

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, CHENNAI**

Excise Appeal No.746/2007

(Arising out of Order-in-Original No. 19/2007 dated 7.9.2007 passed by the
Commissioner of Central Excise, Trichy)

M/s. India Cements Ltd.

Dalavoi Works, Cement Nagar Post
Senthurai Taluk – 621 730.

Appellant

Vs.

Commissioner of GST & Central Excise

No. 1, Williams Road
Cantonment, Trichy – 620 001.

Respondent

Excise Appeal No.293/2008

(Arising out of Order-in-Original No. 01/2008 dated 26.5.2008 passed by the
Commissioner of Central Excise, Trichy)

M/s. Madras Cements Ltd.

Alathiyur Works Cement Nagar
Perambalur – 621730.

Appellant

Vs.

Commissioner of GST & Central Excise

No. 1, Williams Road
Cantonment, Trichy – 620 001.

Respondent

AND

Excise Appeal No.442/2008

(Arising out of Order-in-Original No.08/2008 dated 30.7.2008 passed by the
Commissioner of Central Excise, Trichy)

M/s. India Cements Ltd.

Dalavoi Works, Cement Nagar Post
Senthurai Taluk – 621 730.

Appellant

Vs.

Commissioner of GST & Central Excise

No. 1, Williams Road
Cantonment, Trichy – 620 001.

Respondent

APPEARANCE:

Shri S. Muthuvenkataraman, Advocate and
Shri R. Parthasarathy, Consultant for the Appellants
Ms. Sridevi Taritla, ADC (AR) for the Respondent

CORAM

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

Final Order Nos. **40174-40176 / 2022**

Date of Hearing : 22.4.2022

Date of Decision: 18.5.2022

Per Ms. Sulekha Beevi C.S.

The above matters have come up for hearing as per the remand order of the Hon'ble High Court dated 23.9.2021 in CMA No. 2244 to 2246/2012. These appeals were earlier disposed of by the Tribunal in a batch of cases vide Final Order No. 859 to 976/2011 dated 27.7.2011 whereby the Tribunal allowed the appeals filed by the assessees and rejected the appeals filed by Revenue. The department filed appeals before the Hon'ble High Court and vide the above stated common judgment, the Hon'ble High Court has remanded the matter with the following directions:-

"7. In the instant case also, the Tribunal had followed the decision of the High Court of Karnataka in ABB Limited (supra) and held in favour of the assessee.

8. In the light of the judgment passed by the Hon'ble Division Bench as noticed above, this matter also needs to be remanded to the Tribunal to take a fresh decision and to decide as to the applicability of the two decisions of the Hon'ble Supreme Court, which according to the assessee, are in their favour.

9. In the light of the above, these Civil Miscellaneous Appeals are disposed of by remanding the matter to the Tribunal for fresh consideration in accordance with law, after hearing the parties on the applicability of the above referred judgments of the Hon'ble Supreme Court. Consequently, the substantial questions of law are left open. No costs."

Hence these appeals are once again before us.

2. The learned counsel Shri S. Muthuvenkataram appeared for the appellant in M/s. India Cements Ltd. and learned consultant Shri R. Parthasarathy, appeared for the appellant in M/s. Madras Cements Ltd.

3. The learned AR Ms. Sridevi Taritla appeared for the Respondent Department.

4. The period of dispute in the appeals are as under:-

Appeal No.	Assessee	Period
E/746/2007	M/s. India Cements Ltd.	June 2006 to April 2007
E/442/2008	M/s. India Cements Ltd.	May 2007 to March 2008
E/293/2008	M/s. Madras Cements Ltd.	Jan. 2005 to Sept. 2007

5. Brief facts are that on verification of the records of the appellant, it came to the notice of the department that they were availing CENVAT credit on the service tax paid on freight charges for the outward transportation of finished products upto the buyers' premises as well as the dealers. The department was of the view that in terms of definition of "input service", as it stood then, will not apply to the outward transportation of goods beyond the place of removal i.e. up to the premises of the customer / dealers and that the credit is not eligible. The Show Cause Notice issued for the different periods as above, proposes to disallow the credit and to recover the same along with interest and for imposing penalty. After due process of law, the original authority confirmed the demand, interest and imposed penalty. Against this, the appellants had filed appeals before the Tribunal. In the earlier round, the Tribunal relied upon the decision of the Hon'ble High Court of Karnataka in the case of CCE & Service Tax, Bengaluru Vs. ABB Ltd. – 2011 (23) STR 97 (Kar.) and held that the said activity of outward transportation of goods upto the buyers' premises / dealers will fall within the definition of input service and that the credit is eligible. The matter has been now remanded by the Hon'ble High Court on appeals filed by department.

6. At the time of hearing, the learned counsel as well as the learned consultant explained that the issue is no longer res integra and that the issue stands settled by the decision of the Hon'ble Supreme Court in the case of CCE, Belgaum Vs. M/s. Vasavadatta Cements Ltd. – 2018 (11) GSTL 3 (SC) decided on 17.1.2018 and CCE, Guntur Vs. The Andhra Sugars Ltd. – 2018 (10) GSTL 12 (SC) decided on 5.2.2018. It is pointed out by them that the Hon'ble High Court has taken note of these judgments and has remanded the matter to look into the applicability of these judgments. We now proceed to analyse whether the above judgments of the Apex Court are applicable to the facts of the case.

7. For better appreciation, the definition of 'input service' as it stood prior to and after 1.4.2008 is reproduced as under:-

Input Service definition prior to 01.04.2008	Input Service definition after 01.04.2008
(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 <u>and clearance of final products from the place of removal</u> , 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	(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 <u>and clearance of final products upto the place of removal</u> , 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

8. From the above definition, it can be seen that prior to 1.4.2008, in sub-clause (ii) any service 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, will fall within the definition of input service.

9. After 1.4.2008, the definition has been amended so that any service used for clearance of final products **upto** the place of removal will fall within the definition of input service. The department has taken a view that outward transportation of the goods is a post-sale expenditure and thus is an activity after manufacture. That therefore the credit in relation to the outward transportation of finished products upto the buyers' premises / dealer's premises is not eligible. In all these appeals the period of dispute is prior to 1.4.2008.

10. The Hon'ble Supreme Court in the case of M/s. Vasavadatta Cements Ltd. (supra) had considered the very same issue and held that the expression used in the definition is "from the place of removal". It has to be from the place of removal upto a certain point. Therefore, tax paid on the transportation of the final products from the place of removal upto the that point whether it is depot or the customers' premises has to be allowed. It was further held that the amendment carried out in the definition with effect from 1.4.2008 substituted the words "from the place of removal" with "upto the place of removal". Thus, from 1.4.2008, CENVAT credit would be available upto the place of removal. The relevant portion of the judgment is reproduced as under:-

"7. As mentioned above, the expression used in the aforesaid Rule is "from the place of removal". It has to be from the place of removal upto a certain point.

Therefore, tax paid on the transportation of the final product from the place of removal upto the first point, whether it is depot or the customer, has to be allowed.

8. Our view gets support from the amendment which has been carried out by the rule making authority w.e.f. 1-4-2008 vide Notification No. 10/2008-C.E. (N.T.), dated 1-3-2008 whereby the aforesaid expression “from the place of removal” is substituted by “upto the place of removal”. Thus from 1-4-2008, with the aforesaid amendment, the Cenvat credit is available only upto the place of removal whereas as per the amended Rule from the place of removal which has to be upto either the place of depot or the place of customer, as the case may be. This aspect has also been noted by the High Court in the impugned judgment in the following manner :

“However, the interpretation placed by us on the words ‘clearance of final products from the place of removal’ and the subsequent amendment by Notification 10/2008-C.E. (N.T.), dated 1-3-2008 substituting the word ‘from’ in the said phrase in place of ‘upto’ makes it clear that transportation charges were included in the phrase ‘clearance from the place of removal’ upto the date of the said substitution and it cannot be included within the phrase ‘activities relating to business’.”

(Emphasis supplied)

11. In the case of The Andhra Sugars Ltd. (supra), the Hon'ble Supreme Court observed as under

“6. As mentioned above, in these cases, the assesseees are claiming Cenvat credit in respect of service tax paid on outward transportation from their factory to the premises of customers. As per the Department, outward transportation engaged for removal of goods from factory to customer premises cannot be considered as an input service since premises of customer is not recognized as a place of removal under the Central Excise Act. To put it differently, the Department contends that the outward transportation provided beyond the place of removal is not eligible for input service for availing Cenvat credit.

7. Having regard to the definition of ‘input service’ that was prevailing at the relevant time i.e. prior to April 1, 2008, the aforesaid contention of the Department cannot be accepted. As per the said definition, service used by the manufacturer of clearance of final products ‘from the place of removal’ to the warehouse or customer’s place etc., was exigible for Cenvat credit. This stands finally decided in Civil Appeal No. 11710 of 2016 (Commissioner of Central Excise Belgaum v. M/s. Vasavadatta Cements Ltd.) vide judgment dated January 17, 2018. The matter is squarely covered by the Board’s Circular dated August 23, 2007, relevant portion whereof is as under :

“ISSUE : Up to what stage a manufacturer/consignor can take credit on the service tax paid on goods transport by road?

COMMENTS : This issue has been examined in great detail by the CESTAT in the case of M/s. Gujarat Ambuja Cements Ltd. v. CCE, Ludhiana [2007 (6) S.T.R. 249 Tri-DJ]. In this case, CESTAT has made the following observations :-

“the post sale transport of manufactured goods is not an input for the manufacturer/consignor. The two clauses in the definition of ‘input services’

take care to circumscribe input credit by stating that service used in relation to the clearance from the place of removal and service used for outward transportation upto the place of removal are to be treated as input service. The first clause does not mention transport service in particular. The second clause restricts transport service credit upto the place of removal. When these two clauses are read together, it becomes clear that transport service credit cannot go beyond transport upto the place of removal. The two clauses, the one dealing with general provision and other dealing with a specific item, are not to be read disjunctively so as to bring about conflict to defeat the laws' scheme. The purpose of interpretation is to find harmony and reconciliation among the various provisions".

Similarly, in the case of M/s. Ultratech Cements Ltd. v. CCE, Bhavnagar - 2007-TIOL-429-CESTAT-AHM, it was held that after the final products are cleared from the place of removal, there will be no scope of subsequent use of service to be treated as input. The above observations and views explain the scope of the relevant provisions clearly, correctly and in accordance with the legal provisions. In conclusion, a manufacturer/consignor can take credit on the service tax paid on outward transport of goods up to the place of removal and not beyond that.

8.2 In this connection, the phrase 'place of removal' needs determination taking into account the facts of an individual case and the applicable provisions. The phrase 'place of removal' has not been defined in Cenvat Credit Rules. In terms of sub-rule (t) of Rule 2 of the said rules, if any words or expressions are used in the Cenvat Credit Rules, 2004 and are not defined therein but are defined in the Central Excise Act, 1944 or the Finance Act, 1994, they shall have the same meaning for the Cenvat Credit Rules as assigned to them in those Acts. The phrase 'place of removal' is defined under Section 4 of the Central Excise Act, 1944. It states that, -

"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 stored 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."

It is, therefore, clear that for a manufacturer/consignor, the eligibility to avail credit of the service tax paid on the transportation during removal of excisable goods would depend upon the place of removal as per the definition. In case of a factory gate sale, sale from a non-duty paid warehouse, or from a duty paid depot (from where the excisable goods are sold, after their clearance from the factory), the determination of the 'place of removal' does not pose much problem. However, there may be situations where the manufacturer/consignor may claim that the sale has taken place at the destination point because in terms of the sale contract/agreement (i) the ownership of goods and the property in the goods remained with the seller of the goods till the delivery of the goods in acceptable condition to the purchaser at his door step; (ii) the seller bore the risk of loss of or damage to the goods during transit to the destination; and (iii) the freight charges were an integral part of the price of goods. In such cases, the credit of the service tax paid on the transportation up to such place of sale would be admissible if it can be established by the

claimant of such credit that the sale and the transfer of property in goods (in terms of the definition as under section 2 of the Central Excise Act, 1944 as also in terms of the provisions under the Sale of Goods Act, 1930) occurred at the said place.”

8. As can be seen from the reading of the aforesaid portion of the circular, the issue was examined after keeping in mind judgments of CESTAT in Gujarat Ambuja Cement Ltd. [2017 (6) S.T.R. 249 (Tribunal)] and M/s. Ultratech Cement Ltd. [2007 (6) S.T.R. 364 (Tribunal)]. Those judgments, obviously, dealt with unamended Rule 2(l) of Rules, 2004. The three conditions which were mentioned explaining the ‘place of removal’ are defined in Section 4 of the Act. It is not the case of the Department that the three conditions laid down in the said Circular are not satisfied. If we accept the contention of the Department, it would nullify the effect of the word ‘from’ the place of removal appearing in the aforesaid definition. Once it is accepted that place of removal is the factory premises of the assessee, outward transportation ‘from the said place’ would clearly amount to input service. That place can be warehouse of the manufacturer or it can be customer’s place if from the place of removal the goods are directly dispatched to the place of the customer. One such outbound transportation from the place of removal gets covered by the definition of input service.

9. We, thus, do not find any infirmity in the impugned judgment. Appeals are devoid of any merit and are accordingly dismissed.”

(Emphasis supplied)

12. After appreciating the facts and evidences placed before us, we find that the decision of the Hon'ble Supreme Court is squarely applicable to the facts of this case. Moreover, the Hon'ble jurisdictional High Court in the case of M/s. Bata India Ltd. Vs. Commissioner of Customs & Central Excise, Chennai – III – 2019 (24) GSTL 326 (Mad.) had occasion to consider the very same issue as to whether credit is eligible on the outward transportation of goods upto the customer’s premises prior to the period 1.4.2008. The Hon'ble High Court applied the principle laid down in the case of M/s. Vasavadatta Cements Ltd. (supra) and The Andhra Sugars Ltd. 9supra) and held that the credit is eligible. The relevant portion of the order is reproduced as under:-

“19. To arrive at the correct conclusion, the Adjudicating Authority should have taken note of the decision of the Hon'ble Supreme Court in the case of CCE, Belgaum v. Vasavadatta Cements Ltd. [reported in (2018) 52 GSTR 232 = 2018 (11) G.S.T.L. 3 (S.C.)]. The issue, which fell for consideration before the Hon'ble Supreme Court was as to what interpretation has to be given to input services, which is defined in Rule 2(l) of the CCR. The appeals before the

Hon'ble Supreme Court all related to a period prior to 1-4-2008 and the said Rule stood amended with effect from 1-4-2008. The principles laid down by the Hon'ble Supreme Court in the said decision could be summarized as follows :

"The expression used in Rule 2(I) of the Cenvat Credit Rules, 2004 is 'from the place of removal'. It has to be from the place of removal upto a certain point. Therefore, Cenvat credit of Service Tax paid on goods transport agency service availed of for transport of final product from the place of removal upto the first point, whether it is a depot or the customer's premises, has to be allowed. The amendment of Rule 2(I) with effect from April 1, 2008 by Notification No. 10/2008-C.E. (N.T.), dated March 1, 2008, whereby the expression 'from the place of removal' was substituted by 'upto the place of removal' fortifies this view. Thus, from April 1, 2008, with the amendment, the Cenvat credit is available only upto the place of removal whereas under the unamended Rule, it was available from the place of removal upto either the place of depot or the place of customer, as the case may be."

20. To be noted that the subsequent decision of the Hon'ble Supreme Court in the case of CCE & ST v. Ultra Tech Cement Limited [reported in 2018 (2) SCC 721 = [2018 \(9\) G.S.T.L. 337](#) (S.C.)] dealt with a case where the assessee had got finished goods (cement) from its parent unit on stock transfer basis and sold the same in bulk form and packed bags and during the period from January, 2010 to June, 2010 and availed CENVAT credit of Service Tax paid on outward transportation of goods through a transport agency from their premises to the customer's premises and on the said facts, it was held that the CENVAT credit was not admissible to the assessee for such transport. The decision came to be rendered on considering amendment to the CCR namely Rule 2(I) as effective from 1-3-2008. The decision does not overturn the earlier decision in the case of Vasavadatta Cements Ltd. However, the Tribunal did not endeavour to go into the factual matrix of the case, but applied the decision in the case of Ultra Tech Cement Ltd., and negatived the stand taken by the assessee.

21. It has to be noted that for the period prior to 1-4-2008, the Hon'ble Supreme Court, in the case of Vasavadatta Cements Ltd., held that the tax paid on the transportation of final product from the place of removal upto the first point, whether it is the depot or the customer, has to be allowed and we find that the issue addressed by the Hon'ble Supreme Court in the decision in the case of Ultra Tech Cement Ltd., pertains to the first limb of the definition under Rule 2(1) of the CCR. In other words, the issue involved in that decision was regarding availment of Cenvat credit on goods transport agency service availed for transport of goods from the place of removal to buyer's premises. In the case of Ultra Tech Cement Ltd., the Cenvat credit on tax paid upto the customer's premises was disallowed, as it was found that the factory gate is to be determined as the 'place of removal'. Therefore, the larger question would be as to whether the assessee would have been non-suited based on the decision in the case of Ultra Tech Cement Ltd. In our considered view, the assessee should not be non-suited in the light of the said decision for more than one reason.

22. Firstly, the modus operandi of the assessee requires to be examined by the Adjudicating Authority i.e. establishment of the RDCs and the WSDCs. The assessee's specific case is that the point of sale in their case is the RDCs. However, this issue has not been examined by the Adjudicating Authority in the manner it was required to be examined. We say so because the Adjudicating Authority is the First Authority, who will record the findings of fact. Therefore, before the legal position is applied, a thorough exposition of the facts needs to be done. Then, law is to be applied to the facts of the case and not vice versa.

23. One more reason, which weighs in our mind, is to state that the Adjudicating Authority could have examined the factual background on account

of a decision of the Delhi Tribunal in the case of Pr. CCE v. Lafarge India Pvt. Ltd. [reported in 2017 (52) S.T.R. 350 (Tri.-Del.)]. According to the assessee, the said case was on identical facts and it was held in that decision that the place of removal is inextricably linked to the factum of sale. In the light of the decision of the Delhi Tribunal, which was rendered subsequently, what is required to be examined is as to whether the assessee was right in contending that the goods are removed to the RDCs without any sale and therefore, there can be no removal at the factory gate and the retail outlet, at which, the goods were finally sold was the place of removal.

24. Thus, in our considered view, the issue requires to be examined in depth on the factual matrix and the Adjudicating Authority shall take note of the decision of the Hon'ble Supreme Court in the case of Vasavadatta Cements Ltd., and the decision of the Delhi Tribunal in the case of Lafarge India Pvt. Ltd., and then take a decision as to whether the assessee's contention merits acceptance. Thus, for the above reasons, we are of the considered view that the matters required to be re-adjudicated by the Adjudicating Authority, for which purpose, we intend to remand the matter for a fresh consideration.

25. In the result, while leaving the substantial questions of law open, we allow these appeals and set aside the orders passed by the Tribunal as well as the Adjudicating Authority insofar as they deny the input service credit availed in respect of GTA services on or after 1-4-2008. In all other aspects, the orders passed by the Tribunal stand confirmed. We make it clear that we have set aside the orders of the Tribunal as well as the Adjudicating Authority with regard to disallowance of Cenvat credit in respect of GTA services. The Adjudicating Authority shall afford an opportunity of personal hearing to the authorized representative of the assessee, take note of our observations and take a fresh decision on merits and in accordance with law. No costs."

13. From the discussions made above, we have no hesitation to hold that the credit on outward transportation from the place of removal upto the buyers' premises / dealers for period upto 31.03.2008 is eligible. The impugned orders are set aside. The appeals are allowed with consequential relief if any.

(Pronounced in open court on 18.5.2022)

(SULEKHA BEEVI C.S.)
Member (Judicial)

(RAJU)
Member (Technical)