

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH – COURT NO. 1

Application(s) Involved:

Central Excise Miscellaneous Application No.20079 of 2021
In
Central Excise Appeal No. 639 of 2010

Appeals(s) Involved:

Central Excise Appeal No. 639 of 2010

(Arising out of Order-in-Original No.03/2010 dated 26/02/2010 passed by the
Commissioner of Central Excise, Bangalore-II Commissionerate, Bangalore)

M/s L & T Constructions
Equipment Ltd.

(formerly known as L&T Komatsu Ltd.)
Bellary Road, Byatanapura
Bangalore-560092

....Appellant

VERSUS

The Commissioner Of Central Tax,
Bangalore North

No-59, HMT Bhawan
Ground Floor, Bellary Road
BANGALORE
KARNATAKA
560032

....Respondent

WITH

(i) Central Excise Miscellaneous Application No.20082 of 2021
WITH Central Excise Appeal No.288 of 2011 (L&T Constructions
Equipment Ltd.)

(Arising out of Order-in-Original No.25/2010 dated 10/11/2010 passed by the
Commissioner of Central Excise, Bangalore-II Commissionerate, Bangalore)

(ii) Central Excise Miscellaneous Application No.20080 of 2021
WITH Central Excise Appeal No.247 of 2012 (L&T Constructions
Equipment Ltd.)

(Arising out of Order-in-Original No.33/2011 dated 23/12/2011 passed by the
Commissioner of Central Excise, Bangalore-II Commissionerate, Bangalore)

**(iii) Central Excise Early Hearing Application No.20003 of 2021
WITH Central Excise Appeal No.675 of 2012 (L&T Constructions
Equipment Ltd.)**

(Arising out of Order-in-Original C.No.V/84/15/118/11Adjn. BNG.II/1299/2012 SL No. 10/2012 dated 27.02.2012 passed by the Commissioner of Central Excise, Bangalore-II Commissionerate, Bangalore)

**(iv) Central Excise Early Hearing Application No.20002 of 2021 WITH
Central Excise Appeal No.25288 of 2013 (L&T Constructions
Equipment Ltd.)**

(Arising out of Order-in-Original No.48-49/2012/5629/12 dated 30/11/2012 passed by the Commissioner of Central Excise, Bangalore-II Commissionerate, Bangalore)

**(v) Central Excise Appeal No. 28106 of 2013 (L&T Constructions
Equipment Ltd.)**

(Arising out of Order-in-Original No.17/2013 dated 12/09/2013 passed by the Commissioner of Central Excise, Bangalore-II Commissionerate, Bangalore)

**(vi) Central Excise Appeal No.21368 of 2015 (L&T Constructions
Equipment Ltd.)**

(Arising out of Order-in-Original No.003-BLR-EXCUS-04/2014-15 dated 20/03/2015 passed by the Commissioner of Central Excise, Bangalore-IV Commissionerate, Bangalore)

**(vii)) Central Excise Appeal No.21432 of 2017 (L&T Constructions
Equipment Ltd.)**

(Arising out of Order-in-Appeal No.01/2017 dated 03/07/2017 passed by the Commissioner of Central Excise, Bangalore-II Commissionerate, Bangalore)

APPEARANCE:

Shri S. Muthu Venkataraman, Advocate for the Appellant
Shri P.Rama Holla, Authorized Representative for the Respondent

**CORAM: HON'BLE MR. S.K.MOHANTY, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER**

FINAL ORDER NO. 20273-20280/2022

DATE OF HEARING: 05/05/2022
DATE OF DECISION: 10/08/2022

PER: P. ANJANI KUMAR

The appellants M/s L& T Construction Equipment Limited (earlier known as M/s L&T Komatsu Limited) are engaged in the manufacture

of hydraulic excavators; During the course of an investigation conducted by the Department it was observed that the appellants were availing credit of service Tax on the sales commission paid by them to M/s L&T Ltd, who were marketing their products in India, as per Sole selling Agreement entered in to with them; It appeared that the activity of sales agency carried out by M/s L& T is not an 'input service' and that the appellants have contravened the provisions of Rule 3 of CENVAT credit Rules, 2004 read with Rule 2(I) ibid; A show Cause Notice dated 04.03.2009, covering the period 2006-07 and 2007-08, was issued invoking the extended period, seeking to demand back the credit taken along with interest while proposing to levy penalty. The allegations in the Show Cause Notice were confirmed by Order-in-Original dated 26-02-2010. Thereafter periodic Show Cause Notices were issued and confirmed by the respective Orders-in-Original/Orders-in-Appeal as follows.

