

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. II

Excise Appeal No. 50967 of 2021-SM

(Arising out of order-in-appeal No. 79(SM)/CE/JPR/2021 dated 06.04.2021 (05.05.2021) passed by the Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Jaipur).

M/s Balkrishna Industries Ltd.,
SP-923, RIICO Industrial Area, Bhiwadi
District – Alwar, Rajasthan-301019.

Appellant

VERSUS

**Commissioner, Central Excise &
Central Goods and Service Tax**
Alwar Bypass Road
District – Alwar, Bhiwadi.

Respondent

APPEARANCE:

Ms. Sukriti Das, Advocate for the appellant
Sh. Mahesh Bhardwaj, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER No. 50918/2022

**DATE OF HEARING: 22.04.2022
DATE OF DECISION: 27.09.2022**

ANIL CHOUDHARY:

The issue in this appeal is whether cenvat credit on input service have been rightly denied on-

- (i) Repair and maintenance of factory/ office premises/plant and machinery; and
- (ii) Cenvat credit availed of service tax on the strength of invoices for freight for receipt of input/ fuel, issued by the supplier / trader.

2. The appellant is engaged in the manufacture of pneumatic tyres, used in agricultural/ forestry/ other machines and motor vehicles falling under Chapter 40 of the First Schedule to the Central Excise Tariff Act, 1985.

3. During the course of audit for the period, i.e., May 2012 to March, 2015, it was observed that the appellant had availed cenvat credit on certain ineligible services relating to civil work, erection of steel structure, gate fixing, fixing of pipe railing, fabrication work, shed fabrication work and other maintenance/ repair work of factory etc. which were in the nature of works contract services/ construction services, hence, excluded from the purview of definition of "input service" under Rule 2(I) of the Cenvat Credit Rules, 2004.

4. In June, 2013, non-calcined Grade 'A' petroleum coke was supplied to appellant by M/s Satchidanand Petroleum Pvt. Ltd., who purchased it from Reliance Industries Ltd., Jamnagar (Gujarat). Such pet coke was used by appellant as fuel in the boiler for generating steam to manufacture pneumatic rubber tyres. It was alleged during audit, that the appellant had wrongly availed cenvat credit amounting to Rs.9,312/- on the strength of six invoices issued in June, 2013 where service tax has not been charged, but stamped on invoice 'that amount is inclusive of service tax of Rs. 9,312/- charged on freight of Rs.2,55,395/-, paid by the supplier. The appellant have availed cenvat credit thereof as the appellant being recipient of G&TA service. As SPPL is not a service provider, and has not paid service tax, therefore,

input service credit availed by the appellant is not admissible, as per revenue.

5. Thereafter show cause notice dated 10.03.2016 was issued proposing to recover Rs.6,48,346/- being attributable to construction services which did not appear to be used by them directly or indirectly, in or in relation to manufacture of final products and clearance of final products upto the place of removal. It further appeared that construction services used for building or a civil structure or a part thereof was specifically excluded from the definition of input service in Rule 2(I) of Cenvat Credit Rules. It was further proposed to disallow Rs. 9,312/- being service tax paid on freight as indicated in the invoice of the trader who had supplied petroleum coke/ fuel, as it appeared that service tax have not been charged specifically in the invoice. Thus, the total service tax proposed to be disallowed of Rs.6,57,658/-.

6. This is the second round of litigation. In the first round, the show cause notice was adjudicated on contest vide order-in-original dated 30.11.2017 whereby the proposed demand was confirmed by ex-parte order. In appeal preferred by the assessee the Commissioner (Appeals) vide order-in-appeal dated 28.01.2019 allowed the appeal by way of remand, directing the Assistant Commissioner to examine the actual nature of work undertaken by the appellant and also to examine cenvat credit on GTA service, if service tax has actually been paid in respect of such invoices.

7. Pursuant to remand vide order-in-original dated 21.02.2020, the Assistant Commissioner have again been pleased to

confirm the entire demand of cenvat credit observing that the construction services inter alia include dismantling of RCC, shifting of malwa for construction/ working including glazing & tile fitting, fabrication work are in the nature of civil construction/ work contract, being service excluded and thus are excluded from the definition under the exclusion clause. As regards the cenvat credit on GTA service, it was held that the consignor gave a declaration on the invoice that the amount of service tax charged on freight is paid by them and they have not availed cenvat credit thereof. It was held that service tax on GTA has been charged and deposited by the consignor i.e., SPPL, therefore, cenvat credit is available only to the consignor and not consignee / appellant.

8. Being aggrieved, the appellant preferred appeal wherein the learned Commissioner (Appeals) by the order dated 05.05.2021 have upheld the denial of entire cenvat credit alongwith interest and also imposed penalty. Being aggrieved, the appellant is before this Tribunal.

9. Learned Counsel for the appellant inter alia submits that the cenvat credit availed under dispute, qualify as input service under Rule 2(I) of Cenvat Credit Rules and does not fall under exclusion clause. It is further urged that what is excluded is the service portion in the execution of a work contract and construction services including services listed under clause (b) of Section 66E of the Finance Act. However, repair and maintenance is specifically included, as the definition of input service specifically includes services used in relation

to 'modernization', 'renovation' and 'repair' of a factory. Admittedly, in the facts of the present case, repair and maintenance have been done in the factory premises for which the construction services have been received. It is urged, even post the amendment in the definition of input service w.e.f. 01.04.2011, wherein the exclusion clause was introduced in the definition, still the 'means clause' continues to remain the same. The main clause is worded such as 'directly or indirectly' and 'in or in relation to', which further expands the scope of the definition. It is evident from the invoices for receiving of repair and maintenance service, which are of civil nature that these have been received for repairs of tiles (including tile fixing), floor repairing work, dismantling and fabrication of pipelines, installation of sliding door track, fabrication work relating to STP tank etc. Thus, none of the services received are in the nature of construction work as per the exclusion clause. Further such repair and maintenance are necessary for undertaking of manufacturing of dutiable finished product. Learned Counsel placed reliance on the precedent order of this Tribunal in appellant's own case being Final Order No. 52128/2021-SM(BR) dated 08.07.2021 relating to similar dispute, wherein it was held that such services were in the nature of repair and maintenance work and does not involve any new construction undertaken by the appellant, hence eligible for cenvat credit. Reliance is also placed on the following rulings:-

- i) Hindustan Zinc Ltd., vs. CCGST, F.O. No. 51617-51618/2021 dt. 22.06.2021.
- ii) Hindustan Zinc Ltd., vs. CCE-2020 (8) TMI 2 -CESTAT, New Delhi.
- iii) Hindustan Zinc Ltd., vs. CCE, Udaipur -2018 (3) TMI 102-CESTAT, New Delhi.

- iv) Grasim Industries Ltd., vs. Commissioner of CGST & ST, CE & Cus-2020 (4) TMI 673 –CESTAT, New Delhi.
- v) Bharat Oman Refineries Ltd., vs. CCE-2019 (2) TMI 746-CESTAT, New Delhi.
- vi) CCE vs. Exide Industries Ltd., -2016 (43) STR 463 (Tri. Del.).

10. As regards the input credit of GTA service for transportation of input/fuel, it is urged that by the remand order-in-appeal dated 28.01.2019, the Adjudicating Authority was directed to ascertain whether service tax had actually been paid in respect of such invoices and accordingly allow the credit. The Assistant Commissioner have categorically recorded that service tax on the GTA service was charged and deposited by the consignor –SPPL. However, he has erred in observing that cenvat credit is admissible only to the consignor – SPPL. Thus, the said denial of credit is against the direction of the superior authority. It is further urged that cenvat credit is available to the receiver of service, if he is a manufacturer of dutiable goods or provider of taxable output service. Admittedly, in the facts of the present case, it is the appellant who is the receiver of input – GTA service utilised for transportation of fuel. Thus, under Rule 2(I) it is the appellant who is entitled to take credit of the same. It is immaterial as to who deposits service tax, either by the consignor or the consignee. Accordingly, he prays for allowing the appeal with consequential benefits.

11. It is urged that extended period of limitation is not invocable as there is no malafide or contumacious conduct. The transaction has been duly recorded in the books of accounts. Further the appellant have filed their return regularly.

12. Learned Authorised Representative appearing for the respondent relies on the impugned order.

13. Having considered the rival contentions, I hold that admittedly appellant have received the construction service towards repair and maintenance carried out in the factory premises. I find that repair and maintenance have been specifically provided as input service in the inclusive clause of the definition, which provides for credit with regard to services received for repair of a factory or office relating to such factory. Further, this issue is squarely covered by the precedent order of this Tribunal in appellant's own case (supra).

14. So far the input service on GTA service is concerned, I hold that admittedly it is the appellant manufacturer who are the receiver of the input service in question. I hold that it is immaterial as to who deposited the service tax, as it is specifically mentioned in the invoice of the supplier that service tax of GTA service has been deposited on the freight element. I also find that the Court below has held that service tax has been deposited in respect of GTA service in question. Accordingly, I hold that the appellant is entitled to cenvat credit on the same.

15. In view of my findings and observations, I set aside the impugned order and allow the appeal. The appellant is entitled to consequential relief in accordance with law.

(Pronounced on 27.09.2022).

(Anil Choudhary)
Member (Judicial)