

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

REGIONAL BENCH-COURT NO. 3

Excise Appeal No. 11651 of 2019 - DB

(Arising out of OIA-CCESA-SRT-APPEAL-PS-939-2018-19 dated 31/03/2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

Ambuja Cement Limited

Near Abg Ship Yard, Magdalla Port Road,
Vill. Gavier, Taluka Choryasi
SURAT, GUJARAT

.....Appellant

VERSUS

Commissioner of C.E. & S.T.-Surat-i

NEW BUILDING...OPP. GANDHI BAUG,
CHOWK BAZAR,
SURAT, GUJARAT-395001

.....Respondent

APPEARANCE:

Shri Jigar Shah, Advocate, Appeared for the Appellant

Shri Mihir G Rayka, Additional Commissioner (AR) Appeared for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR**

Final Order No. 12717/2024

DATE OF HEARING: 03.09.2024

DATE OF DECISION: 14.11.2024

RAMESH NAIR

The issue involved in the present case is that whether the appellant are entitled for Cenvat Credit in respect of service tax paid on outward transportation under reverse charge mechanism in the admitted fact that the sale of excisable goods is on FOR basis.

2. Shri Jigar Shah, Learned Counsel appearing on behalf of the appellant at the outset submits that in the identical set of facts and the question of law involved this Tribunal in the case of Ultra Tech Cement Ltd 2019-TIOL-1420-CESTAT-AHM allowed the Cenvat Credit in the case where the sale is on FOR basis and the said Tribunal's judgment has been upheld by the Hon'ble High Court of Gujarat reported at The Commissioner, Central Goods and Service Tax vs. Ultratech Cement Ltd 2020-TIOL-1638-HC-AHM-CX. He prays that this appeal may also be disposed of in the light of the judgment in the case of Ultratech Cement Ltd (supra).

3. Shri Mihir G Rayka, Learned Additional Commissioner (AR) appearing on behalf of the revenue, reiterates the findings of the impugned order.

4. We have carefully considered the submission made by both the sides and perused the records. We find that it is admitted fact even by the adjudicating authority in the impugned order that the sale of excisable goods is on FOR basis and in respect of supply of such excisable goods the appellant have availed the service of transportation on which the appellant have paid the service tax which has been availed as Cenvat Credit. We find that on the identical facts, this Tribunal has decided the matter in favour of the assessee in the case of Ultra Tech Cement Ltd 2019-TIOL-1420-CESTAT-AHM. In the said judgment, in the case of sale of goods on FOR basis, when the freight is integral part of the assessable value on which excise duty was paid, it was held that in this condition the assessee is eligible for the Cenvat Credit on outward transportation. The said judgment of the Tribunal has been upheld by the Hon'ble High Court of Gujarat reported at The Commissioner of Central Goods and Service Tax vs. Ultra Tech Cement Ltd 2020-TIOL-1638-HC-AHM-CX wherein, the Hon'ble High of Gujarat has passed the following judgment:-

"1. These Tax Appeals are filed under Section 35G of the Central Excise Act, 1944 by the Revenue and are directed against the order No.A/10373/2019 dated 25th February 2019 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zone Bench, Ahmedabad in Appeals Nos.E/11098/2015, E/10271/2015DB and E/11326/2017DB=2019-TIOL-1420-CESTAT-AHM respectively.

2 The Revenue has proposed the following question as substantial question of law:

"(i) Whether in the facts and circumstances of the case, was the Tribunal right in law in allowing the appeal of the respondent to avail Cenvat credit of service tax on outward transportation for the period 2009-10 to 2013-14?"

3. The short controversy, which arises in these appeals, is with regard to denial of Cenvat Credit for the period from 2009-10 to 2013-14 of service tax paid on outward transportation of goods by the respondents.

4. The show cause notice was issued for denial of said Cenvat Credit which was confirmed by the adjudicating authority holding that the credit of GTA (Goods Transport Agency) is available on input service upto the place of removal after 1st April 2008 in terms of Rule 2(I) of Cenvat Credit Rules, 2004. According to the adjudicating authority, in terms of Section 4(3)(c) of the Central Excise Act, 1944, "place of removal" means a factory or any other place or premises of production or manufacture of the excisable goods; a warehouse or any other place or premises wherein the excisable goods have been permitted to be stored without payment of duty.