Sl. No	Appeal No	SCN date	OIO/ OIA Date	Demand Confirmed	Period
1.	E-639/2010	04.03.2009	26.02.2010	61,44,78,463	April 2005 to December 2008
2.	E-288/2011	27.01.2010	10.11.2010	10,96,33,738	January 2009 to December 2009
3.	E-247/2012	07.09.2011	23.12.2011	20,85,94,049	January 2010 to March 2011
4.	E-675/2012	17.11.2011	27.02.2012	4,27,70,920	April 2011 to June 2011
	E-675/2012	25.11.2011		3,85,11,701	July 2011 to September 2011
5.	E-25288/ 2013	11.04.2012	06.11.2012	4,25,04,264	October 2011 to December 2011
	do	18.05.2012		4,71,73,305	January 2012 to March 2012
6.	E-28106/ 2013	29.04.2013	12.09.2013	16,75,11,081	April 2012 to March 2013

7	E-21368/ 2015	18.11.2013	20.03.2015	2,20,20,364	April 2013 to June 2013
	do	13.05.2014	do	40,79,583	July 2013 to March 2014
8	E-21432/ 2017	23.01.2015	30.06.2017	8,80,515	April 2014 to September 2014
	Do	27.10.2015	Do	8,93,517	April 2005 to March 2015

2. Shri S. Muthu Venkataraman, Advocate, appearing for the appellants for the Appellant submits that M/s L&T was engaged in the activity of promotion and support of sales of products manufactured by the Appellant; the activities undertaken by L&T under the Marketing / Sole Selling Agreement are Advertisement and Marketing of Products; Determination of Sales Targets in consultation with Appellant; Maintaining offices and staff to support sales activities; Procuring customers and facilitating sale of products by the Appellant and Continuous Review and Monitoring of Sales of Products by the Appellant to evolve sales plans. He submits that *The phrase "directly or indirectly, in or in relation to manufacture" is of wide import to cover services such as Sales Promotion; the phrase "Input Service" has been defined under Rule 2(I) of the Credit Rules to mean the services 'used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal,"*

2.1. He submits that the aforesaid phrase is of wide import and will cover not only services which are directly used in the manufacture of the goods but will also include all such services which are indirectly used by the manufacture in relation to the manufacture of the final products; services of sales promotion would also get covered in the main part of the definition; further, the commission paid to L&T has been included / factored by the Appellant while arriving at the assessable value of its manufacture final products, as per Bombay Tyre International Ltd 1983 (14) E.L.T. 1896 (S.C.). He relies on the following decisions:

- (i). *Coca Cola India Pvt Ltd 2009 (15) S.T.R. 657 (Bom.)*
- (ii). *Press Note dated 12-8-2004 issued by Ministry of Finance, explaining the proposed scheme of Cenvat credit.*
- (iii). *Ultra tech Cement Ltd 2010 (260) E.L.T. 369 (Bom.)*
- (iv). *ONGC 2013 (32) S.T.R. 31 (Bom.)*
- (v). *GTC Industries Ltd. [2008 (12) S.T.R. 468 (Tri. - LB)]*

2.2. He submits that, in view of the above, the services provided by L&T qualify as "input service" in terms of Rule 2(l) of the Credit Rules as the Activity of Advertisement and Sales Promotion is specifically covered in the inclusive part of the definition; with the deletion of the phrase "activities relating to business" w.e.f. 01.04.2011, doubts arose regarding the availability of CENVAT Credit with respect to various services; The CBIC vide Circular No. 943/4/2011-CX., dated 29-4-2011 clarified that the definition of input services allows all credit on services used for clearance of final products up to 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. He submits that divergence of view arose owing to the conflicting decisions of two High Courts in the cases of Commissioner of Central Excise, Ludhiana Vs Ambika Overseas 2012 (25) S.T.R. 348 (P&H) in favour of the assessee and Commissioner vs. Cadila Healthcare Ltd 2013 (30) S.T.R. 3 (Guj.) which purportedly created a distinction between sales promotion and Sales commission services; the entire controversy was finally resolved by insertion of Explanation to Rule 2(l) of the Credit Rules vide Notification No. 2/2016-C.E. (N.T.), dated 3-2-2016 which states that *for the purpose of this clause, sales promotion includes services by way of sale of dutiable goods on commission basis.*"

2.3. He submits the aforesaid Explanation was considered by the Ahmedabad Bench in the case of Essar Steel India vs. CCE, Surat-I [2016 (335) E.L.T. 660 (Tri. - Ahmd.)] wherein after considering the entire controversy right from the clarification in 2011, it was held that the Explanation is declaratory in nature and accordingly, is applicable retrospectively; though, the Departmental Representative states

that appeal against this decision is admitted by the Hon'ble Gujarat High Court, no stay however, has been granted, this decision still holds the field and will be squarely applicable to the facts of the present case; further, the aforesaid decision has been followed in a number of decisions including Federal Mogul (TRP) India Ltd 2020-VIL-521-CESTAT BLR-CE; the entire issue is no longer *Res Integra* and is settled in favour of the assessee. He submits that the decision of the Hon'ble Gujarat High Court in the case of Commissioner Vs Cadila Healthcare Ltd 2013 (30) STR 3] is not applicable to the facts of the present case for the reasons as below.

- the assessee therein was only engaged in causing sale of goods in a foreign territory and was not engaged in any promotional activity; in the facts of the present case, it is clearly evident that M/s L & T was engaged in the complete activity of sales promotion right from the stage of preparing sales targets/ plans, advertisement, procuring customers, after sales support and review monitoring of sales program to boost sales;
- CBIC Instruction F. No. 96/85/2015-CX.I, dated 7-12-2015 had clarified that 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.
- Further, this entire controversy of difference between sales promotion and sales commission agency has been put to rest with the introduction of the amendment in 2016 which has clearly stated that even services of causing sales on commission basis would also be considered as Sales Promotion; the decision of the Gujarat High Court in the case of Cadila (*supra*) was rendered before the introduction of this amendment and accordingly, is not relevant any further;
- the agreement dated 01.02.1998 between the Appellant and L & T Ltd shows that L&T was engaged/involved in Sales promotion and marketing as defined by the Hon'ble Gujarat High Court.

3. Learned Counsel submits that extended period of limitation can be invoked when there is a positive act of willful suppression with an intent to evade payment of duty as held in the cases of Pahwa Chemicals

Private Limited 2005 (189) ELT 257 (SC), Continental Foundation in 2007 (216) ELT 177 (SC) and Damnet Chemicals Pvt Ltd in 2007 (216) ELT 3 (SC); in the present facts, the entire controversy pertains to the interpretation of law and there is no factual suppression involved; the fact of availment of CENVAT Credit of the Service Tax paid on the commission paid to L&T was brought to the knowledge of the Department vide Appellant's letter dated 05.10.2005; fact of payment of commission and availment of CENVAT Credit was not suppressed and the only issue involved in the present is an interpretation of provisions of law; there was a long-standing dispute pertaining to availment of CENVAT Credit on sales commission as is evident from the clarification given in CBIC Circular No. 943/4/2011-CX., dated 29-4-2011; the said dispute was further enlarged owing to the conflicting decisions of two High Courts namely in the cases of Ambika Overseas 2012 (25) S.T.R. 348 (P&H) and Cadila Healthcare Ltd 2013 (30) STR 3 (Guj); entire controversy was finally resolved by insertion of Explanation to Rule 2(I) of the Credit Rules vide Notification No. 2/2016-C.E. (N.T.), dated 3-2-2016, which has then been held to retrospectively applicable by various decisions of this Hon'ble Tribunal including the case of Essar Steel (supra) and the recent decision of Bangalore Tribunal itself in the case of Federal Mogul (supra); dispute involves interpretation of legal provisions and accordingly, invoking the extended period of limitation in Appeal No. E-639/2010 is completely unwarranted. He further submits that penalty can be imposed only when there is *mens rea* on the part of the Appellant to evade payment of Duty as has held by in Tamil Nadu Housing Board CCE 1994 (74) ELT 9] Hindustan Steel Ltd 1978 (2) ELT 1159; accordingly, no penalty under Section 11AC can be imposed when the issue involved is bona fide dispute about the interpretation of law; he relies

- *Fibre Foils Ltd 2005 (190) E.L.T. 352 (Tri.- Mumbai)*
- *Aqua mall Water Solutions Ltd 2003 (153) ELT 428*
- *Adishiv Forge P. Ltd 2008 (9) STR 534 (Tri Ahmd).*

4. Learned counsel submits that, in light of the foregoing, the impugned orders be set aside or alternatively, refer the issue to the Larger Bench of this Hon'ble Tribunal in view of the conflicting decisions of the Tribunal.

