CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70987 of 2018

(Arising out of Order-in-Appeal No.140-CE/APPL/KNP/ADG-NACIN/2017-18 dated 09/04/2018 passed by Commissioner (ZTI) Customs, Central Excise & Service Tax, Kanpur)

M/s Trident Auto Components Pvt. Ltd., ...Appellant
(B-16 & 17, Udyog Kunj, Panki Site-V, Kanpur)

VERSUS

Commissioner of Central Excise, Kanpur ....Respondent

(Division, Kanpur)

APPEARANCE:

Shri Amit Awasthi, Advocate for the Appellant
Shri Shri Sandeep Pandey, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70250/2023

DATE OF HEARING : 10 October, 2023
DATE OF DECISION : 10 October, 2023

SANJIV SRIVASTAVA:

This appeal is directed against order in appeal No 140-CE/APPL/KNP/ADG-NACIN/2017-18 dated 09.04.2018 of the Additional Director General NACIN, Kanpur, who has been assigned the Appeal No 326/CE/APPL/KNP/2016 dated 28.12.2016 under Notification No 26/2017-CE (NT) dated 17.10.2017 read with CBEC, New Delhi's order No 09/2017-S. Tax dated 16.11.2017. By the impugned order appeal filed by the appellant against order in original No 27/ADC/CE/2016 dated 01.10.2016 has been rejected.

1.2 Additional Commissioner has by his order in original held as follows:

"ORDER

a. *I confirm the demand and order to recover the CENVAT Credit of Rs 31,55,106/- (Rupees Thirty One Lakh fifty Five Thousand One Hundred Six Only) from M/s Trident Auto Components 9P) Ltd., B-16-17, Panki Industrial Area Site V, Kanpur under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11A of the Central Excise Act, 1944;*

b. *I also confirm and order to recover interest as applicable form M/s Trident Auto Components 9P) Ltd., B-16-17, Panki Industrial Area Site V, Kanpur under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AA of the Central Excise Act, 1944 on the amount confirmed at (a) above;*

c. *I also impose a penalty of Rs 31,55,106/- (Rupees Thirty One Lakh fifty Five Thousand One Hundred Six Only) upon M/s Trident Auto Components 9P) Ltd., B-16-17, Panki Industrial Area Site V, Kanpur under the provisions of Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944;"*

2.1 Appellant is engaged in manufacture of excisable goods falling under Chapter 86 of the First Schedule to Central Excise Tariff Act, 1985. They are also availing Cenvat Credit of the central excise duties and service tax paid by them on inputs and input services received by them.

2.2 During the course of audit it was noticed that the appellant has taken Cenvat Credit of the service tax paid by them on the services or Commission Agent received by them which was otherwise not admissible to them. Revenue was of the view that in view of the decision of Hon'ble Gujarat High Court in case of Cadila Health Care Ltd [2013 (1) ECS (Guj HC)] the credit in respect of these services as detailed in table below was not admissible to them.

S No	Period	Amount of Credit taken in Rs
1	2011-12	2,573.00
2	2102-13	11,88,091.00
3	2013-14	11,37,985.00
4	2014-15	8,26,457.00
total		31,55,106.00

2.3 A show cause notice dated 201.1.2015 was issued to the appellant asking them to show cause as to why,-

(i) *the Central excise duty amounting to Rs 31,55,106/- (Rupees Thirty One Lakh fifty Five Thousand One Hundred Six Only) should not be demanded and recovered from them by invoking extended period of limitations along with interest under rule 14 of the Cenvat Credit Rules, 2004 read with section 11A and 11AA of the Central Excise Act, 1944.*

(ii) *penalty should not be imposed upon them under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944.*

2.4 Show cause notice was adjudicated as per the order in original referred in para 1.2 above. Appeal filed by the appellant against this order has been dismissed as per the impugned order.

