

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
AHMEDABAD
REGIONAL BENCH, COURT NO. 2**

EXCISE APPEAL NO. 11371 OF 2017 - DB

(Arising out of OIO-KCH-EXCUS-000-COM-006-007-17-18 dated 11/04/2017 passed by Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD)

Ultratech Cement Ltd

S.no.24/25/27/30 Sewagram,
Vayor, Naliya
Kutch, Gujarat

.....Appellant

VERSUS

C.C.-Ahmedabad

Custom House,
Near All India Radio Navrangpura,
Ahmedabad, Gujarat

.....Respondent

Appearance:

Shri Amber Kumrawat, Advocate for the Appellant

Shri Tara Prakash, Deputy Commissioner (AR) for the Respondent

CORAM:

HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)

HON'BLE MR. RAJU, MEMBER (TECHNICAL)

Final Order No. 11452/2024

DATE OF HEARING: **24/04/2024**

DATE OF DECISION: **28.06.2024**

RAMESH NAIR

The issue involved in the present case is that whether the appellant is entitled for Cenvat credit on the service tax paid on outward transportation or otherwise.

2. Shri Amber Kumrawat learned Counsel appearing on behalf of the appellant at the outset submits that the issue involved has already been settled by this Tribunal in their own case as well as in various other judgments. On the query from the bench he submits that facts of that case which was decided for the period of 2009-2010 to 2013-2014 are The same in the present case which is for the period April 2014 to March 2016. Therefore, the Tribunal judgment in their own case is directly applicable in the present case. He placed reliance on the following judgments and board circulars :-

- CCE v. Ultratech Cement Ltd. 2018 (2) TMI 117 (SC)
- CCE, Aurangabad v. Roofit Industries Ltd. 2015 (319) ELT 221 (SC)
- Ultratech Cement Ltd. v. CCE, Kutch (Gandhidham) 2019 (2) TMI 1487 (Ahm.)
- Sanghi Industries Ltd. v. CCE, Kutch (Gandhidham) 2019 (2) TMI 1488 (Ahm.)
- Commissioner, CGST v. Ultratech Cement Ltd. 2020 (3) TMI 1206 (Guj. HC)
- Circular No. 97/8/2007-ST dated 23.08.2007
- Circular No. 988/12/2014-CX dated 20.10.2014
- Circular No. 999/6/2015-CX dated 28.02.2015
- Circular No. 1065/4/2018-CX dated 08.06.2018

3. Shri Tara Prakash learned Deputy Commissioner (AR) appearing on behalf of the revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both the sides and perused the record. We find that on the issue of Cenvat Credit on outward transportation this Tribunal in the appellants own case reported as Ultra Tech Cement Ltd v/s. CCE Kutch Gandhidham , 2019 (2) TMI 1487 Ahmedabad, decided that the appellants are eligible for on credit on outward transportation. It is also observed that fact of the above cited judgment and in the present case is identical. The above judgment has been upheld by the Hon'ble Gujarat High Court reported at Commissioner CGST Ultra Tech CEMENT 2023 TMI 1206 (Gujarat High Court). The relevant portion of the Tribunal's decision in Ultra Tech is as under :-

"4. Heard both the sides and perused the records of the case. We find that the Appellant are clearing their goods on MRP basis in case of clearance from their depot/ stockists or to their customers and in case of sale to institutional consumers the goods are being cleared by them by adopting the valuation of the goods in terms of Section 4. The Appellants have annexed copies of excise invoice cum gate pass which shows that the prices are inclusive of freight and insurance and nothing extra has been charged. The goods are being cleared on FOR basis and all liabilities in respect of transportation of goods or damage to goods were on account of Appellants. They were liable for safe delivery of goods upto their customers doorstep. In such case when the sale of the goods is completed at the doorstep of the Customer or depot/ stockist as the case may be the point of sale shall be such doorstep. We find that the Circular No. 1065/4/2018-CX dt. 08.06.2018 issued by the CBEC in this context clarifies as under:

3. General Principle: As regards determination of 'place of removal', in general the principle laid by Hon'ble Supreme Court in the case of CCE vs Ispat Industries Ltd 2015 (324) ELT 670 (SC) may be applied. Apex Court, in this case has upheld the principle laid down in M/s Escorts JCB (Supra) to the extent that 'place of removal' is required to be determined with

reference to 'point of sale' with the condition that place of removal (premises) is to be referred with reference to the premises of the manufacturer. The observation of Hon'ble Court in para 16 in this regard is significant as reproduced below:

"16. It will thus be seen where the price at which goods are ordinarily sold by the assessee is different for different places of removal, then each such price shall be deemed to be normal value thereof. Sub-clause (b) (iii) is very important and makes it clear that a depot, the 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 are all places of removal. What is important to note is that each of the premises is referable only the manufacturer and not to the buyer of excisable goods. The depot or the premises of the consignment agent of the manufacturer are obviously places which are referable to the manufacturer. Even the expression "any other place of premises refers only to a manufacturer's place or premises because such place or premises is to be stated to be where excisable goods "are to be sold". These are key words of the sub-section. The place or premises from where excisable goods are to be sold can only be manufacturer's premises or premises referable to the manufacturer. If we were to accept contention of the revenue, then these words will have to be substituted by the words "have been sold" which would then possibly have reference to buyer's premises."

4. Exceptions:

(i) The principle referred to in para 3 above would apply to all situations except where the contract for sale is FOR contract in the circumstances identical to the judgment in the case of CCE, Mumbai-III vs Emco Ltd 2015(322) ELT 394(SC) and CCE vs M/s Roofit Industries Ltd 2015(319) ELT 221(SC). To summarise, in the case of FOR destination sale such as M/s Emco Ltd and M/s Roofit Industries where the ownership, risk in transit, remained with the seller till goods are accepted by buyer on delivery and till such time of delivery, seller alone remained the owner of goods retaining right of disposal, benefit has been extended by the Apex Court on the basis of facts of the cases.

5. We find that the Chartered/Cost Accountant has certified that the goods were sold on FOR basis by the Appellant and the freight/ damages in transit was responsibility of Appellant till the goods reaches the doorstep of the Customers. Also we find that the consignment notes were raised upon the Appellant and they did not charge any amount except price of the goods from the customers. Thus in the light of above circular we find that as the ownership of the goods remained with the Appellants till the goods reached to the customer's doorstep and the freight charges as well as damage (insurance) to the goods till destination were borne by the Appellant, they are eligible for the credit of service tax paid by them on outward freight. In case of CCE & CU Vs. Roofit Industries Ltd. 2015 (319) ELT 221 (SC) the Hon'ble Apex Court held as under:

12. The principle of law, thus, is crystal clear. It is to be seen as to whether as to at what point of time sale is effected namely whether it is on factory gate or at a later point of time, i.e., when the delivery of the goods is effected to the buyer at his premises. This aspect is to be seen in the light of provisions of the Sale of Goods Act by applying the same to the facts of each case to determine as to when the ownership in the goods is transferred from the seller to the buyer. The charges which are to be added have put up to the stage of the transfer of that ownership inasmuch as once the ownership in goods stands transferred to the buyer, any expenditure incurred thereafter has to be on buyer's account and cannot be a component which would be included while ascertaining the valuation of

the goods manufactured by the buyer. That is the plain meaning which has to be assigned to Section 4 read with Valuation Rules.

13. In the present case, we find that most of the orders placed with the respondent assessee were by the various Government authorities. One such order, i.e., order dated 24-6-1996 placed by 40 Kerala Water Authority is on record. On going through the terms and conditions of the said order, it becomes clear that the goods were to be delivered at the place of the buyer and it is only at that place where the acceptance of supplies was to be effected. Price of the goods was inclusive of cost of material, Central Excise duty, loading, transportation, transit risk and unloading charges, etc. Even transit damage/breakage on the assessee account which would clearly imply that till the goods reach the destination, ownership in the goods remain with the supplier namely the assessee. As per the terms of payment clause contained in the procurement order, 100% payment for the supplies was to be made by the purchaser after the receipt and verification of material. Thus, there was no money given earlier by the buyer to the assessee and the consideration was to pass on only after the receipt of the goods which was at the premises of the buyer. From the aforesaid, it would be manifest that the sale of goods did not take place at the factory gate of the assessee but at the place of the buyer on the delivery of the goods in question.

14. The clear intent of the aforesaid purchase order was to transfer the property in goods to the buyer at the premises of the buyer when the goods are delivered and by virtue of Section 19 of Sale of Goods Act, the property in goods was transferred at that time only. Section 19 reads as under:

"19. Property passed when intended to pass. - (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in Sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer."

15. These are clear finding of facts on the aforesaid lines recorded by the Adjudicating Authority. However, the CESTAT did not take into consideration all these aspects and allowed the appeal of the assessee by merely referring to the judgment in the case of Escorts JCB Ltd. Obviously the exact principle laid down in the judgment has not been appreciated by the CESTAT.

16. As a result, order of the CESTAT is set aside and present appeal is allowed restoring the order passed by the Adjudicating Authority.

From the above judgment it is clear that till the goods are handed over to the buyer, the cost is borne by the assessee or in other words where the goods are cleared on FOR basis the freight paid on outward transportation would qualify as "Input Service". As regard reliance placed upon by the revenue on the judgment of the Apex Court, we find that the Hon'ble Supreme Court was concerned only with the "place of removal but did not go into the aspect of "Point of sale" or the FOR price destination Issue. Hence the said judgment is not applicable in the facts of the present case.

6. As regards other judgments cited by rivals, though we have considered the same, but since, we have discussed above the most relevant apex court judgments, we need not to discuss each and every judgment.

7. As regard the issue raised by the appellant that the excise duty paid on the element of freight being more than the element of cenvat credit on the outward GTA, therefore, there should not be any demand. We find force in the argument of the appellant however, since we are deciding the issue on merit, the admissibility of the Cenvat Credit on outward GTA on the basis of provision under Cenvat Credit Rules itself, we need not to deal this aspect hence, the issue related to this fact left open. As regard the submission made by Ld. Counsel that they have been operating as per the guideline given in the Circular dated 22.12.2014 and 23.08.2007 which was operative at the relevant time, therefore, even though the same were withdrawn w.e.f. 08.06.2018, but at the relevant time the benefit of said Circular shall be available. We find force in the argument of the Ld. Counsel as the law on this issue has been settled time and again by the Hon'ble Supreme Court as per the judgment cited by the Ld. Counsel and on various other judgments that beneficial Circular cannot be withdrawn retrospectively. Consequently, the benefit of the said Circulars shall be available to the appellant during the material period of this case. As regard limitation, we find that the issue was not free from doubt and right from introduction of Cenvat Scheme under Cenvat Credit Rules, the outward GTA was the matter under litigation and for that reason the Government has to come out with clarification thereafter the matter was subject to various litigation before Tribunal, Hon'ble High Courts and Hon'ble Supreme Court, therefore no malafide intention can be attributed to the appellant, therefore, wherever the demand is for extended period, the same will also not be sustainable on the ground of time bar also.

8. In view of our above findings we hold that the Appellants are eligible for the cenvat credit of service tax paid on outward freight. We therefore, set aside the impugned order and allow the appeal with consequential reliefs, if any. MA(ORS) also stand disposed of."

In view of the above judgment which was upheld by the Hon'ble Gujarat High Court, the issue in the present appeal is no longer res integra.

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

(Pronounced in the open court on **28.06.2024**)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)