5. Shri Rama Holla, authorised Representative, appearing for the department submits that as per the definition of "input service" provided in Rule 2(I) of CCR,2004, to qualify as an input service, the fundamental criteria is that the service has to be used by manufacturer in or in relation to the manufacture of final products; in the instant case, M/s L & T Ltd have provided the services as a sole selling agent to the appellants; these services do not have any connection with the manufacture of final products by the appellants as these services are in the nature of post-manufacturing activities; the said services are related only to sales and not manufacture; appellant is paying sales commission to M/s L & T for the services rendered as sole selling agent, in terms of the contract; the said services are neither advertisement nor sale promotion and are not covered under the inclusive part of the definition of input service also; the appellant's contention that advertisement, sales promotion, market research and customer support, are carried on by M/s L&T as a continuous activity cannot be accepted as rightly held by the adjudicating authority (Para 20 of OIO dated 26/2/2010).

5.1. He submits that the appellant's contention that Cenvat Credit is to be allowed when the value of the commission paid is included in the assessable value of the final products with reference to which the Central Excise duty is paid , is not acceptable, as rightly held by the adjudicating authority (Para 22 of OIO dated 26/2/2010); issue of admissibility of Cenvat Credit on the services rendered by commission agents for sale, has been decided in favour of revenue in the case of Cadila Healthcare Ltd reported in 2013(30)STR.3(Guj); the issue involved in the said case is also similar to the present issue; Hon'ble High Court of Gujarat has very clearly analysed the facts and legal interpretation (Para 5.2) and held that credit is not admissible. He submits that further, in the case of Gujarat State fertilizers & Chemicals Ltd 2016(41) STR 794(Guj.) the Hon'ble High court has held that a fleeting reference to attempt to sales promotion would not change the very basic nature of agreement; Hon'ble High court has relied upon the decision in Cadila Healthcare Ltd 2013(30) STR.3(Guj). He submits that the appellant has relied upon Essar Steel India Ltd 2016 (335) E.L.T. 660 (Tri. - Ahmd.) wherein it was held that Explanation to Rule 2(I) of CCR, 2004 inserted vide

Notification No.2/2016-C.E (NT) dated 3.2.2016, holding that sales promotion includes services by way of sale of dutiable goods on commission basis, was declaratory in nature hence, effective retrospectively; however, this decision has been challenged by the Department before the Hon'ble High Court of Gujarat.

6. Heard both sides and perused the records of the case. Brief issue involved in the case is to see whether the appellants are eligible to avail credit on the services of "Commission Agent" received from Larsen & Toubro Ltd. and whether the same constitutes "Input Service" in terms of Rule 2(I) of CENVAT Credit Rules, 2004 and whether extended period can be invoked in the Appeal No.639/2010. We find that the appellants have availed the services of M/s L&T Ltd. as a "Sales Agent" under a sole selling agent. In order to appreciate the nature of services, it is worthwhile to go through the relevant clauses of the Agreement entered into by the appellants with M/s L&T Ltd. An agreement dated 15th March, 1999, titled Marketing Agreement between L&T-Komatsu Ltd. and Larsen & Toubro Ltd. is placed on record. The important Articles of the Agreement are as follows:

Article 2.1. *With respect to the sales of equipment in territory A, L&T Komatsu hereby appoints L&T as its exclusive agent to market the equipment and provide product support for the equipment and L&T accepts such appointment.*

Article 3.1. *For the services rendered by L&T towards the sale and service of equipment in territory A, L&T Komatsu shall pay agency commission to L&T, and the rate and the other terms shall be stipulated in Annexure B attached thereto.*

Article 9. *Advertisement: L&T shall promote sales of products by means of advertising, exhibition and demonstration of products or any other means suitable and territories at its own account.*

Article 13(2). *Servicing Products:*

(2) Field Campaign L&T, shall at L&T Komatsu, rendered a field campaign for updating product, requested by L&T Komatsu, in accordance with the terms of the "service letter" which will be furnished to L&T by L&T Komatsu from time to time.

