Customs, Excise and Gold Tribunal - Delhi
Hindustan Zinc Ltd. vs Commissioner Of C. Ex. on 13 November, 2002
Equivalent citations: 2003 (152) ELT 148 Tri Del
Bench: K Usha, N T C.N.B.
ORDER C.N.B. Nair, Member (T)

1. These two appeals are directed against a common order-in-original i.e. 14/CE/JP-II/2001 dated 10-9-2001 passed by the Commissioner of Central Excise, Jaipur-II. Accordingly both the appeals were heard together and are disposed of under this common order.

2. The appellant M/s. Hindustan Zinc Ltd. has a plant at Chittorgarh where they manufacture Zinc and lead. Both these metals are liable to Central Excise duty. For the manufacture of zinc and lead the appellants' plant required oxygen gas, nitrogen gas and liquid nitrogen. These are produced in a separate plant located in the premises of the zinc and lead manufacturing plant. The gases produced are fully consumed in the manufacture of zinc and lead. These gases were being consumed by M/s. Hindustan Zinc Ltd. without payment of Central Excise duty on the basis that they were exempt under Notification No. 217/86-C.E., dated 2-4-86 and subsequently under Notification No. 67/95-C.E., dated 16-3-95. In the order impugned in the present appeal, the learned Commissioner of Central Excise held that the gases were actually manufactured by M/s. Industrial Gases Ltd. and were liable to Central Excise duty. It was further held that the exemption under Notification No. 67/95-C.E. was not applicable to the gases inasmuch as that Notification granted exemption only to goods manufactured and captively consumed by the same manufacturer and not goods manufactured by one manufacturer and consumed by another. Accordingly, a duty demand of about Rs- 1.6 crores was imposed on M/s. Industrial Gases Ltd. for the period 5th October 1995 to July 2000. Simultaneously, a penalty of Rs. 10 Lakhs was imposed on the first appellant M/s. Hindustan Zinc and Rs. 1 Lakh on the second appellant Shri Ramakrishna Rao who is a Senior Manager, Marketing of the first appellant. These penalties have been imposed under Rule 209A of the Central Excise Rules, 1944.

3. Rule 209A makes "any person who acquires possession of, or is in any way concerned in transporting..... selling or purchasing,..... any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or Central Excise rules" liable to a penalty not exceeding three times the value of such goods or five thousand rupees, whichever is greater. The Commissioner has found the appellants guilty inasmuchas they were purchasing and using non-duty paid goods which are liable to confiscation.

4. The appellants' position is that of co-accused. The main offender is M/s. Industrial Gases Ltd. who manufactured and cleared the gases without payment of duty. The substance of the charge against M/s. Hindustan Zinc is that they have knowingly purchased tainted goods which was liable to confiscation. Therefore, the test is whether they knew or had reason to belief that the industrial gases which they used in the production of Zinc and lead were liable to confiscation.

5. The appellants have completely refuted the allegations. Their contention is that they were the manufacturers of the industrial gases and had, therefore, rightly claimed and availed themselves of

the exemption under the notifications. The contention of M/s. Hindustan Zinc Ltd. all through was that they were manufacturing the gases in the plant given on rental basis to them by M/s. Industrial Gases and that the relevant facts about the transactions were fully known to the Central Excise Authorities. We read below the relevant submissions made in their appeal.

"C. The ld. Commissioner failed to appreciate that the goods in question are manufactured in the Appellants factory and used within the factory of production. In fact the Commissioner has proceeded on a basis that IGL was a separate legal entity having full control over production and dispatch over the plant. That the Appellants did not have any control over the plant and both the units were independent from each other. That IGL was the actual manufacturer of gas and liable to duty on gases produced and supplied to the Appellants.

C.1 The Appellants submit that the goods in question are manufactured by using the plant given on rental basis to the Appellants. As per the agreement/contract entered into by the Appellants with IGL, the plant and machinery used for production of the goods in question was installed within the Appellants factory. The power necessary for the operation of the equipments for the production of the goods in question was supplied by the Appellants free of cost. The water required for the manufacturer of the goods in question is being provided by the Appellants. Lighting etc. for operating the plant producing the goods in question was provided by the Appellants. Significantly and most importantly the Appellants have to provide the approval of classification list exempting the goods in question. For the goods in question supplied through the pipeline from the plant producing the said goods in question, the Appellants have to pay rental charges to IGL. As per the contract, IGL had to supply specified quantity of the goods in question. The payment is made for the goods in question supplied upto a particular quantity per day. For example in respect of oxygen gas supplied upto 6000 cubic meter per day a fixed rent of Rs. 4,62,600/- per month was to be paid in accordance with the agreement dated 10-9-96. In respect of the oxygen gas supplied beyond 6000 cubic meter per day based on actual consumption, the additional rent of Rs. 2.57 per cubic meter is to be paid by the Appellants. Out of this rental charges collected by IGL, it incurred operational and maintenance expenses. Such rental payments without purchase of gas amount to use of the gas captively by the Appellants.

C.2 A perusal of the contract/agreement entered into by the Appellants with IGL will clearly show that the plant for manufacture of the goods in question was obtained by the Appellants on rental basis and the same was installed within the Appellants factory. Therefore the goods in question have to be treated as manufactured in the Appellants factory and used within the factory of production for the manufacture of zinc and lead."

6. The appellants have further submitted that since full facts of the case were known to the departmental authorities and still they had been allowed to avail of exemption showed that present finding is only the result of a change of opinion in the department and not that the appellant carried out any fraud on the revenue. They point out that they had obtained central excise license for the manufacture of the gases in question, and had filed classification list and other documents from 1990 when the plant was installed. They also point out that upon coming to know about the installation of the gas producing plant a show cause notice dated 7-7-92 had been issued to the

appellant and the said notice was adjudicated by Commissioner of Central Excise vide his order-in-original No. 174/92, dated 24-12-92. In this order the Commissioner held that the appellants were eligible for exemption under Notification No. 217/86. The appellants submit that once the Commissioner had held that the goods were exempt under the Notification, a charge of the appellant having reason to believe that gases were liable to confiscation could not arise at all. It is further pointed out that even otherwise the appellant had no reason to seek to avoid the effect of central excise duty on the gases, since they could avail themselves of Modvat credit in respect of any duty of excise paid on their inputs including the gases in question.

7. As against the aforesaid submissions the learned SDR has pointed out that the appellant had obtained the central excise license by concealing the fact that the plant and machinery for the production of gases belonged to M/s. Industrial Gases and that M/s. Industrial Gases were manufacturing the gases by using their own labour. The learned SDR has emphasized that once it is established that the exemption was obtained by misstating facts, the appellant's knowledge regarding confiscability of gases in question got established. He, therefore, submitted that the penalties have been rightly imposed.

8. The appellants contentions all through have been that the plant and machinery had been taken out on rent and installed in the appellants premises. The arrangement between the Industrial Gases Ltd. and M/s. Hindustan Zinc Ltd. is also under a written contract. The appellants had all along maintained that since the oxygen/nitrogen plant was on rental basis, M/s. Hindustan Zinc Ltd. are the manufacturers and a case of manufacture of gas by M/s. Industrial Gases and sale of the gas to M/s. Hindustan Zinc Ltd. did not arise. The arrangement between M/s. Hindustan Zinc Ltd. and Industrial Gases regarding the gas plant remain the same from the inception upto the period covered by the present adjudication. The appellant's claim that the gas plant is on rental had also been raised in the 1992 adjudication. The existence of the contract for rental is also not denied. The Commissioner held that the appellant to be eligible for exemption. These facts and circumstances lend credibility to the appellant's claim of bona fides. It is further to be noted the gases in question were industrial input for M/s. Hindustan Zinc Ltd. and they were entitled to Modvat credit equivalent to the duty paid on the gases. Thus, by following the route of Modvat credit they could have neutralized the effect of central excise duty on the gases. This aspect of the matter also goes against a finding that the appellant received and made use of the gases with the knowledge that the gases in question were liable to confiscation. It takes quite a convincing to establish that a Public Sector Unit (as M/s. Hindustan Zinc Ltd. then was) would prefer to procure offending goods as inputs to procuring them legitimately and availing themselves of Modvat credit. We are not convinced about the Revenue's allegation that the appellant is M/s. Hindustan Zinc is liable to penalty under Rule 209A in regard to the manufacture and use of the gases.

9. The second appellant was an employee of the first appellant and his actions were in the performance of his duties to the employer. Since we have found the employer assessee to be not guilty, the finding of guilt cannot surviving in respect of the employee.

10. In view of what has been stated above, the appeals are allowed with consequential relief to the appellants.