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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.70450 of 2013

(Arising out of Order-in-Original No.05/Commr/2013 dated 31.01.2013 passed by Commissioner of Central Excise & Service Tax, Jamshedpur.)

M/s. Tinplate Company of India Limited
(Golmuri, Jamshedpur-831003.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Jamshedpur
.....Respondent
(143, New Baradwari, Sakchi, Jamshedpur-831001.)

APPEARANCE

Dr.Samir Chakraborty, Senior Advocate & Shri Abhijit Biswas, Advocate for the Appellant (s)
Shri T.Mondal, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO. 75647/2020

DATE OF HEARING : 14 October 2020
DATE OF DECISION : 14 October 2020

P.K.CHOUDHARY :

This appeal is against the Order-in-Original dated March 31, 2013 passed by the Commissioner of Central Excise & Service Tax, Jamshedpur disallowing Cenvat credit of service tax of Rs.62,27,334.25 availed on input services relating to export of goods to Nepal upto and at the port, airport and land border Customs station by the appellant during the period June 2006 to March 2011 and ordering recovery under the Proviso to Section 11A(i)/11A(4) of the Central Excise Act, 1944 ("the Act") read with Rule 14 of the Central Credit Rules, 2004 ("Cenvat Credit Rules"), along with interest under Rule 14 of the Cenvat Credit Rules read with Section 11AB/11AA of the

Act. Penalty of Rs.62,27,334.25 has also been imposed upon the appellant in terms of Rule 15(2) of the Cenvat Credit Rules read with Section 11AC of the Act.

2. The brief facts leading to the passing of the impugned order are as under:

(a) The appellant during the material period manufactured and exported C.R.Coils, Electrolytic Tin Plates, Tin-free Steel, Lacquered Sheets, Ferrous Waste & Scrap and Miscellaneous Scrap (hereinafter referred to as the “said goods”) falling under Chapter 72 of the First Schedule of the Central Excise Tariff Act, 1985.

(b) In the course of such export under contracts entered into on FOB basis, the appellant availed services included those pertaining to airline handling, documentation, freight handling, terminal handling, clearing, licence verification, export and consultancy services on commission basis, commission paid to different parties for handling the goods in the port area, loading, unloading, storage and transportation of the said goods, container stuffing and destuffing, warehouse usage, wharfage, container handling, security by watchman, inspection of goods at the port of export, container fumigation, supervision of discharge, delivery and cargo reception (hereinafter referred to as the “said services”) and paid service tax on the charges incurred for such services.

(c) Taking the port/airport/land customs station as the “place of removal”, the appellant availed credit of the service tax paid in respect of the said services rendered till shipment, as “input service”, under the Cenvat Credit Rules.

(d) On April 17, 2012 a Show Cause Notice was issued by the Commissioner alleging that the appellant had availed irregular and inadmissible Cenvat Credit amounting to Rs.62,27,334.25 (including education cess, secondary and higher secondary cess) of the service tax paid on the said services since they were rendered beyond the place of removal, i.e., the factory gate and therefore the said services were not "input services" within the meaning of Rule 2(l) of the Cenvat Credit Rules. Invoking the extended period of limitation, upon alleging wilful suppression of fact, misstatement and contravention of the provisions of Rules 3 and 9 of the Cenvat Credit Rules knowingly with intent to evade payment of duty/tax, the show cause notice proposed disallowance and consequent recovery of the said cenvat credit amount of Rs.62,27,334.25 along with interest thereon, in terms of Rule 14 of the Cenvat Credit Rules read with Section 11A(1)/(4) and Section 11AB respectively of the Act and imposition of penalty upon the appellant under Rule 15 of the Cenvat Credit Rules read with Section 11AC of the Act.

(e) On filing of reply by the appellant, the Commissioner adjudicated the case and passed the impugned order. Besides upholding the allegations in the show cause notice, the Commissioner also held that the said services were not used in relation to the manufacture of excisable goods, being not integrally connected with the manufacture of final products by the appellant in its factory and therefore, for this reason also, were ineligible to be "input services" as per Rule 2(l) of the Cenvat Credit Rules.

(f) Being aggrieved the appellant has preferred the instant appeal.

3. We have heard Dr. Samir Chakraborty, Senior Advocate on behalf of the appellant and Shri T. Mondal, learned Authorized Representative on behalf of the Department and have carefully perused the documents on record.

4. The issues involved in the instant case are:

(I) Whether the said services were rendered “upto the place of removal” within the meaning of Rule 2(l) of the Cenvat Credit Rules and thus qualified to be “input services” eligible to cenvat credit of the tax paid thereon under the Cenvat Credit Rules?

(II) Whether the said services satisfied the requirement of Rule 2(l)(ii) of the Cenvat Credit Rules of being directly or indirectly used in or in relation to the manufacture of final products and clearance of the said final products from/upto the place of removal during the said period and/or satisfied the requirement of the inclusive part of the definition of “input services” in Rule 2(l), being activities relating to the business of manufacture of the final products and clearance thereof by the appellant from/upto the place of removal, during the said period.

5. It has been contended by the learned Senior Counsel on behalf of the appellant that:

(a) It is now settled that in case of export of goods, the place of removal gets extended to the place where the export documents are presented to the Customs Office i.e. the port of shipment or the airport or the land customs station, as the case may be. Hence, the said services qualified as “input services” eligible to cenvat credit under the Cenvat Credit Rules and the appellant had correctly availed the credit of the tax paid thereon. Reliance was placed on the following decisions, besides the CBEC Circular No. 999/6/2015-CX dated 28.02.2015:

(i) Electrosteel Castings Limited Vs. Commissioner of Central Excise, 2020-TIOL-1172-CESTAT-KOL.

(ii) Commissioner Vs. Dynamic Industries Limited, 2014 (307) ELT 15 (Guj)

(iii) Honest Bio-vet Pvt. Ltd. Vs. Commissioner of C.Ex., 2014 (310) ELT 526 (T-LB), para-13

(iv) Commissioner of C.Ex. Vs. Bhilai Engineering Corporation Ltd., 2016 (41) STR 774 (T)

(v) Save Industries Vs. Commissioner of C.Ex.&ST, 2016 (45) STR 551 (T).

(b) Each of the services involved are activities integrally connected with the business of manufacture and clearance of excisable goods for export by the appellant from its factory at Jamshedpur upto the place of removal thereof as envisaged under Rule 2(l) of the Cenvat Credit Rules. The said services are also undisputedly services used in relation to the business of manufacture of the said goods, directly or indirectly. Hence, all the said services qualify as “input service” as defined in Rule 2(l) of the Cenvat Credit Rules. Contrary finding of the Commissioner is erroneous and based on misinterpretation of the definition of input service as contained in Rule 2(l) of the Cenvat Credit Rules and has been passed by ignoring the aforesaid binding decisions of Courts and Tribunal and is, thus, untenable and unsustainable. In support of this, reliance has been placed upon the following decisions:-

(i) Commissioner of Central Excise Vs. Ultratech Cement Limited, 2010 (260) ELT 369 (Bom)

(ii) JSW Steel Limited Vs. Commissioner of Central Excise, 2012 (281) ELT 582 (T)

(iii) Birla Corporation Limited Vs. Commissioner of C.Ex., 2013 (288) ELT 427 (T).

(c) Further and in any event the show cause notice and the purported demand contained therein, pertaining to the period from October 1, 2006 to September 30, 2010, amounting to Rs. 56,31,663/-, is barred by limitation, the show cause notice having been issued beyond the prescribed period of one year as contained in Section 11A(1) of the Act. Contrary to the incorrect finding in the impugned order, the extended period of limitation contained in the Proviso to Section 11A(1) of the Act is inapplicable in the facts and circumstances of the instant case. It is an undisputed fact that the appellant had rendered export of the subject goods under the supervision of the jurisdictional Central Excise officers, who put their respective signatures by sealing the export goods. The appellant also duly maintained all records of the export activities, including the expenses incurred. The various services rendered by the appellant were within the full knowledge of the Department. There was no concealment or misstatement of any fact on the part of the appellant. No material has been disclosed in the impugned order as required in terms of the settled principles in this regard to establish that the requirement as laid down in the Proviso to Section 11A(1) of the Act has been satisfied. In absence of such material/evidence being disclosed either in the show cause notice or in the said order, it is settled law that burden is cast upon the Department in this regard. Such onus has not been satisfied and as such there can be no invocation of the extended period of limitation specified in the Proviso to Section 11A(1) of the Act. None of the purported reasons alleged in the show cause notice or held in the said order satisfy the requirement of law as settled by the Apex Court.

6. Shri T. Mondal, learned Authorized Representative reiterates the findings of the Commissioner and submits that the impugned order has been correctly passed.

7. Heard both the sides through video conferencing and perused the appeal records.

8. During the material period the definition of "input service", as in Rule 2(l) of the Cenvat Credit Rules, was as follows:

> *"input service" means any service, -*
>
> *(i) used by a provider of taxable service for providing an output service, or*
>
> *(ii) used by the 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 setting up, modernization, 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."*

9. In the instant case the documents on record evidences that the subject goods were exported under bond by the appellant on FOB basis. Further, all the said services were and had to be rendered and/or availed at or prior to the port of shipment premises. None of these services were or can be rendered after the said goods are removed from the port. They have to be rendered before the vessels containing the subject goods left the port, from where the removal of

the said goods took place. In case of export consignments ownership transfer takes place through Bill of Lading and hence the exporter continues to be owner and holds the title to the goods till the respective export consignment is handed over to master of the vessel and goods are loaded on board the vessel and that all services rendered prior thereto were services upto the place of removal within the meaning of Rule 2(l)(ii) of the Cenvat Credit Rules.

