CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH, COURT NO. 4

SERVICE TAX APPEAL NO. 55688 OF 2023

[Arising out of Order-in-Appeal No.202(AK)ST/ JDR/2023 dated 07.07.2023 passed by the Commissioner (Appeals), Central Excise & CGST, Jodhpur]

M/S. P G FOILS LTD
Pipalia Kalan
(Distt. Pali-Marwar) **Appellant**
Rajasthan-306307.

Vs.

THE COMMISSIONER OF CENTRAL EXCISE & CGST-JODHPUR **Respondent**
CGST & Central Excise Commissionerate
G-105, New Industrial Area,
Opp. Diesel Shed, Basni,
Jodhpur, Rajasthan - 342003.

Appearance:
Present for the Appellant : Mr. Ankit Totuka, Advocate
Present for the Respondent: Mr. Rohit Issar, Authorised Representative

CORAM: HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing/Decision : 10/07/2024

FINAL ORDER NO.56065/2024

DR. RACHNA GUPTA

Present appeal has been filed to assail the order-in-Appeal No.202/2023 dated 07.07.2023. The facts in brief culminating into said order and the present appeal are that the appellant is engaged in manufacture of aluminium foils. Department observed that the appellant has wrongly taken and utilized the Cenvat Credit of Service Tax paid on foreign commission, under reverse charge, amounting to

Rs.2,07,174/- for the period 2011-12 to 2012-13 in contravention of the provisions of rule 2l as Rule 9 (6) of Cenvat Credit Rules, 2004 (hereinafter referred as 'CCR 2004'). The Commission is denied to be the commission towards eligible input services as defined under Rule 2(l) of CCR, 2004. The appellant has also been alleged to have violated Rule 9(6) thereof. Resultantly, vide Show Cause Notice No.665 dated 10.02.2016, the aforesaid amount of availed Cenvat credit is proposed to be reversed alongwith the interest and the appropriate penalties. The proposal was initially confirmed vide the Order-in-Original No.58/2022 dated 31.03.2022. Appeal against the said order has been dismissed vide the order under challenge/the order-in-appeal as mentioned above. Being aggrieved the appeal is before this Tribunal.

2. I have heard Mr. Ankit Totuka, ld. Counsel for the appellant and Mr. Rohit Issar, ld. Authorised Representative for the Revenue.

3. Ld. Counsel for the appellant has mentioned that the amount of Commission in the present case has been paid by the appellant to the agent as was appointed vide the agreement to this effect dated 05.06.2008. Ld. Counsel has mentioned that the commission paid to such agents is eligible for availment of Cenvat credit is an issue which is no more *res-integra*. The decision of this Tribunal in the case of **Commissioner of CGST, Cus. & Central Excise, Alwar vs. Orient Refractories Ltd. reported in 2019 (26) G.S.T.L. 199 (Tri. – Del.)** has been relied upon alongwith the decision **Union of India vs. Kamlakshi Finance Corporation Ltd. reported in 1991 (55)**

E.L.T. 433 (S.C.) has also been relied upon. To impress upon that though there are two contradictory decisions vis-à-vis the impugned issue one from the Hon'ble High Court of Punjab & Haryana in the case of **CCE vs. Ambika Overseas reported in 2012 (25) STR 348 (P & H)** and another is **CCE, Ahmedabad vs. Cadila Healthcare Ltd**. by Hon'ble High Court of **Gujarat reported in 2013 (30) STR 3**. However, High Court of Punjab & Haryana being the jurisdictional High Court this Tribunal has been following the said decisions, wherein the commission paid for the sales promotion activity is held eligible for the availment of Cenvat credit. Ld. Counsel has impressed upon that the availment is thus wrongly been denied. It is also mentioned that there is no element of any suppression or misrepresentation, hence the extended period has wrongly been invoked while issuing the impugned Show Cause Notice. The confirmation of demand proposed by the said Show Cause Noticed by the order under challenge is therefore not sustainable. Order is accordingly prayed to be set aside and the appeal is prayed to be allowed.

4. While rebutting these submissions, ld. D.R. has mentioned that the appellant had never produced any document to the investigation agency to show that the amount of commission as paid by the appellant under reverse charge mechanism is an amount paid towards the sales promotion activity. The agreement as relied upon by the appellant was for the first time produced before the Original Adjudicating Authority. The agreement is of the year 2008, otherwise also the obligations of the agent as recited in the said agreement are

sufficient to show that the agent was simply passing on the information and was not actually assisting any sale promotion. That the adjudicating authorities below after examining the said agreement have rightly arrived at the conclusion that there is no evidence to show that the activity of the agent of the appellant can be called as the activity of sales promotion. Hence, there is no infirmity in the order when such activity is denied to be the eligible input service. Appellant has rightly been denied the availment and utilization of the Cenvat Credit. Appeal is prayed to be dismissed.

5. Having heard the rival contentions and perusing the appeal memo and documents therewith, it is observed that the point of adjudication in the present case is as to whether the activity assigned to the agent vide the agreement dated 05.06.2008 can fall under the definition of input service in rule 2(l) of CCR, 2004. Foremost the said definition is perused. The relevant para reads as follows:-

[(1) ["input service" means,-

> *(i) services provided or agreed to be provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India where service tax is paid by the manufacturer or the provider of output service being importer of goods as the person liable for paying service tax for the said taxable services and the said imported goods are his inputs or capital goods;*
>
> *or*
>
> *(ii) any service used by a provider of output service for providing an output service; or*

(iii) any service used by a 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 modernisation, 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, accounting, auditing, financing recruitment and quality control, coaching and training, computer networking. credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal; but excludes]-

(A) service portion in the execution of a works contract and construction services including service listed under clause (b) of section 66E of the Finance Act (hereinafter referred as specified services) insofar as they are used for-

> *(a) construction or execution of works contract of a building or a civil structure or a part thereof; or*
>
> *(b) laying of foundation or making of structures for support of capital goods,*

except for the provision of one or more of the specified services; or (B) [services provided by way of renting of a motor vehicle), insofar as they relate to a motor vehicle which is not a capital goods, or

(BA) service of general insurance business, servicing, repair and maintenance, insofar as they relate to a motor vehicle which is not a capital goods, except when used by-

> *(a) a manufacturer of a motor vehicle in respect of a motor vehicle manufactured by such person; or*

(b) an insurance company in respect of a motor vehicle insured or reinsured by such person; or]

C) such as those provided in relation to outdoor catering, beauty (treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee:]

Explanation: For the purpose of this clause, sales promotion includes services by way of sale of dutiable goods on commission basis.]

***"8.** Rule 2(l) of Cenvat Credit Rules, 2004 was amended w.e.f. 1-4-2011 and by this amendment, the expression "activities related to business" in the inclusive portion of the definition of 'input service' was excluded. However, the expression "advertisement or sales promotion" was retained. The Board vide Circular No. 943/4/2011-CX., dated 29-4-2011 (S. No. 5 of the Table) in respect of the question "Is the credit of Business Auxiliary Service (BAS) on account of sales commission now disallowed after the deletion of expression "activities related to business", clarified as under "The definition of input service allows all credit on services used for clearance of final products upto the place of removal. Moreover, activity of sale promotion is specifically allowed and on many occasions, the remuneration for the same is linked to actual sale. Reading the provision harmoniously, it is clarified that credit is admissible on the services of sale of dutiable goods on commission basis."*

Thus according to this circular, the service of commission agents (Business Auxiliary Service) is covered by the term "advertisement or sales promotion."

6. The bare perusal makes it clear any activity which amounts to sales promotion i.e. the service by way of sale of dutiable goods on commission basis is eligible for availment of Cenvat credit.

7. Now the agreement between the service provider and the recipient/ the agent is perused.

Clause 1 thereof recites as follows:-

> *"The principal hereby appoints M/s. Joy Corporation as sale agent to represent principal as intermediary in sales of principal products in accordance to the Specification to the present Agreement in the territory of Bangladesh."*

7.1 Perusal of this clause itself clarifies that the agent was appointed as the sale agent to represent the appellant in sales of principal products.

8. One of the obligations fastened on the said agent vide the said agreement is that he had to assist the appellant in respect of the payments from the buyers under the concluded contracts. In addition, to imparting information about various tenders, market rents, competitive possibilities etc. the agent obligation was to procure the sale orders to take care about possible damage to the appellants seller. Clause 4 of the agreement reveals that the commission was agreed to be at the rate of two percent of the net invoice value and the payment was agreed to be remitted in US$ to the Bank Account of the appellant only after the full payment from the customer is received. These clauses have also been observed by

the original adjudicating authority in para 13.2 of the Order-in-Original.

9. Despite observing these paragraphs I do not find any reasonable explanation in the said order to deny the arrangement between the appellant and the agent and the purpose for appointing him for the sales promotion activity. I do not find any reason to sustain those findings. Further, it is observed that this issue though has the contradictory decisions and is subjudiced before Hon'ble Apex Court. But this Tribunal is constantly following the decision of jurisdictional High Court (Hon'ble High Court of Punjab & Haryana). The decision in the case of **Orient Retractories** has already observed as follows:-

> ***"3.*** *After hearing both the parties and perusing the case law as relied upon by the parties, it is observed that the Hon'ble High Court Gujarat in Astik Dyestuff Pvt. Ltd. (supra) has relied upon C.C.E., Ahmedabad v. Cadila Healthcare Ltd. - 2013 (30) S.T.R. 3 (Guj.) however Hon'ble High Court of Punjab and Haryana in the case of Ambika Overseas reported in 2012 (25) S.T.R. 348 had given a contradictory decision. It is thereafter that the matter was referred to Hon'ble Supreme Court. Subsequent thereto there has been a C.B.E. & C. Circular No. 934/4/2011, dated 29-4-2011 vide which the sales promotion activities as mentioned in explanation to Rule 2(l) of Cenvat Credit Rules, 2004 (as was inserted vide Notification No. 2/2016, dated 3-2-2016) was considered. The said Circular was passed by the Department with a view to resolve the confusion prevalent due to the different views of the above said High Courts.*

> ***4.*** *It was clarified therein that an explanation inserted in a Section/Rule is generally to explain the meaning and intendments of the said Section/Rule. Sometimes when the explanation is inserted to clarify a doubtful point of law it would be effectively retrospective in nature. While relying upon the said Circular, this Tribunal in Essar Steel India Ltd. case (supra) has held the commission paid to the agents is a sales promotion activity. Keeping in view the same and the fact that the matter is still subjudiced before Hon'ble Apex Court due to the contrary decisions from two different High Courts but that the Department has subsequently tried to resolve the confusion. Order is hereby set aside. Appeal stands dismissed."*

10. Tribunal Ahmedabad also in **SR Steel India Ltd vs. CCE & ST, Surat reported in 2016 (335) ELT 660** has held as follows:-

> ***"20.*** *But, the Hon'ble Gujarat High Court in the case of Cadila Healthcare Ltd. (supra) was unable to concur with the contrary view taken by the Hon'ble Punjab & Haryana High Court in the case of Commissioner of Central Excise, Ludhiana v. Ambika Overseas (supra). The Hon'ble Gujarat High Court held that this issue is concerned, the question is answered in favour of the Revenue and against the assessee. In this background, legislature explained the meaning of the sales promotion by inserting Explanation in Rule 2(l) of Rules, 2004 and declared that sales promotion includes services by way of sale of dutiable goods on commission basis. In other way, Explanation to Rule 2(l) of Rules says in clear terms that there is no bar on availment of the Cenvat credit on sales promotion service by way of sale of dutiable goods on commission basis. Further, by inserting the Explanation in the Rule 2(l), it has confirmed the Board Circular and resolved the different views of the High Courts. Taking into circumstances under which the*

> *Explanation was inserted in Rule 2(l) of Rules, 2004 and consequence of the Explanation to extend the benefit to the assessee as per Board Circular, we hold that the Explanation inserted in Rule 2(l) of Rules, 2004 by Notification No. 2/2016-CX (N.T.) (supra) should be declaratory in nature and effective retrospectively."*

11. The above discussion clarifies that the issue is no more res-integra. It is held that appellant has rightly availed the Cenvat Credit on the amount of commission paid to its sales agent. The allegations in the Show Cause Notice of suppression are therefore held to be redundant based whereupon the Department has invoked the extended period of limitation while issuing the Show Cause Notice. For the said reason the Show Cause Notice itself is held to be barred by time.

12. With these observations and findings, I hereby set aside the impugned Order-in-Appeal. Consequent thereto, the present appeal stands allowed with consequential benefit.

[Dictated and pronounced in the open Court]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita