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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

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

EXCISE APPEAL BRANCH

Appeal No. E/536 /2009 - EX[DB] Date 16/04/2010

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

To :
M/S L.G. ELECTRONICS (INDIA) PVT. LTD.
PLOT NO. 51, UDYOG VIHAR, GREATER NOIDA,
(U.P.)
M/S L.G. ELECTRONICS (INDIA) PVT. LTD. Appellant

Vs

C.E. NOIDA Respondent

I am directed to transmit herewith a certified copy of **Final order No. 187/ 2010 EX[DB]** dated 12-4-10 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
   C.C.E. NOIDA
   C-56/42, SECTOR-62, NOIDA-201307
2. Adv. / Consult
   MR.V. LAXMIKUMARAN
   B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

3 C.D.R
~~4 J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise. I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
~~9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.~~
10 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
~~11 Taxindiaonline.com Pvt.Ltd. B-XI/8183,Vasant Kunj, New Delhi - 110070~~
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Assistant Registrar
(Excise Appeal Branch)

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

COURT NO. I

Excise Appeal No. 536 of 2009

[Arising out of the Order-in-Original No. 38/COMM/NOIDA/2008 dated 23/09/2008 passed by The Commissioner, Central Excise, Noida.]

For Approval and signature :

Hon'ble Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:
3.	Whether their Lordships wish to see the fair copy of the order?	:
4.	Whether order is to be circulated to the Department Authorities?	:

M/s L.G. Electronics (India) Pvt. Ltd. Appellant

Versus

CCE, Noida Respondent

Appearance

Shri B.L. Narsimghan, Advocate – for the appellant.

Shri B.K. Singh, Authorized Representative (Jt. CDR) – for the Respondent.

CORAM : **Hon'ble Justice R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

DATE OF HEARING : 23/03/2010.
DATE OF DECISION : 12/4/2010

Final Order No. 187/10-EX Dated : ________

Per. Rakesh Kumar :-

The Appellant are engaged in manufacture of electronic and electrical goods such as Colour Television sets, Computer Monitors, Air Conditioners, Refrigerators etc. chargeable to Central Excise Duty. They are also providing certain taxable services like such as repair and maintenance, installation and commissioning, consulting engineers etc. for which also they are registered with the Central Excise Department. Beside providing the above taxable services, they also pay service tax as service recipient in respect of goods transport agency (GTA) service received by them. The Appellant avail the Cenvat credit of the Central Excise Duty paid on the goods and service tax paid on the inputs services under Cenvat Credit Rules, 2004 (hereinafter referred to as CCR, 2004). The period of dispute in this case is from October 2004 to September 2005 and January 2005 to February 2007.

1.1 The appellant clear their goods for sale from the factory gate and also transfer the goods to their depots from where the same are despatched to their customers. During January 2006 and April 2006, the records of the Appellant company in respect of Central Excise Duty payment and Cenvat Credit availment for the clearances during the period from October 2004 to September 2005 and January 2005 to February 2007 were examined. In course of scrutiny of the records, it appeared that there was short payment of education cess amounting to Rs. 3,58,717/- out of which an amount of Rs. 2,54,805/- was paid by appellant immediately.

1.2 Beside the short payment of education cess, it was also found that they had availed Cenvat credit of Service Tax on the GTA service availed in respect of outward transportation of the finished goods from the factory gate to the customer's premises or from factory to depots and from depots to customer's premises and the total credit availed during the period from October 2004 to February 2007 was Rs. 6,22,43,497/-. The Department was of the view that GTA service availed in respect of outward transportation of the finished goods from the place of removal i.e. factory gate or depot to customer's premises is not covered by the definition of "input service" as defined in Rule 2 (I) of the CCR, 2004. Accordingly, a show cause notice dated 10/10/02 was issued to the Appellant for –

(a) recovery of allegedly short paid education cess amounting to Rs. 3,58,717/- alongwith interest on it at the applicable rate as per the provisions of Section 11AB of the Excise Act (hereinafter referred to as the Excise Act) and also for appropriation of an amount of Rs. 2,54,805/- already paid towards this demand ;

(b) recovery of allegedly wrongly taken Cenvat credit amounting to Rs. 6,21,39,585/- of the service tax on the outward transport of the finished goods from the factory gate/depots to the customer's premises, alongwith interest on this amount at the applicable rate ; and

(c) imposition of penalty on the Appellant under Rule 25 (1) of Central Excise Rules, 2002 readwith Section 11AC of Excise Act and also under Rule 15 of CCR, 2004 readwith Section 11AC of the Excise Act.