10. We find that this issue is no longer *res integra*.

10.1 In the case of M/s Electrosteel Casting Ltd. Vs. Commissioner of Central Excise, Kolkata, 2020-TIOL-1172-CESTAT-KOL, involving CHA, port and steamer agent services rendered at the export port on which cenvat credit was availed as "input service", this Bench of the Tribunal, following the decision of the Hon'ble Gujarat High Court in the case of Commr. of Central Excise Vs. Inductotherm India Pvt. Ltd., 2014-TIOL-2678-HC-AHM-ST, it has been held as follows:

> "*10. There is no dispute about the fact that the goods have been exported. In such cases the place of removal is the port where the export of goods is loaded on to the vessel. Inspite of the same, the Adjudicating Authority has denied such credit. We note that Hon'ble High Court of Gujarat in the case of Inductotherm India Pvt. Ltd. (supra) has granted the credit of CENVAT Credit for Cargo Handling Services used for clearance of final product from the port for export. The Hon'ble High Court observed that:*
>
> > *"22. The question that begs the decision is as to whether cargo handling services can be said to have been used in or in relation to manufacture and clearance of final product upto the place of removal, which is port. Admittedly, there is no express inclusion of cargo handling service in the definition of 'input service'. However, in light of the decisions rendered in this area, such interpretation can be made holding that in case of export of final product, place of removal would be port of shipment and not factory gate and therefore, the manufacturer would be*

> *entitled to avail the amount claimed towards cargo handling as 'input service' under the Cenvat Credit Rules."*
>
> *11. Even though, the Hon'ble High Court has held that with regard to 'Cargo Handling service', we find that the same ratio will be applicable to all three services which are in dispute before us since, all of them have been rendered in the port of export of goods.*
>
> *12. By following the decision of the Hon'ble High Court, we conclude that the appellant will be entitled to CENVAT Credit. Accordingly, the impugned orders are set aside and appeals are allowed*."

10.2 In the case of Commissioner Vs. Dynamic Industries Ltd., 2014 (307) ELT 15 (Guj), also the Hon'ble Gujarat High Court has held that where exports are on FOB basis, place of removal is the port and not factory gate and hence since the impugned CHA, shipping agent and container services were utilised for purposes of export of final products and exporters could not do business without them, the service tax paid on these services availed was admissible. It has been further held that the words "input services" cannot be given restrictive meaning in view of the phrase "means….. and includes" used in Rule 2(l) of the Cenvat Credit Rules.

10.3 The view taken in the aforesaid decisions is also the view and instruction of CBEC, as communicated by its Circular No. 999/6/2015-CX dated February 28, 2015. In para 6 of the Circular it has been observed as follows:

> "*6. In the case of clearance of goods for export by manufacturer exporter, shipping bill is filed by the manufacturer exporter and goods are handed over to the shipping line. After Let Export Order is issued, it is the responsibility of the shipping line to ship the goods to the foreign buyer with the exporter having no control over the goods. In such a situation, transfer of property can be said to have taken place at the port where the shipping bill is filed by the manufacturer*

exporter and place of removal would be this Port/ICD/CFS. Needless to say, eligibility to CENVAT Credit shall be determined accordingly."

10.4 The facts in the abovestated cases and the instant case are similar, except that herein there are several other services, all rendered in the port of export of the final products. Hence the ratio laid down in the above decisions are fully applicable to the instant case. Therefore respectfully following the said decisions we hold that the appellant is entitled to the cenvat credit of the said services as "input service" within the meaning of Rule 2(l)(ii) of the Cenvat Credit Rules.

10.5 We also agree with the contention of the appellant that the said services are integrally connected with the business of manufacture and clearance of excisable goods for export by the appellant. This has also been noted by the Hon'ble Gujarat High Court in *Dynamic Industries Ltd*.'s case (supra). Hence the said services are also covered by the inclusive part of Rule 2(l) of the Cenvat Credit Rules, as in force during the material period.

10.6 Both the reasonings of the Commissioner in the impugned order are therefore unsustainable. The appellant has correctly availed of credit of the subject input services.

11. Accordingly the impugned order dated 31.01.2013 passed by the Commissioner is set aside and the appeal is allowed.

(Operative part of the order was pronounced in the open Court.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/
(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

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