2.5 Aggrieved appellant have filed this appeal.

3.1 We have heard Shri Amit Awasthi Advocate for the appellant and Shri Sandeep Pandey, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits:

- the appellant entered into agreement with the service provider and the condition of agreement sate as follows:

  "While conducting the business of this above mentioned company, I have to be Business Activitie with DLW Varanasi

As could not do above activities personally & hence do hereby nominate Mr rai Aswani Kumar do all lawful acts necessary for the above mentioned purposes including collection of Receipted challan, R/notes, P.O. and amendments, rejected/ warranty material, Form 38, warranty withdrawal letters, follow up for payments, *& submission of tender/ offer & bills etc. from DLW Varanasi.*"

- The services thus received by the appellant from the ser5vice provider were integrally connected with the manufacturing and clearance activities of the appellant. These activities having direct nexus with the manufacture and clearance of goods by the appellant are covered by the (ii) of the Rule 2 (l) of Cenvat Credit Rules, 2004.
- The terms and conditions of the agreement along with the touchstone of judicial pronouncements the service received by the appellant do qualify as input services for him. Reliance is placed on the decisions in the case of,-
  - Ambica Overseas [2012 (25) STR 348 (P & H)]
  - Cadilla Health Care Pvt Ltd. [2013 (30) STR 3 (Guj)]
  - Mclube Asia Pvt Ltd. [2020 (37) GSTL 64 (T-Mum)]
- Demand is barred by limitation as has been held in the case of,-
  - Dynamic Industries Ltd. [2014 (35) STR 674 (Guj)]

3.3 Learned authorized representative re-iterated the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Following has been recorded in the impugned order for dismissing the appeal filed by the appellant before the Commissioner (Appeal)

The main issue is eligibility of credit of service tax on invoices of commission agent's service. The revenue has relied upon the decision of Hon'ble high Court of Gujarat in the case of Commissioner Ahmedabad –II vs Cadila Health Care Ltd [2013 91) ECS (Guj HC)] wherein it was held as under:-

> *"5.2 (viii) From the definition of sales promotion, it is apparent that in case of sales promotion a large population of consumers is targeted. Such activities relate to promotion of sales in general to the consumers at large and are more in the nature of the activities referred to in the preceding paragraph. Commission agent has been defined under the explanation to business auxiliary service and insofar as the same is relevant for the present purpose means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration. Thus, the commission agent merely acts as an agent of the principal for sale of goods and such sales are directly made by the commission agent to the consumer. In the present case, it is the case of the assessee that service tax had been paid on commission paid to the commission agent for sale of final product. However, there is nothing to indicate that such commission agents were actually involved in any sales promotion activities as envisaged under the said expression. The term input service as defined in the rules means any service used by a provider of taxable service for providing an output service or used by the manufacturer whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal and includes services used in relation to various activities of the description provided therein including advertisement or sales promotion. Thus, the portion of the definition of input service insofar as the same is relevant for the present purpose refers to any service used by the manufacturer directly or indirectly in relation to the manufacture of final products and clearance of final products from the place of removal. Obviously, commission paid to the various agents*

would not be covered in this expression since it cannot be stated to be a service used directly or indirectly in or in relation to the manufacture of final products or clearance of final products from the place of removal. The includes portion of the definition refers to advertisement or sales promotion. It was in this background that this court has examined whether the services of foreign agent availed by the assessee can be stated to services used as sales promotion. In the absence of any material on record, as noted above to indicate that such commission agents were involved in the activity of sales promotion as explained in the earlier portion of the judgement, in the opinion of this court, the claim of the assessee was rightly rejected by the Tribunal. Under the circumstances, the adjudicating authority was justified in holding that the commission agent is directly concerned with the sales rather than sales promotion and as such the services provided by such commission agent would not fall within the purview of the main or inclusive part of the definition of input service as laid down in Rule 2(l) of the Rules.

