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

Single Member Bench

Court – I

Appeal No. E/30147/2019

(Arising out of Order-in-Original No.TTD-EXCUS-000-COM-06-18-19 dt.22.10.2018 passed by CCT, Tirupati - GST)

M/s Ultratech Cements Ltd,
Bhogasamudram Village, Tadipatri Mandal,
Anantpur, AP – 515 413 **......Appellant**

VERSUS

Commissioner of Central Tax, Tirupati- GST
Tirupati Commissionerate, West Church Compound,
MR Palli Road, Chitthoor, AP – 517 507 **......Respondent**

Appearance

Shri G. Prahlad, Advocate for the Appellant.
Shri P. Sudhakar Reddy, Authorized Representative for the Respondent.

Coram:

HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30555/2019

Date of Hearing: 16.05.2019
Date of Decision: 06.06.2019

[Order per: P.V. SUBBA RAO.]

1. The appellant herein manufactures cement and sell it to various customers. They also avail the benefit of Cenvat Credit under Cenvat Credit Rules (CCR), 2004. Cenvat Credit is available on inputs and input services which go into the manufacture of the product. Rule 2(l) of CCR, 2004 was amended from 01.03.2008 insofar as the Cenvat Credit on the Goods Transport Agency service used for outward transportation of goods is concerned. It reads as follows:

"(l) "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 upto 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 upto 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 upto the place of removal****."*

2. Prior to the amendment with effect from 01.03.2008 the words used were "outward transportation from the place of removal". In other words, the definition of 'input service' has been modified and restricted with effect from 01.03.2008. The appellant herein availed Cenvat Credit on Goods Transport Agency services provided by transporters for outward transportation of goods from their factory to the buyer's premises. It is the case of the revenue that after 2008, such Cenvat Credit is not admissible in view of the changed Rule 2(l) of CCR, 2004.

3. Learned counsel for the appellant would submit that the expression in the Rule "place of removal" has not been defined in CCR, 2004 upto 11.07.2014. Therefore, the definition given in the Central Excise Act in Section 4 applies. This reads as follows:

"Explanation - In this clause –

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(c) "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 deposited 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."

4. It is his submission that in their case, the sales are on FOR basis which means, the delivery as per contract has to be at the buyer's premises only. Therefore, the term "place of removal" as far as they are concerned, does not mean the factory gate but it means the buyer's premises. This is because the goods have to be sold from a place for it to be called as 'place of removal' and the sale is completed only when the handing over the goods

is complete which takes place at the buyer's premises. Therefore, as held by the Hon'ble Apex Court in the case of Roofit Industries [2015 (319) ELT 221 (SC)] the sale takes place only at the buyer's premises in terms of Sale of Goods Act. Until the sale is complete, the goods continue to be in their possession. The buyer's premises, being the place where the sale takes place, it should be considered as place of removal. Therefore, they are entitled to Cenvat Credit on the Goods Transport Agency services availed for transporting the goods from their factory to the buyer's premises. The lower authorities have not agreed with the argument of the appellant holding that the appellant failed to provide any documentary evidence in support of their claim that the sale to dealers takes place at the premises of the buyer. Aggrieved by the order of the lower authority, the appellant preferred an appeal before the first appellate authority who, vide the impugned order, upheld the order of the lower authority and rejected the appeal. Hence this appeal.

5. In deciding the appeal the first appellate authority relied on the judgment of the Hon'ble Apex Court in the case of CCE & ST Vs Ultratech Cement [2018-TIOL-42-SC-CX] [also reported in 2018 (9) GSTL 337 (SC)]. He held that this case is identical to the case decided by the Hon'ble Apex Court in which it has been decided that no Cenvat Credit is admissible for transport of goods to the buyer's premises.

6. Learned departmental representative relies on the aforesaid judgment of the Hon'ble Apex Court in the case of Ultratech Cement (supra) and asserts that case in the Ultratech cement is identical to this case and therefore same case law should be applied and this Tribunal being bound by the judgment of the Apex Court may reject the appeal.

7. Countering the argument, learned counsel for the appellant submits that the decision of Ultratech Cement (supra), being *Sub-silentio*, cannot be applied in the present case of the appellant. He would submit that the Hon'ble Supreme Court in the aforesaid case had proceeded on the assumption that the factory gate is place of removal without independently examining whether it is so. Hon'ble Supreme Court has not considered the applicability of the circular of the CBEC dated 23.08.2007 on the ground that

it cannot be applied to the amended CCR, 2004 effective from 01.03.2008. On the other hand, he submits that the judgment of the Hon'ble Apex Court in the case of Roofit Industries (supra), with respect to the valuation under Section 4, it has been held that where the sale takes place at the buyer's premises that will be the place of removal and all costs up to that point need to be included. Countering the argument of the learned counsel, learned departmental representative submits that the Hon'ble Apex Court in the case of Ultratech Cement (supra) considered an identical issue including the assertion by the assessee that their sales were on FOR basis and therefore, the place of removal is the buyer's premises. After considering these submissions as well as the arguments that where the sale takes place at the buyer's premises, the place of removal under Section 4 shifts to the buyer's premises, the Hon'ble Apex Court has decided against the assessee. He further submits that a Review petition was also filed against the aforesaid judgment of the Hon'ble Apex Court which was dismissed as reported in Ultratech Cement Vs Commissioner [2018 (13) GSTL J101 (SC)].

8. I have considered the arguments on both sides and perused the records. The short point to be decided is whether the appellant is entitled to the Cenvat Credit on Goods Transport Agency Services availed for transport of cement from their factory to the buyer's premises after the amendment to Rule 2(l) of CCR, 2004 w.e.f. 01.03.2008 when the credit has been restricted to the services availed for transportation upto the place of removal. This needs to be examined in the light of appellant's claim that the cement which they sell is on FOR basis and therefore, the buyer's premises should be considered as place of removal. Learned counsel submits that in the aforesaid case of Ultratech Cement, the Hon'ble Apex Court has not examined the issue of sale on FOR basis at all and therefore, the ratio of judgment should not apply. Learned departmental representative, on the other hand, asserts that facts are identical as can be seen from the judgment of the Hon'ble Supreme Court in the case of Ultratech Cement (supra) and therefore, the appeal must be decided against the appellant.

9. I have studied the judgment of the Hon'ble Apex Court in the case of Ultratech Cement (supra) Para 8 & 9 of the judgment explains that the

adjudicating authority in that case had issued an order against the assessee which was appealed against. It reads as follows:

> *"8. The aforesaid order of the Adjudicating Authority was upset by the Commissioner (Appeals) principally on the ground that the Board in its Circular dated August 23, 2007 had clarified the definition of 'place of removal' and the three conditions contained therein stood satisfied insofar as the case of the respondent is concerned, i.e. (i) regarding ownership of the goods till the delivery of the goods at the purchaser's door step; (ii) seller bearing the risk of or loss or damage to the goods during transit to the destination and; (iii) freight charges to be integral part of the price of the goods. This approach of the Commissioner (Appeals) has been approved by the CESTAT as well as by the High Court. This was the main argument advanced by the learned counsel for the respondent supporting the judgment of the High Court.*
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> *9. We are afraid that the aforesaid approach of the Courts below is clearly untenable for the following reasons:"*

10. From the aforesaid extract of the judgment of the Hon'ble Apex Court, it does not appear that the Hon'ble Apex Court was oblivious of the fact or has not considered that the sale was alleged to have taken place at the buyer's door step, the cost and risk of the transport being borne by the seller. The case in hand is identical to this case. Accepting the arguments of the assessee in the Ultratech Cement (supra), Commissioner (Appeals), CESTAT as well as the Hon'ble High Court of Karnataka held that the assessee is entitled to Cenvat Credit on the transport of goods to the buyer's premises. This decision was set aside by the Hon'ble Apex Court in the following words in Para 13.

> *"13. The upshot of the aforesaid discussion would be to hold that Cenvat Credit on goods transport agency service availed for transport of goods from place of removal to buyer's premises was not admissible to the respondent. Accordingly, this appeal is allowed, judgment of the High Court is set aside and the Order-in-Original dated August 22, 2011 of the Assessing Officer is restored."*

11. Learned counsel argues before me that the Hon'ble Apex Court has not considered the fact that the goods were being sold on FOR basis and therefore, the place of removal shifts to the buyer's premises. A plain reading of Para 8, 9 and 13 of the judgment does not show that the Hon'ble Supreme Court has not considered this factor. I, further, find that in the Ultratech Cement case the assessee has thereafter filed a Review Petition before the Hon'ble Apex Court which was dismissed with the following words:

> *"Delay condoned. The instant review petition is filed against the order dated 01.02.2018 whereby the aforementioned appeal was allowed. We have carefully gone through the review petition and the connected papers, we find no error much less apparent in the impugned order. The review petition is, accordingly, dismissed."*

12. Even if the learned counsel's argument that Hon'ble Apex Court has missed out the fact that the sale was on FOR basis while deciding the matter is accepted, it is evident that in the review petition the Hon'ble Apex Court has not only gone through the petition but also all connected papers and have reaffirmed that their earlier order was correct.

13. The facts of the case in the present appeal being identical to the case of Ultratech Cement (supra) inasmuch as the credit being claimed is on the Goods Transport Agency services availed to transport cement from the factory gate to the buyer's premises on the ground that the sale being on FOR basis, the place of removal shifts to the buyer's premises and therefore Cenvat Credit is admissible, I am legally bound to follow the ratio of the judgment of the Hon'ble Apex Court which held against the assessee that no Cenvat Credit is admissible. This position was also reviewed by the Hon'ble Apex Court and reaffirmed in the review petition. Learned counsel also sought to rely on various orders of the Tribunal. None of these prevail over the judgment of the Hon'ble Apex Court especially when the facts of the case are identical.

14. In view of the above, the appeal is rejected.

(Order pronounced in open court on 06.06.2019)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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