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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

SINGLE MEMBER APPEAL BRANCH

Appeal No. **E/1637/2009 – SM[BR]** Date **03/05/2011**

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S MARK EXHAUST SYSTEM LTD.
39/7, BEGAUNPUR KHOTOLA, N.H. 8, GURGAON

M/S MARK EXHAUST SYSTEM LTD. Appellant

Vs

C.C.E. DELHI III Respondent

I am directed to transmit herewith a certified copy of **Final order No. 241 / 2011-SM[BR]** dated 15.4.2011 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
C.C.E. DELHI III
UDYOG MINAR, UDYOG VIHAR,
VANIJYA NIKUNJ, PHASE V,
GURGAON - 122016 (HARYANA)

2. Adv. / Consult
MR.P.M.PANWAR
817, SECTOR 4, URBAN ESTATE, GURGAON

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi -
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

COURT NO. III

Date of Hearing : 15.4.2011

Excise Appeal No. 1637 of 2009-SM

[Arising out of the Order-in-Appeal No. 106/ANS/GGN/2009 dated 15.4.2009 passed by the Commissioner (Appeals), Central Excise, Gurgaon]

Coram:

Hon'ble Mr. Mathew John, Member (Technical)

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
3.	Whether their Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	No

M/s Mark Exhaust System Ltd. Appellant

Vs.

CCE, Delhi-III Respondent

Appearance:

Appeared for Appellant : Shri P.M. Panwar, Consultant
Appeared for Respondent : Shri Anil Khanna, SDR

CORAM: Hon'ble Mr. Mathew John, Member (Technical)

Final Order No. 241/2011-SM (Br) dated............

Per Mathew John:

The Appellant is a manufacturer of Rectified Power Supply System. The Appellant availed Cenvat credit in respect of courier services utilized by the Appellant for despatch of documents and also for despatching samples of final products. The department is of the view that this service amounts to transportation of goods, and is related to post manufacturing activity. It is argued that transportation of manufactured goods beyond the place of removal cannot be covered within the definition of input services as defined in Section 2(l) of Cenvat Credit Rules, 2004. The department also disputes a credit entry relating to an invoice in the name of M/s J.S. Enterprises, on which the Appellant had claimed credit of duty paid. An objection was raised that this invoice is issued to M/s J.S. Enterprises, Faridabad and not to the Appellant. The duty involved on this invoice is stated to be Rs.18,044/- in the Show Cause Notice. The department was of the view that since this invoice is not addressed to the Appellant, it cannot take credit on the basis of this invoice. On the above two counts, a Show Cause Notice was issued to the Appellant demanding duty amount of Rs.1,60,808/-. In adjudicating proceedings, the demand relating to both the above items were confirmed and thus demand for Rs.1,60,808/- was confirmed along with applicable interest. Penalty equal to this amount was also imposed. Aggrieved by the order, the Appellant filed appeal with the Commissioner (Appeals). The proceedings before the first Appellate Authority did not result in relief. Aggrieved by the order of the Commissioner (Appeals), the Appellant is before the Tribunal.

2. The contention of the Appellant is that the department is trying to change classification of the service from that of courier agents to that of goods transport agencies and thereafter arguing

that credit cannot be taken on tax paid on goods transport services utilised for removal of the goods from the place of removal. The Counsel relies on the case law of **CCE, Chandigarh Vs. Gontermann Peipers (India) Ltd.** reported in 2005 (186) ELT 422 (Tri.-Del.) and argues that classification cannot be changed at the recipient's end. He further relies on the decision of the Tribunal in the case of **CCE, Raipur Vs. HEG Ltd.** reported in 2010 (18) STR 446 (Tri.-Del.) which allowed courier services as an input service. It is argued that the services of courier has been utilised in relation to Appellant's business since the Appellant could not have carried on his business without sending the samples to its dealers and prospective buyers and also without transmitting documents. He argues that the definition of "input services" covers such services and relies on the decision of Bombay High Court in **CCE, Nagpur Vs. Ultratech Cement Ltd.** reported in 2010 (20) STR 577 (Bom.). He argues that there is no reason to deny Cenvat credit availed by them for tax paid on courier services.

3. In the case of capital goods, the first submission is that the Cenvat credit involved on invoice No. 1334 dated 29.3.04 is only Rs.15,148/-. But the department has taken the amount as Rs.18,044/-.

4. The Counsel points out that this matter is dealt with in para 4 of Show Cause Notice. In the said para no reference number of the invoice or its date is given. The date on which such credit was taken also is not stated. He submits that in the absence of such

reference details, he is not able to identify exactly which is the credit the department is talking about. During the relevant period, the Appellant has received only one invoice from M/s J.S. Enterprises and that invoice namely No. 1334 dated 29.3.2005 was issued by M/s Statfield Equipments Pvt. Ltd. and the duty involved on this is only Rs.15,148/- BED plus Rs.303/- Education Cess and not Rs.18,044/-. This matter was pointed out by him in his reply to the Show Cause Notice. However, the Adjudicating Authority has not dealt with the discrepancy pointed out and confirmed the demand against him for the amount of Rs.18,044/-.

6. Regarding the merits of this claim, his submission is that M/s J.S. Enterprises is a distributor of equipments manufactured by M/s Statfield Equipments Pvt. Ltd. The invoice clearly shows that equipment was for delivery at the Appellant's factory because the consignee's name is shown as "M/s Mark Exhaust System Ltd., village Begumpur Khatola, NH-8, Delhi Jaipur Highway, Gurgaon". It is submitted that the equipment has been received in the Appellant's factory and it has been used in the process of manufacture and the only contention is that the invoice is not issued to the Appellant though the name of the Appellant is shown as consignee. The Counsel submits that CBEC clarified vide Circular No. 218/52/96-CX dated 4.6.96 that Cenvat credit can be taken on goods sold in transit. Further, he relied on Circular No. 441/7/99-CX dated 23rd Feb. 1999 clarifying that minor procedural lapses in the matter of claiming Cenvat credit can not be sufficient reason for denial of Cenvat credit so long as the facts of receipt of the

goods in the factory and its use in the manufacture of goods are not disputed. The department has not made out any case that this credit was utlised by the person to whom the invoice was issued. The counsel relies on the decision of the Tribunal in **Hero Cycles Ltd. Vs. CCE, Ludhiana** reported in 2011 (266) ELT 110 (Tri.-Del.) to support his claim that credit cannot be denied to the Appellant.

7. The ld. DR submits that the service of courier agencies availed by the Appellant is not in relation to the manufacture of final products. He relies on the finding of Commissioner (Appeal) to the effect that what is being denied is service used in relation to transportation of goods beyond the place of removal. The Commissioner (Appeals) makes it clear that the demand is not being made classifying the services as service of goods transport agency. It is denied because the service of courier also is for transportation of goods beyond the place of removal. According to him, any service used for removal of goods beyond the place of removal is not an input service and the impugned service falls in that category and for that reason credit is to be denied. In the matter of credit taken on capital goods, the ld. DR submits that circular quoted by the board are relating to the period prior to the year 2000 is not applicable.

8. Considered arguments on both sides.

9. The definition of input service, in force at the relevant time, reproduced below :-

"Input service" to mean, 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 from 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 up to 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 of capital goods and outward transportation up to the place of removal."

10. It is very clear that all services used in relation to the clearance of the product from the place of removal was within the ambit of input service. However, the final part of the definition covered transportation of goods up to the place of removal only.

11. It is to be noted that the activity of sending samples is for business promotion and without this business promotion, he cannot be selling these goods. Therefore, the service in question in this case has to be seen as service utilised for removal of the goods from the place of removal. The case is different from the case where the final products is removed from place of removal for use by the buyer. In this case, the benefit of the samples and documents sent accrues to the Appellant and not any other person. Further, I also note this matter was decided by this Tribunal itself in the case of **CCE, Raipur Vs. HEG Ltd.** Therefore, the appeal in

respect of credit availed relating to courier services is to be decided in favour of the Appellant.

12. In the matter of credit taken on invoices in the name of M/s J.S. Enterprises there is lack of clarity as to the amount of credit involved. This is a matter which was specifically raised by the assessee in the reply to the Show Cause Notice and it has not been rebutted in the Order-in-Original. So the submission of the Appellant is taken as correct, in the matter of invoice number and date and duty involved. Since there is no dispute of the facts that the goods were received in the factory and used inside the factory and duty thereon was paid, I find that there is no reason to deny this credit to the Appellant. Thus, the appeal on this count also succeeds.

13. The appeal is allowed on both the counts in favour of the Appellant with consequential relief.

(Dictated & pronounced in open Court)

(Mathew John)
Member (Technical)

RM