

(2019) 12 RAJ CK 0003

In the Rajasthan High Court

Case No : Miscellaneous Application No. 82 Of 2019, Central/excise Appeal No. 126 Of 2017

Union Of India

APPELLANT

Vs

M/s Hindustan Zinc Ltd.

RESPONDENT

Date of Decision : 03-12-2019

Acts Referred:

Finance Act, 1994 — Section 64(4)(c), 67
CENVAT credit Rules, 2004 — Rule 4(7), 9

Citation : (2019) 12 RAJ CK 0003

Hon'ble Judges : Indrajit Mahanty, J;Dr. Pushpendra Singh Bhati, J

Bench : Division Bench

Advocate : Sharad Kothari, Kuldeep Vaishnav

Final Decision : Dismissed

Judgement

D.B. Misc. Application No. 82/2019:-

For the reasons stated in the application, the same is allowed and the order dated 13.09.2019 is recalled.

D.B.Central Excise Appeal No.96/2018:-

1. Learned counsel for both the parties submits that order dated 13.09.2019 passed therein was erroneously passed instead of the order being passed in D.B.Central Excise Appeal No.126/2017.

2. Accordingly, the order passed therein stands re-call and the present appeal stands withdrawn on account of the Circular No. F.No.390/Misc./116/2017-JC dated 22.08.2019 issued by the Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes & Customs, the tax effect involved in the present being less than Rs.1 crore, learned counsel appearing for the appellant seeks permission to withdraw the appeal.

3. The appeal is dismissed as withdrawn.

D.B. Central Excise Appeal No.126/2017:-

1. The question of law framed in this case in order dated 06.08.2019 is as follows:-

"Whether the learned CESTAT, New Delhi has erred in allowing the assessee to avail the Cenvat credit of service tax on that portion of value of services which was not paid by the assessee at the time of taking credit and was retained as performance guarantee in contravention of the provisions of Rule 4(7) of the Cenvat Credit Rules, 2004?"

2. The facts are that the assessee was engaged in manufacturing of lead & zinc concentrate; it availed Cenvat credit excise duty paid on the inputs & capital goods and credit of the service tax paid on input services. Alleging that the full payment of value of the input services was not in fact made to the Service Providers during 2006-07 to 2009-10 a show cause notice was issued. The Adjudicating Authority dropped the demand in the order in original on 01.06.2017. The Excise Department appealed to the Customs Excise and Service Tax Appellate Tribunal (CESTAT). Relying upon a previous decision in Commissioner of Central Excise, Jaipur-II Vs. Hindustan Zinc Ltd., 2014 (34) STR 440 (Tri. Del), the CESTAT allowed the appeal. While doing so, it was mainly influenced by a circular dated 30.04.2010.

3. This Court has considered the submissions of the parties.

4. The main argument of the Revenue is that withholding of amounts towards performance guarantee is not covered by the circular but the other forms of payment withheld from service provider might be.

5. The relevant extract of the circular dated 30.04.2010 to the extent it has been relied upon is as follows:-

"3. As per sub-rule (7) of Rule 4 of the CENVAT credit Rules, 2004,

"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."

A doubt raised 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 notes and debit/credit entries in books of accounts 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 64(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."

6. It is clear that CESTAT in its finding (in para 4) noticed the clarification issued by the Board and held that the withholding of performance guarantee in the present case is covered in para 5(b).

7. This Court is of the opinion that the argument of the Revenue that performance guarantee amounts withheld by the assessee are not per se

covered by the circular, is incorrect. A clear reference to amounts withheld towards various counts including security, in the opinion of the court, comprehends the withholding of amounts towards performance guarantee.

8. The question of law is answered against the Revenue.

9. The appeal is accordingly dismissed.