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

Appeal No. E/40712/2013

(Arising out of Order-in-Original No. LTUC/394/2012-C dated 31.12.2012 passed by the Commissioner, LTU, Chennai)

M/s. Ford India Pvt. Ltd. Appellant

Vs.

Commissioner of GST & Central Excise
Chennai Respondent

Appearance

Shri Sai Prasanth, Advocate for the Appellant
Shri S. Govindarajan, AC (AR) for the Respondent

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Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing / Decision: **21.03.2019**

Final Order No. **40582 / 2019**

Per Bench

Brief facts are that the appellants are engaged in manufacture of passenger cars and are availing the facility of CENVAT credit on excise duty paid on inputs , capital goods and service tax paid on various input services. During the audit of accounts on one of the service providers of the appellant, it was noticed that the service provider namely M/s. Sunmar Constructions had constructed roads for the appellant inside the factory premises. M/s. Sunmar Constructions had paid service tax on the construction activities provided to the appellant and the service tax was also collected from the appellant. The appellant then availed credit of the service tax being input service for them. The department was of the view that construction of roads does not amount to Commissioner or Industrial Construction Service and that the construction of roads is specifically excluded in the said definition. That M/s. Sunmar Constructions ought not to have paid service tax on the said services. The credit therefore availed by the appellant is ineligible. Show Cause Notice was issued proposing to demand the wrongly availed credit along with interest and for imposing penalties. After due process of law, the original authoirty confirmed the demand, interest and imposed penalties. Hence this appeal.

2. On behalf of the appellant, ld. counsel Shri Sai Prashanth submitted that the department does not dispute that the roads were constructed by M/s. Sunmar Constructions within the factory premises of the appellant. So also there is no dispute that the appellant has availed CENVAT credit only on the service tax collected by M/s. Sunmar Constructions from the appellant. The allegation is that since M/s. Sunmar Constructions ought not to have paid service tax since the activity of construction of road does not fall within the

definition of Construction of Industrial or Complex service, the credit is not eligible. He relied upon the decision of the Hon'ble High Court of Gujarat in the case of Commissioner of Central Excise Vs. Nahar Granites Ltd. – 2014 (305) ELT 9 (Guj.) to argue that in the said case though the process did not amount to manufacture, the Hon'ble High Court held that credit availed on inputs is eligible. Similar view has been taken by the Tribunal in the case of Ran India Steels Pvt. Ltd. Vs. Commissioner of Central Excise – 2016 (344) ELT 440 (Tri. Chennai). He also took assistance of the jurisdictional High Court in the case of M/s.Modular Auto Ltd. Vs. Commissioner of Central Excise, Chennai – 2018 (8) TMI 1691 Madras HC.

3. The ld. AR Shri S. Govindarajan supported the findings in the impugned order. He adverted to the definition of CICS in section 65(25)(b) of Finance Act, 1994 and argued that services provided in respect of construction of roads does not fall within the ambit of the said definition. He referred to section 66 of the said Act and submitted that the assessee can avail credit only of the service tax that is paid when the services are leviable to service tax. In the present case, services / activities are not liable to service tax and therefore the credit availed has been rightly rejected. If at all M/s. Sunmar Constructions can apply for refund.

4. Heard both sides.

5. The issue is whether the appellants are eligible to avail credit of the service tax collected by them for construction of roads carried out by M/s. Sunmar Constructions. It is seen that M/s. Sunmar Constructions have collected service tax from the appellant and issued proper invoices. The appellants have availed credit of the same amount under proper documents. It is now the case of the department that M/s. Sunmar Constructions ought not to have paid service tax on the construction of the roads since such activities are not leviable to service. On an analogous situation, wherein credit was availed on inputs, when the process does not amount to manufacture, the Courts have consistently held that the credit cannot be denied at the receiver’s end. The Hon'ble High Court of Gujarat in the case of Nahar Granites (supra) had occasion to analyse such issue wherein it was held as under:-

> “8. In terms of Rules 3 and 4 of the Cenvat Credit Rules, 2004, a manufacturer would be entitled to avail the Cenvat credit in respect of the inputs used for the manufacture of a final product or in providing taxable service of the excise duty specified in First Schedule to the Excise Tariff Act. Insofar as the respondent is concerned, he had purchased the inputs and utilised the same for manufacture of a final product. Such goods were duty paid. Rules 3 and 4 of the Cenvat Credit Rules, 2004, thus would enable him to avail the Cenvat credit. It is a different thing that the supplier of the goods to the respondent paid excise duty on such product under mistaken belief. In law as declared by the Supreme Court in case of Collector of Central Excise, Patna v. Tata Iron and Steel Co. Ltd. (supra), no duty was payable on such product. Strictly speaking therefore, such amount deposited by the original manufacturer would not partake the character of excise duty. However, when the department did not dispute the classification of such manufacturer, accepted the declarations and duties, Cenvat credit on such duty

> cannot be declined to the purchaser of the goods who otherwise fulfilled all conditions tor availing Cenvat credit thereof."

6. So also the Hon'ble Apex Court in the case of Commissioner of Central Excise Vs. MDS Switchgear Ltd. – 2008 (229) ELT 485 (SC) has held that the MODVAT credit enables the recipient manufacturer to avail the benefit of duty paid by the supplier manufacturer. In the present case, CENVAT scheme enables the service recipient to avail credit of the service tax paid by the service provider. The jurisdictional High Court in the case of Modular Auto Ltd. (supra) has observed that even when the activity rendered by the service provider does not amount to service, the credit availed by the service recipient for the on the service tax collected from him would be eligible for credit. The relevant portion is noticed as under:-

> "In the instant cases, it is not in dispute that whatever the portion of service tax component which was collected from the assessees by BIL was only the amount on which the CENVAT credit has been claimed by the assessees. Therefore, unless and until the assessment made on BIL was revised, which obviously could have been done, at this juncture, on account of the expiry of the period of limitation, the interpretation given by the Commissioner (Appeals) as well as the Tribunal with regard to the nature of invoice raised on the assessees is unsustainable. Furthermore, we find that the reason assigned by the Tribunal in para 6.2 stating that the activity performed by the BIL for monitoring of production activities of the assessees cannot by any stretch of imagination be considered as an input service or in relation to the manufacture of final products of the assessees, is a statement, which is unsubstantiated by any record. At best, it can be taken as a personal opinion of the Tribunal, which could not have been a reason to reverse the credit availed by the assessees."

7. The basis fundamental concept for availment of CENVAT credit is to avoid cascading effect of tax and it is a compensation for arrangement for the recipient of goods or services who has suffered tax or duty at the hands of the provider or supplier. The CENVAT scheme therefore allows the manufacturer or service recipient to avail the credit of duty to the extent that has been paid by the supplier or provider and in the invoices in full unless the same is restricted or barred by some other legal provision in law. The manufacturer or service recipient cannot be denied the credit only on the score that the same has been short-paid or has been paid when not required. This is the ratio that has been granted in slew of decisions of the higher appellate forums.

8. On appreciating the facts and law and also applying the ratios laid down in the above decisions, we are of the considered opinion that the demand cannot sustain. The impugned order is set aside and the appeal is allowed with consequential relief, if any.

(Dictated and pronounced in open court)

(**Madhu Mohan Damodhar**)
Member (Technical)

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

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