7. We find that Annexure A lists out Komatsu products and L&T products and the "Agency Commission" for the products is stated to be on a

percentage basis of actual sales in Territory A and a certain percentage of list price in Territory B and in respect of spare parts, list price less 20% discount. We find that the appellants argue that M/s L&T Ltd not only work as Agents, for a Sales Commission, but also promote sales and therefore, the services rendered can be called 'Input Service' in terms of Rule 2(l) of CENVAT Credit Rules. We find that Rule 2(l) reads as under:

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

[]

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

8. The appellants submit that the phrase used in the Rules is of wide import and will cover not only services which are directly used in the manufacture of the goods but will also include all such services which are indirectly used by the manufacturer in relation to the manufacturer of final products. The appellants relied upon the following cases:

- *Coca Cola India Pvt. Ltd. Vs CCE, Pune-III [2009 (15) S.T.R. 657 (Bom.)]*
- *CCE, Nagpur Vs Ultratech Cement Ltd. [2010 (260) E.L.T 369 (Bom.)]*
- *ONGC Vs CCE, ST & Cus [2013 (32) STR 31 (Bom.)]*
- *UOI Vs Bombay Tyre International Ltd. [1983 (14) ELT 1986 (SC)]*
- *CCE, Mumbai-V Vs GTC Industries Ltd. [2008 (12) STR 468 (Tri. LB)]*
- *CCE, Ludhiana Vs Ambika Overseas [2012 (25) STR 348 (P&H)]*

9. It is the case of the appellant that the activity of Advertisement and Sales Promotion is specifically covered in the inclusive part of the definition. It is the contention of the Department that the activities undertaken by M/s L&T for the appellants is a post-production and post-removal activity and as such has no nexus with the manufacturing activity; the Rule itself defines Input Service rendered in or in relation to the manufacture of final products up to the place of removal. Now, we should find out whether the services rendered were up to the place of removal or beyond and whether any sales

promotion is involved. To understand the same, it is required to see the Agreement in a holistic manner and to identify the general tenor of the Agreement. We find that the appellant's contention is correct and it has been held in *Rashtriya Ispat Ltd. Vs Commercial Tax Officer- 77-STC-182 (AP)*, Hon'ble High Court of Andhra Pradesh held that:

"In our view whether the transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as whole, to determine the nature of the transaction. From a close reading of all the clauses in the agreement, it appears to us that the contractor is entitled to make use of the machinery for purpose of execution of the work of the petitioner and there is no transfer of right to use as such in favour of the contractor. We have reached this conclusion because the effective control of the machinery even while the machinery is in the use of the contractor is that of the petitioner company. The contractor is not free to make use of the same for other works or move it out during the period the machinery is in his use. The condition that he will be responsible for the custody of the machinery while the machinery is on the site does not militate against the petitioner possession and control of the machinery. For these reasons, we are of the opinion that the transaction does not involve transfer of right to use the machinery in favour of the contractor."

9.1. We also find that it was also held by the Apex Court in the case of *M/s Panipat Woolen and General Mills Co. Ltd. 1975-SCR-186* that:

"It is well settled that the court in order to construe and agreement has to look into the substance or the essential of it rather than to its form. A party cannot escape the consequence of law merely by describing an agreement in a particular form though the essence and substance may be a different in the transaction."

10. We have gone through the Agreement in question and we have extracted relevant paras as above. We find that general tenor and purport of the Agreement is sales and not sales promotion. It can be inferred from the Agreement that the terms of payment are only as a percentage of sales and the payment terms have no relation with any activity of sale promotion like advertisement etc. for which the appellants have not paid any money to M/s L&T Ltd. Even though there is a mention of filed campaign in the Agreement,

it is on a case to case basis and on a specific offer letter to be issued by the appellants; no payments for such activity have been agreed upon in an Agreement. Therefore, it is a clear-cut understanding between the parties that M/s L&T Ltd would work as Commission Agents for sales and get a fixed percentage of the sales turnover. For this reason, we find that the appellant's submission on sales promotion is not valid as far as the Agreement between them and M/s L&T is concerned. We find that learned Commissioner has correctly held that the impugned service does not qualify as Input Service as the same was not used in or in relation to manufacture of goods by the appellants and therefore, the credit availed is illegal.

11. We find that Gujarat High Court has gone into this issue in an elaborate manner and had made a final distinction between Sales Promotion and Sales Commission Services in the case of Cadila Healthcare Ltd. 2013 (30) STR 3 (Gujarat) has held as under:

5.2 Commission paid to the foreign agents: The assessee availed of CENVAT credit of Rs. 39,45,791/- towards commission paid to foreign agents. According to the assessee, out of the total amount paid as service tax, they had availed of CENVAT credit only on that part which was attributable to dutiable products manufactured in their plant only and that no CENVAT credit has been availed on exempted goods. It was contended that service tax paid on commission paid to commission agents for sale of final products is available as credit according to the inclusive part of the definition of input service, which includes services in relation to sales promotion. Reference was made to the definition of business auxiliary service as defined under Section 65(19) of the Finance Act, 1994 which lays down that business auxiliary service means any service in relation to (i) promotion or marketing or sale of goods produced or provided by or belonging to the client or (ii) promotion or marketing of service provided on behalf of the client and includes services as a commission agent.

(i) The Adjudicating Authority held that on a perusal of the definition of commission agent as defined under clause (a) to the Explanation under Section 65(19) of the Act, a commission agent is a person who acts on behalf of another person and causes sale or purchase of goods. In other words, he is directly responsible for selling or purchasing on behalf of another person and that such activity cannot be considered as sales promotion. According to the Adjudicating Authority there is a clear

distinction between sales promotion and sale. A commission agent is directly concerned with sales rather than sales promotion. He, accordingly, held that service provided by commission agent does 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 and, therefore, the assessee was not eligible for CENVAT credit in respect of the service tax paid on commission paid to foreign agents.

(ii) The Tribunal has held that foreign commission agent service is in the nature of sales promotion and without any elaborate discussion in respect thereof has held that CENVAT credit was admissible on service tax paid in respect of such service. The Tribunal while reversing the findings recorded by the Adjudicating Authority has not given any reasons in support thereof and has merely placed reliance upon its findings in relation to the services rendered by the Clearing and Forwarding agents.

(iii) The learned counsel for the appellant placed reliance upon the findings recorded by the Adjudicating Authority to submit that the commission paid to foreign agent is being availed in the category of Business Auxiliary Service. However, this service is not used for manufacture of final product and is not used for clearance of final product from the place of removal. The commission agent is directly concerned with the sales and not with production, therefore, it is also not related to any activity specified in the inclusive part of the definition of input service. Besides, the activities carried out by the commission agent do not fall within the ambit of sales promotion and, therefore, also the commission paid to the foreign agents would not fall within the ambit of the expression input service as envisaged under Rule 2(l) of the Rules.

(iv) On the other hand, the learned counsel for the assessee supported the impugned order of the Tribunal by submitting that the assessee avails of services of commission agents for sale of its final products. The commission agents find buyers for the assessee's goods and thereby promote the sales of the assessee's goods. The inclusive portion of the definition specifically mentions services used in relation to sales promotion. The service of commission agents is, therefore, covered by the definition of input service. Moreover, such service is received in relation to the assessee's business only and not for any other purpose. The same is, therefore, a service in relation to the activity relating to business which is also covered by the inclusive portion of the definition. It was argued that the show cause notice had proposed to deny CENVAT credit merely on the ground that the said service is a post-manufacturing activity and is not used directly or indirectly in the manufacture of final products, completely ignoring the inclusive portion of the definition. It was also submitted that the service tax paid to a commission agent for sale of final product would fall within the ambit of sales promotion which is a business auxiliary service and would, therefore, also fall within the purview of input service.

