IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Excise Appeal No.78330 of 2018

(Arising out of Order-in-Original No.02/Commr.(Audit)/C.Ex. & CX/Kol.II/Adjn./2018 dated 24.05.2018 passed by Commr. (Audit) of Central Tax & Central Excise, Kolkata II)

M/s Himadri Speciality Chemical Ltd.
Rubi House, 2nd Floor,
8, India Exchange Place, Kolkata-700001.

Applicant

VERSUS

CGST & Excise, Howrah
15/1, Strand Road,
Kolkata 700001.

Respondent

Appearance:

S/Shri Rajeev Agarwal & A.Damani, both C.As. for the Appellant
Shri S.S.Chattopadhyay, A.R. for the Respondent

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE SHRI BIJAY KUMAR, TECHNICAL MEMBER

FINAL ORDER NO.76381/2019

DATE OF HEARING : 07.08.2019
DATE OF DECISION : 07.08.2019

PER P.K.CHOUDHARY :

The instant appeal has been filed by the assessee against Order-in-Original dated 24.05.2018 passed by the Ld. Commissioner, Central Excise (Audit), Kolkata whereby Cenvat Credit has been disallowed on services rendered by the commission agents/stockists.

2. The facts of the case in brief are that the assessee, Himadri Speciality Chemical Limited, is engaged in the business of manufacture of coal tar pitch and allied products from coal tar by the process of distillation and is paying central excise duty on the final products. They

are availing the benefits of Cenvat credit in terms of CENVAT Credit Rules, 2004. In order to promote sales, appellant entered into agreements with various parties (referred to as 'Consignment Stockist'). Pursuant to the audit of records of the appellant, a Show Cause Notice dated 04.11.2016 was issued to the appellant wherein it was alleged that the services rendered by Consignment Stockist is not covered under the definition of 'input services' as per Rule 2(l) of the Credit Rules for the reason that the said services are not related to 'sales promotion' as required in the said Credit Rules. The said SCN culminated into adjudication order dated 24.05.2018 whereby the demand for recovery of cenvat credit amounting to Rs.3,99,07,973/- was confirmed together with applicable interest and penalty of equal amount was imposed. The appellant is in appeal before us against the said adjudication order.

3. Heard Sri Rajeev Agarwal, CA, for the appellant and Sri Sumit Mukhopadhyay, Ld.A.R. for the Revenue.

4(i). The Ld. CA for the appellant submitted that the subject contract between the appellant and the Consignment Stockist is to foster and promote sale, inform about prospective demand, distribution and sale of appellant's goods, providing warehouse facility etc. He submitted that the responsibility assigned to the Consignment Stockist is not restricted only to sale of product but also includes activities undertaken for promotion and sale of company's goods. He made the Bench go through agreement dated 01.04.2013 with Parikh & Co. as appearing in pg. no. 182 of the Appeal Paper Book, which reads as below:

> "*4. (b) The Consignment Stockist will provide good, safe and sufficient warehouse accommodation of class 1 construction for storing the products consigned to it.*
>
> *5.(b) .....The Consignment Stockist will make its best endeavour to promote, develop and extend sales of the products.*

7. The Consignment Stockist shall work diligently and faithfully to foster and promote sales of the products within territory/areas as stated above and safeguard Company's interest to the best of its ability.

8. The Consignment Stockist shall convey to the Company all information regarding demand of enquires of the product from outside its territory/area that may come to its knowledge."

He submitted that the scope of the agreement is not restricted only to sale of the goods but also various activities for sales promotion and marketing and therefore the said activity undertaken by the service providers (Consignment Stockist) clearly falls under the ambit of input service as per Rule 2(l) of Credit Rules, 2004.

4(ii). He referred to the clarifications issued by CBEC vide Circular 943/04/2011-CX dated 29.04.2011, wherein it is clarified that credit is admissible on the services of sale of dutiable goods on commission basis. He relied upon the decision of Hon'ble Punjab & Haryana High Court in the case of CCE, Ludhiana v. Ambika Overseas 2012 (25) STR 348 (P&H) wherein it has been held that commission paid to overseas agents for sale of goods is covered within the ambit of sales promotion. He further submitted that the Ld. Commissioner has raised demand on the basis of the decision of Hon'ble High Court of Gujarat in the case of CCE, Ahmadabad v. Cadila Healthcare Ltd. 2013 (30) STR 3 Guj. wherein it has been held that the services provided by selling agents are not eligible for input services since the agents were not involved in the sales promotion activity. He submitted that in their case, the Consignment Stockists are duly engaged in sales promotion, as would be evident from the clauses of the agreement. He submitted that the decision of the Hon'ble Gujarat High Court has no bearing on their case inasmuch the facts of the both cases are distinct from each other.

4(iii). He further stated that pursuant to the amendment made in Rule 2(l) of Credit Rules, vide Notification No. 02/2016-CE dated 03.02.2016, wherein Explanation has been added to clarify that sales promotion would include services by way of sale of dutiable goods on commission basis. He stated that pursuant to said amendment, even mere selling activities on commission basis will constitute input service and eligible for credit. He also submitted that the said amendment being clarificatory in nature would have retrospective application and would also be applicable for the impugned period from October 2011 to February 2016. He relied upon the decision of Ahmedabad Bench of this Tribunal in Essar Steel India Ltd. v. CCE &ST, Surat 2016 (335) ELT 660 (Tri-Ahm) wherein it has been held that Explanation inserted in Rule 2(l) of Credit Rules is declaratory in nature and thus applicable retrospectively.

4(iv). The Ld. CA also contested the demand on time bar. He submitted that the availment of credit was duly disclosed in ER-1 returns filed with the department. He stated that in the absence of any column in the return to disclose the nature of input service, the same cannot be construed to mean mala fide intention on the part of the assessee. In this regard, he relied on the decision of UltraTech Cement Ltd. v. CCE, Jaipur-II [2014 (48) taxmann.com 99 (New Delhi-CESTAT). He also contested the imposition of penalty on same counts.

5. The Ld. DR appearing for the Revenue justified the demand by placing reliance on the decision of the Hon'ble Gujarat High Court in Cadila Healthcare Ltd (Supra) wherein the credit on services provided by selling agents have been disallowed. He accordingly prayed that the appeal of the assessee be rejected.

6. Heard both sides and perused the appeal records.

7. We find that the short issue that arises for consideration is whether the appellant is entitled to avail credit on services provided by

Consignment Stockists. We have perused the subject agreement and find that apart from effecting mere sale of goods, the concerned agents are also mandated to undertake sales promotion related activities. It is specifically stated in the agreement that the Consignment Stockist will foster and promote sale, inform the appellant about demand prospects, distribution and sale of appellant's goods, arranging warehouse facility etc. It is clear that the responsibility assigned to the said Stockist is not restricted only to sale of product but also to undertake sales promotion activities. The relevant portion of the definition of 'input service', as appearing in Rule 2(l) of the Credit Rules w.e.f. 01.04.2011, is reproduced below:

> *"input service" means any service, -*
>
> *(i) used by a provider of taxable service for providing an output service; or*
>
> *(ii) used by a 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 modernisation, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or <u>sales promotion</u>, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal; but excludes services......."*

In view of the above, we observe that the services undertaken by the concerned agents for sales promotion are included in the definition of input services. We find that the very basis followed by the Ld. Commissioner to deny credit by merely relying on the Gujarat High Court decision is not correct inasmuch as the facts appearing in the said decision is clearly distinguishable with the case in hand.

We have also perused the amendment made in the definition of 'input service' whereby an Explanation has been added vide Notf. no. 2/2016-CE(NT) dtd 03.02.2016 which reads as below-

> *"Explanation. - For the purpose of this clause, sales promotion includes services by way of sale of dutiable goods on commission basis."*

We find that the issue relating to eligibility of credit on commission agent services is no longer res-integra inasmuch as this Tribunal in Essar Steel India Ltd. (Supra), as also relied by the appellant, has held that the above amendment would be applicable retrospectively and would cover cases for the past period also. The co-ordinate Bench of this Tribunal at Ahmedabad held as below:

> *"22.An explanation inserted in a Section/Rule, is generally to explain the meaning of the words contained in the Section/Rules. The purpose of explanation is to explain the meaning and intendenments of the Section/Rule. Sometimes, the explanation may be inserted to clarify a doubtful point of law, which would be effective retrospectively. In the present case, the expressions in the explanation as inserted by Notification No. 2/2016-C.E. (supra), make it clear that it is for explaining the meaning of clause "sales promotion" in the context of Rule 2(l) of the Rules, 2004. It is to provide an additional support to the dominant object of the word "sales promotion" in Rule 2(l) in order to make it meaningful and purposeful. The language of the explanation is consistent with Board Circular to the benefit of the assessee and it would be effective retrospectively. The Hon'ble Supreme Court in the case of Vatika Township Pvt. Ltd. (supra), in the identical situation, held that if a legislation confers a*

benefit on some other person or on the public generally, and where to confer such benefit appears to have been the legislature's object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect…."