(ix) As regards the contention that in any event the service rendered by a commission agent is a service received in relation to the assessee's activity relating to business, it may be noted that the includes part of the definition of input service includes activities relating to the business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security. The words activities relating to business are followed by the words such as. Therefore, the words such as must be given some meaning. In Royal Hatcheries (P) Ltd. v. State of A.P., 1994 Supp (1) SCC 429, the Supreme Court held that the words such as indicate that what are mentioned thereafter are only illustrative and not exhaustive. Thus, the activities that follow the words such as are illustrative of the activities relating to business

which are included in the definition of input service and are not exhaustive. Therefore, activities relating to business could also be other than the activities mentioned in the sub-rule. However, that does not mean that every activity related to the business of the assessee would fall within the inclusive part of the definition. For an activity related to the business, it has to be an activity which is analogous to the activities mentioned after the words such as. What follows the words such as is accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security. Thus, what is required to be examined is as to whether the service rendered by commission agents can be said to be an activity which is analogous to any of the said activities. The activity of commission agent, therefore, should bear some similarity to the illustrative activities. In the opinion of this court, none of the illustrative activities, viz., accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security is in any manner similar to the services rendered by commission agents nor are the same in any manner related to such services. Under the circumstances, though the business activities mentioned in the definition are not exhaustive, the service rendered by the commission agents not being analogous to the activities mentioned in the definition, would not fall within the ambit of the expression activities relating to business. Consequently, CENVAT credit would not be admissible in respect of the commission paid to foreign agents.

8. CBEC has issued Instruction vide F No 96/85/2015-CX.I dated 07.12.2015. vide this Instruction, Minutes of Tariff Conference held on 28th & 29th October 2015 have been published. The relevant portion of the minutes are reproduced below:

B.30 -Meerut Zone -Cenvat Credit –Admissibility of Cenvat Credit on Service Tax Paid on Sales Agency Commission Service:

Issue: CBEC vide its Circular No. 943/4/2011-CX dated 29.04.2011 at point No.5 has clarified that credit of service tax paid on sales commission services (Business auxiliary services) used in 28relation to manufacture/sale of finished goods is admissible under Cenvat Credit Rules, 2004. However, there are conflicting judgments of Hon'ble High Courts in this regard. Hon'ble High Court of Gujarat in case of Cadila Health care [2013(030) STR 0003] has disallowed the said Cenvat creditwhereas Hon'ble Tribunal in case of Birla Corporation Ltd –[2014(35) STR977] followed the judgment of Hon'ble High Court of Bombay and allowed the credit. Board may be requested by the conference to issue necessary clarification on the subject to avoid further litigation and to achieve uniformity in the practice of assessment.

Discussion & Decision: The conference discussed the issue in detail and the facts of both the cases where apparently conflicting judgments have been delivered. It was noted that the judgment of Hon'ble High Court of Gujarat was in a very specific set of circumstances where the sales commission agent seemed to be only trading in the goods i.e. buying and selling the goods without undertaking any sales promotion or advertising. In the said judgment, Hon'ble Court noted that "there is nothing to indicate that such commission agents were actually involved in any sales promotion activities as envisaged under the said expression. Obviously, commission paid to the various agents would not be covered in this expression since it cannot be stated to be a service used directly or indirectly in or in relation to the manufacture of final products or clearance *of final products from the place of removal". Board Circular No. 943/4/2011-CX., dated 29.4.2011 at point no 5 on the other hand has explained the situation where the commission agent renders the service of sales promotion in following words –"....... Moreover the activity of sale promotion is specifically allowed and on many occasions the remuneration for same is linked to actual sale....... " . Board circular directs that input service credit would be available when there is a element of sales promotion as sales promotion is a service. Thus, the conflict between the judgment and the circular is not as large as is perceived. Both the Board circular and case laws on the subject allow credit of input services, when the activity of the sales commission agent involves an element of sales promotion."*

9. The appellant has submitted copy of the agreement dated 15.04.2010 with M/s Loko Spares Agencies Pvt Ltd Varanasi. As per this agreement M/s loko Spares will be required to submit and negotiate the tender requirements for promoting the business of the appellant, they will collect the purchase orders, schedules, road permit and other documents, keep a close follow up of the tender and enquiries related to business etc.

