CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 01

Excise Appeal No. 10328 of 2019-SM

[Arising out of OIA-VAD-EXCUS-001-APP-453-2018-19 dated 29.10.2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-I]

M/s Gmm Pfaudler Ltd. **.....Appellant**
Vithal Udhyognagar, Anand-Sojitra Road,
Karamsad, ANAND, GUJARAT

VERSUS

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

APPEARANCE:
Ms. Jigar Shah (Advocate) for Appellant
Shri. Prakash Kumar Singh, Suptd. (Authorized Representative) for Respondent

CORAM: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

FINAL ORDER NO. A/ 12452 /2021

DATE OF HEARING:18.10.2021
DATE OF DECISION:18.10.2021

PER: RACHNA GUPTA

Present appeal has been filed against order in appeal No. 001-2018-19 dated 29.10.2018. The facts in brief relevant for the present adjudication are as follows:

That the appellants were served with a Show Cause Notice dated 31.03.2017 / 03.04.2017 alleging the wrong availment of cenvat credit on the outward transportation services. The amount of Rs. 15,81,983/- for the period October 2015 to December 2016 was proposed to be recovered from the appellants along with the interest and the appropriate penalties. The said proposal was initially confirmed by the original adjudicating authority vide order No. 27/2016-17 dated 29.12.2017. The appeal thereof has been rejected vide the order under challenge. Being aggrieved, the appellant is before this Tribunal.

2. I have heard Shri Jigar Shah, Learned Counsel for the appellant and Shri Prakash Kumar Shah, Learned Authorized Representative for the Respondent.

3. Learned Counsel for the appellant has mentioned that the sale in the present case is on FOR basis, due to which it was buyer's place where the sale actually got concluded. Hence, the transportation from factory to the buyer's place is an eligible input service despite the amendment in the definition in Section 2(l) of Cenvat Credit Rules, 2004. Learned Counsel has impressed upon that the Tribunal in their own case reported at **2019 (5) TMI 1406-CESTAT** and also in final order No. **A/13790-13791 of 2017 dated 21.11.2017** has decided in appellant's favour for the period post amendment in the definition of 'Input Services'. Learned Counsel has also laid emphasis upon the Circular dated 23.08.2007. He also has read the extract of the Board's Circular No. 999/6/2015-CX dated 28.02.2015 and Circular No. 1065/4/2018-CX dated 08.06.2018 and thus has prayed for the order under challenge to be set aside and appeal to be allowed.

4. While rebutting these arguments, Learned DR has made emphasis upon the decision of Hon'ble Apex Court in the case of **M/s Ultratech Cement Limited reported as 2007 (6) STR 364** to emphasize that once the final products are cleared from the factory premises extending the credit beyond the point of clearance of final product is not permissible under Cenvat Credit Rules and post clearance use of service in transport of manufactured goods cannot be the input service for manufacture of final product. Order in appeal No. 84/17-18 dated 29.10.2018 in appellant's own case has also been emphasized where the outward transport services are denied to be the eligible input services. Impressing upon the justification and reasonableness in order under challenge, appeal in hand is prayed to be dismissed.

5. After hearing the parties, the rival contentions and perusing the records, I observe and hold as follows:

6. The only issue involved herein is as to whether the appellants are eligible to avail credit of service tax paid on GTA Service (Outward Freight) during the impugned period of October 2015 to December 2016. To adjudicate the above question the utmost important aspect to be checked is the definition of 'Place of Removal' in section 4 of Central Excise Act, 1944 (CEA) which reads as follows:

> "**place of removal**" means —
> (i) a factory or any other place or premises of production or manufacture of the excisable goods;
> (ii) a warehouse or any other place on premises wherein the excisable goods have been permitted to be deposited without 3[payment of duty;]
> (iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory;

from where such goods are removed;

Apparently and admittedly the sale in the present case is on FOR basis, i.e. an arrangement where seller retains risk of loss until the goods reach the buyer. Since apparently the service in the present case is beyond the factory gate which is not even the warehouse, the above clause (i) and (ii) are not applicable. Hence Clause (iii) of the above definition is applicable to the given facts and circumstances. For the purpose of this clause it is not merely the clearance from factory gate/ warehouse which is to be checked but precisely the point of sale is to be checked to ascertain as to whether the transportation services used are upto the place where sale got concluded or beyond the said place. To further adjudicate, we also need to check the definition of 'Sale'.

> The expression "sale" has been defined under the Central Excise Act, 1944 as well as under Sale of Goods Act, as under:-
>
> "h) "sale" and "purchase", with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration; "
>
> As per Section 4 of the Sale of Goods Act, 1930, sale means transfer of property in goods to the buyer for a price. (Section 19 of this Act explains as to when property passes.) It reads as follows:
>
> "4. Sale and agreement to sell.—
>
> (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.
>
> (2) A contract of sale may be absolute or conditional.
>
> (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.
>
> (4) An agreement to, sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. "

Section 19 therein prescribes as to when the property passes on so as to concluded the sale. Section 4 thereof defines the 'Sale'. Perusal of those provisions make it clear:

> *"that as far as interpretation under the Central Excise laws is concerned, as per the above provisions, "transfer of possession with title of goods by one person to another" is the crux of the sale transaction. Therefore, until and unless the goods are delivered to the buyer, and the possession with title of goods is transferred unto the buyer, the sale does not take place and it cannot be said that goods have been sold. Though it may not always be the physical delivery and physical possession."*

7. Though the department has laid emphasise upon the decision of Hon'ble Apex Court in Ultratech Cement case (supra) but the perusal there of also makes it clear that the Hon'ble Apex Court has held that after the final products are cleared from the 'Place of Removal' that there will be no scope of subsequent use of service. The Hon'ble Apex Court has emphasized upon 'place of removal' which has not been specified to be the factory gate or the warehouse gate. The sale in the present case being on FOR basis got concluded only at the buyer's place. As already observed above, in terms of clause iii of Section 4 of Central Excise Act, the place of removal is the place of conclusion of Sale. Hence seen even from the said decision, the facts of the present case are held to be covered under the said decision. Infact the earlier decisions also i.e. of M/s Roofit Industries Ltd. **2015 (319) ELT 221(SC)** and even the M/s Escorts JCB Limited **2002 (146) ELT 31 (SC)** the emphasise is upon the place of removal and the place where sale gets concluded is definitely covered under the said definition.

8. Further, I observe that the circular dated 08.06.2018 also cannot be made retrospectively applicable to the period in question (April 2015 to June, 2017). At the relevant time, circular No. 988/12/2014 CX dated 20.10.2014 / Circular No. 97/8/2007-CX dated 23.8.2007 were applicable. It has been time and again been settled by the Hon'ble Supreme Court that the beneficial circular cannot be retrospectively withdrawn. Consequently, benefit of the said circular shall continue to be available to the appellant. Accordingly, I am of the opinion that the Adjudicating Authority Below has wrongly disallowed the CENVAT Credit relying upon the decision of Ultratech Cement (supra) and consequent circulars of 2018. Also there already has been a decision of this Tribunal in appellant's own case holding appellant entitled for the cenvat credit on the outward GTA service in F.O. No. E/11306-11307/2018-SM.

9. In view of the above discussion and the earlier decisions of this Tribunal in favour of the appellant, the order under challenge is hereby set aside. Appeal, accordingly, stands allowed.

(Dictated and pronounced in the open court)

(Rachna Gupta)
Member (Judicial)

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