1.3 The above show cause notice was adjudicated by the Commissioner, Central Excise, Noida vide order-in-original No. 38/COMM/NOIDA/2008 dated 23/09/08 by which the Commissioner –

(a) confirmed the education cess demand of Rs. 3,58,717/- alongwith interest and ordered appropriation of an amount of Rs. 2,54,805/- already paid towards this demand ;

(b) imposed penalty of Rs. 3,58,717/- on the appellant under Rule 25 (1) of Central Excise Rules, 2002 readwith Section 11AC of the Excise Act for short payment of education cess ;

(c) confirmed the Cenvat credit demand of Rs. 6,21,39,585/- alongwith interest on it at the applicable rate under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 readwith Section 11A and 11AB of Excise Act ; and

(d) imposed penalty of Rs. 6,21,39,585/- on the appellant under Rule 15 of the Cenvat Credit Rules, 2004 readwith Section 11AC of the Excise Act.

1.4 The appellant filed an appeal to the Tribunal against the above order of the Commissioner alongwith a stay application. The stay application was decided by the Tribunal vide order No. 381/09-EX dated 24/4/09 by which the Tribunal ordered the appellant to deposit a sum of Rs. One crore within the stipulated period and subject to deposit of this amount the requirement of pre-deposit of the balance amount of duty, interest and penalty would stand waived and recovery thereof stayed till the disposal of the appeal. Against this order of the Tribunal, the Appellant filed an appeal to Hon'ble Allahabad High Court under Section 35G of Excise Act and Hon'ble High Court vide order dated 5/6/09 allowed the appeal, set aside the Tribunal's order and remanded the matter back to the Tribunal to decide the stay application afresh in accordance with law and observations made in this order. The Hon'ble High Court directed the Tribunal to decide the stay application as expeditiously as possible, preferably within a period of three weeks from the date of production of certified copy of the order.

1.5 Against the order of Hon'ble Allahabad High Court, the Department filed an SLP in the Hon'ble Supreme Court and Hon'ble Supreme Court vide order dated 5/1/10 directed this Tribunal to expeditiously hear and dispose of the appeal itself on merits within period of three months. Accordingly, in pursuance of Hon'ble Apex Court directions, this appeal has been taken up for final disposal.

2. Heard both the sides.

2.1 Shri B.L. Narsimghan, Advocate, the learned counsel for the Appellant, made the following submissions.

(1) The impugned order has been passed without granting the opportunity for personal hearing. The

Commissioner by a single letter had fixed personal hearing on four dates – 14/8/08, 20/8/08, 21/8/08 and 22/8/08. Since the main point of dispute in this case is regarding eligibility of a manufacturer to avail Cenvat credit of service tax on outward transportation of goods and since this issue was pending before a larger bench of the Tribunal, the Appellant vide letter dated 20/8/08 requested the Commissioner to keep the matter pending till decision of this issue by the larger bench. But the Commissioner, without informing the Appellant, decided this issue ex-parte vide order dated 23/9/09. The impugned order, thus, has been passed in violation of the principles of natural justice.

(2) The main point of dispute is as to whether the Appellant are eligible for Cenvat credit of service tax amounting to Rs. 6,21,39,585/- paid on outward transportation of finished goods from the depots/factory gate to the customer's premises during the period from October 2004 to September 2005 and January 2005 to February 2007. The appellant clear the finished goods from factory to depots for which GTA services are used. On rare occasions, the goods are despatched directly to customers from factory gate. In all the cases, the sales to dealers, whether from factory gate or from depots, are on FOR destination basis, the goods are transported to the dealers from factory gate/depots at the Appellant's risk and expenses of transportation and transit insurance are integral part of the price of the goods sold. Therefore the sale takes place at the customer's premises and it is the customer's premises which have to be treated as the "place of removal" and since, transportation from depot/factory gate to the customer's premises is covered by the definition of 'input service', as given in Rule 2 (l) of CCR, 2004, the Commissioner has wrongly disallowed the Cenvat credit by treating only the factory gate as the place of removal.

(3) As per Rule 2 (l) of the CCR, 2004, words and expression used in these rules and not defined but defined in the Excise Act or Finance Act, 1944 shall have meaning assigned to them in those Acts. In view of this, the expression "place of removal" in the definition of "input service" in rule 2 (l) must be given the meaning in term of its definition in Section 4 of the Excise Act. Since the Sales of the Appellants are on FOR basis at the customer's premises, it is the customer's premises which have to be treated as the place of removal, not the factory gate.

(4) out of total disputed Cenvat credit of Rs. 6,21,39,585/-, Cenvat credit of Rs. 4,82,68,526/- is of service tax on GTA services availed for transportation of finished goods from factory gate to depots, which has to be treated as "place of removal" if the sales are held to be from depots. Therefore, there is no justification for denying the Cenvat credit of this amount.

