

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

Appeal(s) Involved:

E/21756/2017-SM, E/21757/2017-SM, E/21758/2017-SM

[Arising out of Order-in-Appeal Nos. 229-231/2017-CT dated
18/09/2017 passed by the Commissioner of Central Tax,
Bangalore-II(Appeals)]

Bharat Fritz Werner Ltd.

Off Tumkur Road,
Yeshwanthpur Post, Peenya
Bangalore – 560 022
Karnataka

Appellant(s)

Versus

**C.C.,C.E.& S.T-Commissioner Of
Central Tax, Bangalore North
West Commissionerate**

2nd Floor, South Wing, BMTC Bus
Stand Complex
Shivaji Nagar
Bangalore – 560 051
Karnataka

Respondent(s)

Appearance:

Mr. Mohammed Rahim, Advocate
No. 152(18), Race Course Road,
Bangalore – 560 001,
Karnataka

For the Appellant

Mrs. Kavita Podwal, Superintendent
(AR)

For the Respondent

Date of Hearing: 30/10/2018

Date of Decision: 31/12/2018

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order Nos. 21960 - 21962 / 2018

Per: S.S GARG

The appellants have filed these three appeals directed against the common impugned order dated 18.09.2017 passed by the Commissioner (Appeals) whereby the Commissioner (Appeals) has rejected the appeals of the appellant. Since the issue involved in all the three appeals is identical, therefore all the three appeals are being disposed of by this common order. The details of all the three appeals are given herein below:

| Appeal Ref. | Period involved | Cenvat Credit demanded | Penalty imposed | SCN Date |
|--------------------|--------------------------------|-------------------------------|--|--------------------------|
| E/21756/2017 | November 2013 to February 2015 | Rs. 8,56,988/- | Rs. 8,56,988/- under Rule 15(1) read with S. 11AC | 08.12.2014 07.08.2015 |
| E/21757/2017 | 2010-11 to 2012-13 | Rs. 16,26,589/- | Rs. 16,26,589/- under Rule 15(2) read with S. 11AC | 26.02.2014 |
| E/21758/2017 | March 2015 to August 2015 | Rs. 4,63,422/- | Rs. 46,342/- under Rule 15(1) read with S.11AC | 30.03.2016 |

Briefly the facts of the case are that the appellants are engaged in the manufacture of CNC Machines, special purpose machines, milling machines falling under Chapter 84 of CETA, 1985. During the audit of the records of the unit, it was noticed by the Department that the appellants had wrongly availed input service credit on the service tax paid on outward freight for transporting finished goods from the factory to the buyer's premises. The Department alleged that since the factory gate is the 'place of removal' for the goods cleared by the assessee and the outward freight which is used for clearance of final products beyond the factory gate did not fall within the purview of definition of 'input service'

as per Rule 2(I) of CCR, 2004, the input service credit availed on the outward freight by the appellant was irregular and hence recoverable. Accordingly, a show-cause notice dated 26.02.2014 was issued by the Additional Commissioner demanding Rs. 16,26,589/- (Rupees Sixteen Lakhs Twenty Six Thousand Five Hundred and Eighty Nine only) for the period from 2010 to 2013 under Section 11A for recovery of the wrongly availed cenvat credit, with a proposal to impose penalty under Rule 15(2) read with Section 11AC of CEA, 1944. For the further period from November 2013 to February 2015, two show-cause notices dated 08.12.2014 and 07.08.2015 were issued by the Assistant Commissioner demanding a total amount of Rs. 8,56,988/- (Rupees Eight Lakhs Fifty Six Thousand Nine Hundred and Eighty Eight only) under Section 11A with proposal to impose penalty under Rule 15 of CER, 2002. The show-cause notice dated 30.03.2016 was issued for the period from March 2015 to August 2015 demanding Rs. 4,63,422/- (Rupees Four Lakhs Sixty Three Thousand Four Hundred and Twenty Two only) covering the period from March 2015 to August 2015 with proposal to impose penalty under Rule 15 of CER, 2002.

The original authority after following the due process of law vide Order-in-Original confirmed the demand and interest along with penalties. Aggrieved by the said orders, appellant filed appeals before the Commissioner who rejected the appeals.

2. Heard both the parties and perused the records.

3. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that in the present case the place of removal is the buyer's place in terms of Section 4(3)(c) of Central Excise Act 1944 read with Explanation to Rule 5 of the Central Excise (Determination of Price of Excisable Goods). He further submitted that outward freight has been included while computing the assessable value of the goods and the invoices and purchase orders clearly show the same. He further submitted that as per Rule 2 of CCR 2004 input service credit on freight is availed upto the place of removal i.e. the customer's premises. He also submitted that the goods supplied by the appellant are tested for acceptance at the customer's place and hence sale takes place at the customer's place and not the appellant's factory. He also submitted that none of the invoices in question state that the price is 'ex-works' indicate that the appellant bears the risk of loss and damage of goods as the appellant has taken the insurance cover for the goods. He also submitted that the extended proviso for demanding duty is not applicable as there is no willful suppression of fact with intent to evade payment of service tax. In support of his submission, the appellant relied upon the following decisions:

a. CCE V. Roofit Industries Ltd. - 2015 (319) E.L.T. 221 (SC)

b. CCE V. Vardhaman Prestressed Products (P) Ltd. - 2017 (6) GSTL 286 (Tri.-Mum.)

- c. *Madras Cements Ltd. V. Addl. CCE, 2015 (40) STR 645 (Kar.)*
- d. *Mahle Engine Components India Pvt. Ltd. V. CCE, 2017 (51) STR 44 (Tri.-Del.)*
- e. *GKN Sinter Metals Pvt. Ltd. V. CCE, 2018-TIOL-662-CESTAT-MUM.*
- f. *CCE V. EMCO Ltd. 2015 (322) E.L.T. 394 (SC)*
- g. *Birla Corporation Ltd. V. CCE, 2018 (10) GSTL 43 (Tri.-Del.)*
- h. *Mahle Engine Components India Pvt. Ltd. V. CCE, 2017 (51) STR 44 (Tri.-Del.)*

3.1. Learned counsel for the appellant submitted that after the decision of the Apex Court in the case of Ultra Tech Cement Ltd., the Board has issued a Circular dated 08.06.2018 whereby they have clarified that for the purpose of availing cenvat credit on GTA, facts of each case is to be ascertained. The learned counsel further submitted that the said Circular clarifies the doubts in the mind of field formation as to how they have to find out where the sale takes place as per the evidences of the parties.

4. On the other hand the learned AR defended the impugned order and submitted that the appellants are not entitled to credit of service tax paid on GTA as the same does not fall within the definition of 'input service'. He further submitted that earlier there were certain decisions in favour of the appellant as relied upon by the appellant wherein it has been held that in case of FOR sale the place of removal is the buyer's premises where the sale takes place and the assessee is entitled to cenvat credit on GTA up to the buyer's premises because the property in the goods

does not take place at factory gate rather it takes place only at the buyer's premises. He further submitted that the Hon'ble Supreme Court recently in the case of Commissioner of **Central Excise Vs. Ultra Tech Cement reported in 2018-TIOL-42-SC-CX** has held that cenvat credit on Goods Transport Agency Service availed for transport of goods from the place of removal to buyer's premises is not admissible to the assessee.

5. After considering the submission of both the parties and perusal of the material on record, I find that in the present case as per the purchase orders, the appellant is supposed to supply the goods at the buyer's premises and the price of the goods include outward freight. Further I note that the various circular issued by the Board in the year 2007, 2014 clearly show that evidences of the parties is to be ascertained as to when the property in the goods passes along with the other documents i.e. purchase order, invoices etc. Further I note that the Hon'ble Supreme Court in the case of Ultra Tech Cement cited supra has held in para 11 to 13 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. and M/s. Ultratech Cement Ltd. Those judgments, obviously, dealt with unamended Rule 2(l) of Rules, 2004. The three conditions which were mentioned explain 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.

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."*

Further I find that the subsequent Circular issued in 2018 does not held the appellant because once the Hon'ble Apex Court has settled the law, the Circular issued by the Board cannot override the judgment of the Apex Court. By following the ratios of the Apex Court and the decision in the case of Ultra Tech Cement, I am of the considered view that there is no infirmity in the impugned order demanding the cenvat credit wrongly availed by the appellant. As far

as invoking the extended period of limitation and imposition of penalty is concerned, I find that there were divergent views during the period in dispute on the issue, therefore the allegation of suppression with intent to evade payment of duty is not sustainable. In these circumstances, the demand beyond the normal period of limitation is set aside as there was no intention to evade payment of duty. Therefore, the penalties imposed on the appellant are also not sustainable and hence set aside. The impugned orders in respect of the demand for the normal period with interest is upheld and penalties are set aside.

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

(S.S GARG)
JUDICIAL MEMBER

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