CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. III

Excise Appeal No.55424 of 2023 (DB)

[Arising out of Order-in-Original No.UDZ-EXCUS-000-COM-001-2023-24 dated 22/23.05.2023 passed by the Commissioner (Appeals), CGST and Central Excise Commissionerate , Udaipur (Rajasthan)]

M/s. Hindustan Zinc Limited, **Appellant**
Yashad Bhawan, Zawar Mines,
Udaipur (Rajasthan).

Versus

Commissioner of CGST and **Respondent**
Central Excise Commissionerate,
142-B, Hiran Magri, Sector-11,
Udaipur (Rajasthan).

APPEARANCE:

Shri S.C. Vaidyanathan and Ms. Masooma Rizvi, Advocates for the appellant.
Shri M.K. Chawda, Autorised Representative for the respondent.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER NO. 55985 /2024

DATE OF HEARING: 26.06.2024
DATE OF DECISION: 02.07.2024

BINU TAMTA:

1. The present appeal arises out of the *de novo* adjudication on the matter being remanded by this Tribunal vide order dated 07.05.2012, *inter alia,* observing as under:-

> **"6**. We have considered the rival contentions and perused the record. It is not disputed by the Department that originally the cenvat credit was rightly claimed by the appellant. The question is whether the providing of the relevant inputs by the appellant to the job contractor for user for completion of contract work, would amount to the transfer of inputs to the third party which may require the appellant to reverse the cenvat credit relating to those

> inputs. This issue is basically a question of fact. For resolving this issue, it would be necessary to scrutinize the contract between appellant and job contractors as also the actual transactions, which have taken place. Admittedly, the Adjudicating Authority has not cared to refer the terms and conditions of the job contractor which could have thrown light upon the interest of the parties and the nature of transaction. Therefore, we are of the view that the adjudicating authority has confirmed the demand against the appellant without looking into the basic evidence i.e. the contract between the parties. Thus, we are unable to sustain the impugned order. Appeal is accordingly accepted and the matter is remanded back to the Commissioner (Adjudication) for de novo adjudication after allowing the appellant to produce all relevant documents including the contracts in support of his defence and giving due hearing to the appellant."

2. The issue to be considered is whether the appellant is required to reverse cenvat credit availed on the inputs and capital goods such as explosives, detonators, lubricants, components, etc. provided to the contractors for mine development work/ore production in terms of Rule 3(5) of the Cenvat Credit Rules, 2004 [1].

3. We find that the issue is no longer *res integra* and has been considered in the case of the appellant **CCE & ST, Udaipur Vs. Hindustan Zinc Ltd.** [2] , which related to the subsequent period i.e. April, 2008 to May, 2010 involving identical facts and submissions. In the present case, the appellant is engaged in the mining of ores and concentrating the same, for which the mining activity was outsourced to M/s. Aravali Construction Company Ltd., Zawar Mines and M/s. Technomin Construction Ltd., Udaipur. For this purpose, the appellant supplied input and capital goods such as explosives, detonators, lubricants, components, pipes and rods and others goods etc., on which they availed the cenvat

[1] (CCR)
[2] 2017 (5) TMI 514 – CESTAT New Delhi

credit. Show cause notice dated 1.8.2008 was issued alleging that the appellants were liable to reverse the credit availed on inputs and capital goods removed as such under Rule 3(5) of CCR as these goods were transferred by the appellant to the contractors for execution of both contracts and, therefore, the appellant was required to pay an amount equal to the cenvat credit availed on duty paid on these items under Rule 3(5) of CCR. The show cause notice was adjudicated by the order-in-original dated 16.11.2009, whereby the recovery of cenvat credit along with interest and penalty was ordered. On appeal, the Tribunal remanded the matter to consider the actual transaction on the basis of the documents and contract between the parties. In compliance, the impugned order dated 22.05.2023 affirmed the earlier order.

4. Having heard both the sides and perused the records of the case, we find that the learned counsel for the appellant is right in submitting that the issue in the present case is squarely covered by the earlier decision in their own case, covering the subsequent period. Learned Authorised Representative for the respondent/Department has also accepted and agreed that the issue is covered and the appeal has to be disposed of in terms thereof.

5. For the sake of reference, we may note that the issue considered in the decision of the Tribunal in the appellant's own case related to the issue whether the explosives, lubricants, detonators, pipes and rods on which cenvat credit was availed and supplied to various outsourced companies, who undertake the mining activities is correct or the respondent is required to discharge the cenvat credit on such goods. In the said case, the Adjudicating Authority had dropped the demand and

the appeal filed by the Revenue was rejected, relying on the decision of the Tribunal in the case of **Bhilai Steel Plant** [3] and **Steel Authority of India Limited** [4] upholding the findings of the Adjudicating Authority, which are as under:-

> **"5.8** I further find that recovery of credit already taken can be effected if the inputs are not used in or in relation to the manufacture of final products or are removed as such, or capital goods have not been utilized within the factory or have been removed as such; in these circumstances alone, the cenvat credit allowed can be recovered. The show cause notice itself admits that the goods have been used for undertaking mining activities on behalf of the assessee. As such there is no removal of inputs or capital goods and there is no question of any reversal under rule 3(5) of the Cenvat Credit Rules 2004. Therefore, credit cannot be denied in this case.
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> **5.9** I further find in the show cause notice itself, it had been mentioned that the assessee were purchasing the goods in question and availing cenvat credit on such items and subsequently, supplying them to the service providers. The service providers in turn undertook mine development work at the mines of the assessee from these items; that when supply of the goods to the contractors on chargeable basis was under dispute with the sales tax authorities, the assessee has changed the terms and conditions of the agreement entered with the contractors and instead of adjusting the cost of explosives, detonators so supplied to the contractors on chargeable basis, it has been alleged in the SCN that the cost of these items was already deducted from the amount to be charged towards service provided by the contractors. For such an allegation in the SCN, no evidence has been given that the cost of these items was deducted to arrive at the amount to be paid to the service provider. Hence, I reject the allegation that amount to be paid to the contractor for providing the services was arrived at after deducting the cost of explosives, detonators, pipes and tubes, etc. Since the assessee, after the decision of the Hon"ble High Court of Rajasthan, has changed the terms and conditions of the contract whereby inputs and capital goods required

[3] Final Order No.55927/2016-EX (DB) dated 20.12.2016
[4] 2016(332) ELT 825 (T-Del)

> for rendering the services are supplied free of cost to the service provider.
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> **5.10** I have seen the copies of agreement relating to the period under dispute i.e. from April 2008 to May 2010 which revealed that during the impugned period the material, equipments, facilities, explosives and detonators were provided by the assessee free of cost to the contractors, for use in the work of their company. In view of the above, it cannot be said that the assessee has sold these items to contractors as there is evidence of free supply of these items by the assessee to the contractors during the period of dispute."

From the impugned order, we find that though the final order of the Tribunal dated 9.5.2017 was taken note of by the Adjudicating Authority and instead of following the same, it was completely ignored on the ground that the said order was not accepted by the Department and an appeal was preferred before the High Court, which was dismissed on 02.09.2019 on the ground of low tax effect. Similarly, in the case of **M/s.Bhilai Steel Plant (supra)**, the appeal has been dismissed by the Supreme Court on low tax effect and on the same ground, the appeal in the case of **M/s. Steel Authority of India Ltd. (supra)** was dismissed by the Chandigarh High Court. Needless to mention that the dismissal of the appeals by the Higher Forum was not on merits but on account of low monetary effect and in that view, the order of the Tribunal in the case of **Hindustan Zinc Ltd. (supra)** has to be followed as a judicial proprietary. The order of the Tribunal is binding on the Authorities below has been repeatedly reiterated by the High Court as well as Apex Court unless the same is modified or over-ruled. The impugned order is, therefore, unsustainable.

7. On merits, following the earlier decisions of the Tribunal in **Hindustan Zinc,** we hold that there is no sale and no removal of inputs and capital goods when the assessee supplied the same to the contractor, which was used for mine development activity and, therefore, the provisions of Rule 3(5) are not applicable. In the circumstances, the appellant was not required to reverse the credit availed in respect of the impugned items. Merely providing the inputs and capital goods to the contractor for use within the captive mines for mine development works of the appellant does not amount to removal and thereby, do not attract the provisions of Rule 3(5) of CCR. Since the issue has been decided on merits in favour of the appellant, the question of extended period of limitation, levy of interest and penalty does not survive.

8. We are of the considered opinion that the impugned order deserves to be set aside. The appeal is accordingly allowed.

[Order pronounced on 2nd July, 2024]

(Binu Tamta)
Member (Judicial)

(Hemambika R.Priya)
Member (Technical)

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