(5) Since the sales have taken place on FOR destination basis at the customer's premises, risk during transportation is of the Appellant and the price for the goods charged from the customers, includes the freight and insurance upto the customer's premises, in terms of the Board's Master Circular No. 97/8/07-ST dated 23/8/07, which is based on the Tribunal's judgment in case of **M/s Gujarat Ambuja Cements Ltd. vs. CCE, Ludhiana** reported in **2007 (6) STR – 249 (Tri.)**, Cenvat credit of service tax paid on the GTA services availed for transportation upto the customer's premises will be available to the Appellant. In terms of Board's circular No. 137/3/2006-CX-4 dated 2/2/06, Cenvat credit of service tax paid on transportation of the finished goods from the factory gate to the depot or any other place of removal, will be available even if duty on the finished goods is payable at specific rate or on value

determined under Section 4A on the basis of valuation with reference to retail sale price.

(6) Even if freight for transportation from depots/factory gate to customer's premises is not treated as part of assessable value, even then the GTA services availed for transportation from the factory gate/depots to customer's premises have to be treated as "service in relation to business of the Appellant" and would be covered by the definition of 'input service'. In this regard, reliance is placed on Hon'ble Bombay High Court's judgment in case of **Coca Cola India Pvt. Ltd. vs. CCE, Pune - III** reported in **2009 (242) E.L.T. – 168 (Bom.)**

(7) Since the Appellant have never suppressed any facts relating to availment of Cenvat credit from the Department, extended period for recovery of allegedly wrongly taken Cenvat credit cannot be invoked. Since the show cause notice for recovery of allegedly wrongly taken Cenvat credit for the period from October 2004 to February 2007 was issued on 10/10/07, the bulk of the demand is time barred. For the same reason, there is no justification for imposition of penalty under Rule 15 of Cenvat Credit Rules, 2004 readwith Section 11AC of Central Excise Act.

(8) As regards the short payment of education cess amounting to Rs. 3,58,717/- the same was due to computational mistake and there was no intention to evade the same, and as such, the demand for the same is also time barred.

2.2 Shri B.K. Singh, the learned Jt. CDR, made the following submissions.

(1) Since the duty on the finished goods claimed to have been sold on FOR destination basis has not been paid on

value including the freight from factory gate/depots to the customer's premises, but has been paid on value determined under Section 4A with reference to MRP minus abatement, Cenvat credit of service tax paid on the GTA service availed for transportation from depots/factory gate to customer's premises would not be available. MRP minus abatement is not the same as FOR price. In case of payment of duty under Section 4A, Board's Circular No. 97/8/07-ST dated 23/8/07 becomes irrelevant.

(2) Under Section 37 (2) (xviaa) of the Excise Act, Central Government can frame rules to provide for credit of service tax leviable under Chapter V of the Finance Act, 1994 paid on taxable services used in or in relation to the manufacture of excisable goods. The GTA service for outward transportation of finished goods from the place of removal has nothing to do with manufacture, even if the sale is on FOR basis. Therefore the definition of "input service", as given in Rule 2 (l) of Cenvat Credit Rules, 2004 cannot cover outward transportation of finished goods from the place of removal. As held by Hon'ble Supreme Court in case of **Ispat Industries Ltd. vs. Commissioner of Customs, Mumbai** reported in **2006 (202) E.L.T. 561 (S.C.)**, the scope of Cenvat Credit Rules, 2004, framed under Section 37 of the Excise Act cannot go beyond the scope of the provisions of the parent Act under which the Rules have been framed.

(3) Outward transportation of finished goods from the place of removal cannot be treated as an activity ancillary to manufacture or integrally connected with manufacture. Therefore in terms of Hon'ble Supreme Court's judgment in case of **Maruti Suzuki Ltd. vs. CCE, Delhi – III** reported in **2009 (240) E.L.T. 641 (S.C.)**, "outward transportation of finished goods from the place of removal" cannot be treated as an input service.

(4) Since in the relevant ER-1 returns filed by the Appellant, it had not been disclosed that the Cenvat credit, in question, is of service tax paid on GTA service availed for outward transportation of finished goods from depots/ factory gate to customer's premises, there is an clement of suppression of facts and hence longer limitation period is available for the Department for recovery.

(5) As regards the short payment of education cess, the appellant themselves have admitted the same.

3. We have carefully considered the submissions from both the sides and perused the records. The appellant manufacture Refrigerators, Colour Television Sets, Computer Monitors etc. all of which being notified under Section 4A of the Excise Act are assessed to duty on the basis of the value determined with reference to their declared MRP minus abatement, if any, notified by the Government. The goods, except for very few cases, where the sales are from the factory gate, are transferred to depots from where the same are sold to various customers/dealers. The duty liability in all these cases are discharged by the Appellant on the basis of the assessable value determined with reference to the declared MRP minus abatement. According to the Appellant, their all the sales of the finished goods to their customers/dealers are on FOR destination basis and the transport and transit insurance is arranged by them whose cost is integral part of the price charged from the customers and risk of damage to the goods or loss of goods during transit is of the Appellant. In other words, according to the appellant, the sale takes place at the

customer's premises and accordingly the price charged by them from the customers is on FOR basis. It is on this basis that the Appellant claim that the place of removal of the goods is the customer's premises. The point of dispute is as to whether the Appellant would be eligible for Cenvat credit of service tax paid on the GTA service availed for transportation of the goods up to the customer's premises. According to the Appellant, since the sale take place at the customer's premises, it is the customer's premises which is the "place of removal" within the meaning of this expression as defined under Section 4 (4) (c) of the Excise Act and since the definition of "input service", as given in Rule 2 (l) of Cenvat Credit Rules, 2004 covers the transportation of the finished goods up to the "place of removal", they would be eligible for Cenvat credit of the service tax on the GTA service availed for the transportation of finished goods up to the customer's premises. The Commissioner, however, has disallowed the Cenvat credit on the ground that since the Appellant are selling their final products from their factory through their depots to different dealers situated in different parts of the country, they are not entitled to avail Cenvat credit of the amount of service tax paid by them on the GTA service availed for transportation of the goods from the factory gate/Depots to customer's premises or from factory gate to Depots. Though the Appellant in their reply to the show cause notice had cited the Board's Circular No. 137/3/2006-CX.4 dated 02-Feb-2006 according to which the Cenvat credit of service tax paid on the GTA service availed for transportation of the goods from the factory to the depot/place of removal has to be allowed, even if the duty on the goods has been paid at specific rate or at advalorem rate based on the value determined under Section 4 or 4A of the Excise Act and though this plea of the Appellant has been mentioned by the Commissioner in para 16.11 of the order-in-original, no finding with regard to applicability of the circular on the point as to whether in the Appellant's case the sales take place on FOR destination basis at the customer's premises has been given. However, at the time of hearing, the learned DR pleaded that the transportation of goods from the factory or depot to the customer's premises has no nexus with the manufacture and hence the same would not be covered by the definition of "input service" as given under Rule 2 (l) of CCR, 2004, that scope of Rule 2 (l) of CCR, 2004, framed under Section 37 (2) (xvi aa) of the Excise Act cannot go beyond the provisions of the parent Act and that in any case, even in terms of the Board's Master Circular No. 97/8/2007-ST dated 23/08/07, the Cenvat Credit of Service Tax on the GTA service availed for transportation of the finished goods up to the customer's premises by treating the customer's premises as the 'place of removal' cannot be allowed, as in this case the duty has not been paid under main Section 4 on the assessable value including the freight up to the customer's premises, but has been paid on the assessable value determined as per the provisions of Section 4A.

4. CCR, 2004 and its predecessor rules have been framed by the Central Government under the powers vested under Section

37 (2) of the Excise Act, Clause (xvi a) and (xvi aa) of which empower the Central Government to frame rules to provide for –

> "(a) credit of duty paid or deemed to have been paid on the goods used in, or in relation to the manufacture of excisable goods and
>
> (b) credit of service tax leviable under Chapter V of the Finance Act, 1944 paid or payable on taxable services used in or in relation to, the manufacture of excisable goods."

4.1 Rule 2 (l) of the CCR, 2004 defines "input service" as under:-

> "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 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 or capital goods and outward transportation up to the place of removal".

4.2 It is the contention of the learned DR that outward transportation of finished goods from the factory gate has no nexus with the manufacture and, therefore, the definition of 'input service' as given in Rule 2 (l) of Cenvat Credit Rules would not cover the outward transportation of the finished goods from the factory, as the Section 37 (2) empowers the Central Government to frame rules for providing input duty credit only in respect of the services used in or in relation to the manufacture and in case of conflict between the provisions of an Act and the provisions of the rule framed under the Act, it is the provisions of the Act which would prevail. We are of the view this argument, is not correct for the reasons given below.

4.2.1 Hon'ble Supreme Court in the case of **Union of India and others etc., etc. vs. Bombay Tyre International Ltd. and others etc., etc.** reported in **1983 (14) E.L.T. 1896 (S.C.)**, while dismissing the contention that since excise is a tax on manufacture, in case of levy of excise at an advalorem rate, the assessable value must be confined only to the manufacturing cost and manufacturing profit, has in para 11,12,13 and 49 of the judgment held that –

(a) a distinction has to be drawn between the nature of the tax and the point at which it is collected and theoretically there can be no reason why excise duty can not be collected on retail sale of an article if the taxing act so provides ;

(b) while excise duty is a levy on the manufacture or production of goods, the stage of collection need not in point of time synchronize with the completion of manufacturing process and while the levy of central excise has the status of a constitutional concept, the point of collection is located where the statute declares it will be ;

(c) it has long been recognised that the measure employed for assessing a tax must not be confused with the nature of the tax and the measure adopted cannot be identified with the nature of the tax – and viewed from this stand point, it is not possible to accept the contention that because the levy of excise is a levy on goods manufactured or produced in India, the value of an excisable article must be limited to the manufacturing cost plus manufacturing profit ; and

(d) the price of an article is related to its value and into that value have poured several components including those which have enriched its value and given the article its marketability in the trade and therefore the expenses incurred on account of several factors which have contributed to its value upto the date of sale, which apparently would be the date of delivery, are liable to be included in its value for assessment of duty and consequently when the sale is effected at the factory gate, expenses incurred by the assessee up to the date of delivery on account of storage charges, outward handling charges, after sales service charges, marketing and selling organisation expenses including advertisement expenses would be includible in the assessable value.

Thus the assessable value of excisable goods, for the purpose of charging duty at an advalorem rate, is not confined to manufacturing cost and manufacturing profit. It would include all the expenses incurred upto the place of delivery/ sale except for cost of transportation from the place of removal to the place of delivery/sale.

4.2.2 Since 28/9/96 by amendment to Section 4 of the Excise Act, the "place of removal" has been expanded to include Depots, consignment agent's premises or any other premises from where the goods are sold after their clearance from the factory and since the assessable value of the goods, as per the provisions of Section 4 (1) of the Excise Act, is the transaction value for delivery at the time and place of removal, in case the goods are sold on FOR destination basis at the customer's premises, all expenses incurred by the manufacturer up to the time of sale at the customer's premises including transportation expenses would be includible in the assessable value.

4.2.3 Since 1986, the Government, started providing the facility of input duty credit to be utilized towards payment of duty on the finished product. Since 1994, this facility was extended to capital goods used in the factory of manufacture of the finished goods and since September 2004, as a step towards integrating the central excise duty with the service tax, the credit of service tax and excise duty was extended across the goods and services. In other words, a manufacturer using various duty paid inputs and capital goods and taxable services in or in relation to manufacture of finished goods became eligible for credit of duty paid on inputs and capital goods and credit of service tax paid on input services to be utilised towards payment of excise duty on the finished products and similarly a taxable service provider became eligible for input duty credit of excise duty paid on inputs and capital goods and service tax paid or input services used in or in relation to providing the output services. Since a value added tax operates by taxing input goods and services and output goods and services with provisions for credit of tax paid on inputs goods and services which can be utilized for payment of tax on output goods/services, the present system of levy of central excise duty on manufactured goods and levy of service tax on certain services with facility of credit being available of the central excise duty paid on inputs/capital goods and of service tax paid on input services, which can be utilised towards payment of central excise duty on finished goods or for payment of service tax on output service, has the character of a value added tax. With effect from 12/5/2000, the name of 'central excise duty' on excisable goods was changed to 'central value added tax (CENVAT) by amendment to Section 3 of the Central Excise Act, 1944. Hon'ble Bombay High Court, in case of Coca Cola India Pvt. Ltd. vs. CCE, Pune – III (supra) while considering the question of eligibility of the Appellant – a manufacturer of soft drink concentrates for Cenvat credit of service tax paid on advertisement and publicity expenses incurred for promotion of the sales of Aerated waters, manufactured by various bottlers using their soft drink concentrates, keeping in view –

(a) the principles regarding valuation of excisable goods that flow from Apex Court's judgment in case of Union of India and others vs. Bombay Tyre International Ltd. and others (supra) and specially para 49 of the judgment ;

(b) the system of Cenvat credit of excise duty paid on input goods and capital goods and of service tax paid on input services being available to a manufacturer which can be utilised towards payment of duty as finished products; and

(c) rechristening the central excise duty as 'central value added tax' by amending Section 3 of the Central Excise Act, has held that amendment to Section 3 of the Excise Act will show that manifest object of legislation is to levy and collect the excise duty as a value added tax. In view of this, it is clear that though central excise is a tax linked with the event of manufacture, it is collected as a value added tax and because of this, it has the character of a value added tax.

4.2.4 Since basic principle of a value added tax is that while subjecting a finished product to tax, credit of tax paid on all input goods, capital goods and input service is allowed which can be utilized towards payment of tax on the finished product, a corollary to this principle would be that in an indirect tax of the nature of value added tax, when a finished product is taxed, credit of duty paid on all input goods, capital goods and input services has to be allowed. When the assessable value of the goods under Section 4 of the Excise Act is not confined to manufacturing cost and manufacturing profit but includes all the components like marketing and selling organisation expenses, advertisement expenses, after sales services, storages upto time of removal etc. which have contributed to the value of the goods and in case of FOR destination sales at the customer's premises, all expenses including transport expenses upto the customer's premises are includible in the assessable value for charging duty, the input duty credit cannot be confined only to the services used in completion of manufacturing process. Therefore, while interpreting the scope of "input services" as defined in rule 2 (l) of CCR, 2004, clause (xvia) and (xvii aa) of sub-section (2) of Section 37 of the Excise Act should not be looked at in isolation and it is the entire Central Excise Act containing the scheme of levy and collection of central excise duty which has to be taken into account.

4.2.5 In view of the above, we do not find any conflict between the provisions of Rule 2 (l) of the CCR, 2004 and clause (xvi a) and (xvi aa) of Section 37 (2) of the Excise Act.

5. Coming to the main question as to whether Cenvat credit of service tax of the GTA service availed for transportation of goods up to the customer's premises would be available to the Appellant in this case or not, from the perusal of definition of 'input service' as given in Rule 2 (l) of the Cenvat Credit Rules, 2004 as reproduced above, it will be seen that while the main

definition of the input service with regard to manufacturers covers any service used by a manufacturer, whether directly or indirectly in or in relation to the manufacture of final products and clearance of the final products from the place of removal, the inclusive part of the definition specifically covers "inward transportation of inputs or capital goods and outward transportation up to the place of removal". Thus, outward transportation of finished goods up to the place of removal is specifically covered by the definition of "input service". Now question arises to what is the "place of removal" for the purpose of Cenvat Credit Rules. Though, there is no definition of this expression in the Cenvat Credit Rules, Rule 2 (t) of the Cenvat Credit Rules states that words and expressions used in these rules and not defined but defined in the Excise Act or the Finance Act, 1994 shall have meanings respectively assigned to them in those acts. The expression "place of removal" is defined in Section 4 (3) (c) of the Excise Act and, therefore, in view of the provisions of Rule 2 (t) of the CCR, 2004, the definition of "place of removal", as given in Section 4 (3) (c) will have to be adopted for ascertaining the scope of this expression in the definition of "input service". The expression "place of removal", as defined in Section 4 (3) (c) of the Central Excise Act, is as under :-

> "Place of removal" means –
>
> (i) a factory or any other place or premises of production or manufacture of excisable goods;

(ii) a warehouse or any other place or premises, wherein excisable goods have been permitted to be deposited without payment of duty;

(iii) a depot or 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 ; and

from where such goods are removed."

5.1 In terms of above definition of "place of removal", if the sale of the goods takes place at a place other than depot or consignment agent's premises - for example at the customer's premises, it is such place or premises which would have to be treated as "place of removal" and accordingly the GTA service availed for transportation of the goods to such "place of removal" - would have to be treated as "input service" eligible for input tax credit. Thus, if the goods instead of being sold from the factory are stock transferred to the depots where the same are sold, in terms of the definition of expression "place of removal" in Section 4 (3) (c) of the Excise Act, depots would have to be treated as the "place of removal" and the GTA services availed for transportation of the goods from the factory gate up to the depots would be treated as "input service" and if the goods are sold from the consignment agent's premises or at the customer's premises and delivery of the goods is given to the customers at these places, it is the consignment agent's premises or customer's premises which would have to be treated as place of removal and the GTA service availed for transportation of the goods up to these places would have to be treated as "input service". This is the view which has been expressed in the Board's Circular No. 137/3/2006-CX.4 dated 2/2/06 and subsequently reiterated in para 8 of the Board Circular No. 97/8/07-ST dated 23/8/07. In the latter Circular dated 23/8/07, on the question as to up to what stage a manufacturer/consigner can take credit of the service tax paid on the goods transport by road, the Board relying upon the Tribunal's judgment in the case of **Gujarat Ambuja Cements Ltd. vs. CCE, Ludhiana** reported in **2007 (6) S.T.R. 249 (Tri. – Del.)** has clarified as under :-

"Issue. Upto what stage a manufacture/consignor can take credit of service tax paid on goods transported by road?

Comment : 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-D)]. 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 (6) S.T.R. 364 (Tri.) = 2007-

TOIL-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.

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 Excise Act 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 Excise Act. 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 Excise Act as also in terms of the provisions under the Sale of Goods Act, 1930) occurred at the said place."

5.2 Hon'ble Punjab & Haryana High Court in case of **Ambuja Cements Ltd. vs. Union of India** reported in 2009 (TIOL) 110 – HC – P&H – ST, relying upon the above-mentioned circular of the Board has held that the service of transportation of goods up to the customer's door step in case of FOR destination sales, where the entire cost of freight is paid and borne by the manufacturer, would be "input service" within the meaning of this term as defined in Rule 2 (l) of the CCR, 2004. Thus, if the goods after removal from the factory or depot are sold on FOR destination basis at the customer's door step, that is, the ownership of the goods and property in goods remains with the manufacturer of the goods till delivery of the goods in acceptable condition to the purchaser at his door step, the manufacturer/ seller bears the risk of loss of goods of or damage to the goods during transit to the customer's premises and the entire freight charges are integral part of the price of the goods, the GTA service availed for transportation of the goods up to the customer's door steps would be treated as "input service" and would be eligible for Cenvat credit.

6. However, another objection of the learned DR is that even if the Appellant's sales are on FOR destination basis, and the conditions as mentioned in the Board Circular dated 23/8/07 are satisfied, Cenvat credit in this case would not be available as the Central Excise Duty has not been paid on the value determined under main Section 4 of the Central Excise Act, which includes

the freight charges up for transportation of the goods up to the customer's door steps and that in this case the duty has been paid on the assessable value determined on the basis of declared MRP minus abatement as per the provisions of Section 4A of the Central Excise Act. However, on this point, we find that there is a specific clarification of the Board in its Circular 137/3/2006-CX.4 dated 2/2/06 referred to above. On this point, the Board in the Circular has clarified as under :-

"Subject : Eligibility of CENVAT credit of service tax paid on goods transported from factory to depot and sold therefrom - Reg.

It may be recalled that under the CENVAT Credit Rules, 2004 (hereinafter referred to as 'Credit Rules'), the definition of 'input service' includes 'outward transportation up to the place of removal'. The expression 'place of removal' has not been defined in the Credit Rules and therefore in terms of rule 2 (t) of the said Rules, the said expression shall have the same meanings assigned to it in the Excise Act or the Finance Act, 1944. The expression 'place of removal' has been defined under Section 4 of the Central Excise Act, as per which it is (a) a factory (in case of factory gate sale); (b) a warehouse (in case goods permitted to be stored without payment of duty); or (c) a depot (in case of depot sale). Therefore, in case excisable goods are sold from depot after their clearance from the factory, the manufacturer is eligible to take credit of service tax paid on transportation of goods up to such depot.

2. In this regard a doubt has arisen as to whether a

manufacturer manufacturing and clearing goods on payment of duty at specified rates (for example cement) or on the basis of valuation with reference to retail sale price (for example refrigerators), and selling the goods from a depot, is also eligible to take credit of service tax paid on transportation of goods up to such depot. The doubt appears to be based on reasoning that since such goods are not charged to duty on the basis of valuation under section 4 of the Central Excise Act, the definition of the expression 'place of removal' given in that section would not apply in case of such goods.

3. The matter has been examined at the level of the Central Board of Excise and Customs. It has been observed that the availment of credit and valuation for payment of duty are two independent issues. Further, the provisions under rule 2(t) of the CENVAT Credit Rules refers to definitions under the Excise Act and the Finance Act, 1994 for uniform understanding of the words and phrases used in the Credit Rules. Therefore, if an expression is not defined in the Credit Rules but is defined under a particular section of the Central Excise Act, it shall be applicable to all goods for purposes of the Credit Rules, irrespective of whether or not the said section is applicable for the purposes of working out the duty on such goods.

4. In view of the above, the undersigned is directed to state that, in case of depot sales of goods, the credit of service tax paid on the transportation of goods up to such depot would be eligible, irrespective of the fact, whether the goods were chargeable to excise duty at specific rates or *ad valorem* rates on the basis of valuation under section 4 or 4A of the Central Excise Act.

6.1 Thus, in this Circular, the Board has clarified that availment of Cenvat credit and valuation for payment of duty are two independent issues and that Cenvat credit of service tax on GTA service availed for transportation of the goods up to the place of removal would be available even if the duty on the finished goods has been paid at specific rates or on the valuation with reference to retail sale price under Section 4 (a). A Constitutional Bench of the Hon'ble Supreme Court in the case of **CCE, Bolpur vs. Ratan Melting and Wire Industries** reported in **2008 (231) E.L.T. 22 (S.C.)** has held that the Departmental clarifications/ circulars are binding on the respective authorities except a Circular which is contrary to the statutory provisions, which would have no existence in law. In view of this for the learned DR's contention to be acceptable, it has to be shown that the Board Circular No. 137/3/2006-CX.4 dated 2/2/06 is contrary to the statutory provisions. On going through the CCR, 2004, we do not find any provision which prohibits input duty credit, if duty on the finished products has been paid at the specific rates or at advalorem rates on the tariff values fixed under Section 3 (2) of Central Excise Act or on the assessable value determined under MRP of Section 4A of the Central Excise Act. If a service is covered by the definition of 'input service' and the finished product is not 'exempted goods', the credit of service tax paid on such input service has to be allowed irrespective of whether the duty on the finished product has been paid at a specific rate or at advalorem rate on the assessable value determined under Section 4 or under

Section 4A or on tariff value fixed under Section 3 (2) of the Excise Act, as so long as the finished product is subjected to duty and the credit of the input stage duty is allowed, the tax will retain the character of value added tax. The reason for this is that while ideally in a tax system with character of VAT, the input goods/services as well as finished product must be subjected to tax at a uniform advalorem rate on their sale value, in which case, the net tax collected after allowing credit of input stage duty will be exactly the tax on the value addition, in practice, it is not always possible, but even if the input goods/services and the finished products are taxed at different advalorem rates or at specific rates, once the input stage duty credit is allowed, on overall basis, the net tax collected would be more or less the tax on value addition. Therefore for allowing credit of tax paid on input goods/service used in or in relation to manufacture of a finished product, what is relevant is as to whether the items in respect of which input duty credit is being claimed are covered by the definition of "inputs" or "input services" and finished product is chargeable to duty, for allowing the credit of duty paid on input goods and/or of service tax paid on input services ~~______~~ it is not relevant as to whether the duty on the finished product has been paid at specific rate or at advalorem rate and if at advalorem rate whether on the assessable value determined under Section 4 or Section 4A of the Excise Act or on tariff value fixed under Sec. 3(2). We, therefore, hold that the Cenvat credit of service tax paid on the GTA service availed for transportation of the goods up to the customer's door steps in case of sales on FOR destination basis cannot be denied just because the duty on the goods has been paid on the assessable value determined under Section 4A i.e. on the [illegible] value determined with reference to declared MRP minus abatement.

7. Therefore, in this case, if as claimed by the Appellant, their sales are on FOR destination basis and the three conditions in this regard mentioned in the Board's Circular dated 23/8/07 are satisfied, that is, ownership and property in the goods remains with the appellant till delivery of the goods in acceptable condition to the customers at their door steps, the Appellant bear the risk of loss or damage to goods during transit upto the destination and freight charges are integral part of the price of the goods, the GTA service availed for transportation of the goods up to the customer's door steps would be covered by definition of 'input service' and would be eligible for Cenvat credit. However, we find that in this case, firstly, the Commissioner has decided the matter ex-parte without granting personal hearing and secondly the appellant's claim that their sales were on FOR destination basis has not been examined at all. Therefore, for this purpose, the matter will have to be remanded to the Commissioner for giving his specific findings after hearing the Appellant and, if there is evidence on record that the Appellant's sales were on FOR destination basis satisfying the conditions in this regard in the above-mentioned Circular dated 23/8/07 of the Board, the Cenvat credit of service tax paid on the GTA service availed for transportation of the goods up to the customer's premises would have to be allowed.

8. The second issue involving a very small amount, is regarding short payment of education cess. While the appellant do not dispute the short payment claiming the same due to computational mistake, they have raised the plea of time bar claiming that during the period of dispute, the ER-1 returns were being filed regularly and, if, there was short payment due to computational mistake, it was possible for the Department to inform the appellant regarding short payment. The Commissioner in para 15.3 and 15.4 of the order-in-original, while discussing this point has not given any finding as to on what basis the Appellant can be accused of wilful misstatement, suppression of facts or contravention of provisions of Central Excise Rules with intent to evade the payment of duty, so as to invoke the proviso to Section 11A (1) of the Excise Act. Since, as discussed above, the matter with regard to Cenvat credit is being remanded, the Commissioner is directed to examine the issue regarding limitation in respect of demand of short paid education cess also, keeping in view Hon'ble Supreme Court's judgments in cases of **CCE Vs. Chemphar Drugs & Liniments** reported in **1989 (40) E.L.T. 276 (S.C.)**, **Padmini Products vs. CCE** reported in **1989 (43) E.L.T. - 195 (S.C.)** and **Tamil Nadu Housing Board vs. CCE, Madras** reported in **1994 (74) E.L.T. 9 (S.C.)**.

9. In view of the above discussion, the impugned order is set aside and the matter is remanded to the Commissioner for

denovo adjudication in terms of our directions in para 7 and 8 of this order.

(Pronounced in the open court on 12/4/2010)

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

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