credit Rules, 2004,*
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> *"Credit in respect of input service shall be allowed, on or after the day on which payment is made of the value of input service and the service tax paid or payable as is indicated in invoice, bill or as the case may be, challan referred to in Rule 9".*
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> *A doubt raised is as to whether the receiver of input service can take credit only after the full value that is indicated in the invoice, bill or challan raised by the service provider, and also the service tax payable thereon, has been paid. It has been represented that in many cases, after the invoice is issued by the service provider, the service receiver does not make the full payment of the invoiced amount on account of discount agreed upon after issuance of invoice; or deducts certain amount due to unsatisfactory service; or withholds some amount as security to be held during contract period. Due to these reasons the value paid may not tally with the amount indicated in the invoice, bill or challan. In such cases the department has raised objections to*

the taking of credit as it does not meet the requirement of the said sub-rule (7).

4. Thus the following issues relating to availment of Cenvat credit need clarification, - whether Cenvat credit can be claimed

(a) when payments are made through debit/credit and debit/credit entries in books of account or by any other mode as mentioned in Section 67 Explanation (c) for transactions between associate enterprises; or

(b) where a service receiver does not pay the full invoice value and the service tax indicated thereon due to some reasons.

5. Matter has been examined and clarification in respect of each of the above mentioned issues is as under :-

(a) When the substantive law i.e. Section 67 of the Finance Act, 1994 treats such book adjustments etc., as deemed payment, there is no reason for denying such extended meaning to the word 'payment' for availment of credit. As far as the provisions of Rule 4(7) are concerned, it only provides that the Cenvat credit shall be allowed, on or after the date on which payment is made of the value of the input service and of Service Tax. The form of payment is not indicated in the same and the rule does not place restriction on payment through debit in the books of accounts. Therefore, if the service charges as well as the service tax have been paid in any prescribed manner which is entitled to be called 'gross amount charged' then credit should be allowed under said Rule 4(7). Thus, in the case of "Associate Enterprises", credit of service tax can be availed of when the payment has been made to the service provider in terms of Section 67(4)(c) of Finance Act, 1994 and the service tax has been paid to the Government Account.

(b) In the cases where the receiver of service reduces the amount mentioned in the invoice/bill/challan and makes discounted payment, then it should be taken as final payment towards the provision of service. The mere fact that finally settled amount is less than the amount shown in the invoice does not alter the fact that service charges have been paid and thus the service receiver is entitled to take credit provided he has also paid the amount of Service Tax, (whether proportionately reduced or the original amount) to the service provider. The invoice would in fact stand amended to that extent. The credit taken would be equivalent to the amount that is paid as service tax. However, in case of subsequent refund or extra payment of service tax, the credit would also be altered accordingly."

Thus, according to the Board's Circular, credit of full service tax paid by a service provider in respect of service provided to a manufacturer would be available to the manufacturer even if the amount payable to the service provider has been reduced, so *long as the service tax paid by the service provider has not changed.*

7. The rationale behind Rule 4(7) of the Cenvat Credit Rules is that during the period prior to 1-3-2011, which is the period of dispute in this case, by virtue of Rule 6(1) of the Service Tax Rules, 1994, service tax in respect of the service provided or to be provided was payable by 6th day of the month immediately following the month in which the payment for the service provided or to be provided was received by the service provider. This rule had been framed to prevent a situation where while on the basis of the invoice issued by a service provider in respect of some service provided or to be provided, the service recipient takes the Cenvat credit, even though the service provider has not paid the service tax for the reason that for some reasons, there is delay in receipt of payment by him from the service recipient. Thus Rule 4(7) would be applicable only in a situation where though the service provider has issued the invoice but he has not paid the service tax. But where there is no dispute that service tax has been paid by the service provider on the full invoice value, even though he has not received full payment from the service recipient and part of the payment due to him has been withheld by the service recipient due to some reason, this rule would not be applicable. There is, therefore, nothing in the Board's Circular dated 30-4-2010 which is contrary to the provisions of the Finance Act, 1994 or of the rules made thereunder. In terms of the Apex Court judgment in the case of CCE, Bolpur v. Ratan Melting & Wire Industries (supra), the Board's Circulars are binding on the Departmental authorities unless the same are contrary to the law.

7.1 Moreover in this case, it is also not the department's case that the amount withheld was never paid or that the service providers subsequently sought and obtained refund of the service tax amount not reimbursed to them by the respondent. When the service tax paid by the service provider has not varied, the Cenvat credit also cannot be reduced."

4. In view of the above settled position of law, I do not find any merit in the impugned order. Accordingly, after setting aside the same, the appeal is allowed in favour of the appellant.

(Pronounced and dictated incourt)

(S K Mohanty)
Member (Judicial)

PJ