Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

EXCISE Appeal No. 10312 of 2016- DB

[(Arising out of OIO-AHM-EXCUS-001-COM-010-15-16 dated 26/11/2015 passed by Commissioner of Central Excise-AHMEDABAD-I)]

C.C.E.-Ahmedabad-i **........Appellant**
C. Ex Bhavan,
Nr Panjrapole & Polytechnic, Ambavadi,
Ahmedabad, Gujarat- 380015

VERSUS

Inspiron Engineering Pvt Ltd **......Respondent**
Survey No. 320, Odhav Road,
Ahmedabad, Gujarat

APPEARANCE:
Shri Rajesh R Kurup, Superintendent (AR) for the Appellant
Shri Amal Dave, Advocate for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No.12824/2023

DATE OF HEARING: 02.11.2023
DATE OF DECISION: 22.12.2023

RAMESH NAIR

The issue involved in the present case is that whether the respondent is entitled for Cenvat credit in respect of service of Sales Commission and whether the demand for the extended period was rightly set aside by the Adjudicating Authority or otherwise.

2. Shri Rajesh R Kurup, Learned Superintendent (AR) appearing on behalf of the Revenue/ Appellant reiterates the grounds of the appeal. He further submits that the Learned Commissioner though held that the appellant is not entitled for Cenvat credit on Sales Commission. However, wrongly set aside the demand on the ground of time bar, for the extended period.

2.1 He further submits that the appellant cannot entertained any bona fide belief in availing the wrong credit on Sales Commission, as the issue was decided way back in the case of Maruti Suzuki Ltd. 2009 (240) ELT 641

(S.C.) that the service, which does not have nexus with the activity of manufacturing the credit cannot be allowed. Therefore, in view of the Supreme Court judgment, the appellant was not eligible for Cenvat Credit on Sales Commission. This was further endorsed by the Hon'ble Gujarat High court in the case of Cadila Helth Care Ltd. reported at 2013 (30) STR 3. The appellant have not disclosed the fact of availment of Cenvat credit on Sales commission. Therefore, there is a clear suppression of fact on their part. Accordingly, the demand of extended period ought to have confirmed by the Adjudicating Authority. Therefore, to this extent, the order of the Adjudicating authority is not legal and the same deserve to be set aside. Revenue's appeal be allowed.

3. Shri Amal Dave, Learned counsel appearing on behalf of the respondent submits that on the specific issue of eligibility of Cenvat Credit, there were catena of judgments in favour of the assessee therefore, as per those judgments the appellant was legally entitled to avail the Cenvat Credit. Hence, no mala fide can be attributed in availment of Cenvat Credit on Sales commission by the respondent therefore, the learned commissioner has rightly dropped the demand for the extended period. He placed reliance on the following judgments:

- CCE, Ludhiana Vs. Ambika Overseas 2012 (25) STR 349 (P&H)
- CCE, Jallandhar Vs. Ambika Overseas 2010 (20) STR 514 (Tri.-Del.)
- Metro Shoes Pvt. Ltd. Vs. CCE, Mumbai-I 2008 (10) STR 382 (Tri.-Mumbai)
- Commissioner Vs. Metro Shoes Pvt. Ltd.- 2012 (28) STR J19 (Bom.)
- Lanco Industries Ltd Vs. CCE Trirupathi- 2010 (17) STR 350 (Tri.-Bang.)
- Principal Commr, Kolkata Vs. Himadri speciality Chemical Limited- 2022 (9) TMI 1213- Culcutta High Court
- Commissioner Vs. Essar Steel India Ltd.- 2016 (45) STR J2018 (Guj.)

- Essar Steel India Vs. CCE & ST, Surat-I- 2016 (335) ELT 660 (Tri.-Ahmd.)