Similar view has also been taken in the case of Simbhaoli Sugar Ltd. v. CCE, Meerut-II 2018 (363) ELT 1172 (Tri-All) wherein it has been held that -

"2. Cenvat credit has sought to be denied to the appellant relying on the decision of Hon'ble High Court of Gujarat in the case of Commissioner of Central Excise, Ahmedabad-II v. Cadila Healthcare Ltd. reported in 2013 (30) S.T.R. 3 (Gujarat) wherein it has been held that such commission agents are not engaged in the activity of sales promotion. The said judgment has been examined by this Tribunal in the case of Essar Steel India Ltd. v. Commissioner of Central Excise & Service Tax, Surat-I reported in 2016 (335) E.L.T. 660 (Tri.-Ahmedabad) after examining the issue of sales promotion activity, as per Section 65(19) of the Finance Act, 1994 which defines the Business Auxiliary Service. While examining the definition of Business Auxiliary Service, where the agent is engaged in either promotion or marketing or where sale of goods produced or provided by or belonging to the appellant, the Hon'ble High Court has considered the issue of sales promotion and has not considered the issue of marketing or sale of goods and this Tribunal has examined that issue in the case of Essar Steel India Ltd. (supra) wherein it has been held that the assessee is entitled to avail Cenvat credit for commission paid to the commission agent who effected the sale of goods manufactured by the appellant. Further, I find that Hon'ble High Court of Punjab & Haryana in the case of Commissioner of Central Excise, Ludhiana v. Ambika Overseas reported in 2011 (07) LCX 0196 has held that Cenvat credit on

> *service tax paid to selling agent for sale of goods is admissible as Cenvat credit. Therefore, as there are contrary judgments, in that circumstance without relying on either of the judgment of the Hon'ble High Courts, we decide the issue independently in the light of the decision of this Tribunal in the case of Maheshwari Solvent Extraction Ltd. v. Commissioner of Central Excise, Nagpur reported in 2014 (299) E.L.T. 116 (Tri.-Mumbai) wherein it has been held that if there are contrary view of the Apex Court, in that circumstance the Adjudicating Authority is independent to take any view on merits of the case. Therefore, we are taking independent view and hold that appellants are entitled to avail Cenvat credit on commission paid to the selling agent for selling the goods in terms of Rule 2(l) of the Cenvat Credit Rules, 2004.*

The aforesaid views have also been taken by this Tribunal in the following cases-

- Birla Corporation Ltd. vs. CCE Lucknow 2014 (35) STR 977 (Tri-Del)
- CCE Alwar vs. Orient Refractories Ltd (CESTAT Delhi Final Order no 50494/2019

In view of the above discussions, we agree with the submissions made by the Ld. CA that the appellant is legally eligible for credit. Further, in so far as limitation is concerned, it is not in dispute that the availment of credit was duly disclosed in ER-1 returns. The observations made by the Ld. Commissioner that the nature of credit availed was not disclosed by appellant in the return is not correct for the reason that in the absence of any column in the return requiring the assessee to disclose the nature of input service, the same cannot be construed to mean that there is a malafide intention on the part of the appellant.

This Tribunal in Ultra Tech Cement Ltd. v. CCE, Jaipur-II [2014 (48) taxmann.com 99 (New Delhi-CESTAT), has observed that -

> *"2. Without going into the merits of the case, I find that the Revenue has invoked the longer period of limitation by simplicitor observing that the appellant has not disclosed the nature of the service in respect of which credit was availed. Commissioner (Appeals) has observed that the returns filed by the appellant only shows the total amount of credit by which it cannot be inferred that credit of certain inadmissible input services was availed.*
>
> *3. However, <u>I find no justification in the above stand of the lower authorities. Admittedly, the credit was duly reflected in the returns, which were filed with the Revenue. In the absence of any column in returns requiring the nature of the input or input services, the non-disclosure of the same cannot attribute any mala fide to the assessee.</u> The Hon'ble Gujarat High Court in the case of Prolite Engineering Co. v. Union of India 1990 taxmann.com 680 has observed that non-disclosure of information, which is not required to be disclosed or recorded by statutory provisions or prescribed proforma does not amount to suppression or concealment. By applying the ratio of the above decision, I hold the demand to be barred by limitation. Accordingly, assessee's appeals are allowed."*

In view of the above, we are of the view that in absence of suppression on the part of the appellant, the impugned SCN dated 04.11.2016 issued by invoking extended period of limitation is not sustainable.

In view of above discussions, the appeal filed by the assessee succeeds both on merits as well as on limitation. The impugned order is thus set aside and the appeal is allowed with consequential relief as per law.

(Operative part of the order was pronounced in the open court)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/

(Bijay Kumar)
Member (Technical)

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