10. I find that the activities undertaken by M/s Loko Spares Agencies Pvt. Ltd., Varanasi are not covered in the definition of input services under rule 2(1) of the CCR in as much as neither the activity is sales promotion nor accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal. I also find that judgment of Hon'ble High Court of Gujarat was in a very specific set of circumstances where the sales commission agent seemed to be only trading in the goods i.e. buying and selling the *goods without undertaking any sales promotion or advertising. Both the Board circular and case laws on the subject allow credit of input services, when the activity of the sales commission agent involves an element of sales promotion. From the definition of "sales promotion", it is apparent that in case of sales promotion a large population of consumers is targeted. Such activities relate to promotion of sales in general to the consumers at large. Further as per Hon'ble Gujarat High Court order in the case of Cadila the expression 'sales promotion' has been defined in the "Oxford Dictionary of Business" to mean an activity designed to boost the sales of a product or service. It may include an advertising campaign, increased PR activity, a free-sample campaign, offering free gifts or trading stamps, arranging demonstrations or exhibitions, setting up competitions with attractive prizes, temporary price reductions, door-to-door calling, telephone selling. personal letters etc. In the "Oxford Dictionary of Business English", sales promotion has been defined as a group of activities that are intended to improve sales, sometimes including advertising, organizing competitions, providing free gifts and samples. These promotions may form part of a wider sales campaign. Sales promotion has also been defined as stimulation of sales achieved through contests, demonstrations, discounts, exhibitions or tradeshows, games, giveaways, point-of-sate displays and merchandising, special offers, and similar activities. The Advanced Law Lexicon by P. Ramanatha Aiyar, third edition, describes the term 'sales promotion' as use of incentives to get people to buy a product or a sales drive. In the case of Commissioner of Income-tax v. Mohd. Ishaque Gulam, 232 ITR 869, a Division Bench of the Madhya Pradesh High Court drew a distinction between the expenditure made for sales promotion and Commission paid to agents. It was held that commission paid to the agents cannot be termed as expenditure on sales* *promotion. Therefore, I hold that credit of service tax on the invoices of Commission Agent M/s Loko Spares Agencies Pvt. Ltd., Varanasi is not admissible."*

4.3 Rule 2 (l) of the Cenvat Credit Rules, 2004 read as follow:

(l) "input service" means any service,-

(i) used by a provider of taxable service for providing an output service; or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal, and

and includes services used in relation to setting up, modernisation, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage up to the place of removal, procurement of inputs, activities relating to business such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry and security, inward transportation of inputs or capital goods and outward transportation up to the place of removal;

4.4 From the perusal of the above rule it is evident that for the service to qualify as input service the service should qualify the test laid down as per (i) or (ii) or should be included in the list of services as specified in the inclusive part of definition. Agreement letter dated 15.04.2010, between the appellant and the Commission agent provides as follows:

"We are pleased to inform you in connection with the discussion held with you for doing business with the following party for the period from related to 1st April 2010 to 31st March 2014.

Name of the party: Diesel Locomotive Works (DLW)

Location : Varanasi

The terms & conditions for this agreement are as follows:

1. *You will be required to submit and negotiate for tender requirements for promoting business of our product to the above party.*
2. *You will collect the purchase orders, schedules, road permit and other documents which may be required from the aprty and send to us for further action.*
3. *You are required to keep a close follow up of the tender & enquiries related to business as specified and inform us accordingly.*
4. *The other responsibilities entrusted upon you are after submission of tender, coordinate with the department on our past product performance with technical details.*
5. *Trident Auto Components Pvt. Ltd. will intimate you about the dispatch of material and accordingly you need to intimate it to the department and also arrange for the return of rejected components to us.*
6. *You are responsible for all communications with DLW and taking necessary action as per the authority given to you to act on behalf of the company and forward us the same.*
7. *During the period of agreement you will not be dealing with any other party manufacturing similar products as of our organization with DLW.*
8. *Confidentiality: You shall keep our business secretes confidential and not disclose them to any third party during and after termination of this agreement.*
9. *Trident Auto Components Pvt Ltd. shall pay you commission at the arte of 2% on Purchase order value, excluding ED & VAT. Service Tax charged on your bill will also be paid.*
10. *You are not entitled for any other compensation for services performed or expenses incurred in connection with this agreement.*
11. *Trident Auto Components Pvt Ltd. reserves all rights to terminate the agreement at anytime during the period of agreement by issuing letter to that effect giving 90 days notice without giving any explanation for the same.*
12. *The commission will be paid to you on a quarterly basis, against actual dispatch from our end against individual PO no's."*

