

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI**

Appeal Nos. E/42620 & 42621/2017

(Arising out of Order-in-Appeal No. 337 & 338/2017 (CTA-I)
dated 14.11.2017 passed by the Commissioner of GST &
Central Excise (Appeals – I), Chennai)

M/s. HCL Infosystems Ltd. Unit - III

Appellant

Vs.

Commissioner of GST & CCE, Pondicherry

Respondent

Appearance

Ms. S. Yogalakshmi, Advocate for the Appellant

Shri K. P. Muralidharan, AC (AR) for the Respondent.

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Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Date of Hearing / Decision: 04.06.2018

Final Order No. **41725-41726 / 2018**

The issue involved in both these appeals being the same, they were heard together and are disposed of by this common order.

2. Brief facts are that the appellants are manufacturers of computer systems and were availing the facility of Cenvat Credit of duty paid on inputs, capital goods and services tax paid on input services. On verification of records, it was noticed that during the period from April 2012 to September 2012, as well as October 2012 to March 2013, the appellants

had availed Cenvat Credit on outward transportation of goods up to the buyer's premises. The department was of the view that the credit is not eligible and, therefore, show-cause notices were issued, proposing to recover the wrongly availed credit along with interest and for imposing penalties. After due process of law, the original authority confirmed the demand, interest and penalties. In appeal, the Commissioner (Appeals) upheld the same. Hence, these appeals.

3. On behalf of the appellant, the learned Counsel Ms. S. Yogalakshmi submitted that the appellants had sold the manufactured products on FOR (Destination) basis, as the appellant had an obligation to deliver the goods at the customer's premises and the ownership of the said goods got transferred to their client only at that stage. The price quoted to their clients is inclusive of the freight charge incurred by the appellant for the outward transportation. The appellant had paid excise duty on the assessable value, which is inclusive of the freight charges thus incurred. It is submitted that the actual credit availed by the appellant pertains to service tax paid on 25% of the gross amount of the freight charge incurred, whereas the appellant had paid the excise duty at the rate of 10% on the assessable value of the final goods, which is inclusive of the entire freight charge incurred. Thus, the credit availed in respect of the freight incurred is very meagre when compared to the excise duty paid on the

assessable value. The department had insisted to add the freight value to the assessable value for the payment of excise duty treating the place of the client as the place of removal. Whereas, thereafter, the department has not accepted the customer's place, as the place of removal in order to deny the Cenvat Credit availed on the outward freight incurred. She submitted that as the excise duty paid on the assessable value, being at a relatively high rate, the denial of Cenvat Credit availed on service tax paid on 25% of the gross amount on reverse charge mechanism is a clear case of double taxation.

4. She adverted to the definition of Input service and submitted that with effect from 01.04.2008, an amendment has been made by notification 10/2008 CE NT dated 01.03.2008, wherein the words "clearance of final products from the place of removal", is substituted with the words "clearance of final products up to the place of removal". For the period prior to the above amendment, the issue is settled by the judgement in the case of CCE Vs. ABB Ltd., {2011 (23)STR 97 Kar.}. It was held therein that the expression "clearance of the final products from the place of removal" would cover such transportation services up to the customer's place, and the same cannot be restricted by the expression "outward transportation up to the place of removal". The judgement has also made it clear that the position post

01.04.2008 is not examined. Hence, when the definition has been amended from 01.04.2008, restricting the credit entitled for clearance of final products up to the place of removal, read with outward transportation up to the place of removal, would lead to the meaning of the term "place of removal", as stated in respect of transportation services availed up to such "place of removal". She adverted to the definition of "place of removal" contained in Section 4 (3) (c) of Central Excise Act, 1944, and also referred to Master Circular No. 97/8/2007 dated 23.08.2007. Relying on the decision in the case of M/s. Ultratech Cement Ltd. Vs. CCE 007 (6) STR 364 (Tribunal), the learned Counsel argued that the crux of the clarification given by the Board is as to the scope of the term "place of removal". Once, the term "place of removal" is thus understood, Cenvat Credit is eligible for transportation up to the place of removal. If buyer's premises can be considered as place of removal, then credit for GTA services up to buyer's place is also eligible. Further, that since the clarification as per the decisions as well as the Master Circular has not overcome the practical difficulties in determining the eligibility of Cenvat Credit of service tax paid on outward transportation, the CBEC came out with another Circular No. 988/12/2014 dated 20.10.2014. The Circular clarified that the place where sale has taken place or when the property, in goods, passes from the seller to the buyer, is the relevant

consideration to determine the place of removal. The effect of the above Circulars is that if the transfer of property in the goods happens to be at the buyer's place, in terms of the provisions of the Sale of Goods Act, 1930, then such buyer's place would be the place of removal, and, hence, any service tax paid on GTA services availed for transporting the goods till the buyer's premises would be eligible for Cenvat Credit.

5. That, while this being so, it is submitted by her that the Hon'ble Apex Court in the case of Ultratech Cement Ltd. (supra) has not noticed that the clarification contained in the Circular has got nothing to do with the amendment. The Circular only clarifies that the buyer's place can become place of removal if the three conditions are satisfied. If these three conditions are satisfied, the place of removal would be the buyer's place up to 31.03.2008 and credit would be eligible. After 01.04.2008, credit is not eligible for clearance of final products up to the place of removal and the GTA services availed for transporting the goods from the factory or depot to the buyer's place could be covered within the expression for clearance of final products up to the place of removal, if otherwise, the buyer's place can be considered as the place of removal. That, therefore, the conclusion of the Hon'ble Apex Court in the said clarification is not relevant after 01.04.2008, as it appears to be incorrect. That the judgement of the Hon'ble Apex Court does not deal with these issues and,

therefore, does not cover the issue under consideration. She prayed that the credit on the service tax, paid on outward transportation of finished products, up to the buyer's premises is eligible and, therefore, be allowed.

6. The learned AR, Shri K.P. Muralidharan, supported the findings in the impugned order. He submitted that the issue stands settled by the decision in the case of M/s. Ultratech Cement Ltd. 2018-TIOL-42 SC-CX.

7. Heard both sides.

8. The period involved is after 01.04.2008. The issue involved in both the appeals is whether the appellant is eligible to avail the Cenvat Credit of service tax paid on the GTA service received by them for outward transportation of final products from the factory gate up to the premises of the buyer when the sales are on FOR basis. The said issue has been decided in the case of M/s. Ultratech Cement Ltd. by the Hon'ble Apex Court, wherein it has been held that credit is eligible up to 01.04.2008 and after such date, the assessee is not eligible for credit. Though the learned Counsel for appellant has put forward lengthy arguments in the written submissions, I am afraid the same does not find any merit in view of the decision of the Hon'ble Apex Court in the case cited *supra*. Following the ratio laid by the Hon'ble Apex Court in the case of Ultratech Cement Ltd., I hold that the appellant is not eligible for credit. However, taking into consideration

that the issue was under litigation and was in favour of assessee at the Tribunal level as also decided by various High Courts and got settled only by the decision of the Hon'ble Apex Court, I am of the view that the penalty imposed is unwarranted and requires to be set aside which I hereby do.

9. In the result, the impugned order is modified to the extent of setting aside only the penalties, without disturbing the duty demand or interest thereon. The appeal is partly allowed in above terms with consequential reliefs, if any.

(Operative portion of the order was
Pronounced in open court)

(Sulekha Beevi C.S.)
Member (Judicial)

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