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

REGIONAL BENCH – COURT NO.2

S.Tax Appeal No.174 of 2010

(Arising out of Order-in-Appeal No.15-16/HAL/2010 dated 16.02.2010 passed by Commr. of Service Tax (Appeals), Kolkata)

M/s Lumino Industries Ltd.
Bipparnapara, Jalan Industrial Complex, 1 No.Gate,P.S.Domjur, Junglepur , Howrah -711411

Appellant

VERSUS

Commr. of Service Tax, Haldia
15/1 Strand Road, Kolkata-700001

Respondent

APPERANCE :

None for the Appellant
Shri S.S.Chattopadhyay, Authorized Representative for the Respondent

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

FINAL ORDER NO…75423/2020

DATE OF HEARING : 29.01.2020
DATE OF PRONOUNCEMENT : 01.10.2020

PER P.K.CHOUDHARY :

The instant appeal has been filed by the assessee, M/s. Lumino Industries Limited, against disallowance of Cenvat credit of service tax paid on outward transportation services from factory to customer's premises vide Order-in-Appeal dated 22.02.2010 passed by the Ld. Commissioner (Appeals), Kolkata, for the period in dispute i.e from January 2005 to December 2007.

2. The Tribunal vide Final Order dated 01.0.2012 allowed the appeal by relying upon the decision of the Hon'ble Karnataka High Court in the case of CCE, LTU vs. ABB Ltd 2011 (23) STR 97 (Kar.) wherein it has been held that assessee is eligible to avail credit on outward

transportation services in terms of the definition of 'input service' as appearing in the CENVAT Credit Rules prior to amendment made on 01.04.2008.

3. Against the aforesaid order of the Tribunal, the Revenue preferred an appeal before the Hon'ble Calcutta High Court. Vide Order dated 27.11.2013 , the Hon'ble Calcutta High Court while disagreeing with the Karnataka High Court's decision (Supra) remanded the matter to the Tribunal for deciding the matter afresh. Hence, the instant appeal is before us for reconsideration.

4. None appeared on behalf of the appellant assessee. Sri S. S. Chattopadhyay, Ld.A.R. appeared for the Revenue.

5. We find that in identical matter in the case of CCE, Kolkata vs. Vesuvious India Ltd 2014 (34) STR 26 (Cal), the issue was decided against the assessee. The said decision was further carried in appeal before the Hon'ble Supreme Court which has settled the issue in favour of the assessee. In the said decision dated 17.01.2018, while deciding the batch of appeals filed by Department as well as assessees, reported as CCE vs. Vasavadatta Cements Ltd 2018 (11) GSTL 3 (SC), the Apex Court has inter-alia held that the assessee is legally eligible to avail credit on outward transportation availed from place of removal upto a certain point, whether it is a depot or customer's premises. The relevant portion of the decision is reproduced below:-

> *"4. We may make it clear that in the instant appeals, we are concerned with the first part of the definition. Insofar as second part is concerned, certain contentions, which have been raised by some of the assessees, have been rejected and that aspect is decided in favour of the Department. Since these appeals are filed by the Department questioning the interpretation that is given by the CESTAT as well as the High Court in respect of first part, we are not making any comments insofar as judgment of the CESTAT pertaining to second part is concerned.*
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> *5. Coming back to the first part of the definition as to what input service means, the Full Bench of the CESTAT held that all input services which are used by the manufacturer, whether directly or indirectly, in or in relation to manufacture of final products and clearance of final products from the place of removal are concerned, they are treated as input services and Cenvat credit in respect of expenditure incurred in relation to such services would*

be admissible. The expression with which the CESTAT was concerned, and which was the subject matter of discussion, was as to what would be the meaning of "from the place of removal". Obviously, any input service given for clearance of the final products "from the place of removal" and tax paid thereon the Cenvat credit has to be given. The question is from the place of removal up to what place. The assessees had claimed the tax paid on the transportation of final products from the place of removal (i.e. the place of manufacture) to either the place to their respective depots or transport upto the place of the customers, if from the place of removal the goods were directly delivered at customers place. It is made clear that only first set of transportation from the place of removal was claimed. To put it otherwise, in those cases where the tax paid on transportation on the goods from the place of removal upto the place of depot only that was claimed and if there was any such tax again paid from the place of depot to the place of customers, the Cenvat credit thereof was not claimed and there is no dispute about it.

6. The aforesaid approach of the Full Bench of the CESTAT, as affirmed by the High Court, appears to be perfectly correct and we do not find any error therein. For the sake of convenience, we would like to reproduce the following discussion contained in the judgment of the High Court.

"30. The definition of 'input service' contains both the word 'means' and 'includes', but not 'means and includes'. The portion of the definition to which the word means applies has to be construed restrictively as it is exhaustive. However, the portion of the definition to which the word includes applies has to be construed liberally as it is extensive. The exhaustive portion of the definition of 'input service' deals with service used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products. It also includes clearance of final products from the place of removal. Therefore, services received or rendered by the manufacturer from the place of removal till it reaches its destination falls within the definition of input service. What are the services that normally a manufacturer would render to a customer from the place of removal? They may be packing, loading, unloading, transportation, delivery, etc. Though the word transportation is not specifically used in the said section in the context in which the phrase 'clearance of final products from the place of removal' is used, it includes the transportation charges. Because, after the final products has reached the place of removal, to clear the final products nothing more needs to be done, except transporting the said final products to the ultimate destination i.e. the customer's/buyer of the said product, apart from attending to certain ancillary services as mentioned above which ensures proper delivery of the finished product upto the customer. Therefore, all such services rendered by the manufacturer are included in the definition of 'input

service'. However, as the legislature has chosen to use the word 'means' in this portion of the definition, it has to be construed strictly and in a restrictive manner. After defining the 'input service' used by the manufacturer in a restrictive manner, in the later portion of the definition, the legislature has used the word 'includes'. Therefore, the later portion of the definition has to be construed liberally. Specifically what are the services which fall within the definition of 'input service' has been clearly set out in that portion of the definition. Thereafter, the words 'activities relating to business' - an omni-bus phrase is used to expand the meaning of the word 'input service'. However, after using the omni-bus phrase, examples are given. It also includes transportation. The words used are (a) inward transportation of inputs or capital goods (b) outward transportation upto the place of removal. While dealing with inward transportation, they have specifically used the words 'inputs' or 'capital goods'. But, while dealing with outward transportation those two words are conspicuously missing. The reason being, after inward transportation of inputs or capital goods into the factory premises, if a final product emerges, that final product has to be transported from the factory premises till the godown before it is removed for being delivered to the customer. Therefore, 'input service' includes not only the inward transportation of inputs or capital goods but also includes outward transportation of the final product upto the place of removal. Therefore, in the later portion of the definition, an outer limit is prescribed for outward transportation, i.e., up to the place of removal.

7. As mentioned above, the expression used in the aforesaid Rule is "from the place of removal". It has to be from the place of removal upto a certain point. Therefore, tax paid on the transportation of the final product from the place of removal upto the first point, whether it is depot or the customer, has to be allowed.

8. Our view gets support from the amendment which has been carried out by the rule making authority w.e.f. 1-4-2008 vide Notification No. 10/2008-C.E. (N.T.), dated 1-3-2008 whereby the aforesaid expression "from the place of removal" is substituted by "upto the place of removal". Thus from 1-4-2008, with the aforesaid amendment, the Cenvat credit is available only upto the place of removal whereas as per the amended Rule from the place of removal which has to be upto either the place of depot or the place of customer, as the case may be. This aspect has also been noted by the High Court in the impugned judgment in the following manner :

"However, the interpretation placed by us on the words 'clearance of final products from the place of removal' and the subsequent amendment by Notification 10/2008-C.E. (N.T.), dated 1-3-2008 substituting the word 'from' in the said phrase in place of 'upto'

> *makes it clear that transportation charges were included in the phrase 'clearance from the place of removal' upto the date of the said substitution and it cannot be included within the phrase 'activities relating to business'."*
>
> *9. In view of the aforesaid discussion we hold that the appeals are bereft of any merit and are accordingly dismissed........."*

6. In the instant case, the availment of credit on outward transportation from factory gate to customer's place pertains to period prior to April 2008 i.e. prior to period when the definition of input service was amended. Since the credit eligibility finally stands decided by the Apex Court in favour of assessee, the impugned adjudication order is liable to be set aside.

7. Accordingly, the appeal filed by the assessee is allowed with consequential relief as per law.

(Pronounced in the open court on **01.10.2020**)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/
(P.V.Subba Rao)
Member (Technical)

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