CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Excise Appeal No. 51325 of 2023

(Arising out of Order-in-Original No. 42/Commissioner/DDN/2022 dated 30.09.2022 passed by the Commissioner, Central Goods & Services Tax, Dehradun)

Hindustan Zinc Ltd. **...Appellant**
Plot No. 2 & 3, Sector 14,
IIE SIDCUL
Pantnagar, Rudrapur
Dist- Udham Singh Nagar
Uttarakhand

VERSUS

Commissioner of Central Goods And Service Tax, Dehradun **...Respondent**
E- Block, Nehru Colony
Haridwar Road
Dehradun (Uttarakhand)

APPEARANCE:
Ms. Sukriti Das, Advocate for the Appellant
Shri S.K. Ray, Authorized Representative of the Department

CORAM :
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 21.04.2025
Date of Decision: 30.04.2025

FINAL ORDER NO. 50551/2025

JUSTICE DILIP GUPTA

The order dated 30.09.2022 passed by the Commissioner, Central Goods and Service Tax Commissionerate, Dehradun[1] has been assailed in this appeal that has been filed by M/s Hindustan Zinc Limited[2]. The order drops the demand of central excise duty of Rs. 96,55,547/-; disallows CENVAT credit of Rs. 4,02,90,678/- with interest for the reason that it was inadmissible under rule 14 of the CENVAT Credit Rules, 2004[3]; imposes penalty of Rs. 4,02,90,678/- upon the appellant under section 11AC of the Central Excise Act,

1 the Commissioner
2 the appellant
3 the 2004 Credit Rules

1944[4]; and demands service tax amounting to Rs. 88,49,710/- under the proviso to section 73 (1) of the Finance Act, 1994[5] with interest and penalty.

2. Two issues arise for consideration in this appeal namely:

i. Admissibility of CENVAT credit of service tax paid on goods transport agency[6] services availed for outward transportation of goods from the factory gate/depot of the appellant to the premises of the customer under rule 2(1) of the 2004 Credit Rules.

ii. Demand of service tax on "fine/penalties, retention money and liquidated damages", against delayed completion of works or non-performance of contract under section 66E(e) of the Finance Act.

3. The appellant is engaged in the manufacture of Silver Ingot, Zinc Ingot and Lead Ingot and avails CENVAT credit on inputs, capital goods and input services under the provisions of the 2004 Credit Rules.

4. During the period from July 2016 till June 2017, the appellant claims that it sold the final product to its customers on Free on Road[7] destination basis, and consequently remained responsible for getting the goods delivered to the premises of the buyer; the appellant also bore the risk of loss while the goods were in transit; and the sale took place at the premises of the customers. The appellant availed the services of GTA for such outward transportation of its final products from the factory/depots to the premises of the buyers, and took credit of service tax paid on such GTA services.

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4 the Central Excise Act
5 the Finance Act
6 GTA
7 FOR

5. The appellant also claims that for smooth operations of business and to ensure timely execution of the contracts, the appellant collected liquidated damages for breach of the terms agreed upon with the parties to the agreement, and an amount in the nature of fines and penalties were also recovered by the appellant in case of non-compliance or contravention of the agreed terms with the contractors or transporters. The appellant also withheld a certain percentage of the amount from the payments of the customers till the time of completion of its project. This served as a financial security to ensure that the contractors completed the tasks within the stipulated time.

6. Pursuant to an audit conducted for the relevant period, a show cause notice dated 06.08.2021 was issued to the appellant proposing a demand after invoking the extended period of limitation on the following issues-

(i) Central excise duty of Rs. 96,55,547 on the extra consideration in the nature of interest received from the buyers on delayed payment in the assessable value in terms of rule 6 of Valuation Rules, 2000;

ii) Wrongful availment of CENVAT credit of Rs. 4,02,90,678 on service tax paid by the appellant on GTA services; and

iii) Failure to discharge service tax of Rs. 88,49,710 on the amount collected by the appellant towards fines/penalties, retention money and liquidated damages collected from various service providers.

7. The appellant filed a reply to the show cause notice and denied the allegations. The Commissioner passed an order dated 30.09.2022 which has been assailed in this appeal.

8. It is this order dated 30.09.2022 passed by the Commissioner that has been assailed in this appeal.

9. Ms. Sukriti Das, learned counsel for the appellant made the following submissions:

i) Sales were on FOR destination basis. The premises of the buyer is the place of removal. Hence, CENVAT credit on the service of outward transportation of the finished goods to the places of the buyers is admissible. To support this contention, learned counsel placed reliance upon a decision of the Tribunal in **Hindustan Zinc Ltd.** vs **The Commissioner, Central Excise & CGST Commissionerate, Udaipur**[8]**;**

ii) The amount collected as "liquidated damages/retention money/fines and penalties" from the parties to the contract for breach or non-performance is not towards provision of any service and so would not be susceptible to service tax. To support this contention, learned counsel placed reliance upon a decision of the Tribunal **in South Eastern Coalfields Ltd** vs **Commissioner of Central Excise & S.T., Raipur**[9] and the Circular dated 03.08.2022 issued by the department;

iii) The extended period of limitation could not have been invoked and so the impugned order deserves to be set aside since the entire demand is covered by extended period; and

iv) Imposition of penalty and recovery of interest is not sustainable.

10. Shri S.K. Ray, learned authorised representative appearing for the department has, however, supported the impugned order and submitted that it does not call for any interference in this appeal.

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8 Excise Appeal No. 51652 of 2021 decided on 18.04.2024
9 2021 (55)G.S.T.L. 549(Tri-Del.)

11. The submissions advanced by the learned counsel for the appellant and the learned authorised representative appearing for the department have been considered.

12. Regarding the first issue relating to admissibility of CENVAT credit of service tax paid on GTA services, it is clear from the invoice dated 25.06.2016 that the appellant had not charged freight charges separately and they were included in the value for delivery of the goods to the premises of the buyers. The appellant, therefore, cleared the finished goods to the buyers on FOR destination basis. The agreement executed with JSW Steel Coated Products Ltd, when read with the Memorandum of Understanding, also shows that the delivery terms were on FOR basis. In such circumstances, the finding recorded by the Commissioner that no evidence was led by the appellant to establish that delivery was on FOR terms is clearly erroneous as all the relevant documents had been submitted by the appellant.

13. In **Hindustan Zinc,** relied upon by the learned counsel for the appellant, the Tribunal considered the judgment of the Supreme Court in **Commissioner of Central Excise and S.T.** vs. **Ultra Tech Cement Ltd.**[10] as also the decision of a Larger Bench of the Tribunal in **The Ramco Cements Limited vs the Commissioner of Central Excise**[11] and observed as follows:

> "**25.** According to the appellant, since the 'place of removal' is the premises of the buyer, the cost of transportation of the goods upto the premises of the buyer would be included in determining the transaction value of the goods for the purpose of payment of excise duty and the appellant would also be entitled to avail CENVAT credit as it would be an

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10. 2018 (9) G.S.T.L. 337 (S.C.)
11 Central Excise Appeal No. 40575 of 2018 decided on 21.12.2023

'input service' defined under rule 2(l) of the 2004 Rules.

26. The department, however, believes that since the 'place of removal' is the factory gate of the appellant, credit of service tax paid on GTA service would not be available to the appellant since it would not be an 'input service' under rule 2(l) of the 2004 Rules.

27. The Commissioner (Appeals) has disallowed credit to the appellant basis the judgment of the Supreme Court in **Ultratech Cement**. This judgment, therefore, needs to be considered first.

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29. A perusal of the aforesaid judgment of the Supreme Court in **Ultra Tech Cement** would indicate that the Supreme Court did not lay down the principles for ascertaining the 'place of removal' in the context of admissibility of CENVAT credit on GTA services and the judgment only dealt with the change brought about by the amendment made in rule 2(l) of the 2004 Rules on 01.03.2008. This is how the Larger Benches of the Tribunal in **The Ramco Cements** and **Sweety Industries** vs. **Commissioner of CGST & Central Excise**[12] also interpreted the decision of the Supreme Court in **Ultra Tech Cement**.

30. Paragraph 27 of the decision of the Tribunal in **The Ramco Cements** is reproduced below:

> "**27**. Applying the said principle to the present circumstances, it is seen that the Supreme Court, though in paragraph 13 observed that CENVAT credit on Goods Transport Agency availed for transport of goods from place of removal to buyers' premises was not admissible, but the principles in ascertaining the place of removal in the context of admissibility of CENVAT credit on GTA Services have not been laid down, as was also submitted by the learned counsel for the appellant. The said issue has been left open to be decided on the facts of each case."

31. In **Sweety Industries** the Larger Bench of the Tribunal observed as follows:

> "38. A perusal of the aforesaid judgment of the Supreme Court in **Ultra Tech Cement** would indicate that the

12. Excise Appeal No. 12738 of 2018 decided on 14.02.2024

> Supreme Court did not lay down the principles for ascertaining the 'place of removal' in the context of admissibility of CENVAT credit on GTA services and only dealt with the change brought about by the amendment made in rule 2(l) of the 2004 Rules on 01.03.2008. This is how the Larger Bench of the Tribunal in **The Ramco Cements Limited** vs. **The Commissioner of Central Excise** also interpreted the decision of the Supreme Court in **Ultra Tech Cement**."

> **32.** It also needs to be noted that after the decision of the Supreme Court in **Ultra Tech Cement**, the Central Board of Indirect Taxes and Customs issued a Circular dated 08.06.2018. In the said Circular the general principles for determination of 'place of removal' were laid down in paragraph 3, and paragraph 4 provided for exceptions to the principles contained in paragraph 3. The Circular points out that, in general, the 'place of removal' is required to be determined with reference to 'point of sale' in terms of the principles laid down by the Supreme Court in **Commissioner of Cus. & C. Ex., Nagpur** vs. **Ispat Industries Ltd**[13]. The Circular also deals with CENVAT credit on GTA service and clarifies that the Circular only brings to the notice of the field formations the various judgments of the Supreme Court, which decisions can be referred to for further guidance in the individual cases."

14. In this view of matter, the appellant was clearly entitled to avail CENVAT credit of service tax paid on GTA services for onward transportation of goods from the factory gate of the appellant to the premises of the customers.

15. Regarding the second issue relating to demand of service tax on fines, penalties, retention money and liquidated damages, the issue is

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13. 2015 (324) E.L.T. 670 (S.C.)

covered by a decision of this Tribunal in **South Eastern Coalfields**. The Tribunal held as follows:

> "**25.** It is in the light of what has been stated above that the provisions of section 66E(e) have to be analyzed. Section 65B(44) defines service to mean any activity carried out by a person for another for consideration and includes a declared service. One of the declared services contemplated under section 66E is a service contemplated under clause (e) which service is agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act. There has, therefore, to be a flow of consideration from one person to another when one person agrees to the obligation to refrain from an act, or to tolerate an act, or a situation, or to do an act. In other words, the agreement should not only specify the activity to be carried out by a person for another person but should specify the:
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> (i) consideration for agreeing to the obligation to refrain from an act; or
> (ii) consideration for agreeing to tolerate an act or a situation; or
> (iii) consideration to do an act.
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> **26**. Thus, a service conceived in an agreement where one person, for a consideration, agrees to an obligation to refrain from an act, would be a 'declared service' under section 66E(e) read with section 65B (44) and would be taxable under section 68 at the rate specified in section 66B. Likewise, there can be services conceived in agreements in relation to the other two activities referred to in section 66E(e).
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> **27.** It is trite that an agreement has to be read as a whole so as to gather the intention of the parties. The intention of the appellant and the

parties was for supply of coal; for supply of goods; and for availing various types of services. The consideration contemplated under the agreements was for such supply of coal, materials or for availing various types of services. The intention of the parties certainly was not for flouting the terms of the agreement so that the penal clauses get attracted. The penal clauses are in the nature of providing a safeguard to the commercial interest of the appellant and it cannot, by any stretch of imagination, be said that recovering any sum by invoking the penalty clauses is the reason behind the execution of the contract for an agreed consideration. It is not the intention of the appellant to impose any penalty upon the other party nor is it the intention of the other party to get penalized.

28. It also needs to be noted that section 65B(44) defines "service" to mean any activity carried out by a person for another for consideration. Explanation (a) to section 67 provides that "consideration" includes any amount that is payable for the taxable services provided or to be provided. The recovery of liquidated damages/penalty from other party cannot be said to be towards any service per se, since neither the appellant is carrying on any activity to receive compensation nor can there be any intention of the other party to breach or violate the contract and suffer a loss. The purpose of imposing compensation or penalty is to ensure that the defaulting act is not undertaken or repeated and the same cannot be said to be towards toleration of the defaulting party. The expectation of the appellant is that the other party complies with the terms of the contract and a penalty is imposed only if there is non-compliance.

> **29.** The situation would have been different if the party purchasing coal had an option to purchase coal from 'A' or from 'B' and if in such a situation 'A' and 'B' enter into an agreement that 'A' would not supply coal to the appellant provided 'B' paid some amount to it, then in such a case, it can be said that the activity may result in a deemed service contemplated under section 66E (e).
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> **30.** The activities, therefore, that are contemplated under section 66E (e), when one party agrees to refrain from an act, or to tolerate an act or a situation, or to do an act, are activities where the agreement specifically refers to such an activity and there is a flow of consideration for this activity.
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> **32.** In the present case, the agreements do not specify what precise obligation has been cast upon the appellant to refrain from an act or tolerate an act or a situation. It is no doubt true that the contracts may provide for penal clauses for breach of the terms of the contract but, as noted above, there is a marked distinction between 'conditions to a contract' and 'considerations for a contract'.
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> **43.** It is, therefore, not possible to sustain the view taken by the Principal Commissioner that penalty amount, forfeiture of earnest money deposit and liquidated damages have been received by the appellant towards "consideration" for "tolerating an act" leviable to service tax under section 66E(e) of the Finance Act."

16. As the demand confirmed cannot be sustained on merits, it will not be necessary to examine the contention raised by the learned

counsel for the appellant that the extended period of limitation could not have been invoked in the facts and circumstances of the case.

17. The impugned order dated 30.09.2022 passed by the Commissioner, therefore, deserves to be set aside and is set aside. The appeal is, accordingly, allowed.

(Pronounced in the open court on 30.04.2025)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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