CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

E/20514/2018-SM

[Arising out of Order-in-Appeal No. BEL-EXCUS-000-DHAR-APP-MSC-093-2017-18 dated 16/01/2018 passed by Commissioner of Central Tax , BELGAUM]

E/20312/2018-SM

[Arising out of Order-in-Appeal No. BEL-EXCUS-000-DHAR-APP-MSC-092-2017-18 dated 16/01/2018 passed by Commissioner of Central Tax , BELGAUM]

Shakunt Enterprises Pvt Ltd
No 577 C & D, Belur Industrial Area Dharwad
BELGAUM
KARANATAKA
0

Appellant(s)

Versus

Commissioner Of Central Tax And Central Excise, Belgaum
N0.71, Club Road, Belgaum
Belgaum
Karnataka
590001

Respondent(s)

Appearance:

PRADYUMNA G.H. ADVOCATE
NO.371, 8TH MAIN
SADASHIV NAGAR
banglaore
Karnataka
560080

For the Appellant

Mr. K.B. Nanaiah, Asst. Commissioner, AR

For the Respondent

Date of Hearing: 01/11/2018
Date of Decision:31/12/2018

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order No.21953-21954/2018

Per : S.S GARG

The appellants have filed these appeals against the impugned order dated 16.01.2018 passed by the Commissioner (Appeals) whereby the Commissioner (A) has rejected the appeal of the appellant. Since the issue involved in both the appeals is identical, therefore both the appeals are being disposed of by this common order.

2. Briefly the facts of the present case are that the appellants are engaged in the manufacture and clearance of Copper Coated Welding Wires on weight basis in running length of different sizes packed in spools and drums. It was observed by the Audit that the excisable goods in question were cleared as per purchase orders issued by the buyers wherein as per the terms and conditions the goods were delivered on 'Free on Road' basis at the premises of the customers/buyers on certain conditions stipulated in the purchase orders which varied from case to case. It was also seen that the invoice value included cost of the products including insurance and freight on which Central Excise duty was paid. Besides this, it was also noticed that the appellants had paid Service Tax on the outward freight and had availed CENVAT credit of the same treating the GTA Service on the outward freight as 'input service'. The total CENVAT credit availed by the appellants during the period from April 2012 to

March 2015 was Rs.3,93,919/- and for the period April 2015 to March 2016 an amount of Rs.2,74,705/- was availed as CENVAT credit which appeared to be irregular inasmuch as only such services which were used by a manufacturer directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal were liable to be treated as 'input service' as per Rule 2(1) of CENVAT Credit Rules, 2004. On these Audit objection, a SCN dated 29.02.2015 was issued demanding CENVAT credit of Rs.3,93,919/- and another SCN dated 05.05.2016 was issued demanding an amount of Rs.2,74,705/- for the subsequent period. After following the due process, the Original Authority vide Order-in-Original confirmed the demand of CENVAT credit along with interest and penalty. Aggrieved by the said order the appellant filed the appeals before the Commissioner (A) who rejected both the appeals vide impugned order.

3. Heard both sides and perused the records of the case.

4. Learned counsel for the appellants submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law and also the judicial precedents. He further submitted that the

appellant has cleared the goods on 'FOR' basis for delivery at the premises of the customer as can be seen from the Purchase Orders that the value shown in the invoices raised by the appellant included the cost of goods, cost towards insurance and freight and duty was admittedly paid by the appellants on the total invoice value. He further submitted that the ownership of the goods remained with the appellant up to the place of destination; in fact, the place of removal was the customers' destination and therefore, the CENVAT credit on the outward freight was rightly admissible to the appellant as per the submission of the learned counsel. He further submitted that this issue is already settled in their favour by the Hon'ble CESTAT, Delhi Bench vide Final Order No. A/52328/2015 dated 22.07.2015. He also relied upon the judgment of Hon'ble High Court of Karnataka rendered in the case of ***Madras Cements Ltd. Vs. Add. Commr. of C.Ex., Bangalore, 2015 (40) STR 645 (Kar.)*** wherein it was held that when it is clear from the invoices that title of the goods had passed on from the seller to buyer only at the place of destination, the buyer had no right over the goods till the same is delivered to him and the sale is concluded only after the delivery of the goods at the buyers' premises. In support of this submission, he also relied upon the

following cases:

(i) Ambuja Cement Ltd. Vs. UOI, 2009 (236) ELT 431 (P&H).

(ii) Commr. of C. Ex. Vs. Rine Machine Tools, 2016 (42) STR 809 (P&H).

4.1 Learned counsel also referred to the following Circulars:

(i) 97/8/2007-ST dated 23.08.2007.

(ii) 988/12/2014-CX dated 20.10.2014.

(iii) 999/6/2015-CX dated 28.02.2015.

He buttresses his argument that when there is 'FOR' sale, property (ownership) in the goods is transferred at the buyers' premises and place of removal is extended to buyers' premises. He also submitted that the demand for extended period is not sustainable in the present case because there was no suppression on the part of the appellant with intent to evade payment of duty. He further submitted that the extended period of limitation is invocable only in case where duty has not been levied or paid or short-levied or short-paid or erroneously refunded by reason of 'suppression of facts' or 'fraud' or 'collusion' or 'willful mis-statement of facts' or 'contravention of the statutory provisions' with intent to evade payment of duty. He further submitted that admittedly in the present case, the appellant had filed the excise

returns to the Department showing therein the total CENVAT credit inclusive of the amounts in respect of the input services in question. He further submitted that in the absence of any specific columns in the excise returns to specify credit availed in respect to each and every input or input service, it would be sufficient if the credit availed on such inputs/input service is included in the total credit availed in a given month which has been admittedly done by the appellants in the present case. He also submitted that suppression of facts cannot be alleged in matter involving interpretation of admissibility of CENVAT credit. He further submitted that during the impugned period, there were decisions in favour of the assessee wherein it has been held that the assessee is entitled to CENVAT credit in respect of freight outward up to the premises of the buyer and he bona fidely believed that he is entitled to avail CENVAT credit and therefore, no penalty can be imposed on the appellant. The learned counsel also submitted that the decision of the Hon'ble Supreme Court in the case of ***Ultratech Cement Ltd. reported in 2016 (44) STR 227*** is not applicable in the present case. He also submitted that after the decision of the Apex Court in the case of ***Ultratech Cement Ltd.***, the Department has issued a detailed Circular dated 08.06.2018 and provides clarification regarding the

implementation of the decision of the Apex Court.

5. On the other hand, the learned AR defended the impugned order and submitted that the Apex Court in the case of ***Ultratech Cement Ltd***. (Supra) has categorically held that the assessee is not entitled to claim CENVAT credit on GTA services for transport of goods from the place of removal to buyers' premises. The learned AR further submitted that the Circular dated 8.6.2018 issued by the CBEC cannot nullify the law laid down by the apex court. In this regard, he referred to the decision of the Constitutional Bench of the apex court in the case of ***Commissioner of Central Excise Vs. Ratna Melting & Wire Industries: 2008 (231) ELT 22 (SC***) wherein it has been held that circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statute but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be proper for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the circulars/clarifications issued by the Central Government and all the State Governments are concerned, they represent merely their understanding of the statutory provisions and they are not binding upon the Courts. It is for the Court to

declare what the particular provision of statute says and it is not for the executive. Looked it from another angle, circular which is contrary to statutory provision has really no existence in law.

6. After considering the submissions of both the parties and perusal of the material on record and the various decisions relied upon by both the parties, I find that the appellants as per the contracts entered into between the parties, the appellants are supplying the goods on 'FOR' basis and are availing the credit on Service Tax paid on GTA services on the ground that it falls under the definition of 'input service' as contained in Rule 2(1) of the CCR, 2004. Further, I find that in the purchase order itself the terms and conditions are on 'FOR' basis and ownership remains with the appellant till the goods are delivered to the buyer at the buyers' premises and the cost of transit insurance and freight in respect of the goods sold are borne by the appellant. Further, I find that the various Circulars relied upon by the appellants issued by the Board has clarified that the place where the sale takes place is the place of removal because the property in goods passes at the place of buyer. There are decisions which have specifically held that the place of removal need to be determined in terms of the provisions of Central Excise Act, 1944 read with provisions of Sales of Goods Act, 1930 and the terms of contract

between the parties. I also find that it is not in dispute that the credit of input service is available only up to the place of removal and not beyond it. This issue is no more *res integra* and has been settled by the Apex Court in the case of ***Ultratech Cement Ltd***. (supra) wherein the Hon'ble Apex Court in Para 11-13 had held as under:

> ***"11.*** *As can be seen from the reading of the aforesaid portion of the circular, the issue was examined after keeping in mind judgments of CESTAT in Gujarat Ambuja Cement Ltd., 2007 (6) S.T.R. 249 (Tribunal) and M/s. Ultratech Cement Ltd., 2007 (6) S.T.R. 364 (Tri.- Ahd.). Those judgments, obviously, dealt with unamended Rule 2(l) of Rules, 2004. The three conditions which were mentioned explaining the 'place of removal' as defined under Section 4 of the Act, there is no quarrel upto this stage. However, the important aspect of the matter is that Cenvat Credit is permissible in respect of 'input service' and the Circular relates to the unamended regime. Therefore, it cannot be applied after amendment in the definition of 'input service' which brought about a total change. Now, the definition of 'place of removal' and the conditions which are to be satisfied have to be in the context of 'upto' the place of removal. It is this amendment which has made the entire difference. That aspect is not dealt with in the said Board's circular, nor it could be.*
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> ***12.*** *Secondly, if such a circular is made applicable even in respect of post amendment cases, it would be violative of Rule 2(l) of Rules, 2004 and such a situation cannot be countenanced.*
>
> ***13.*** *The upshot of the aforesaid discussion would be to hold*

that Cenvat Credit on goods transport agency service availed for transport of goods from place of removal to buyer's premises was not admissible to the respondent. Accordingly, this appeal is allowed, judgment of the High Court is set aside and the Order-in-Original dated August 22, 2011 of the Assessing Officer is restored."

Now the CBEC has issued a circular after the decision of the apex court for the clarification and guidance of the field formations but the said Circular cannot override the decision of the apex court in the case of ***Ultratech Cement Ltd.*** (supra). Therefore, by following the ratio of the decision of the apex court in the case of ***Ultratech Cement Ltd.*** (supra), I am of the view that the appellant is not entitled to CENVAT credit on GTA services. As far as invoking the extended period of limitation on the ground that the appellant has suppressed the material facts with intent to evade payment of duty, I am of the view that the appellants have not suppressed any fact and they have been filing return regularly and has been showing the CENVAT credit availed on various input services including the GTA services. Further, I find that during the impugned period, there were decisions in favour of the appellant holding that the Service Tax paid on GTA services is admissible as credit being input service and there were decisions in favour of the appellant regarding the same issue before the decisions of the Apex Court in the case of

Ultratech Cement Ltd. (supra). In these circumstances, the demand beyond the normal period of limitation is set aside as there was no intention to evade payment of duty. Similarly, the penalties imposed on the appellant are also not sustainable in view of the discussions above. Consequently, the demand for the normal period is upheld and penalties are also set aside. Hence, both the appeals are accordingly disposed of.

(Order was pronounced
in Open Court on **31/12/2018**)

S.S GARG
JUDICIAL MEMBER

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