

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**

REGIONAL BENCH – COURT NO.1

Ex. Appeal No. 76981 of 2018

Arising out of Order-in-Appeal No.550/HWH/CE/2017-18 Dated 06/02/2018 passed by Commissioner of CGST & Central Excise, Appeals-II, Kolkata.

M/s. Gillanders Arbuthnot & Company Ltd.

A-1, Gillander House,
Netaji Subhas Road,
Kolkata-700001

Respondent (s)

VERSUS

Commissioner of CGST & Excise, Howrah

M. S. Building, 15/1 Strand Road,
Kolkata-700001

Appellant (s)

APPEARANCE :

Mr. Arvind Baheti, CA for the Appellant

Mr. S. S. Chattopadhyay, A. R. for the Respondent

CORAM:

HON'BLE MR. P. K. CHOUDHARY, MEMBER (JUDICIAL)

ORDER NO.FO/75109/2020

Date of Hearing : 24 December 2019

Date of Decision : 23 January 2020

PER P. K. CHOUDHARY:

Excise Appeal No. 76981 of 2018 is directed against Order-in-Appeal No. 550 dated 6 February 2018 ('OIA') upholding the demand of Rs. 32,86,580/- along with equivalent penalty and interest as adjudicated vide Order-in-Original No. 48 dated 28 October 2015 ('OIO').

1. Briefly stated the facts of the case are that the Appellant, M/s. Gillanders Arbuthnot and Company Limited (Unit – Waldies) is engaged in the manufacture of chemicals at its sole manufacturing facility at Konnagar, District – Hooghly. The Waldies Division also comprises of three depots located at Delhi, Mumbai and Coimbatore. The registered office of the Appellant at Gillander House, N.S. Road, Kolkata – 700001, is duly registered as an Input Service Distributor (ISD).
2. The Appellant operates under the Cenvat Credit Scheme and has been discharging its excise duty liability on the clearance of finished goods

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from its manufacturing facility after utilizing the Cenvat credit availed, inter alia, on input services. Pursuant to an audit of records and returns of the Appellant for the period March 2009 to December 2012, a Show-cause Notice dated 20 December 2013 was served upon the Appellant alleging irregular availment of Cenvat credit of service tax amounting to Rs. 32,86,580/- paid on outward transportation of finished goods from the factory to the buyer's/customer premises not qualifying as an input service under Rule 2(I) of the Cenvat Credit Rules ('CCR'). It was, inter alia, contended on behalf of the Appellant that the disputed credit of Rs. 32,86,580/- is not attributable to outward transportation of finished goods to the buyer's premises alone as alleged in the Notice but comprises of the following:

Sl. No.	Particulars	Amount of Credit
1	Credit availed on transportation of raw material and fuel to the factory	2,65,730/-
2	Credit availed on outward transportation of finished goods to Depot	1,80,677/-
3	Credit availed on outward transportation of finished goods to Customer/buyer's premises	3,26,055/-
4	Credit availed on input services other than GTA	3,39,673/-
5	Credit availed on ISD invoices	22,35,066/-
TOTAL		33,47,201/- **

****** Inadvertently considered as Rs. 32.86,580/- in **Annexure – I** to the Notice.

The demand proposed in the Notice was confirmed by the adjudicating authority vide 'OIO' and an appeal preferred by the Appellant against the said 'OIO' was also rejected by the Lower Appellate Authority vide the impugned order while accepting that the disputed credit did not entirely pertained to outward transportation of finished goods from factory premises to the premises of the buyer/customer but comprised of different categories as claimed by the Appellant duly supported by a C.A. Certificate dated 2 February 2018.

3. The Ld. A/R for the Appellant has assailed the 'OIA' on the following grounds:

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(a) The 'OIA' has clearly travelled beyond the scope of the Notice in so far as it seeks to deny Cenvat credit of service tax on services other than Goods Transport Agency (GTA) services availed for outward transportation of finished goods from the factory premises to the premises of the buyer being the sole allegation in the Notice. Reliance in this regard was placed upon the following decisions:

- **Commissioner of Central Excise Vs. Gas Authority of India Ltd. – 2008 (232) E.L.LT 7 (S.C.);**
- **Commissioner of Customs, Mumbai Vs. Toyo Engineering India Ltd. – 2007 (201) E.L.T. 513 (S.C.)**

(b) Credit availed on transportation of raw materials and fuel to the factory premises is an inward transportation specifically covered by the definition of input service and that payment of service tax on the underlying transportation charges was not at all in dispute, contrary to the findings in this regard in the 'OIA'. The Ld. A/R also took me through sample monthly calculation sheets and tax payment challans in support of having paid service tax on a reverse charge basis in respect of such inward transportation.

