IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Appeal No. E/78003/2018

Arising out of Order-in-Appeal No. 647/HWH/CE/2017-18 dated 15.03.2018 passed by the Commissioner of CGST & Central Excise (Appeals-II), Kolkata.

M/s Bengal Iron Corporation.

….Appellant (s)

Vs.

Commissioner of CGST & Central Excise, Howrah.

…Respondent (s)

Appearance:
Shri Aditya Das, Advocate for the Appellant (s)
Shri S. Mukhopadhyay, Suptd. (AR) for the Respondent(s)

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)

Date of Hearing/Decision: - 03.05.2019

Order No. FO/A/75465/2019

Per Shri P. K. Choudhary:

The present appeal has been listed for admission today.

2. Notwithstanding the amount involved in the case being less than Rs.2.00 lakhs, the appellant intends to contest the issue on merits, which is admitted.

3. Since the dispute in the present appeal lies in a narrow compass, the appeal itself is taken up for hearing with the consent of both sides.

4. The Ld. Advocate appearing on behalf of the appellant company submits that the only issue in the present appeal is regarding availability of CENVAT Credit of Service Tax paid on outward transportation upto March, 2008 i.e. prior to the amendment of the definition of "input service" by Notification No. 10/2008-CE (N.T) dated 01.03.2008. The Definition of Rule 2(1) of Cenvat Credit Rules, 2004 was amended w.e.f. 01.04.2008 to substitute the phrase clearance of

final product "from the place of removal" in the said Section with the phrase "upto the place of removal."

5. The Ld. Advocate further submits that the Adjudicating Authority had confirmed the demand of Rs.1,29,191/- in the adjudication order and the Department was in appeal before the Commissioner (Appeals). The Ld. Commissioner (Appeals) allowed the appeal. Hence, the present appeal before the Tribunal.

6. The Ld. D. R. re-iterates the order of the Commissioner (Appeals).

7. Heard both sides and perused the appeal records.

8. I find that the issue of availability of CENVAT Credit paid on outward transportation upto March, 2008 i.e. prior to the amendment of the definition of "input service" under Notificaion No. 10/2008-CE (N.T) dated 01.03.2008 has been decided by the Hon'ble Supreme Court in the case of Commissioner of Customs, Central Excise & Service Tax, Guntur Vs. Andhra Sugars Limited as reported in 2018 (10) GSTL 12 (S.C)], thus :-

> "*7.Having regard to the definition of 'input service' that was prevailing at the relevant time i.e. prior to April 1, 2008, the aforesaid contention of the Department cannot be accepted. As per the said definition, service used by the manufacturer of clearance of final products 'from the place of removal' to the warehouse or customer's place etc., was exigible for Cenvat credit. This stands finally decided in Civil Appeal No. 11710 of 2016 (Commissioner of Central Excise Belgaum v. M/s. Vasavadatta Cements Ltd.) vide judgment dated January 17, 2018. The matter is squarely covered by the Board's Circular dated August 23, 2007, relevant portion whereof is as under :*
>
> *"**ISSUE :** Up to what stage a manufacturer/consignor can take credit on the service tax paid on goods transport by road?*

COMMENTS : *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-TIOL-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 8.2 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 Central Excise Act, 1944 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 Central Excise Act, 1944. 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 Central Excise Act, 1944 as also in terms of the provisions under the Sale of Goods Act, 1930) occurred at the said place."*

8.*As can be seen from the reading of the aforesaid portion of the circular, the issue was examined after keeping in mind judgments of CESTAT in Gujarat Ambuja Cement Ltd. [2017 (6) S.T.R. 249 (Tribunal)] and M/s. Ultratech Cement Ltd. [2007 (6) S.T.R. 364 (Tribunal)]. Those judgments, obviously, dealt with unamended Rule 2(l) of Rules, 2004. The three conditions which were mentioned explaining the 'place of removal' are defined in Section 4 of the Act. It is not the case of the Department that the three conditions laid down in the said Circular are not satisfied. If we accept the contention of the Department, it would nullify the effect of the word 'from' the*

> *place of removal appearing in the aforesaid definition. Once it is accepted that place of removal is the factory premises of the assessee, outward transportation 'from the said place' would clearly amount to input service. That place can be warehouse of the manufacturer or it can be customer's place if from the place of removal the goods are directly dispatched to the place of the customer. One such outbound transportation from the place of removal gets covered by the definition of input service."*

9. In view of the ratio as laid down by the Hon'ble Supreme Court, the appellant/assessee is eligible for availment of CENVAT Credit of outward transportation of goods from the place of removal to the warehouse or customer's place.

In view of the above discussions, the impugned order is set aside. The appeal filed by the appellant is allowed with consequential benefit to the appellant.

(Dictated and pronounced in the open court.)

(P. K. Choudhary)
Member (Judicial)

Tushar Kr.