5. However, Commissioner, Central Excise, Kutch (Gandhidham) by order dated 20th March 2015 disallowed Cenvat Credit of ₹ 16,67,51,317/- and levied interest and penalty.

6. Being aggrieved by the order passed by the adjudicating authority, the appeals were preferred before the Customs, Excise and Service Tax Appellate Tribunal (for short, 'the Tribunal') and the Tribunal, after hearing both the sides, has held 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)=2015-TIOL-238-SC-CX 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 Honb'le Count 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, Subclause (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 manufacturers 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 subsection. 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)=2015-TIOL-163-SC-CX and CCE vs M/s Roofit Industries Ltd 2015(319) ELT 221(SC)=2015-TIOL-87-SC-CX. To summarise, in the case of 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)=2015-TIOL-87-SC-CX 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 Withthe respondent assessee were by the various Government authorities. One such order, I.e., order dated 2461996 placed by 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."

7. In view of the aforesaid findings of facts given by the Tribunal relying upon the Board Circular No.1065/2018-CX dated 8th June 2018 as well as the decision of the Supreme Court in the case of Ultratech Cement Ltd vs. Commissioner reported in 2015(37) STR 364(T)=2014-TIOL-1934-CESTAT-DEL and in the case of Commissioner of Cus. & C. Ex. Aurangabad vs. Roofit Industries reported in 2015(319) ELT 221(SC)=2015-TIOL-87-SC-CX, no question of law much less of any substantial question of law arises out of the impugned order passed by the Tribunal.

The appeals, therefore, stand dismissed. No order as to costs."

Recently, on the identical issue and under the same set of facts, the Hon'ble Kerala High Court in the case of Transformers and Electricals Kerala Ltd vs. Commissioner of Central Tax and Central Excise Kochi/ Bangalore also taken the same view which is reproduced below:

"4. We have heard Sri.Abraham Markos, the learned counsel for the appellant as also Sri.Sreelal N. Warrior, the learned Standing Counsel for the respondent Department.

On a consideration of the rival submissions, we find that while it may be a fact that in the decision of the Supreme Court in Commissioner of Customs and Central Excise, Aurangabad v. Roofit Industries Ltd. - [2015 (319) E.L.T. 221 (SC)] that is relied upon by the learned counsel for the appellant, it was found that in circumstances where a manufacturer enters into a contract with his buyer on FOR basis, the place of removal for the purposes of payment of Central Excise duty has to be seen as the buyer's premises and not the manufacturer's factory, the upshot of the said finding was that the manufacturer, in that case, was legally obligated to include the cost of transportation of the goods from his factory to the premises of the buyer in the assessable value of the goods for the purposes of payment of Central Excise duty. May be in a factual situation similar to that, the appellant would be justified in contending that on the cost of transportation being included in the assessable value of the goods for the purposes of Central Excise duty, the amount paid to the goods transport agencies, who carried out the transportation, has to be seen as incurred in connection with an input service, for the purposes of claiming input tax credit of the tax paid in relation to the said services. In the instant cases, however, we find that it is the admitted case that the appellant did not include the transportation costs in the assessable value of the goods for the purposes of payment of Central Excise duty. Under such circumstances, we fail to see how the appellant can claim input tax credit in respect of the transportation services availed by it for the purposes of transporting the goods from the place of removal to the buyer's premises. In our view, permitting the appellant to avail input tax credit in such circumstances would militate against the very Scheme of CENVAT credit, which is designed to avoid the cascading effect of tax and an ultimate burden on a consumer. We therefore see no reason to interfere with the order of the Tribunal impugned in these appeals. The appeals fail, and are accordingly dismissed."

In view of the above judgments of the Hon'ble High Court of Gujarat and Kerala High Court, the issue is no longer res-integra. Hence, applying the above judgments in the present case also, the appellant is eligible for Cenvat Credit on outward GTA service.

5. Hence, the impugned order is set aside, the appeal is allowed with consequential relief.

(Pronounced in the open court on 14.11.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

Bharvi