4.5 From the perusal of the above agreement it is evident that all the services received by the appellant in terms of this agreement are used by the appellant, directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal. The para of Hon'ble Gujarat High Court decision relied in the impugned order is not even a consideration of the dispute in terms of the (ii) of the Rule 2 (l) of the Cenvat Credit Rules, 2004. After taking note of the decision of Hon'ble Gujarat High Court, this bench has in case of Simbhaoli Sugar Ltd. [2018 (363) E.L.T. 1172 (Tri. - All.)] held as follows:

> *"2. Cenvat credit has sought to be denied to the appellant relying on the decision of Hon'ble High Court of Gujarat in the case of Commissioner of Central Excise, Ahmedabad-II v. Cadila Healthcare Ltd. reported in 2013 (30) S.T.R. 3 (Gujarat) wherein it has been held that such commission agents are not engaged in the activity of sales promotion. The said judgment has been examined by this Tribunal in the case of Essar Steel India Ltd. v. Commissioner of Central Excise & Service Tax, Surat-I reported in 2016 (335) E.L.T. 660 (Tri.-Ahmedabad) after examining the issue of sales promotion activity, as per Section 65(19) of the Finance Act, 1994 which defines the Business Auxiliary Service. While examining the definition of Business Auxiliary Service, where the agent is engaged in either promotion or marketing or where sale of goods produced or provided by or belonging to the appellant, the Hon'ble High Court has considered the issue of sales promotion and has not considered the issue of marketing or sale of goods and this Tribunal has examined that issue in the case of Essar Steel India Ltd. (supra) wherein it has been held that the assessee is entitled to avail Cenvat credit for commission paid to the commission agent who effected the sale of goods manufactured by the appellant. Further, I find that Hon'ble High Court of Punjab & Haryana in the case of Commissioner of Central Excise, Ludhiana v.*

Ambika Overseas reported in 2011 (07) LCX 0196 has held that Cenvat credit on service tax paid to selling agent for sale of goods is admissible as Cenvat credit. Therefore, as there are contrary judgments, in that circumstance without relying on either of the judgment of the Hon'ble High Courts, we decide the issue independently in the light of the decision of this Tribunal in the case of Maheshwari Solvent Extraction Ltd. v. Commissioner of Central Excise, Nagpur reported in 2014 (299) E.L.T. 116 (Tri.-Mumbai) wherein it has been held that if there are contrary view of the Apex Court, in that circumstance the Adjudicating Authority is independent to take any view on merits of the case. Therefore, we are taking independent view and hold that appellants are entitled to avail Cenvat credit on commission paid to the selling agent for selling the goods in terms of Rule 2(l) of the Cenvat Credit Rules, 2004."

4.6 In the case of Mclube, supra relied upon by the Appellant, Mumbai Bench has held as follows:

5. *Gone through the case record and relevant decisions referred in the order and cited by the appellant. It is a fact that basing on the judgment of Cadila Healthcare, cited Supra, the demand has been confirmed but it is observed that the Learned Commissioner (Appeals) had placed its reliance on Paras 5.2(viii) and (ix) of the said judgment and borrowed meaning of 'sales promotion' from different internet sites while Para (vii) of the Cadila's judgment explains the definition of sales promotion and its meaning. It is obtained by Hon'ble High Court from Oxford Dictionary of business and advance law which includes a free sample campaign also, baring analogy from the case laws reported in 232 ITR 869 in the case of the Commissioner of Income Tax v. Mohd. Ishaque Gulam, in which a Division Bench of Madhya Pradesh High Court drew a distinction between the expenditure made for 'sales promotion' and 'commission' paid to agents. It was held that commission paid to the* *agents cannot be termed as expenditure on sales promotion who are merely agent of the principal for sale of goods and such sales are directly made by the commission agent to the consumer, while activities relating to promotion of sales in general to the customers at large are more in the nature of activities referred to in the proceeding para, i.e., in para (vii), which is reproduced below for better clarity.*

