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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.75302 of 2017

(Arising out of Order-in-Appeal No.159/Kol-III/2016-17 dated 25 November 2016 passed by Commissioner(Appeals-II) of Central Excise, Kolkata.)

Commissioner of Central Excise, Kolkata-III Commissionerate
(Kendriya Utpad Shulk Bhawan (1st Floor),
180, Shantipally, Rajdanga Main Road,
Kolkata-700107.)

...Appellant

VERSUS

M/s.Texmaco UGL Rail (P) Ltd.

.....Respondent

([now known as Texmaco Hi-Tech Pvt.Ltd.],
Belgharia, Kolkata-700056.)

WITH

Excise Appeal No.75319 of 2017

(Arising out of Order-in-Appeal No.159/Kol-III/2016-17 dated 25 November 2016 passed by Commissioner(Appeals-II) of Central Excise, Kolkata.)

M/s.Texmaco UGL Rail (P) Ltd.
(Presently known as M/s.Texmaco Hi-Tech Pvt.Ltd.)
(Belgharia, Kolkata-700056, West Bengal.)

...Appellant

VERSUS

Commissioner of Central Excise, Kolkata-III Commissionerate

.....Respondent

(The Assistant Commissioner of Central Excise,
Khardah Division, Kolkata-III Commissionerate,
4, Brabourne Road, 3rd Floor,
Kolkata-70001.)

APPEARANCE

Shri A.Roy, Authorized Representative for the Appellant (s)
Shri Bhaskar Thakhar, C.A. for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI P.V. SUBBA RAO, MEMBER(TECHNICAL)

FINAL ORDER NO. 76706-76707/2019

DATE OF HEARING : 25 July 2019
DATE OF DECISION : 25 July 2019

P.K.CHOUDHARY :

The Appellant M/s. Texmaco UGL Rail Pvt. Ltd., presently known as Texmaco Hi Tech Pvt. Ltd had filed a refund application under Rule 5 of the Cenvat Credit Rules, 2004 for unutilized Cenvat credit for the period April, 2014 to June, 2014. The refund claim was filed for Rs.7,27,52,794/- in respect of various input services which remained unutilized during the period April, 2014 to June, 2014 and hence proportionate unutilized credit against export of goods made during the said period was claimed as refund as per the provisions of Rule 5 of the Cenvat Credit Rules, 2004. The Appellant further submits that out of refund claim of Rs.7,27,52,794/-, the department has allowed refund of Rs.1,75,79,982/- and balance refund of Rs.5,51,72,812/- has been rejected.

2. The Appellant has contested refund claim rejected to the tune of Rs.5,51,72, 812/- vide Excise Appeal Number 75319 of 2017 and department has challenged refund sanctioned by the lower authority to the tune of Rs.1,75,79,982/- vide Excise Appeal Number 75302 of 2017 on the sole ground that from the documentary trail it could not be established that amount was paid for renting of immovable property.

3. The Appellant argued that the manufacturing unit was set up to cater to Australian market with joint venture between Indian company Texmaco Rail and Australian Company UGL. Various process for setting up business were outsourced and hence the Appellant took various kind of input services viz. Business Auxiliary Service, Business Support Service, Clearing and forwarding service, erection commissioning and maintenance service, information technology service, renting of immovable property service, technical testing services during the set up stage of the manufacturing unit. The Appellant argued that all such input services were essential for running of business and were integral

part, indirectly and directly, relating to the manufacturing process. The Appellant further argued that these input services were for set up of business process and not related to setting of factory by way of construction activities, which was not allowed as alleged by the department. The Appellant further argued that the department in their order-in-original in the observation part had admitted that these input services were essential for running the business and are pre-condition for manufacturing final product.

4. The Appellant also argued that the show cause notice solely rejected refund application without disputing on the ground that whether credit was eligible or not. It was only in the adjudication order i.e. Order-in-Original, it was the observation of the adjudicating authority that such input services were used for the setting of factory and hence does not quality within the definition of input service as provided in Rule 2(l) of the Cenvat Credit Rules, 2004. The Appellant argued that as such denial of credit was not alleged in the Show Cause and thus the same cannot be adopted in Order-in-Original. It a settled legal position that adjudication order cannot go beyond what has been alleged in show cause notice.

5. It is not the case of the department that input services received by the Appellant have not been utilized for the manufacture of final products or whether the goods have been manufactured but not exported or whether application has been incorrectly made under Rule 5 of the Cenvat Credit Rules, 2004. The only question on the basis of which refund claim has been rejected is on the ground that input services used by the Appellant were in relation to set up of the factory which has been specifically excluded from the definition of input services as provided in Rule 2(I) of the Cenvat Credit Rules, 2004.

6. Before we take up issue on eligibility of input tax credit in respect of various services used for the set up of the factory, it is observed that in the show cause notice the refund was rejected without rejecting eligibility of input service in terms of Rule 2(l) of the

Cenvat Credit Rules, 2004. Thus, rejection of refund claim on this ground in Order-in-Original is beyond jurisdiction and bad in law. It is settled legal principle that any new findings not forming part of allegation raised in the show cause notice is legally not tenable, hence on this ground itself department have no case and appeal is allowed.

7. Having allowed this appeal on the basis of above ground, we shall like to discuss and provide our findings on department contention that input services used during factory set up, although were in relation directly or indirectly for manufacturing of final products, but this does not qualify as Input Service in terms of Rule 2(l) of the Cenvat Credit Rules, 2004.

8. Let us examine the definition of input services as it stands during two different periods i.e. prior to 28th February, 2011 and post 1st March, 2011.

Definition of Input Service Prior to 31st March, 2011 (Old Definition)

2 (l) "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 from the place of removal,

and includes services used in relation to setting up, modernisation, 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;*

Definition of Input Service Post 1st April, 2011 (New Definition)

2 (l) "Input service means any service, -

(i) used by a provider of output 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 sales promotion, 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, -

(A) service portion in the execution of a works contract and construction services including service listed under clause (b) of section 66E of the Finance Act (hereinafter referred as specified services) in so far as they are used for -

(a) construction or execution of works contract of a building or a civil structure or a part thereof; or

(b) laying of foundation or making of structures for support of capital goods,

except for the provision of one or more of the specified services; or

(B) services provided by way of renting of a motor vehicle.......”

9. On conjoint reading of above definitions, it can be observed that the substantive part in respect of eligibility of credit in respect of input service has remained the same, being used by the manufacturer, whether directly or indirectly, in relation to the manufacture of final product. It is the inclusive part wherein amendment has been made effective from 1st April, 2011 vide Notification no. 3/2011-CE (NT) dated 01.03.2011 and accordingly several exclusions have been brought in the definition of Input services, which did not exist, in the prior period. Moreover, the term “services used in relation to setting up of the factory” has been removed from the definition, being replaced by specific exclusions. Thus, based on such amendments, the department has argued that credit in respect of input services which were used for setting up of the factory shall not be allowed. Such narrow interpretation, without even considering changes made in the definition of input services shall lead to wrong conclusion.

10. We observe that the amendments have been made in the definition of input services effective from 1st April, 2011 to specifically exclude input services in forms of works contract or construction services used in relation to building or civil structure or part thereof. It also excludes similar services used for laying of foundation or making of structure for support of capital goods. Thus, the intention of legislature was to restrict input tax credits on above services, which

are used during factory set up and hence the term “setting up” was removed from the earlier definition having specific exclusion clause in the new definition.

11. The refund claim filed by the Appellant is for the period April, 2014 to June, 2014. Various kind of input services viz. Business Auxiliary Service, Business Support Service, Clearing and forwarding service, erection commissioning and maintenance service, information technology service, renting of immovable property service, technical testing services has been taken by them during the set up stage of the manufacturing unit. These services do not form part of such exclusion clause, hence they are clearly available as credit. Moreover, adjudicating authority has admitted in the impugned order that the input services on which credit has been availed were essential for running of business and a pre condition for manufacturing final product. This also goes long way in establishing the fact that these services were eligible.

12. In view of the above discussion, the appeal filed by the appellant Revenue being Excise Appeal No.75302 of 2017 is rejected and the Appeal filed by the Appellant assesee being Excise Appeal No.75319 of 2017 is allowed.

Both the appeals are disposed of in above terms.6

(Dictated and pronounced in the open Court.)

SD/

(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/

(P.V.SUBBA RAO)
MEMBER (TECHNICAL)

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