CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. IV

Excise Appeal No.40575 of 2018

(Arising out of Order-in-/Appeal No.359/2017 [CTA-II], dated 30.11.2017 passed by the Commissioner of CGST & Central Excise, (Appeals), Chennai)

M/s. The Ramco Cements Ltd. **: Appellant**
Cement Grinding Unit,
Village: Kattuputhur, Post: Olaiyur,
Via., Salavakkam, Taluk: Uthiramerur,
Pin – 603 107. Distt: Kancheepuram.

VERSUS

Commissioner of GST & CE, **: Respondent**
Puducherry Commissionerate,
Puducherry.

APPEARANCE:

Shri R. Parthasarathy, Cons. for the Appellant

Shri B.Balamurugan, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE SHRI P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

INTERIM ORDER NO. 400002 / 2020

DATE OF HEARING: 26.09.2019

DATE PRONOUNCEMENT: 08.06.2020

Per P. Venkata Subba Rao:

1. Heard both sides and perused the records.

2. This appeal is filed against Order-in-Appeal No. 359/2017 [CTA-II], dated 30.11.2017. The issue which falls for consideration in this appeal is whether the appellant is entitled to Cenvat credit of the

duty paid on the outward transportation of goods from their factory to the buyer's premises, where the sale is on F.O.R. [buyer's premises] basis. It is the case of the assessee that they are entitled to such Cenvat credit, whereas, it is the case of Revenue that they are not entitled to Cenvat credit because it pertains to a service beyond the place of removal. Learned counsel for the appellant would submit that the Hon'ble Single Member of this Bench in Final Order Nos.42569-14576/2017, dated 31.10.2017 and Division Bench in Final Order Nos. 40440 – 40450/2019, dated 25.02.2019 remanded such cases for examination to the original authority to examine from the totality of evidence as to which is the place of removal in each case. Accordingly, he prays that the matter may be remanded to the original authority in this case also. He would rely on the judgment of the Hon'ble Apex Court in the case of *M/s. Roofit Industries Ltd., [2015 (319) E.L.T.221 (S.C.)]* in which the Hon'ble Apex Court had held that where the goods are sold for delivery at the buyer's premises on F.O.R. basis, the transaction is completed only when the ownership of the goods shifts to the buyers. Since the property passed on to the buyer's in terms of Section 19 of the Sale of Goods Act, 1930 only at the buyer's premises, the place of removal gets shifted to the buyer's premises.

3. He would argue that in their case since the buyer's premises is the place of removal, the cost of transportation of the goods from their factory to the buyer's premises is eligible for Cenvat credit as an input service. However, for verification of facts, the matter should be remanded to the original authority.

4. The learned Departmental Representative, on the other hand, asserts that the assessee is not entitled to Cenvat credit on the inputs for the simple reason that the GTA services were availed for transporting from their factory to the buyer's premises. He would assert that this issue is no long *res integra* and in an identical case the Hon'ble Apex Court in the case of *M/s. Ultra Tech Cements Ltd.,* [*2018 (9) G.S.T.L.337 (S.C.)*] has categorically held that no Cenvat credit is available for services used for transporting goods from the place of removal to the buyer's premises. He would further argue that the next question is what is the place of removal in case goods are sold on F.O.R. buyer's premises basis? He concedes that in the case of *M/s.*

Roofit Industries Ltd., (supra) Hon'ble Apex Court had taken a view that when the goods are sold for delivery at the buyer's premises such premises will become the place of removal. He further submits that this has been reversed by the Hon'ble Apex Court in the subsequent judgment in the case of *M/s. Ispat Industries Ltd.,* [*2015 (324) E.L.T.670 (S.C.*)] and the Hon'ble Apex Court has categorically held that the buyer's premises can never be the place of removal under Section 4. Therefore, there is no case to remand the matter back to the original authority to determine which is the buyer's premises because the issue has been settled by the Hon'ble Apex Court in the case of *M/s. Ispat Industries Ltd.,* (supra).

5. He would further argue that the present case is not on valuation but it is confined to entitlement of Cenvat credit on GTA Services used for transportation of goods from the factory to the buyer's premises. This issue has been decided by Hon'ble Apex Court in the case of *M/s. Ultra Tech Cements Ltd.,* (supra) and the decision is binding on this Tribunal.

6. We have considered the arguments on both sides and perused the records. The appellant manufactures cement and sells it to various consumers on FOR buyer's premises basis. They avail the benefit of CENVAT Credit under CCR 2004, available on inputs and input services which go into the manufacture of the product. Rule 2(l) of CCR, 2004 was amended from 01.03.2008 insofar as the Cenvat Credit on the Goods Transport Agency service used for outward transportation of goods is concerned. It reads as follows:

> "(l) *"input service" means any service,-*
>
> *(i) used by a provider of taxable service for providing an output service; or*
>
> (ii) *used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal, and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and* ***outward transportation upto the place of removal."***

7. Prior to the amendment with effect from 01.03.2008 the words used were "**outward transportation from the place of removal**". In other words, the definition of 'input service' has been modified and restricted with effect from 01.03.2008. The appellant herein availed Cenvat Credit on Goods Transport Agency services provided by transporters for outward transportation of goods from their factory to the buyer's premises. It is the case of the revenue that after 2008, such Cenvat Credit is not admissible in view of the amended Rule 2(l) of CCR, 2004.

8. Learned counsel for the appellant would submit that the expression in the Rule "place of removal" has not been defined in CCR, 2004 upto 11.07.2014. Therefore, the definition given in the Central Excise Act in Section 4 applies. This reads as follows:

> "*Explanation - In this clause –*
>
> .
>
> *(c) "place of removal" means –*
>
> *(i) a factory or any other place or premises of production or manufacture of the excisable goods;*
>
> *(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;*
>
> *(iii)* ***a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory; from where such goods are removed."***

9. The argument of the appellant is that since the sales are on FOR basis and the delivery takes place only at the buyer's premises, place of removal, as far as their product is concerned, is the buyer's premises and not the factory gate. The reason for this is that the goods have to be sold from a place for it be called as "place of removal" and the sale is complete only when the goods are handed over to the buyer which takes place at the buyer's premises. Therefore, as held by Hon'ble Apex Court in the case of Roofit Industries [2015 (319) ELT 221 (S.C.)], the sale takes place only at the buyer's premises in terms of Sale of Goods Act. Until the sale is complete, the goods continue to be in their possession. The buyer's

premises, being the place where the sale takes place, should be considered as the place of removal. Therefore, they are entitled to CENVAT Credit on the Goods Transport Agency availed for transporting the goods from their factory to their buyer's premises.

10. Per contra, the case of the Revenue is that with respect to the same product viz; Cement where the goods were sold for delivery at the buyer's premises in the case of Ultratech Cement Limited [2018-TIOL-42-SC-CX)] [also reported in 2018 (9) GSTL 337 (SC)], the Hon'ble Apex Court has held that CENVAT credit is not available for the GTA services availed for transportation from the factory to the buyer's premises. This judgment of the Apex Court is binding on this Tribunal and hence there is no case to either allow CENVAT Credit or remand the matter to the lower authority. They would further submit that the decision of Hon'ble Apex Court in the case of Roofit Industries Limited (supra) holding that "where the goods are sold for delivery at the buyer's premises, such buyer's premises become the place of removal" has been over-turned by Hon'ble Apex Court in the case of Ispat Industries Limited [2015(324)ELT 670 (S.C.)] and it has been held that the buyer's premises can never be the place of removal under section 4 of Central Excise Act, 1944. He would further argue that the appellant's arguments that in the case of Ultratech Cement Limited, the Hon'ble Apex Court has not decided what is the place of removal, is without basis. On careful consideration of the arguments we find that Hon'ble Apex Court had indeed, in the case of Roofit Industries (supra) held that their goods are sold for delivery in the buyer's premises and sale being completed at the buyer's premises, they become the place of removal. This view has been over-turned by Hon'ble Apex Court in the case of Ispat Industries Limited (supra), para 24 of which reads as follows:

> ***"24.*** *It will thus be seen that, in law, it is clear that for the period from 28-9-1996 up to 1-7-2000, the place of removal has reference only to places from which goods are to be sold by the manufacturer, and has no reference to the place of delivery which may be either the buyer's premises or such other premises as the buyer may direct the manufacturer to send his goods. As a matter of law therefore, the Commissioner's order and Revenue's argument based on that order that freight charges must be included as the sale in the present facts took place at the buyer's premises is incorrect. Further, for the period 1-7-2000 to 31-3-2003 there will be no extended place of removal, the factory premises or the warehouse (in the circumstances mentioned in the Section), alone being places of removal.* ***Under no circumstances can the buyer's premises, therefore, be the***

> ***place of removal for the purpose of Section 4 on the facts of the present case."***

11. In this judgment, the Hon'ble Apex Court has also distinguished the case of Ispat Industries Limited from the case of Roofit Industries on some facts. This, in our considered view, is the settled legal position that the place of removal can never be the buyer's premises and it has to be the seller's premises such as their factory, godown, consignment agent's premises, etc.

12. We have also considered the arguments of the appellant that in the case of Ultratech Limited (supra), the Hon'ble Apex Court while denying the CENVAT Credit, has not dealt with the issue as to what was the place of removal of goods. The Hon'ble Apex Court in Paras 8 & 9 of the judgment observed as follows:

> *"8. The aforesaid order of the Adjudicating Authority was upset by the Commissioner (Appeals) principally on the ground that the Board in its Circular dated August 23, 2007 had clarified the definition of 'place of removal' and the three conditions contained therein stood satisfied insofar as the case of the respondent is concerned, i.e. (i) regarding ownership of the goods till the delivery of the goods at the purchaser's door step; (ii) seller bearing the risk of or loss or damage to the goods during transit to the destination and; (iii) freight charges to be integral part of the price of the goods. This approach of the Commissioner (Appeals) has been approved by the CESTAT as well as by the High Court. This was the main argument advanced by the learned counsel for the respondent supporting the judgment of the High Court.*
>
> *9. We are afraid that the aforesaid approach of the Courts below is clearly untenable for the following reasons:"*

13. From the aforesaid extract of the judgment, it does not appear that the Hon'ble Apex Court was oblivious of the fact or has not considered that the sale was alleged to have taken place at the buyer's door step, the cost and risk of the transport being borne by the seller. The case in hand is identical to this case. Accepting the arguments of the assessee in the Ultratech Cement (supra), Commissioner (Appeals), CESTAT as well as the Hon'ble High Court of Karnataka held that the assessee is entitled to Cenvat Credit on the transport of goods to the buyer's premises. This decision was set aside by the Hon'ble Apex Court in the following words in Para 13.

> *"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."*

14. Learned counsel argues that the Hon'ble Apex Court has not considered the fact that the goods were being sold on FOR buyer's premises basis and therefore, the place of removal shifts to the buyer's premises. A plain reading of Para 8, 9 and 13 of the judgment does not show that the Hon'ble Supreme Court has not considered this factor. We find that in the Ultratech Cement case the assessee has, thereafter, filed a Review Petition before the Hon'ble Apex Court which was dismissed with the following words:

> *"Delay condoned. The instant review petition is filed against the order dated 01.02.2018 whereby the aforementioned appeal was allowed. We have carefully* ***gone through the review petition and the connected papers, we find no error much less apparent in the impugned order****. The review petition is, accordingly, dismissed."*

15. One of us (P.V. Subba Rao) has also decided an identical case in the case of Ultratech Cement Limited (Appeal No. E/30147/2019) vide Final Order No. A/30355/2019, dated 16.06.2019 (CESTAT, Hyderabad), holding that no CENVAT Credit is admissible on the GTA services availed for transporting the cement from the factory or the depot to the buyer's premises even when such sale is on FOR buyer's premises basis, relying on the above judgment of Hon'ble Apex Court on the exact same issue.

16. However, we find that on an identical issue, Hon'ble Single Member Bench of CESTAT Chennai in Final Order No. 42569 – 42576/2017, dated 31.10.2017 and the Hon'ble Division Bench of CESTAT Chennai in final orders No. 40440 – 40450/2019, dated 25.02.2019, remanded the matters back to the adjudicating authority to reconsider the issue afresh, deciding what is the place of removal in those cases. We respectfully disagree with these decisions and are of the view that once the Hon'ble Apex Court decided that the place of

removal can not be the buyer's premises in the case of ISPAT Industries Limited (supra) and has also decided that no CENVAT Credit is admissible for outward transportation of goods to the buyer's premises in the case of *M/s.Ultratech Cement Limited* (supra), there is no scope for any other interpretation including by the adjudicating authority to decide the matter otherwise. In our view, the adjudicating authority cannot decide the place of removal in case of sale on FOR buyer's premises basis is the buyer's premises and that CENVAT Credit on GTA services is available on outward transportation of goods from factory to the buyer's premises.

17. As we do not agree with the aforesaid decisions of CESTAT Chennai, we find this is a fit case to be referred to Larger Bench to decide the following question:

"In the light of the judgment of the Hon'ble Apex Court in the case of Ultratech Cement Limited [2018(9)GSTL 337 (SC)] and the Ispat Industries Limited [2015(324)ELT 670 (SC)] should CENVAT Credit on GTA services for outward transportation of goods from the factory to the buyer's premises be denied in cases where the goods are sold on FOR (buyer's premises) basis or should such matters be remanded to the lower authorities for determining what is the place of removal?"

18. Accordingly, we direct the Registry to place this file before Hon'ble President to consider constitution of a Larger Bench to decide the above question.

(Pronounced in the open court on **08.06.2020**)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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