4. On careful consideration of the submission made by the both the sides and perusal of record, we find that as regard the merit of the case, whether the assessee is eligible to avail the Cenvat credit on Sales Commission the issue is pending before the Hon'ble jurisdictional High court of Gujarat in the case of commissioner Vs. Essar Steel Ltd 2016 (45) STR J 218 Gujarat. Therefore, in our considered view, the merit of the case cannot be taken up. However, in the present appeal, the limited issue to be decided is that whether the demand for extended period is sustainable or the same was rightly set aside by the learned commissioner.

4.1 We find that the period involved in the present case is April-2010 to March-2014. During this period, there was no dispute about admissibility of the Cenvat Credit on Sales Commission to the assessee in the light of the following judgments:

4.2 In the case of Ambika Overseas Hon'ble Punjab & Haryana High Court has allowed the Cenvat Credit on the Sales Commission by the following order:

> *"This appeal filed under Section 35G of the Central Excise Act, 1944 by the revenue-appellant is directed against the order dated 20-7-2010 [2010 (20) S.T.R. 514 (Tri. - Del.)] passed in Excise Appeal No. 1287 of 2008-SM(BR) by the Customs, Excise and Services Tax Appellate Tribunal, New Delhi (for short "the Tribunal").*
>
> *2. The appellant has claimed that the following substantial question of law arises for consideration by this Court :*
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> > *"Whether the Hon'ble CESTAT was correct in holding that the respondent is entitled to avail the CENVAT credit on the services provided by Overseas Commission Agents (provided in relation to canvassing and procuring of orders) as input services despite the fact that the services of "overseas commission agents" are post removal services and do not fall under the ambit of the definition of "input service" given under Rule 2(l) of Cenvat Credit Rules, 2004, which defines "input services" as the services used in or in relation to the manufacture or clearance of final products from the place of removal?"*

3. The facts, in brief, necessary for adjudication as narrated in the appeal, are that the respondent is engaged in the manufacture and clearance for export and home consumption of hand tools. The respondent had been paying overseas commission to its overseas commission agents who were causing sale of the exported goods, on payment of commission at an agreed percentage of business generated by them. As the commission agents were non-residents from outside India and had no office in India, the respondent being the receiver of their services was liable to pay service tax on the value of overseas commission paid by it to them for procuring business auxiliary services under Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 (for short "the Rules"). The respondent was, thus, required to obtain service tax registration, pay service tax and file ST-3 returns under Rule 7 of the Rules. A notice was issued to the respondent to show cause why recovery of service tax of Rs. 8,205/- for the period from 4/04 to 12/04 be not made from it. It was, however thereafter, that the respondent wrote a letter dated 29-8-2006 to the Assistant Commissioner, Central Excise Division-I, Jalandhar intimating that it had deposited service tax of Rs. 4,20,592/- including the education cess of Rs. 8,246/-, along with interest of Rs. 45,127/- as its service tax liability for the period from 9-7-2004 to 30-6-2006. It was further stated in the letter that the same be treated as an intimation as required under sub-section (3) of Section 73 of the Finance Act, 1994 and that it had taken Cenvat Credit of the said service tax in its Cenvat account which would be utilized for payment of excise duty.

4. On scrutiny, it was observed that the respondent had wrongly availed the Cenvat Credit of service tax and thus, contravened the statutory provisions of Rule 2(l) read with Rules 3 and 4 of the Cenvat Credit Rules, 2004 (in short "the 2004 Rules"). It is how a show cause notice dated 26-10-2006 was issued to the respondent requiring it to submit its stand and further why the recovery of the wrongly availed service tax be not made from it. The adjudicating authority thereafter by order dated 31-10-2007 confirmed the recovery of Rs. 4,20,592/- besides imposing penalty of the equal amount, under Rule 15 of the 2004 Rules.

5. The respondent preferred appeal before the Commissioner (Appeals) challenging the order-in-original dated 31-10-2007. The Commissioner (Appeals) allowed the appeal and set aside the above order, vide order dated 27-3-2008.

6. The appellant-department preferred appeal before the Tribunal. The Tribunal upheld the order of the Commissioner (Appeals) by its order dated 20-7-2010.

