

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

Appeal(s) Involved:

E/20383/2018-SM & E/20390/2018-SM

[Arising out of No. COC-EXCUS-000-APP-260-261/17 dated
20/11/2017 passed by Commissioner of Central Tax,
COCHIN.]

**M/s. Transformers And Electricals
Kerala Ltd**

Angamaly – 683 576.
KERALA

Appellant(s)

Versus

**Commissioner Of Central Tax &
Central Excise, Cochin**

C.R. Buildings, I.S Press Road
Cochin – 682 018.
Kerala

Respondent(s)

Appearance:

Mr. G. Shviadass, Advocate

LAKSHMI KUMARAN & SRIDHARAN
WORLD TRADE CENTRE NO.404-406, 4TH
FLOOR, SOUTH WING BRIGADE GATEWAY
CAMPUS NO.26/1, DR. RAJKUMAR ROAD,
BANGALORE - 560 055
KARNATAKA

For the Appellant

**Mrs. Kavitha 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 No. 21955 – 21956 / 2018

Per : S.S GARG

The appellants have filed these two appeals against the
common impugned order dated 20.11.2017 passed by the

Commissioner (A) whereby the Commissioner (A) has upheld the Order-in-Original and rejected the appeal of the appellant. Since the issue involved in both the appeal is identical and there is a common impugned order, both the appeals are being taken up for discussion and disposal.

2. The details of both the appeals are given herein below:

Sl. No.	Appeal No.	E/20383/2018	E/20390/2018
1	Impugned Period	01.04.2012 to 31.03.2013	01.05.2013 to 28.02.2015
2	Date of Show-cause notice	30.4.2013	04.09.2015
3	Order-in-Original No. & Date	19/2014/CE dt. 02.06.2014	No.06/2015-CE dt.28.12.2015
4	Order-in-Appeal No. & Date	COC-EXCUS-000-APP-260 & 261 - 2017 dt. 20.11.2017	
5	CENVAT Credit denied	Rs.15,39,628/-	Rs.24,45,027/-
6	Penalty Imposed	Rs.4,00,00/-	Rs.24,450/-

3. Briefly the facts of the case are that the appellants are engaged in the manufacture and sale of electrical transformers and allied appliances falling under Chapter 85 of CETA, 1985. During the impugned period, the appellant had entered into contracts with various customers for supply, installation at site and commissioning of transformers manufactured by them and the relevant terms and conditions contained in the contract between the appellant and its customers are as follows:

- a. The obligation to undertake packaging, delivery and unloading of the goods at the customer's premises would be with the appellant.
- b. Payments will be released by the customer only upon receipt, preliminary verification and acceptance of the goods by the customers.
- c. Ex-factory price of the goods, freight charges and transit insurance charges are separately identified in the contract.
- d. The customer reserves the right to inspect the goods upon delivery at its premise before accepting the same.
- e. The appellant undertakes to insure the goods during transit and also for an additional stipulated time after the goods are shipped and warehoused at the customer's premises at its own cost.

3.1 The goods are manufactured and sold to the customers as per the terms and conditions stated above. At the time of sale, the appellant raises an invoice on the customer charging basic price on which excise duty at prescribed rate is paid and separately indicates the applicable freight and insurance charges. Excise duty is not paid on freight and insurance component even though the same is recovered from the customer. The appellant

also receives transportation services from GTA service provider for transportation of goods to the customer's premises and discharges service tax under reverse charge basis. The appellant is availing the credit of the taxes paid on the aforementioned GTA services to the extent the said services are used for transportation of the goods to the customer's premises in terms of the contract entered into with such customers. The department entertained a view that in view of the Circular dated 23.8.2007, since the outward freight charges do not form an integral part of the price of the goods, the appellant is not eligible to avail and utilize the credit of service tax paid on freight. After following due process, both the authorities below have confirmed the demand along with interest and penalty. Aggrieved by the said order, the appellant have filed these appeals.

4. Heard both the parties and perused the records.

5. 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 and by ignoring the binding judicial precedent. He further submitted that the sole ground on which CENVAT credit availed by the appellant has been denied in the impugned order is that the freight

component charged on the invoices does not form part of the assessable value of goods for payment of excise duty by the appellant. He further submitted that CENVAT credit Rules, 2004 does not specify any such precondition of inclusion of expenses incurred on any input service availed in the assessable value for eligibility to avail credit on service tax paid on the same. So long as such service fall within the definition of input service, credit of service tax paid on such service would be available. For this submission, he relied upon the decision of the Larger Bench in the case of **ABB Ltd.** reported in **2009 (15) STR 23 (Tri.-LB)** which has been upheld by the Karnataka High Court reported in **2011 (23) STR 97** as well as the Hon'ble Supreme Court **2018 (1) GSTL 3 (SC)**. He also submitted that wherever the legislature intended to allow the availment of credit subject to inclusion of value of such input in the assessable value for payment of excise duty, it has done so by specifically providing for it. Learned counsel thereafter referred to the Circular No.97/8/2007-ST dated 23.8.2007 which notes the decision in the case of **Gujarat Ambuja: 2007 (6) STR 249 (Tri.-Del.)** and **Ultratech Cement: 2007 (6) STR 364 (Tri.-Ahmd.)** holding that credit on GTA service would be eligible only up to the place of removal and not beyond that. He further submitted that this Circular

clarifies that for the determination of the phrase 'place of removal', facts of each individual case need to be taken into account. He also submitted that the circular clarifies that in cases where an assessee claims that sale takes place at the destination point than credit of service tax paid on transportation up to such place of sale would be admissible if it can be established that the sale and the transfer of property in goods occurred at such destination. The learned counsel also referred to Circular No.988/12/2014-CX dated 20.10.2014 and submitted that this Circular clarified that the point where transfer of property in goods takes place shall be considered as 'place of removal' and the place where sale takes place is the place where transfer of property in goods takes place from the seller to the buyer. He also submitted that the Hon'ble apex court in the case of **Escorts JCB Ltd. vs. CCE: 2002 (146) ELT 31 (SC)** has held that the factory premises is the place of removal since the transaction of sale, payment of price and delivery of goods to the carrier occurs at the factory premises. Thereafter, the learned counsel also relied upon the decision in the case of **CCE vs. Roofit Industries LTd.: 2015 (319) ELT 221 (SC)** and **CCE vs. Emco Ltd.: 2015 (322) ELT 394 (SC)** wherein on facts it was held that the sale of goods do not take place at the factory premises of

the appellant but at the buyer's premises. He also referred to the apex court decision in the case of ***Ispat Industries Ltd.: 2015 (324) ELT 670 (SC)*** wherein it has been held that 'premises' referred to in the definition of the 'place of removal' to a manufacturer's place or premises and not the buyer of the excisable goods. He further submitted that after the decision of the apex court in the case of ***Ultratech Cement Ltd.: 2018 (9) GSTL 337 (SC)***, the CBEC has issued a detailed Circular dated 8.6.2018 and provides clarification on the implementation of the decision of the apex court. He further submitted that it is no longer in dispute that the credit of input service is available only "upto the place of removal" and not beyond it but the determination of 'place of removal' can only be done in the facts of each case. The 2018 circular read with decision of the Hon'ble Supreme Court of ***Roofit Industries Ltd.*** (supra) and ***Emco Ltd.*** (supra) provides guidance on how in a FOR transaction the premises of the buyer would be place of removal. He further submitted that in the present case, the contract entered into by the appellant with its customer is on FOR basis and therefore, they are eligible to avail CENVAT credit on GTA services received for transportation of goods from the factory gate to the customers' premises.

6. On the other hand, the learned AR defended the impugned order and submitted that the apex court in the case of ***Ultratech Cements Ltd.*** (supra) has categorically held that the assessee is not entitled to take 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, the 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.

7. 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 with their customers, they are supplying the goods on FOR basis and are availing the credit of the service tax paid on the GTA services to the extent that such services are used for transportation of goods to the customer premises. As per the department, the appellant is not eligible to take CENVAT credit on the freight component charged on the invoices because the same does not form part of the assessable value of the goods for payment of excise duty by the appellant. Further, I find that vide various circulars issued in 2007, 2014, 2015 by the Board, 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 the buyer. There were decisions which have specifically held that the place of removal needs to be ascertained in terms of provisions of Central Excise Act, 1944 read with provisions of Sale 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. But this issue is no more *res integra* in view of the judgment of the apex court in the case of **Ultratech Cement Ltd.** (supra) wherein the Hon'ble apex court in para 11 – 13 has 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.*

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 imposition of penalty is concerned, since the issue relates to interpretation of the definition of 'input service' and the apex court has only settled the issue in the case of **Ultratech Cement Ltd.** in 2018, therefore, suppression cannot be alleged against the appellant and penalty cannot be imposed. Consequently, I set aside the penalties imposed in both the cases and confirmed the demands.

(Order was pronounced in Open Court on **31.12.2018.**)

S.S GARG
JUDICIAL MEMBER

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