(v) *In the backdrop of aforesaid facts and contentions, reference may be made to the definition of business auxiliary service as defined under Section 65(19) of the Finance Act, 1994, which to the extent the same is relevant for the present purpose reads thus :*

Business Auxiliary Service means any service in relation to,

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or promotion or marketing of service provided on behalf of the client; or and includes services as a commission agent but does not include any information technology service and any activity that amounts to manufacture within the meaning of clause (f) of Section 2 of Central Excise Act, 1944

Explanation.- For the removal of doubts, it is hereby declared that for the purposes of this clause,

(a) Commission Agent 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, and includes any person who, while acting on behalf of another person

(i) deals with goods or services or documents of title to such goods or services; or

(ii) collects payment of sale price of such goods or services; or

(iii) guarantees for collection or payment for such goods; or

(iv) undertakes any activities relating to such sale or purchase of such goods or services;

(vi) As noted hereinabove, according to the assessee the services of a commission agent would fall within the ambit of sales promotion as envisaged in clause (i) of Section 65(19) of the Finance Act, 1994, whereas according to the appellant a commission agent is a person who is directly concerned with the sale or purchase of goods and is not connected with the sales promotion thereof. Under the circumstances, the question that arises for consideration is as to whether services rendered by a commission agent can be said fall within the ambit of expression 'sales promotion'. It would, therefore, be necessary to understand the meaning of the expression sales promotion.

(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 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 tradeshow, games, giveaways, 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.

(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.

(x) For the reasons stated hereinabove, this court is unable to concur with the contrary view taken by the Punjab and Haryana High Court in Commissioner of Central Excise, Ludhiana v. Ambika Overseas [[2012 \(25\)](#)]

S.T.R. 348 (P & H)]. Insofar as this issue is concerned, the question is answered in favour of the revenue and against the assessee.

11.1. We also find that Hon'ble Gujarat High Court, in the case of Gujarat State Fertilizers & Chemicals Ltd. 2016 (41) S.T.R. 794 (Guj.) has held that:

6. As noted above, the assessing authority as well as the Tribunal came to factual finding that there was no material on record to establish that the commission agents of the appellant GSFC had incurred any expenses or involved in any means for sales promotion. Even otherwise if we peruse the agreement in question, the same is predominantly in the nature of appointing partnership firm by the name Yarn Trading as a stockist for the sales of the appellant-company. Very preamble to the agreement shows that the appellant-company was desirous of appointing consignment stockist for the sales of its product and the partnership firm had approached the appellant with a request to be so appointed. As per Clause (2) of the agreement, company would transfer its stock of yarn to the consignment stockist at the price fixed by company from time to time on advance payment basis along with deposits. Clause (3) provided that consignment stockist would bear the insurance coverage for materials stored at its godown. As per Clause (4), all expenses incurred in selling or storing the products would be borne by consignment stockist. Clause (7) pertains to the commission to be paid to the consignment stockist which was graded depending on the sales turnover.

7. Thus predominantly the entire agreement was one in the nature of appointing a partnership firm as stockist of the appellant-company who would upon being supplied the goods in question would store the same and dispose of in the market at agreed rates upon which would receive certain commission.

8. A fleeting reference to attempt to sales promotion would not change the very basic nature of agreement and the relations between the appellant and the stockist converting the stockist as sales promotion agent. No question of law arises. Tax appeal is therefore, dismissed.

12. The appellants rely on Punjab and Haryana High Court Judgment in the case of M/s Ambika Overseas 2012 (25) S.T.R. 348 (P & H) and the judgment of this Tribunal in the case of Essar Steel India 2016 (335) ELT 660 (Tri. Ahmedabad) and Federal Moghul (TRP) India Ltd. 2020-VIL-521-BLRE-CE and submits that the Explanation to Rule 2(I) of the CENVAT Credit Rules inserted vide Notification No. 2/2016-CE (NT) dated 03.02.2016 is clarificatory and applicable retrospectively and therefore Sales Promotion is to be understood by way of sale of dutiable goods on commission basis. We find that in the case of Cadila Healthcare Ltd. (supra), Hon'ble High Court of Gujarat has gone into all the legal issues involved and have come to a categorical conclusion as cited above. It is pertinent to note that Hon'ble High Court has also referred to the judgment of Punjab & Haryana High

Court in the case of Ambika Overseas (supra) and have clearly held that they are not inclined to accept the contention. We are of the considered opinion that Hon'ble High Court of Gujarat in the case of Cadila Healthcare (supra) have discussed the issue at length. Compare to this judgment, the judgment in Ambika Overseas did not consider all the relevant issues. Moreover, it is much more pertinent to note that Hon'ble High Court of Gujarat have given similar findings in the case of GSFC (supra). For these reasons, we are of the considered opinion that the judgment in Cadila Healthcare Ltd. holds good, more so, being the latest. For this reason, we are not inclined to accept the reliance of the appellants on the judgments of the Tribunal in Essar Steel Ltd. and Federal Moghul (supra). We find that the appellants are not eligible to avail CENVAT credit on the Sales Commission paid to M/s L&T Ltd. We find that the appellants have also submitted that in case the bench takes a contrary view to the judgments of tribunal in Essar India Ltd and Federal Mogul, the may refer the issue to a larger Bench. We find that in view of the elaborate discussion and categorical finding of the Gujarat High Court in the case of Cadila (supra) and in view of our discussion as above, no such reference to larger bench is warranted.

13. Coming to the issue of limitation, the appellants submit that there is no positive act or wilful suppression with an intent to evade payment of duty; the entire controversy pertains to the interpretation of law and there is no factual suppression involved; the fact of availment of CENVAT credit of the service tax paid on the Commission paid to M/s L&T was brought to the knowledge of the Department vide their letter dated 05.10.2005 and therefore, the issue was very much in the knowledge of the Department; therefore, it is not open for the Department to invoke extended period of limitation. We find that the appellant's contention is acceptable. The appellants have also submitted that penalty under Rule 25 of the CENVAT Credit Rules has been wrongly imposed; it is a settled position that in the absence of evidence showing clandestine removal, Rule 25 of Cenvat Credit Rules, 2004, cannot be invoked as held in GAL Aluminium Extrusions Pvt. Ltd. 2011 (247) ELT 582; the issue involved pertains to eligibility of CENVAT credit on input services and there is no dispute regarding production, manufacture and removal of the goods clandestinely; therefore, none of the

provisions of Rule 25 are attracted. The appellants also submit that penalty under Section 11AC of the Central Excise Act, 1944 cannot be invoked in the periodical show cause notices as held in Nizam Sugar Factory 2008 (9) STR 314 (SC). The appellants also submit that as the issue involved is availment of CENVAT credit for reasons other than fraud, collusion, suppression etc; the appellant had not contravened any provisions of CENVAT Credit Rules and therefore, penalty under Rule 15(1) of the CENVAT Credit Rules cannot be imposed.

14. We find that the appellant's contention are acceptable in the facts of the case, as far as penalty under Section 11AC of the Central Excise Act, 1944 and Rule 25 of Cenvat Credit Rules, 2004 are concerned. As per our discussion above, we held that extended period is not invocable in respect of the first show cause notice that is the part of the proceedings in Appeal No. E/639/2010 and for that reason, suppression, fraud, collusion etc. with intent to evade payment of duty cannot be alleged and therefore, penalty under Section 11AC cannot be imposed. We also find that as the issue involved does not pertain to clandestine removal etc. and therefore, the question of confiscation and penalty under the provisions of Rule 25 of the Central Excise Rules do not arise. Therefore, we are of the considered opinion that penalty imposed under Section 11AC of Central Excise Act and Rule 25 of Central Excise Rules are not sustainable. However, we find that in some of the appeals, penalty under Rule 15 of CENVAT Credit Rules, 2004 has been imposed. As per our discussion above, we hold that the appellants are not eligible to avail the impugned credit and therefore, availment of credit, before the amendment carried out with effect from 03.02.2016, does constitute a contravention of Central Excise Rules and therefore, penalty under Rule 15 of CENVAT Credit Rules, 2004 is rightly imposed.

15. In view of the above, we pass the following order:

15.1. Appeal Nos. E/639/2010; E/288/2011; E/247/2012 and E/675/2012 are partly allowed as follows:

(i). Appeal No. E/639/2010: duty demand confirmed within normal period; extended period not invokable; However, penalty under Section 11AC is set aside;

(ii). Appeal No. E/288/2011: Duty demand of Rs.10, 96, 33,738 is confirmed; however, penalty under Rule 25 of Central Excise Rules is set aside.

(iii) Appeal No. E/247/2012: duty demand of Rs.20, 85, 94,049 is confirmed; however, penalty under Section 11AC is set aside.

(iv). Appeal No. E/675/2012: duty demand of Rs.8, 12, 82,621 is confirmed; however, penalty under Rule 25 of Central Excise is set aside.

15.2. Appeal Nos. E/25288/2013; E/28106/2013; E/21368/2015 and E/21432/2017 are rejected.

15.3. Miscellaneous Applications are also disposed of in the above terms.

(Order pronounced in the open court on 10/08/2022)

(S.K.MOHANTY)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER