

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Bench – SMB
Court – I

Appeal No. E/20665/2014

(Arising out of Order-in-Appeal No. 91/2013 (H-IV) CE dated
30.09.2013 passed by Commissioner of Customs, Central Excise &
Service Tax (Appeals-I& III), Hyderabad)

M/s Akzo Noble (India) Ltd.,

.....Appellant(s)

Vs.

**Commissioner of Customs, Central Excise
& Service Tax, Hyderabad – IV**

.....Respondent(s)

Appearance

Shri Lalit Mohan Chandna, Consultant for the Appellant.
Shri Bhanu Kiran, Assistant Commissioner (AR) for the Respondent.

Coram:

Hon'ble Mr. P. Venkata Subba Rao, Member (Technical)

Date of hearing: 20/09/2018

Date of decision: 25/10/2018

FINAL ORDER No. A/31344/2018

[Order per: P. Venkata Subba Rao]

This appeal is filed against Order-in-Appeal No. 91/2013
(H-IV) CE dated 30.09.2013.

2. Heard both sides and perused the records.
3. The facts of the case in brief are that the appellant is manufacturer of paints and had taken CENVAT credit on the inputs and input services under CCR, 2004. A show cause notice was issued to the appellant seeking to deny the credit of service tax availed on

construction of warehouse within the factory premises during the period December, 2009 to January, 2011 and to deny them input credit of service tax paid on repair and maintenance of Automatic Dispensing Machines (ADM) installed at the dealer's premises during the period September, 2007 to November, 2011. One of the ways of selling paints is through Automatic Dispensing Machines at the dealer premises. These machines combine the base paint with appropriate quantities of various pigments to produce the paint of the exact shade required by the customer at the dealer's premises. It is the case of Revenue that the maintenance of these machines which are beyond the stage of manufacture and place of removal does not entitle the appellant to credit of service tax paid on maintenance of these machines. It is the argument of the appellant that these ADMs machines are linked to their process of manufacture because without these machines the products in question cannot be sold. Therefore, they are entitled to the credit of service tax paid on maintenance of these machines.

4. As far as, the credit of the service tax paid on construction of warehouse being the factory premises is concerned, it is the case of the Revenue that the warehouse, though within the factory premises, has no nexus to the process of manufacture and hence the credit of service tax paid on this construction cannot be availed by the appellant. After following due process of law, the lower authority confirmed the demands and ordered recovery of the CENVAT credit availed on appellant on these two services along with interest under Rule 14 of CCR, 2004. He further imposed a penalty under Rule 15(2) of CCR, 2004 read with Section 11AC of the Central Excise Act. On

appeal, the First Appellate Authority passed the impugned order upholding the Order-in-Original and rejected the appeal. Hence this appeal.

5. The Learned Consultant for the appellant contested the demand both on merits and on the question of limitation. As far as, credit on warehouse is concerned, it is his submission that the credit of input services is available within the factory and the definition of input service includes services used in relation to setting up, modernization, renovation or repairs of a factory. As regards the service tax paid on maintenance of ADMs, he argues that they have paid the service tax on the repairs and maintenance of ADMs and the credit may be allowed as they were used for dispensation of paint. On limitation, it is his contention that the entire credit was taken and duly shown in the monthly ER-1 returns along with other credits; there was no legal requirement to separately show the credit taken on these two elements and therefore they have not suppressed any facts. The show cause notice dated 01.10.2012 was issued for the period covered is December, 2009 to January, 2011 denying credit on warehouse and for the period September, 2009 to November, 2011 denying credit on service tax paid on maintenance of ADMs. They have been filing ER-1 returns and merely because the audit has pointed out an alleged irregularity, it does not mean that there was any fraud or suppression their side. He relied on following case laws.

i) Commissioner of Central Excise, Nagpur Vs. Ultratech Cement Ltd., [2010 (20) STR 577 (Bom.)] in which, the Hon'ble High Court of Bombay held that the credit is available also of all services used in the

business of manufacture of final products under Rule 2(I) of CCR, 2004.

ii) Liugong Indian Pvt. Ltd., [2015 (38) STR (96) (Tri.- Del.)] in which, it was held that services used for setting up of factory to be treated as "input services" eligible for CENVAT credit prior to the amendment of Rule 2(I) of CCR, 2004 with effect from 01.04.2011.

iii) Suzuki Motorcycle (I) Pvt. Ltd., [2011 (267) ELT 216 (Tri.- Del.)] in which, it was held that the input services used in commercial or industrial construction service availed for construction of factory buildings and office premises within the factory are covered by Rule, 2(I) of CCR, 2004.

6. Learned Departmental Representative reiterated the Order-in-Original and Order-in-Appeal and argued that the appellant is not eligible for CENVAT credit on either of these two services and had wrongly availed the same. The appellant had not disclosed to the Department that he availed CENVAT credit on these items in violation of the CCR, 2004. It is his argument that by violating the rules the appellant had availed Central Excise duty and therefore the extended period of demand is invokable and penalty is also imposable upon the assessee/appellant.

7. I have examined the arguments on both sides and the records of the case. During the relevant period credit was available to a manufacturer on input services which were used whether directly or indirectly in or in relation to the manufacture of final products and clearance of the final products up to the place of removal and included services used in relation to modernization, renovation, repairs of a factory. The appellant being a manufacturer paying excise duty,

CENVAT credit has to be in terms of Rule 2(I) as applicable to him during the relevant period. The definition of manufacture under the Central Excise Act includes "any process in or in relation to manufacture". Therefore, the definition is wide and would encompass any process which is related to the manufacture of the final products. As far as entitlement of credit of input services used in relation to manufacture is concerned Rule, 2(I) of CCR, 2004 itself has drawn a line and allowed credit on all services used up to the place of removal. In this case the warehouse in question was built within the factory premises and I do not find any force in the argument of the Revenue that simply because the warehouse is not meant for manufacture the appellant is not entitled to the credit of service tax. The warehouse being prior to the place of removal, the service tax paid on construction of the same is available to the appellant the demand on this count therefore needs to be set aside. As far as, the credit of service tax on maintenance of ADMs is concerned, these are used in relation to the business by the dealers of the appellant and not by the appellant himself. The manufacture and clearance of their products is complete the moment of the goods leave the factory or other place of removal. What happens thereafter is not part of the manufacture although it may be part of the business of the appellant. Therefore, on merit, I find the appellant is not entitled to the credit of service tax or the maintenance of ADMs at their dealers premises which are beyond the place of removal. On the question of limitation, I find that the appellant cannot be alleged to have suppressed the facts, because ER-1 did not require the appellant to show dealers of credit availed on each input or input services. However, it is the responsibility of

appellant to ensure that they take credit of goods as per the law. The Central Excise Act and Rules are framed giving total authority of taking credit and clearing goods to the assessee with concomitant responsibility. While the assessee can take credit on inputs or input services, it is his equal responsibility to take credit of only such amount as it is admissible to him under the rules. When Rule 2(l) of CCR, 2004 clearly indicated that "he can take credit on inputs used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products up to the place of removal" the appellant has wrongly availed the CENVAT credit beyond the place of removal and thereby evaded Central Excise duty. In this case, the nexus between irregularly availed CENVAT credit on such input services and their intention to evade Central Excise duty is apparent from the face of the record. Therefore, I find that the extended period of limitation is invokable in this case. In conclusion, the demand for recovery of service tax availed on repair and maintenance of Automatic Dispensing Machines used at dealer premises is upheld and demand for recovery of service tax on construction of a warehouse is set aside. The demand of interest and penalty get reduced proportionately. The appeal is disposed of as herein above.

(Order pronounced on 25/10/2018 in open court)

(P. VENKATA SUBBA RAO)
MEMBER(TECHNICAL)

Lakshmi....