

IN THE CUSTOMS, EXCISE & SERVICE TAX  
APPELLATE TRIBUNAL,  
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-SM

COURT – IV

**Service Tax Appeal No. ST/52676/2018** with  
**Service Tax CROSS Application No. ST/CROSS/51171/2018**

[Arising out of Order-in-Appeal No. 201-SM-CE-JPR-2018 dated 27/04/2018 passed by the Commissioner of CGST & Central Excise, Alwar]

**C.G.S.T., C&C.E., Alwar** **...Appellant**  
**Vs.**  
**Orient Refractories Ltd** **...Respondent**

Present for the Appellant : Mr. H.C. Saini, DR

Present for the Respondent: Ms. Ashmita Nayak &  
Mr. R.K. Ranjan, Advocates

**Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)**

**Date of Hearing/Decision: 07.12.2018**

**FINAL ORDER NO. 53471 / 2018**

**PER: RACHNA GUPTA**

The appellants are engaged in manufacture of excisable goods and are discharging Central Excise duty on clearances of goods and also availing cenvat credit on input services. However, Department observed that appellant has availed cenvat credit of service tax which was paid on sales commission paid to their sale agents denying the services provided by the commission agents to be the input service. A SCN No. dated 21.09.2016 was issued to the appellant proposing the recovery of the cenvat credit of service tax of Rs. 22,92,316/- as availed by the appellant for the period w.e.f. September, 2015 to February 2016 alongwith interest and the proportionate penalty. The said proposal was confirmed vide the Order of Assistant Commissioner bearing No. 24 dated 06.06.2017. Being aggrieved an Appeal was preferred. Commissioner(Appeals)

vide Order No. 204-205 dated 25.04.2018 allowed the Appeal with the consequential benefits to follow. However, vide a subsequent review Order No. 119-120 dated 26.07.2018 the Department moved in Appeal before us. It is submitted on behalf of the Department that the sales Commission Services have already been denied to be the input services and the assessee has already been held to not to be entitled for the cenvat credit on the sales Commission Services. Decision of High Court of Gujarat in the case **Astik Dyestuff Pvt. Ltd. Vs. C.C.E. Customs 2014 (34) STR 814(Guj.)** is being relied upon. It is further submitted that an Appeal has been preferred to Hon'ble Supreme Court against the said Order however the appellant has been denied any stay against the said decision of Gujarat High Court. The issue since has squarely been covered under the said decision, the original adjudicating authority had committed an error while allowing the Appeal.

2. While rebutting these arguments it is submitted that after the decision of Hon'ble Gujarat High Court as has been impressed upon by the Department there has been a clarification on this issue holding that sales promotion include service by way of sale of dutiable goods on Commission basis. Decision of **Essar Steel India Ltd. Vs. Commissioner of Central Excise & Service Tax, Surat 2016 (335) ELT 660 (Tri.-Ahmd.)** has been relied upon and the Appeal is prayed to be dismissed.

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 Vs. Cadila Healthcare Ltd. 2013 (4) STR 3(Guj.)** however Hon'ble High Court of Punjab and Haryana in the case

**Ambika Overseas reported in 2012 (25) STR 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 CBEC Circular No. 934/4/2011 dated 29.04.2011 vide which the sales promotion activities as mentioned in explanation to Rule 2(I) of Cenvat Credit Rules, 2004 (as was inserted vide Notification No. 2/2016 dated 03.02.2016) 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 intendenments 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.(supra) case 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.

[Operative part pronounced in the open Court]

**(RACHNA GUPTA)**  
**MEMBER (JUDICIAL)**

D.J.