7. Hence, this appeal by the appellant-Department.

8. The Tribunal while affirming the order of Commissioner (Appeals) and adjudicating the issue in favour of the respondent had come to the conclusion that the activities in respect of which cenvat had been filed, were pre-removal activities and the same could not be held to be post-removal. It was further observed that canvassing and procuring orders were in relation to 'sales promotion' and would fall under sales promotion activities. These activities were, thus, included in the definition of input services and the assessee was entitled to benefit of cenvat credit of service tax. It would be advantageous to notice here the findings recorded by the Tribunal in para 6 of its order which are to the following effect :

> *"I have carefully considered the submissions from both sides. The canvassing and procuring orders are activities preceding removal of the goods by the manufacturers. Without the firm order, the respondents were not expected to*

> *remove the goods to a foreign destination. Therefore, the submission of the learned DR that these activities are post-removal activities cannot be accepted. Further, the definition of the 'input services' includes services used in relation to 'sales promotion' and these activities can rightly be described as sales promotion activities. Sales promotion activities undertaken at given point of time also aims at sales of goods which are to be manufactured and cleared on future. Any advertisement given as a long term impact cannot be treated as post- clearance activities and, therefore, sales promotion has been specifically included in the definition of input services. As regards the other contention that the documents on which the respondent has taken the credit is not the prescribed document, it is to be noted that the respondent is not a service provider per se. They are basically the service recipients. They are required to pay service tax as a deemed service provider. Under these circumstances, the respondents have paid service tax using TR-6 challans and taken credit treating the said documents as documents covered by Rule 9(1) of the Cenvat Credit Rules, 2004. There is nothing irregular about it."*

9. In the light of the aforesaid finding, learned counsel for the revenue was unable to justify that the claim of cenvat credit by the assessee was erroneous in any manner. No perversity or illegality could be shown by the learned counsel in the order passed by the Tribunal which may call for any interference by this Court.

10. In view of the above, this Court is of the opinion that in this appeal, no substantial question of law arises for consideration by this Court. The appeal is accordingly dismissed.

4.3 The similar issue was also considered by this Tribunal in the case of Metro Shoes Pvt. Ltd and same was upheld by the Hon'ble Bombay High Court reported at Commissioner Vs. Metro Shoes Pvt. Ltd - 2012 (28) STR J19 (Bom.). In the case of Lanco Industries (supra) the Tribunal Bangalore bench had allowed the Cenvat Credit on Sales Commission by order dated 02.07.2009. Similarly, in various other judgments cited by the learned Counsel the credit during the relevant period on the sales commission was admissible in the light of various judgments. It is obvious that any assessee has to act in accordance to the law laid down by the Tribunal or as the case may be in the High Court.

4.4 As discussed the above, since during the relevant time the dispute on availability of Cenvat Credit, in respect of Sales Commission stood decided in favour of the assesse, whereby, credit on Sales Commission was admissible, there cannot be any mala fide intention or suppression of fact with intent to evade payment of duty or wrong availment of credit, on the part of the respondent. The Revenue has heavily relied upon the decision of Hon'ble Supreme Court in the case of Maruti Suzuki Inidia Ltd. Which was on general principle of Cenvat Credit Rules. Whereas, the specific issue of availment of Cenvat Credit on Sales Commission has been decided in various judgments. Therefore, in our considered view the judgments dealing with the specific issue will prevail over the judgment in respect of general principle of the Cenvat Credit Rules. Accordingly, we do not find any mala fide on the part of the respondent. Therefore the Adjudicating Authority's order setting aside the demand of Cenvat credit on Sales Commission exclusively on the ground of time bar is not found any fault. Therefore, we are of the considered view that the extended period was not invokable for the demand beyond the normal period.

5. Accordingly, we do not find any infirmity in the impugned order setting aside the demand on the ground of time bar, therefore impugned order to the extent it set aside the demand on time bar is upheld. Revenue's appeal is dismissed.

(Pronounced in the open court on 22.12.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha