CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 1479 of 2011

(Arising out of Order-in-Appeal No. 93/2011-CE dated 29/03/2011
passed by Commissioner of Central Excise(Appeals-I), Bangalore)

ASHIRVAD PIPES PVT. LTD.
NO.4-B, ATTIBELE INDUSTRIAL AREA,
HOSUR ROAD, BANGALORE 562 107

Appellant(s)

VERSUS

Commissioner of Central Excise ,
Customs and Service Tax
BANGALORE-I
POST BOX NO 5400...CR BUILDINGS,
BANGALORE, - 560001
KARNATAKA

Respondent(s)

APPEARANCE:
Shri M.S. NAGARAJA, Advocate for the Appellant
Shri P. Gopakumar, Addl. Commissioner(AR) for the Respondent

CORAM:
HON'BLE MR. S.K. MOHANTY, JUDICIAL MEMBER
HON'BLE MR. P.V. SUBBA RAO, TECHNICAL MEMBER

Final Order No. 20743 / 2021

Date of Hearing: 01/09/2021
Date of Decision: 01/09/2021

Per : S.K. MOHANTY

Briefly stated, the facts of the case are that the appellant herein is engaged in the manufacture and sale of PVC *& CPV*C pipes and fittings thereof, falling under Chapter 39 of the 1st Schedule to the Central Excise Tariff Act, 1985. The appellant avails CENVAT credit in respect of central excise duty paid on the inputs & capital goods and service tax on the input services. During the period April 2005 to

January 2010, the appellant had availed cenvat credit of service tax paid on the services provided by the Commission Agents. Availment of cenvat credit on such services was disputed by the Department on the ground that the services provided by the commission agents for the sale of goods were related to after sales service and that since such disputed service was not used in or in relation to manufacture of final product, such service does not qualify to be an input service, defined under Rule 2(l) of the CENVAT Credit Rules, 2004 for the purpose of availment of cenvat benefit. The show-cause notices dt. 20.10.2007, 28.10.2009 and 27.04.2010 issued in this regard was adjudicated vide Order dt. 28.10.2010, wherein the original authority had confirmed cenvat demand of Rs.10,00,324/- along with interest and also imposed penalties under Rule 15(1) ibid read with Section 11AC of the Central Excise Act, 1944. On appeal, the learned Commissioner (Appeals) vide the impugned order dt. 29.03.2011 has upheld the adjudged demands confirmed on the appellant and rejected the appeal filed before him. In support of rejection of appeal, the learned Commissioner (Appeals) has held that sales advertisements or sales promotion, market research etc. mentioned in the category of services in the definition clause is of generic in nature undertaken by many manufacturer and not related to specific sales and accordingly, such services cannot be considered as input service for availment of the benefit of cenvat credit. Feeling aggrieved with the impugned order, the appellant has preferred this appeal before the Tribunal.

2. Shri M.S. Nagaraja, learned advocate appearing for the appellant submitted that the services of advertisement, sales promotion, market research etc. are specifically finding place in the definition of input service and as such, the disputed services should qualify as input service for the purpose of availment of cenvat credit. He further submitted that the case of appellant falls under the un-amended definition of input service (effective upto 31.03.2011);

whereunder, the phrase "activities relating to business" was specifically defined in the inclusive part of such definition. Thus, learned advocate submitted that since the services of commission agents were availed by the appellant for accomplishing the business activities, the benefit of cenvat credit should be available on such service. Learned advocate also submitted that the explanation clause appended to Rule 2(l) ibid by Notification No.2/2016-CE dt. 03.02.2016 will have the retrospective effect and as per the clarification furnished therein, the service tax paid on the disputed service should be allowed as cenvat credit to the appellant. To strengthen such stand, the appellant has relied upon the circular No.943/4/2011-CX dt. 29.04.2011 and instructions of CBEC issued from file F.No.96/85/2015-CX-J dt. 7.12.2015. further, the learned advocate has also relied upon the judgment of Hon'ble Madras High Court in the case of Commissioner of GST & C.Ex, Chennai Vs. Intimate Fashions India (P) Ltd. [2019(31) GSTL 22 (Mad.)] and the decisions of this Tribunal in the case of Essar Steel India Ltd. Vs. CCE&ST, Surat-I [2016(335) ELT 660 (Tri. Ahmd.)], Bajaj Hindustan Ltd. Vs. CCE, Lucknow [2016(46) STR 416 (Tri. Del.)] and Simbhaoli Sugar Limited Vs. CCE, Meerut-II [2018(363) ELT 1172 (Tri. All.)], to state and submit that the disputed service should be considered as input service and the service tax paid thereon should be available as cenvat credit to the assessee.

3. On the other hand, Shri P. Gopakumar, learned AR for the Revenue, reiterated the findings recorded in the impugned order.

4. Heard both sides and perused the records.

5. The period of dispute involved in this case is from April 2005 to January 2010. We find that the authorities below in their

respective orders though have held that the commission agents had paid service tax under the category of "Business Auxiliary Service", but denied the cenvat credit to the appellant on such service, holding that the commission amount paid on the basis of achievement of sales turnover was entirely an activity relates to post clearance of goods from the place of removal and as such, such activity does not fall under the purview of the definition of 'input service', as per Rule 2(l) *ibid*. In view of the period of dispute, the case of the appellant falls under the scope and ambit of the un-amended definition of "input service", effective up to 31.03.2011. Under the un-amended definition of input service, the phrase "activities relating to business" was specifically finding place for consideration of services as 'input service', for the purpose of availment of cenvat credit of service tax paid thereon. In this case, the fact is not under dispute that the activities undertaken by the commission agents for selling of goods on behalf of the appellant is for accomplishing the ultimate business objective of the appellant. Further, the commission amount paid by the appellant to selling agents is forming a part of the expenditure incurred and also duly reflected in the books of accounts maintained by the appellant. Since, the appellant had incurred such expenses for achieving its business activities, the same is confirming to the inclusive part of definition of input service.

6. We find that consequent of amendments made in the Budget 2011 and changes made vide Notification No.13/2011-C.E. (N.T.), dt. 31/03/2011, the CBEC vide Circular No.943/4/2011-Cx. Dt. 29/04/2011 had clarified certain issues, including the issue involved in the present case. The clarification furnished in the said circular at Sl.No.5 is extracted herein below:-

Sl.No.	Issue	clarification
5.	s the credit of Business Auxiliary Service (BAS) on	The definition of input services

	account of sales commission now disallowed after the deletion of expression “activities related to business”?	allows all credit on services used for clearance of final products upto the place of removal. Moreover activity of sale promotion is specifically allowed and on many occasions the remuneration for same is linked to actual sale. Reading the provisions harmoniously it is clarified that credit is admissible on the services of sale of dutiable goods on commission basis.

7. Further, we also note that an explanation clause was appended to Rule 2(l) ibid, providing that sale promotion includes service by way of sale of dutiable goods on commission basis. Though, such definition clause was amended vide Notification dt. 03.02.2016, but such amendment being clarificatory in nature should give effect retrospectively. In this context, this Tribunal in the case of Essar Steel India Ltd. (supra) has held that an explanation inserted in a section / rule is generally to explain the meaning of the words contain therein and that an explanation clause is normally inserted in the statute to clarify a doubtful point of law, which should be effectively retrospective in nature. The relevant paragraphs in the said order are extracted herein below:-

> ***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."*

8. In view of the foregoing discussions and analysis, we are of the considered opinion that the disputed service on which service tax liability was discharged by the service provider should be considered an input service for the appellant, on which cenvat benefit should be available to the appellant.

9. Therefore, we do not find any merits in the impugned order, insofar as it has denied the cenvat benefit and confirmed the adjudged demands on the appellant. Accordingly, the impugned order is set aside and the appeal is allowed in favour of the appellant.

(Order pronounced in the open court on **01/09/2021**)

(S.K. MOHANTY)
JUDICIAL MEMBER

(P.V. SUBBA RAO)
TECHNICAL MEMBER

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