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

REGIONAL BENCH-COURT NO. 3

EXCISE Appeal No. 10997 of 2015 - DB

(Arising out of OIA-VAD-EXCUS-001-APP-96-2015-16 dated 20/05/2015 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-I)

Omori India P Ltd ....**Appellant**
357,358 & 360, Sankarda Bhadarwa Road,
Rania, Taluka : Savli,
Vadodara, Gujarat

VERSUS

C.C.E. & S.T.-Vadodara-I ......**Respondent**
1st Floor...Central Excise Building,
Race Course Circle,
Vadodara, Gujarat- 390007

APPEARANCE:
Shri Saurabh Dixit, Advocate for the Appellant
Shri A R Kanani, Superintendent (AR) for the Respondent

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

Final Order No. 10187/2024

DATE OF HEARING: 07.11.2023
DATE OF DECISION: 22.01.2024

RAMESH NAIR

The issue involved in the present case is that whether the appellant is eligible for Service Tax credit on commission paid to its directors, as per the company's board resolution. The case of the Revenue is that the commission paid to directors is nothing but a commission paid to commission agent, hence the credit is not available to the appellant.

2. Shri Saurabh Dixit, Learned Counsel appearing on behalf of the appellant submits that there is no dispute that the director of the appellant company is not commission agent but he is the director on the board of the directors of the company and as per the boards resolution the directors are entitled for share in the profit as remuneration, which is called as commission. Therefore, the commission paid to the director is nothing but a

remuneration towards its directorship in the company, the director is not commission agent. Therefore, entire basis of the department's case being on wrong footing fails on this count itself.

2.1 He also refers to the Article of association of the company to show that the remuneration paid to the director include salary commission or participation in profits. Therefore, the payments under the nomenclature of commission made to the director is nothing but remuneration paid to them. Therefore, the credit of Service Tax paid on such remuneration is admissible to the appellant. In support of his submission, he placed reliance on the following judgments:

- M/s. Rane Brake Lining Ltd 2018 (7) TMI 611- CESTAT Chennai
- CBEC Circular No. 115/9/2009-ST, Dated 31.07.2009
- M/s. SKN Organics P Limited 2016 (10) TMI 1201- CESTAT Chennai

3. Shri A K Kanani, Learned Superintendent (AR) appearing on behalf of the revenue reiterates the findings of the impugned order.

4. On careful consideration of the submission made by both the sides and perusal of record, we find that the short issue to be decided is, whether the appellant is entitled for Cenvat Credit in respect of commission paid to the director company or otherwise. We find that as regard the remuneration to be paid to the director of the company in the Article of association of the company, the following relevant clause is reproduced below:

> *"74. A Managing or whole time Director may be paid such remuneration (whether by way of salary, commission or participation in profits or partly in one way and partly in other) as the Board of Directors may determine."*

Form the above para 74 of Articles of association, it is clear that the director is entitled for payment of commission by the company, which is participation part of the profit earned by the company. The company also passed the resolution which is scanned below:

64 73

HELD AT .... ON .... TIME ....

ANNEXURE-4

MINUTES OF THE MEETING OF THE BOARD OF DIRECTORS OF MULTI PACK SYSTEMS PRIVAT ELIMITED HELD ON THURSDAY, JULY 4, 2013 AT 2.00 PM AT ROHIT CHAMBERS, JANMABHOOMI MARG, MUMBAI 400 001

Present : Shri R J Patel – Chairman
Shri B H Patel – Wholetime Director
Shri P R Patel - Director

Shri R J Patel took the Chair.

LEAVE OF ABSENCE
Leave of Absence was granted to Shri N B Patel, as per his request.

MINUTES OF THE MEETING
The Minutes of the last Board meeting held on June 27, 2013 were confirmed and signed by the Chairman

TO CONSIDER AND APPROVE THE COMMISSION TO THE DIRECTORS
The Chairman stated that the Board had to decide about the commission payable to the Directors for the financial year ended 31st March, 2013. After discussion following resolution was passed unanimously:

"RESOLVED THAT a sum of Rs. 1,00,00,000/- be appropriated from the profits of the Company for the year ended 31st March, 2013, to be paid equally to the four Directors of the Company by way of commission."

TO CONSIDER & RECOMMEND THE DIVIDEND FOR THE YEAR ENDED 31ST MARCH 2013:
The Directors discussed about the quantum of dividend to be recommended for the year ended 31st March, 2013. After discussion the following Resolution was passed unanimously.

"RESOLVED THAT the interim dividend paid during the year 2012-13, be treated as final dividend.

TO CONSIDER AND APPROVE THE AUDITED ACCOUNTS & DIRECTORS' REPORT TOGETHER WITH DRAFT AUDITOR'S REPORT AND DRAFT MANAGEMENT REPRESENTATION LETTER FOR THE YEAR ENDED 31ST MARCH, 2013.
Mr. B. H. Patel, WTD placed before the Board, the audited accounts for the year ended 31st March, 2013, along with the Draft Directors' Report.

The Board discussed the audited accounts. Mr. Pranav R. Patel expressed his views that information provided about the related party transactions was not adequate and that full particulars of all aspects of the related party transactions should be provided to the Board and lodged his protest. The Chairman clarified that the information as required by Accounting Standards had been provided in the Schedule attached to the accounts. After some discussion, the following Resolutions were proposed:

"RESOLVED THAT the following additions to fixed assets during the year be and are hereby approved."

Assets	Amount (Rs.)

CHAIRMAN'S INITIALS

From the above board resolution, it can be seen that as per the first resolution sum of Rs. 1 Crore to be paid equally to four directors of the company by way of commission this clearly shows that the commission paid to the director in the fact of the present case is not a sales commission paid to a commission agent but it is a remuneration paid to the directors. This very same issue has been considered by the board in the following Circular No. 115/9/2009-ST dated 31.07.2009 which is reproduced below:

Circular No. 115/9/2009-S.T., dated 31-7-2009
Dy. No. 324/Comm (ST)/2008

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject: Service tax on commission paid to Managing Directors/Directors by the company - Regarding Below mentioned issues have been referred to the Board seeking clarifications, -

(i) applicability of service tax under 'Business Auxiliary service on commission paid to Managing Directors/Directors (whole time, or Independent) by the company,

(ii) applicability of service tax on Independent Directors who are part of the Board of Directors under 'Management Consultant service'.

2. Both the matters have been examined by the Board and the clarifications are as under. -

(i) Some Companies make payments to Managing Directors/Directors (Whole-time or Independent), terming the same as 'Commissions'. The said amount paid by a company to their Managing Director/Directors (Whole-time or Independent) even if termed as commission, is not the 'commission' that is within the scope of business auxiliary service and hence service tax would not be leviable on such amount.

(ii) The Managing Director/Directors (Whole-time or Independent) being part of Board of Directors perform management function and they do not perform consultancy or advisory function. The definition of management consultant service makes it clear that what is envisaged from a consultant is advisory service and not the actual performance of the management function. The payments made by Companies, to Directors cannot be termed as payments for providing management consultancy service. Therefore, it is clarified that the amount paid to Directors (Whole-time or Independent) is not chargeable to service tax under the category 'Management Consultancy service. However, in case such directors provide any advice or consultancy to the company, for which they are being compensated separately, such service would become chargeable to service tax.

> *3. In view of the above, it is clarified that remunerations paid to Managing Directors/Directors of companies whether whole-time or independent when being compensated for their performance as Managing Directors/Directors would not be liable to service tax.*
>
> *Pending issues may be resolved in line with the above.*

From the above circular, it was categorically clarified that even if any amount paid to the director as a commission, the said amount paid by a company to their directors is not commission within the scope of 'Business Auxiliary Services'. With this clarification also, it is clear that payment made to directors even under the nomenclature of commission, the same is not the commission classifiable under 'Business Auxiliary Services'. Therefore, in our view the said commission is part of remuneration paid to the directors, hence not a sales commission. Accordingly, the same is eligible for Cenvat Credit to the appellant. This issue has been elaborately considered by this Tribunal in the case of M/s Rane Brake Lining Ltd. (Supra), wherein the Tribunal has passed the following order:-

> *"5. The first issue that arises for consideration is whether the appellant is eligible for credit of the service tax paid on product liability insurance. The department has denied the same on the ground that it is post-manufacturing activity and the liability arose only when the goods are handed over to the buyers. In fact, as per the explanation given by the appellant, it can be seen that the risk covers the defects with the product. In such cases, when there are defects to the product, the appellant / manufacturer will have to recall the product and thereby incur huge financial loss. The insurance is for covering the financial loss of the appellant / manufacturer and it cannot be considered as a post-manufacturing activity. The finance / raising a capital or adjustment of finances by way of taking insurance etc. falls within the inclusive part of the definition. This cannot be said to be a post-manufacturing activity for the reason that such insurance policies addresses the financial risks of the manufacturer. Further, in the case of Granules India Ltd. (supra), the Tribunal has held that the credit availed on directors' liability insurance is eligible. I find that the disallowance of credit on this input service is unjustified and requires to be set aside, which I hereby do.*
>
> *6. The second issue for consideration is regarding the eligibility of credit on service tax paid on Director Sitting Fees. The said issue is covered by the decision in the case of SKN Organics P. Ltd. (supra). Further, it is also to be stated that it is the duty of the director to attend the meetings and therefore the service tax paid on such fees is eligible for credit.*
>
> *7. From the discussions made above, I am of the view that the disallowance of credit on the impugned services is incorrect and requires to be set aside, which I hereby do. The impugned order is set aside and the appeal is allowed with consequential relief, if any."*

In view of the above discussions and findings, we are of the view that the appellant is legally entitled for the Cenvat credit in respect of the Service Tax paid on commission paid to the directors.

5. Accordingly, the impugned order is set aside. Appeal is allowed.

(Pronounced in the open court on 22.01.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha