



**HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR**

D.B. Central/excise Appeal No. 3/2010

CNR: RJHC010416872009 | URN: EXCIA / 4U / 2010

Hindustan Zinc Limited Registered Office at Yashad Bhawan
Udaipur.

Unit : rampura Agucha Mines, P.O. Agucha District : Bhilwara
Through Shri V.V. Nandawat S/o Ambalal Ji, aged 46 years,
Associated Senior General Manager (Finance).

-----Appellant

Versus

Dy. Commissioner, Central Excise Division, Bhilwara

-----Respondent

For Appellant(s)	:	Mr. Sharad Kothari Mr. Pranjul Mehta Mr. Kalpit Shishodia
For Respondent(s)	:	Mr. Rishabh Dadhich

**HON'BLE MR. JUSTICE ARUN MONGA
HON'BLE MR. JUSTICE SUNIL BENIWAL**

Order

Reportable

Conclusion of Arguments &

Reserved on : 09/10/2026

Pronounced on : 16/10/2026

(per Sunil Beniwal,J.)

1. The present appeal has been filed against the order dated 14.05.2009 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi, whereby the appeal preferred by the appellant against the demand of differential duty and interest arising out of the finalisation of provisional assessment for the period from 01.04.2004 to 31.03.2005 was dismissed.
2. The facts, as narrated by the appellant, are that the appellant is a mining unit of Hindustan Zinc Limited, engaged in



the manufacture of lead and zinc concentrate. A substantial portion of the production is captively consumed by the smelting units of the company, while a part thereof is also exported. Since the determination of the assessable value requires ascertainment of the cost of production and the determination of the dry metric tonne (DMT) weight of the concentrate through laboratory testing, the appellant obtained permission for provisional assessment from the Assistant Commissioner, Central Excise Division, Bhilwara, vide order dated 25.04.2000. The provisional assessments were thereafter finalised on a yearly basis.

2.1. During the financial year 2004-05, the appellant initially adopted a provisional assessable value of Rs. 5,050/- per metric tonne, which was successively revised to Rs. 5,200/-, Rs. 5,875/- and Rs. 6,500/- per metric tonne in view of the increased costs arising from the expansion of the plant. Upon completion of the annual costing exercise, the assessable value was determined at Rs. 5,333/- per metric tonne, which was accepted by the Department during the adjudication proceedings.

2.2. The Deputy Commissioner, Central Excise Division, Bhilwara, vide Order-in-Original No. 57/05-06 (Prov. Ass.) dated 30.11.2005, finalised the provisional assessment and determined the total duty payable for the financial year 2004-05 at Rs. 33,65,43,811/-. The order also recorded that the appellant had deposited duty amounting to Rs. 34,19,68,596/-. Nevertheless, the adjudicating authority directed recovery of Rs. 1,16,53,609/- towards alleged short-payment of duty for the period from



01.04.2004 to 19.12.2004, together with interest under Rule 7(4) of the Central Excise Rules, 2002 (hereinafter referred to as the 'Rules of 2002'). The appellant challenged the said demand, contending that the duty deposited exceeded the total liability determined upon finalisation of the provisional assessment.

2.3. The appeal preferred before the Commissioner of Central Excise (Appeals-II), Jaipur, was dismissed vide order dated 28.04.2006, inter alia, on the ground that the incidence of duty had been passed on to the purchaser and, consequently, no refund or adjustment was permissible. Thereafter, the appellant preferred an appeal before the Customs, Excise and Service Tax Appellate Tribunal, New Delhi, registered as Appeal No. E/2622/2006. The Tribunal also dismissed the appeal vide order dated 14.05.2009.

2.4. Hence, the present appeal.

3. Learned counsel for the appellant submitted that the Tribunal had erred in affirming the order dated 30.11.2005 passed by the Deputy Commissioner without properly appreciating the applicable legal provisions and the decisions rendered on the issue, including the Tribunal's own decision in the appellant's case vide Final Order No. 1199/06 dated 04.08.2006. He further submitted that the Deputy Commissioner had finalised the provisional assessment for the financial year 2004-05 under Rule 7(3) of the Rules of 2002, determining the total duty liability at Rs. 33,65,43,811/-, whereas the appellant had deposited Rs. 34,19,68,596/-. Despite the excess payment of Rs. 54,24,785/-, the authority divided the financial year into two periods and raised a demand of Rs.



1,16,53,609/- for the period from 01.04.2004 to 19.12.2004, while declining to adjust the excess duty paid during the subsequent period. He contended that provisional assessment was required to be finalised for the financial year as a whole, particularly when the relevant cost of production could be ascertained only at the end of the year, and that no provision of law authorised such a bifurcation.

3.1. He further submitted that the demand was inconsistent with the final determination of duty liability recorded in the order-in-original. If the additional demand of Rs. 1,16,53,609/- were added to the duty liability already determined, the total liability would exceed the amount legally payable on the basis of the applicable rate of duty and the assessable value determined in accordance with the Board's Circular No. 692/09/2003-CX dated 13.02.2003 and the prescribed CAS-4 methodology. He also contended that the Department's method of computing period-wise short-payment by applying the annual cost of production, without corresponding consideration of the cost applicable to the respective periods, was erroneous. The appellant had progressively revised the provisional assessable value in response to the increase in production costs during the latter part of the financial year, hence, the alleged short-payment could not be determined by comparing figures calculated on inconsistent bases.

3.2. He also submitted that the bar against refund on the ground of unjust enrichment had been erroneously invoked to deny inter se adjustment of excess duty paid against any short-payment



during the relevant financial year. The entire quantity of concentrate was transferred to the appellant company's captive smelting units, where the duty paid by the mining unit was available as CENVAT credit. Since both units belonged to the same company, the incidence of duty had not been passed on to any other person within the meaning of Section 11B(2) of the Central Excise Act, 1944 (hereinafter referred to as the 'Act of 1944'). He contended that the excess duty paid was, therefore, liable to be adjusted against any alleged short-payment and that only the net amount, if any, could be recovered from the appellant. He also submitted that the he is not pressing for refund of the amount rather he merely seeks adjustment of the amount as admittedly the duty paid by the appellant for the subsequent period from 20.12.2024 to 31.03.2005 was in excess of the actual duty payable.

3.3. He further relied upon Final Order No. 447/2008-Excise dated 10.07.2008 passed by the Tribunal in Appeal No. E/769/2007 in the appellant's own case, wherein the availability of CENVAT credit to the company's smelting units was relied upon in considering the revenue-neutral nature of the transaction. He also placed reliance on the following judgments for his submissions:-

- (i) ***Toyota Kirloskar Auto Parts Pvt. Ltd. v. C.C.E, LTU, Bangalore; C.E.A. No. 103/2010***, decided on 13.10.2011 – Karnataka High Court
- (ii) ***The Principal Commissioner, CGST and Central Excise Headquarters, Bhopal v. Godrej Consumer***



Products Ltd., C.E.A No.13/2019, decided on 23.04.2019

– Madhya Pradesh High Court

(iii) **Hindustan Zinc Ltd. v. Commissioner of Central Excise, Jaipur, Final Order No. A/53134/2015- EX (DB)**, decided on 06.10.2015 – Customs, Excise and Service Tax Appellate Tribunal Principal Bench, New Delhi

3.4. Based on the above submissions, learned counsel prayed that the impugned order dated 14.05.2009 passed by the Tribunal and the order-in-original dated 30.11.2005 be quashed and set aside.

4. Per contra, learned counsel for the respondent submitted that the adjudicating authority had rightly determined the duty liability for the financial year 2004-05 at Rs. 33,65,43,811/- and identified a short-payment of Rs. 1,16,53,609/- for the period from 01.04.2004 to 19.12.2004 and an excess payment of Rs. 1,70,78,391/- for the subsequent period from 20.12.2004 to 31.03.2005. He further submitted that the appellant's claim for adjustment of the excess duty against the short-payment was not admissible, as the appellant had failed to establish that the incidence of excess duty had not been passed on to its captive smelting units. The smelting units had already availed CENVAT credit of the duty paid on the concentrate. He also pointed out that, by letter dated 14.09.2005, the appellant had stated that it would not claim a refund of the excess duty since its smelting units had already availed the corresponding credit. In these



circumstances, the appellant was not entitled to the adjustment sought.

4.1. He further submitted that the claim was governed by Rule 7(3) read with Rule 7(6) of the Rules of 2002, which prescribed the conditions subject to which any refund arising upon finalisation of provisional assessment could be paid to the assessee. Since the appellant had passed on the incidence of duty to its sister concern units and the recipient units had availed the corresponding CENVAT credit, the excess amount could neither be refunded nor adjusted against the demand. He contended that the adjudicating authority and the Commissioner (Appeals) had duly considered this aspect and that the Tribunal had also examined the relevant facts before correctly rejecting the appellant's appeal.

4.2. He also submitted that the assessable value of the captively consumed concentrate had been determined in accordance with the applicable costing methodology under CAS-4, as contemplated by Board's Circular No. 692/08/2003-CX dated 13.02.2003, read with Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. The determination of the short-payment and rejection of the claim for adjustment were, therefore, justified under the applicable statutory provisions and in view of the fact that the incidence of excess duty had already been passed on to the recipient units.

4.3. He lastly submitted that the impugned order passed by the Tribunal did not warrant interference and that the appeal is devoid



of merit. Accordingly, he prayed that the appeal be dismissed and the impugned orders be maintained.

5. Heard learned counsel for the parties and perused the material available on record.

6. The present excise appeal was admitted on 13.01.2010 and following questions of law were framed:-

(i) Whether the period of one year can be bifurcated in two imaginary parts and can it be held that assessee has short paid the duty in the first part and paid excess duty in the other?

(ii) Whether the duty paid in excess under Rule 7 of Central Excise Rules, 2002 can be adjusted against the duty short paid?

(iii) Whether the assessee is entitled to claim interest on the amount of duty paid in excess?

ISSUE NO.1 :

7. The controversy arising in the present appeal requires consideration of the manner in which the duty liability is to be determined upon finalisation of provisional assessment. The appellant was permitted to pay duty provisionally because the assessable value of the lead and zinc concentrate depended upon the determination of the cost of production and other relevant particulars. The final assessable value was determined upon completion of the annual costing exercise in accordance with CAS-4. The question, therefore, is whether, after adopting the annual cost of production for determining the assessable value, the Department could treat the short-payment during one part of



the financial year and the excess payment during the remaining part as separate and independent liabilities.

8. Rule 7 of the Rules of 2002 provides for provisional assessment where the assessee is unable to determine the value of excisable goods or the rate of duty applicable thereto, which reads as under:-

“7. Provisional assessment.—

1. Where the assessee is unable to determine the value of excisable goods or determine the rate of duty applicable thereto, he may request the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, in writing giving reasons for payment of duty on provisional basis and the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, may order allowing payment of duty on provisional basis at such rate or on such value as may be specified by him.

2. The payment of duty on provisional basis may be allowed, if the assessee executes a bond in the form prescribed by notification by the Board with such surety or security in such amount as the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, deem fit, binding the assessee for payment of difference between the amount of duty as may be finally assessed and the amount of duty provisionally assessed.

3. The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall pass order for final assessment, as soon as may be, after the relevant information, as may be required for finalizing the assessment, is available, but within a period not exceeding six months from the date of the communication of the order issued under sub-rule (1):

Provided that the period specified in this sub-rule may, on sufficient cause being shown and the reasons to be recorded in writing, be extended by the Commissioner of Central Excise for a further period not exceeding six months and by the Chief Commissioner of Central Excise for such further period as he may deem fit.



4. The assessee shall be liable to pay interest on any amount payable to Central Government, consequent to order for final assessment under sub-rule (3), at the rate specified by the Central Government by notification issued under section 11AA or section 11 AB of the Act from the first day of the month succeeding the month for which such amount is determined, till the date of payment thereof.

5. Where the assessee is entitled to a refund consequent to order for final assessment under sub-rule (3), subject to sub-rule (6), there shall be paid an interest on such refund at the rate specified by the Central Government by notification issued under section 11 BB of the Act from the first day of the month succeeding the month for which such refund is determined, till the date of refund.

6. Any amount of refund determined under sub-rule (3) shall be credited to the Fund:

Provided that the amount of refund, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to-

- (a) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person; or
- (b) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person.”

9. The statutory scheme thus contemplates that provisional assessment is followed by final assessment upon the availability of the relevant information, and that the difference between the duty provisionally assessed and the duty finally assessed is to be determined. The assessment cannot be finalised by adopting one method for determining the assessable value and another, inconsistent method for calculating the resulting duty liability.

9.1. In ***Toyota Kirloskar Auto Parts Pvt. Ltd.*** (supra), the Karnataka High Court considered the consequences of finalisation of provisional assessment where excess duty had been paid on



certain goods and a short-payment had been identified in respect of others. The Court emphasised that the total duty liability had to be considered before interest could be levied on an alleged shortfall. The overall position could not be ignored by isolating individual components of the assessment.

9.2. The same principle finds support in **Godrej Consumer Products Ltd.** (supra) wherein the Madhya Pradesh High Court considered the adjustment of excess duty paid during certain months against short-paid duty during other months where the assessable value was determined on the basis of annual CAS-4 costing. The Court held that when annual cost of production formed the basis for determining the assessable value, the overall duty liability had to be calculated after taking into account the duty already paid during the relevant year. The Department could not rely upon annual costing for determining the value of goods while selectively considering only those months in which a short-payment was noticed.

9.3. The principle emerging from these decisions is that the method adopted for determining the assessable value must be applied consistently in determining the corresponding duty liability. Where the final assessment is founded upon annual cost of production, the duty already paid during the relevant assessment period cannot be disregarded merely because the payments made during different portions of that period disclose different results.



10. In the present case, the Deputy Commissioner determined the total duty liability for the financial year 2004-05 at Rs.33,65,43,811/-, whereas the appellant had deposited Rs.34,19,68,596/-. The appellant had thus deposited an amount exceeding the final annual duty liability by Rs.54,24,785/-. The adjudicating authority nevertheless treated Rs.1,16,53,609/- as short-paid duty for the period from 01.04.2004 to 19.12.2004, while separately recognising excess payment of Rs.1,70,78,391/- for the period from 20.12.2004 to 31.03.2005.

10.1. Such an approach fails to give effect to the overall result of the final assessment. Once the assessable value has been determined on the basis of annual costing, the Department cannot disregard the excess payment made during the remainder of the same financial year while enforcing the demand arising from the earlier period. The payments made during the year must be taken into account in arriving at the actual duty liability.

10.2. It is clarified that the conclusion does not rest upon a general proposition that duty payable on every clearance must invariably be assessed only on an annual basis. The relevant consideration is that, in the present case, provisional assessment was permitted and the final assessable value was determined through an annual costing exercise. The Department was, therefore, required to give effect to that determination consistently while calculating the net duty liability.

11. A specific query was put to learned counsel for the respondent to point out any statutory provision under the Rules of



2002, or any other applicable law, authorising the Department to bifurcate the assessment for the entire financial year into two separate periods and determine short-payment for one period without accounting for the excess duty paid during the remaining period of the same financial year. However, learned counsel for the respondent failed to point out any such statutory provision. In the absence of any enabling provision, such bifurcation, particularly when the assessable value was determined on the basis of annual costing, cannot be sustained in law.

12. Accordingly, Issue No. 1 is answered in favour of the appellant. In the facts of the present case, the short-payment and excess payment could not lawfully be treated as independent liabilities without considering the overall duty position for the financial year 2004-05.

ISSUE NO.2 :

13. The answer to the question as to whether the duty paid in excess under Rule 7 of the Rules of 2002 can be adjusted against the duty short-paid, depends upon the distinction between a claim for refund of excess duty and the adjustment of duty already paid while determining the net liability upon finalisation of provisional assessment.

14. Sub-rule (6) of Rule 7 of the Rules of 2002 provides, in substance, that an amount determined as refundable upon finalisation of provisional assessment is ordinarily to be credited to the Consumer Welfare Fund, subject to the prescribed exceptions where the incidence of duty has not been passed on to another



person. The provision governs the manner in which a refund is to be dealt with. The question in the present appeal, however, is not whether the appellant is entitled to receive the excess amount in cash, but whether the amount already deposited must be taken into account in determining the net duty payable.

14.1. In the case of **Associated Cement Co. Ltd. v. Commercial Tax Officer, Kota & Ors.; (1981) 4 SCC 578**, the Hon'ble Supreme Court explained the distinction between charging provisions and machinery provisions of a taxing statute and while discussing about their interpretation, observed as under:

“28. XXX XXX XXX
It is settled law that a distinction has to be made by court while interpreting the provisions of a taxing statute between charging provisions which impose the charge to tax and machinery provisions which provide the machinery for the quantification of the tax and the levying and collection of the tax so imposed. While charging provisions are construed strictly, machinery sections are not generally subject to a rigorous construction. The courts are expected to construe the machinery sections in such a manner that a charge to tax is not defeated.
XXX XXX XXX
33.....*It is the duty of the Court while interpreting the machinery provisions of a taxing statute to give effect to its manifest purpose having a full view of it. Wherever the intention to impose liability is clear courts ought to have no hesitation in giving what we may call a common-sense interpretation to the machinery sections so that the charge does not fail.”*

Keeping in view the above observations, this Court is of the opinion that the provisions governing the finalisation of provisional assessment must be interpreted in a manner that gives effect to their object and the statutory scheme as a whole. In the present case, Rule 7 of the Rules of 2002 provides for provisional



assessment and the mechanism for determining the final duty liability upon the availability of the relevant information. Sub-rules (5) and (6), which regulate the manner in which an amount determined as refundable is to be dealt with, cannot be construed as requiring the Department to disregard the excess duty already deposited while determining the net duty liability. The question of adjustment of the duty already paid is distinct from the question of entitlement to receive a refund in cash. Therefore, the appellant's claim for adjustment requires consideration with reference to the overall duty liability determined upon finalisation of the provisional assessment, rather than being rejected solely on the ground that the incidence of duty had been passed on to the recipient units.

14.2. In ***Toyota Kirloskar Auto Parts Pvt. Ltd.*** (supra), the Karnataka High Court held that the overall duty position had to be considered upon finalisation of provisional assessment before an interest liability could be imposed on an alleged short-payment. The judgment recognises the importance of determining the actual liability after accounting for the duty payments already made, rather than treating the shortfall in isolation.

14.3. Further, in ***Godrej Consumer Products Ltd.*** (supra), the Madhya Pradesh High Court examined whether excess duty paid in certain months could be adjusted against short-paid duty in other months where the assessable value was determined on the basis of annual CAS-4 costing. The Court upheld the principle that, where annual costing forms the basis for determining the



assessable value, the duty already paid during the relevant year must be considered while calculating the overall liability. It further held that the principle of unjust enrichment did not preclude such adjustment in the circumstances of that case, as no refund was being claimed.

15. Applying the aforesaid principles to the facts of the present case, it is evident that the final assessment must take account of the duty already deposited while determining the net liability. The restrictions governing payment of a refund under Rule 7(6) of the Rules of 2002 cannot, in themselves, justify disregarding an excess payment while calculating the duty, if any, remaining payable.

15.1. Learned counsel for the respondent has contended that the appellant passed on the incidence of excess duty to its smelting units, which availed CENVAT credit, and that the appellant stated in its letter dated 14.09.2005 that it would not claim a refund of the excess payment. These circumstances are relevant to a claim for refund. They do not, however, alter the nature of the relief sought in the present appeal. The appellant does not seek payment of the excess amount in cash, it seeks only that the duty already deposited be adjusted against the demand raised upon finalisation of the assessment. The distinction is material. Permitting adjustment does not result in a cash payment of the excess amount to the appellant nor does it confer upon the appellant a right to recover from the Department an amount which it has expressly stated it would not claim as a refund. It merely



ensures that the Department determines and recovers the duty, if any, that remains payable after accounting for the payments already made. The fact that the recipient units have availed CENVAT credit cannot, by itself, justify calculating the appellant's duty liability without giving credit for the duty already deposited.

15.2. The figures recorded in the adjudication order reinforce this conclusion. The final annual duty liability was determined at Rs.33,65,43,811/-, whereas the appellant had deposited Rs.34,19,68,596/-. The total payment thus exceeded the final annual liability by Rs.54,24,785/-. The demand of Rs.1,16,53,609/- was raised by isolating the earlier portion of the financial year, notwithstanding the excess payment recognised for the remaining period. Such a demand cannot be sustained without giving effect to the adjustment required for determining the net liability.

15.3. If the interpretation given by learned counsel for the respondent is accepted, it would produce an anomalous result that the Department would retain the benefit of the excess duty already deposited while recovering the alleged short-payment as though that excess payment had never been made. Such a result would not represent the actual duty liability established upon finalisation of the provisional assessment.

16. Accordingly, Issue No.2 is answered in favour of the appellant. The excess duty paid during the financial year 2004-05 is liable to be taken into account and adjusted against the alleged short-payment while determining the net duty liability. The



appellant's entitlement is confined to such adjustment and does not extend to a cash refund of the excess amount.

ISSUE NO.3 :

17. Learned counsel for the appellant has submitted that the appellant only seeks that the excess duty already deposited should be adjusted against the alleged short-payment. It does not seek a refund of the excess amount.

18. In view of the nature of the relief claimed and the conclusion reached on Issue No. 2, in the considered opinion of this Court, the appellant is not entitled to interest on the excess duty as though a refund were being ordered.

18.1. Rule 7(5) of the Rules of 2002 deals with interest on a refund arising upon finalisation of provisional assessment, subject to the conditions prescribed under Rule 7(6). Those provisions concern a refund and the statutory conditions governing payment of the refundable amount. Since the present decision allows adjustment and does not direct payment of a refund, there is no occasion to award interest to the appellant on the excess amount.

19. A separate consideration arises in respect of interest demanded by the Department on the alleged short-payment. Once the excess duty is taken into account and the net duty liability is determined, interest cannot be imposed on a shortfall that no longer exists. If the adjustment establishes that no further duty was payable, no interest can be recovered on the basis of the demand sustained by treating the two portions of the financial year in isolation.



20. Accordingly, Issue No. 3 is answered by holding that the appellant is not entitled to interest on the excess duty, as no refund is being granted. The Department, however, cannot demand interest on an alleged short-payment without first giving effect to the adjustment directed herein.

CONCLUSION :

21. In view of the foregoing discussion, this Court is of the opinion that the appeal deserves to be allowed. The impugned order dated 14.05.2009 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi, and the consequential demand arising from the order-in-original dated 30.11.2005 cannot be sustained to the extent that they deny adjustment of the excess duty paid by the appellant against the alleged short-payment.

22. The final assessment for the financial year 2004-05 determined the total duty liability at Rs.33,65,43,811/-, against which the appellant had deposited Rs.34,19,68,596/-. The Department was required to take the payments made during the relevant year into account in determining the net liability and could not sustain the demand of Rs.1,16,53,609/- by considering only the period from 01.04.2004 to 19.12.2004.

23. The demand of Rs.1,16,53,609/- and the consequential interest liability are accordingly set aside, subject to giving effect to the adjustment in the appellant's duty account. No cash refund or interest on the excess duty is directed. The Department shall carry out the consequential exercise in accordance with law,



taking into account the total duty liability finalised for the financial year and the duty already deposited by the appellant. If the records confirm the figures already recorded in the final assessment, no further duty shall be recoverable on the demand in question.

24. The questions of law are answered accordingly in favour of the appellant, except that the claim for interest on the excess duty is rejected. The appeal stands **allowed** in the above terms.

25. All pending applications stand disposed of.

(SUNIL BENIWAL), J

(ARUN MONGA),J

RAKESH MATHUR