(c) Credit of service tax availed in respect of outward transportation of finished goods from the factory premises to the depots is also specifically covered by the inclusive limb of the definition of input service, as such depots also come within the ambit of place of removal in terms of Section 4(3)(c)(iii) of the Central Excise Act read with Rule 2(I) of the CCR. Payment of service tax in respect of the underlying transportation charges was not at all in dispute as against the contrary allegations in the 'OIA' and the same is also evident from the sample calculation sheets along with tax payment challans in support thereof.

(d) With respect to denial of Cenvat credit of service tax incurred on outward transportation of goods from the factory to the premises of the buyer, it is claimed that the supplies were delivered supplies and the cost of transportation stood included in the transaction value of finished goods on which excise duty was discharged. Moreover, the finished goods supplied were subject to inspection and approval at the premises of the buyer and thus, the property in goods stood transferred only at the premises of the buyer/customer in terms of

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Section 24 of the Sale of Goods Act. Therefore, the place of removal was the buyer's premises and service tax paid on outward transportation upto the place of removal was eligible for credit, drawing support from the Circulars dated 23 August 2007 and 20 October 2014 as also the following decisions.

- (i) **CC Vs. Ultratech Cement – Tax Case No. 53 of 2017 (Chhattishgarh High Court)** and the Order of the Hon'ble Supreme Court dismissing the Special Leave Petition No. 38843/2017;
- (ii) **Mangalam Cement Ltd. - Civil Appeal No. 8824 of 2019** decided by the Hon'ble Supreme Court setting aside the Order of the Hon'ble Rajasthan High Court following the contrary judgement rendered by the Hon'ble Supreme Court in Ultratech Cement reported in 2018 (2) SCC 721;

Reliance was also placed upon the **Circular No. 1065/4/2018 dated 8 June 2018** in support of their contention that in any event, the issue involved is entirely an interpretational one, capable of more than one interpretation not warranting invocation of extended period of limitation. Besides a Show-cause Notice dated 25 June 2008 stood issued to the Appellant on the self-same issue for the prior period and therefore, the subsequent Notice could not have been issued invoking the extended period by following the ratio of the decision of the **Hon'ble Supreme Court rendered in the case of Nizam Sugar Factory Vs. CCE – 2008 (9) STR 314.**

(e) Credit availed on input services other than GTA to the tune of Rs. 3,39,673/- has been denied on the purported ground that the invoices were addressed to the Head Office and such credit should have been distributed through the ISD mechanism. The Ld. A/R claims that this was entirely a procedural breach inasmuch as the invoices addressed to the Head office clearly reflected "Waldies Division" and that the question of taking credit twice over did not arise as the Appellant had only one factory within the Waldies Division drawing support from the decision of the Hon'ble Tribunal in

Parekh Plast (India) Pvt. Ltd. Vs. CCE, Vapi reported in 2012 (25) STR 46 (Tri. – Ahmd).

(f) Credit of service tax of Rs. 22,35,066/- availed on the strength of ISD invoices is sought to be denied on the purported ground that the same reflected the recipient of such credit as the "Waldies Division" without any particulars of the factory premises where the credit has actually been availed. The Ld. A/R submits that there was only one factory within the "Waldies Division" i.e. the Waldies Unit and therefore, non-reflection of the factory particulars of the Waldies Unit was a curable procedural defect and that the substantive benefit of Cenvat should not be denied for such procedural breach by relying upon the following decisions:

- (i) **M/s. Hindustan Unilever Ltd. Vs. CCE & ST, Kanpur – 2017 (3) TMI 867 – CESTAT Allahabad;**
- (ii) **M/s. POBC (Division of Patel Integrated Logistics Ltd.) Vs. Commissioner of CGST, Mumbai West – 2019 (2) TMI 5784 – CESTAT Mumbai**

4. The Ld. D/R invites attention to the decision of the Hon'ble Supreme Court in the case of CCE Vs. Ultratech Cement – 2018 (9) GSTL 337 to contend that on merits the issue as regards eligibility of Cenvat credit of service tax paid on outward transportation of finished goods from the factory to the buyer's premises has already been decided against the assessee and in favour of the revenue. In respect of denial of credit on other grounds, the Id. D/R supports and re-iterates the findings in the 'OIA'.

5. Heard both sides and perused the appeal records.

6. I find that the Notice proceeds on the basis that the alleged irregular credit of Rs. 32,86,580/- pertains entirely in respect of service tax paid on outward transportation of finished goods from the factory to the buyer's premises. However, the 'OIA' has accepted that the Cenvat credit involved on this score is confined to Rs. 3,26,055/- only and that rest of the disputed credit relates to four other issues. The break-up of the disputed credit involved in each of these issues are duly supported by a certificate dated 7 February 2018 from an independent Chartered Accountant and the same has not been disputed in the OIA. Therefore, there is considerable force in the contention of the Appellant that the denial of credit in respect of the other four issues was clearly beyond the scope of the Notice, which

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lays the foundation for any proceeding and an altogether new case could not have been made out at the appellate stage being violative of the principles of natural justice. As regards the issue of eligibility of Cenvat credit of service tax paid on outward transportation from the factory to the buyer's premises is concerned, I find that the interpretation as to the place of removal extending to the buyer's premises was very much prevalent in the field prior to the contrary decision of the Hon'ble Supreme Court in Ultratech case cited (supra) by the revenue. One such decision rendered in Tax Case No. 53 of 2017 by the Chhattisgarh High Court was also endorsed by the Hon'ble Supreme Court by dismissing the Special Leave Petition filed by the revenue, albeit in limine. Even after the decision rendered by the Hon'ble Supreme Court against the assessee in Ultratech case, another Bench of the Hon'ble Supreme Court in a later decision rendered in Mangalam Cement's case cited (supra) has remanded the matter back to the Hon'ble Rajasthan High Court to consider whether the place of removal could be the buyer's place. Suffice it to say that the issue involved is clearly an interpretational one and the Board Circular dated 8 June 2018 also acknowledges the same. The period involved in the present proceeding is also prior to the contrary interpretation rendered in Ultratech case (supra) denying such credit. It also cannot be said that the department was not aware of the factum of the Appellant taking Cenvat credit of service tax on outward transportation of finished goods to buyer's premises having served a Notice dated 25 June 2008 for the prior period. Therefore, I am inclined to take a view that the extended period is clearly not available to the revenue. Consequently, invocation of the extended period and the imposition of penalty under Section 11AC is set aside. The demand on this aspect has to be confined to the normal period of limitation alone. Since the Notice was served on 26 December 2013, the demand for the period December 2012 aggregating Rs. 7,727/- as per the C.A. certificate is upheld along with interest thereon.

7. The demand confirmed on account of the other four issues is even otherwise unsustainable, as discussed hereinafter. In so far as the credit of service tax on inward transportation of inputs to the factory premises and outward transportation of finished goods upto the depots are concerned, I am in agreement with the contentions of the Appellant that these are specifically covered by the inclusive limb of the definition of input service as contained in Rule 2(I) of the CCR. The sample monthly

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calculation sheets and tax payment challans clearly refute the findings in the 'OIA' as regards lack of any evidence as to payment of service tax on GTA services. Besides, such finding in the 'OIA' also turns the entire edifice of the Notice upside down as payment of service tax in respect of the services on which credit stood availed was not at all the subject matter of any dispute. In so far as the denial of credit on invoices addressed to the Head Office is concerned, I find that such invoices were addressed to "Waldies Division" and given that the Appellant had only one factory in the "Waldies Division", denial of such credit is unjustifiable by following the decision rendered in Parekh Plast (India) case (supra). In so far as the ISD invoices are concerned, such invoices clearly reflected that the credit was being distributed to the Waldies Division and therefore non reflection of the factory address is only a curable procedural defect not warranting denial of the substantive benefit of cenvat credit, by following the precedent decisions cited by the appellant.

8. Therefore, the impugned 'OIA' is liable to be set aside and I do so. The Appeal is allowed on above terms, with consequential relief, if any.

(Pronounced in open Court on 23 January 2020.)

Sd/-

(P. K. Choudhary)

Member (Judicial)

Pooja