"(vii) The expression 'sales promotion' has been defined in the Oxford Dictionary of Business to mean an activity designed to boost the sales of a product or service. It may include and advertising campaign, increased PR activity, a free-sample campaign, offering free gifts or trading stamps, arranging demonstrations or exhibitions, setting up competitions with attractive prizes, temporary price reductions, door-to-door calling, telephone selling, personal letters, etc. In the Oxford Dictionary of Business English, sales promotion has been defined as a group of activities that are intended to improve sales, sometimes including advertising, organizing competitions, providing free gifts and samples. These promotions may form part of a wider sales campaign. Sales promotion has also been defined as stimulation of sales achieved through contests, demonstrations, discounts, exhibitions or trade shows, games, give aways, point-of-sale, displays and merchandising, special offers, and similar activities. The advanced Law Lexicon by P. Ramanatha Aiyar, third edition, describes the term sales promotion as use of incentives to get people to buy a product or a sales drive. In the case of Commissioner of Income-tax v. Mohd. Ishaque Gulam, 232 ITR 869, a Division Bench of the Madhya Pradesh High Court drew a distinction between the expenditure made for sales promotion and commission paid to agents. It was held that commission paid to the agents cannot be termed as expenditure on sales promotion."

6. *Therefore, precisely stated sales promotion relates to activities that stimulated sales achieved through contacts, advertisements, discounts, exhibition or trade show, commission, give away, merchandisation, special offer and similar activities that would act as incentive to get people to buy a product. This being the meaning of sales promotion, it is imperative to have a look at the agreement Exhibit-B to find out if the activities of appellant sales promotion agency would amount to pure sale or sales promotion. Paras 3 and 4 of said agreement read as follows.*

"(3) SPA is agreed on price patterns declared by "manufacturer". "Manufacturer" is having all rights to amend the prices at any time under intimation to "SPA" as there is no standard price list is declared by "manufacturer". "Manufacturer" will give free samples to "SPA" for trial purpose at Customer's end for existing as well as new product if any.

(4) "Manufacturer" is agreed to give commission on selling price. The percentage of commission may be varied product to product and shall be intimated time to time to "SPA" as and when change. "Manufacturer" is not liable to pay reimbursement of expenses which will borne by "SPA" for advertising, travelling additional discount if any, gifts, exhibition etc."

7. *The above 2 paras of agreed upon terms clearly indicate that free samples for demonstration purposes was to be provided by manufacturer and rest of the expenses including advertising and offering of additional discounts, gift or expenses on exhibitions have to be borne and carried out by sales promotion agency. Further sample invoice copy dated 31-8-2012 produced before this Tribunal, though cannot be taken as a piece of evidence in view of stipulation content in Rule 22 of CESTAT (Procedure) Rules, indicates that the payment was being* *made as commission charges for order procurement, sales promotion activities and sales servicing and they have documents in their possession to substantiate the same, contrary to the findings of the lower authority concerning non-availability/non-production of documents. This being the facts and evidence on records and when C.B.E. & C. Circular 943/4/2010-CX, though was ignored by the Commissioner as contrary to the Rule, clearly states that such credits are admissible, I am of the considered view that appellant had availed eligible credits on input service on Service Tax paid to the sales promotion agency. It is needless to mention here that consistent judicial findings are available including the decisions in Bedmutha Industries Ltd. v. Commissioner of C.E.ST, Nashik [2019-TIOL-445-CESTAT-MUM], Rosa Sugar Works - 2014-TIOL-150-CESTAT-DEL and Birla Corporation Ltd. - 2014 (35) S.T.R. 977 (T), to the effect that audit report cannot form the basis for invocation of extended period. Hence the order."*

4.7 In the case of ESSAR STEEL INDIA LTD. [2016 (335) E.L.T. 660 (Tri. - Ahmd.)] Ahmedabad bench held as follows:

"17. The learned Authorised Representative submits that the agent's commission is linked with the sale of goods, which is similar to a commission agent's consideration based on the quantum of such sale or purchase as defined in Explanation to Notification No. 13/2003. It is well settled that an agreement should be read on its tone and tanor and not isolately on the basis of single clause of agent's commission. It is between the parties to decide the consideration of the service by various modes and one of which is commission on the basis of export sale. In our considered view, merely the agent's commission paid on the basis of export sales cannot be changed the entire gamut of the agreement as commission agent for sale of goods. The Board also clarified that the remuneration for

sales promotion is linked to actual sale would be read harmoniously.

18. The learned Advocate submits that by Notification No. 2/2016-S.T. (N.T.), dated 3-2-2016, the Cenvat Credit Rules, 2004 was amended. In the Cenvat Credit Rules, 2004, in Rule 2, in Clause (l), after sub-clause (C), the following Explanation shall be inserted, namely :-

"Explanation. - For the purpose of this clause, sales promotion includes services by way of dutiable goods on commission basis."

19. It is submitted that by inserting Explanation in Rule 2(l) of Rules, 2004, by Notification No. 2/2016-C.E. (supra), sales promotion includes services by way of sale for dutiable goods on commission basis. After reading to the Board Circular, dated 29-4-2011 and the Explanation by Notification No. 2/2016-S.T. (supra) harmoniously, it is clear that the agent's remuneration linked with sale of goods would cover sales promotion. The learned Authorised Representative submits that the Notification No. 2/2016-C.E. (supra) would be effective prospectively. We find that the Hon'ble Supreme Court in the case of CIT v. Podar Cement (P) Ltd. - (1997) 5 SCC 482, observed that the circumstances under which the amendment was brought in existence and the consequences of the amendment will have to be taken care of while deciding the issue as to whether the amendment was clarificatory or substantive in nature and, whether it will have retrospective effect or it was not so. In the present case, the Explanation inserted in Rule 2(l) of Rules, 2004, is in conformity with the Board Circular, dated 29-4-2011, and extended the benefit to the assessee. It may be noted that after Board Circular, dated 29-4-2011, the Hon'ble Punjab & Haryana High Court in the case of Commissioner of Central Excise, Ludhiana v. Ambika Overseas - 2012 (25) S.T.R. 348 (P&H), on the identical issue dismissed the *appeal filed by the Revenue. In that case, the issue was raised before the Hon'ble High Court as to whether the CESTAT was correct in holding that the Respondent is entitled to avail 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 service" as the service used in or in relation to the manufacture or clearance of final products from the place of removal. The Hon'ble Punjab & Haryana High Court in the case of Commissioner of Central Excise, Ludhiana v. Ambika Overseas (supra) upheld the order of the Tribunal and observed as under :-*

"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."

20. But, the Hon'ble Gujarat High Court in the case of Cadila Healthcare Ltd. (supra) was unable to concur with the contrary view taken by the Hon'ble Punjab & Haryana High Court in the case of Commissioner of Central Excise, Ludhiana v. Ambika Overseas (supra). The Hon'ble Gujarat High Court held that this issue is concerned, the question is answered in favour of the Revenue and against the assessee. In this background, legislature explained the meaning of the sales promotion by inserting Explanation in

Rule 2(l) of Rules, 2004 and declared that sales promotion includes services by way of sale of dutiable goods on commission basis. In other way, Explanation to Rule 2(l) of Rules says in clear terms that there is no bar on availment of the Cenvat credit on sales promotion service by way of sale of dutiable goods on commission basis. Further, by inserting the Explanation in the Rule 2(l), it has confirmed the Board Circular and resolved the different views of the High Courts. Taking into circumstances under which the Explanation was inserted in Rule 2(l) of Rules, 2004 and consequence of the Explanation to extend the benefit to the assessee as per Board Circular, we hold that the Explanation inserted in Rule 2(l) of Rules, 2004 by Notification No. 2/2016-CX (N.T.) (supra) should be declaratory in nature and effective retrospectively.

21. In the case of Brij Mohan Das Laxman Das v. Commissioner of Income Tax, Allahabad - (1997) 1 SCC 352, the Hon'ble Supreme Court in the identical situation held that explanation added by the Taxation Laws (Amendment) Act, 1984 with effect from 1-4-1985, is declaratory in nature and effective retrospectively. The relevant portion in the case of Brij Mohan Das Laxman Das (supra) is reproduced below :-

"5. It may be mentioned that Explanations 1, 2 and 3 to the above clause were added by the Taxation Laws (Amendment) Act, 1984 with effect from 1-4-1985. Explanation 2 expressly provides that where an individual is a partner in a firm on behalf of or for the benefit of any other person, any interest paid by the firm to such individual otherwise than as partner in representative capacity, shall not be taken into account for the purpose of clause (b). It is, therefore, clear that with effect from 1-4-1985, the question of the nature involved herein would not arise. Where a person is a partner in a representative capacity, i.e., as representing HUF, any interest paid to

him in his individual capacity will not be hit by clause (b). The only question is what is the position earlier to 1-4-1985 - which is the case here. Prior to the introduction of the said Explanation, there was a conflict of opinion among the several High Courts in the country, the majority of High Courts, taking the view in favour of the assessee and a few High Courts taking the contrary view. There was no decision of the Supreme Court on this question. The Taxation Laws (Amendment) Act which introduced the said Explanation does not say that the said Explanation shall have the effect retrospectively. The question is whether the said Explanation is merely declaratory and clarificatory in nature, in which case it will govern the previous assessment years as well or whether it is a substantial provision having effect only prospectively."

"The provisions in Chapters III and IV of the Partnership Act, 1932 amply define and delineate duties, obligations and rights of the partners vis-à-vis the firm. The question yet remains where an individual is a partner in one capacity, e.g. as a representative of another person, can he have no other capacity vis-à-vis the firm. To be more precise, does the above position of law preclude an individual, who is a partner representing a HUF, from depositing his personal funds with the partnership and receiving interest thereon? Explanation 2 says in clear terms that there is no such bar. This is the legislative recognition of the theory of different capacities an individual may hold - no doubt confined to clause (b) of Section 40. Once this is so, we see no reason to hold that this theory of different capacities is not valid or available for the period anterior to 1-4-1985. Accordingly, we hold that even for the period anterior to 1-4-1985, any interest paid to a partner, who is a partner representing his HUF, on the deposit of his personal/individual funds, does not fall within the mischief of clause (b) of Section 40. In this view of the matter, we agree with the view taken by the

Rajasthan High Court in Gajanand Poonam Chand that Explanation 2, in the context of clause (b) of Section 40, is declaratory in nature. Accordingly, we allow this appeal, set aside the judgment of High Court and answer the question referred under Section 256 in the affirmative, i.e., in favour of the assessee and against the Revenue."

22. An explanation inserted in a Section/Rule, is generally to explain the meaning of the words contained in the Section/Rules. The purpose of explanation is to explain the meaning and intendenments of the Section/Rule. Sometimes, the explanation may be inserted to clarify a doubtful point of law, which would be effectively retrospectively. In the present case, the expressions in the explanation as inserted by Notification No. 2/2016-C.E. (supra), make it clear that it is for explaining the meaning of clause "sales promotion" in the context of Rule 2(l) of the Rules, 2004. It is to provide an additional support to the dominant object of the word "sales promotion" in Rule 2(l) in order to make it meaningful and purposeful. The language of the explanation is consistent with Board Circular to the benefit of the assessee and it would be effective retrospectively. The Hon'ble Supreme Court in the case of Vatika Township Pvt. Ltd. (supra), in the identical situation, held that if a legislation confers a benefit on some other person or on the public generally, and where to confer such benefit appears to have been the legislature's object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. The relevant portion of the decision in the case of Vatika Township Pvt. Ltd. (supra) is reproduced below :-

"We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some

other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In Government of India & Ors. v. Indian Tobacco Assn, the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in Vijay v. State of Maharashtra. It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are (sic not) confronted with any such situation here."

4.8 In view of the discussions as above we do not find any merits in the impugned order.

5.1 Appeal is allowed.

(Dictated and pronounced in open court)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp