IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO. IV

Appeal No. E/87937 & 87939/2017

(Arising out of Order-in-Appeal No. MMK/05/RGD/APP/2017 dated 24.08.2017 passed by the Commissioner of Central Excise & Service Tax (Appeals), Raigad).

M/s Ved PMC Ltd.	Appellant

Vs.

Commissioner of Central Excise, Belapur	Respondent

Appearance:

Shri S.S. Gupta, C.A.	for Appellant

Shri M.R. Melvin, Supdt. (AR) Shri N.N. Prabhudesai, Supdt. (AR)	for Respondent

CORAM:

HON'BLE SHRI RAMESH NAIR, MEMBER (JUDICIAL)

Date of Hearing: 02.05.2018

Date of Decision: 02.05.2018

ORDER NO. **A/86338-86339/2018**

Per: Ramesh Nair

The issue involved in the present case is that whether appellant is entitled for CENVAT Credit in respect of outward transportation during the period April, 2011 to March, 2016.

2. Shri S.S. Gupta, learned C.A. appearing on behalf of the appellant fairly concedes that as per the Hon'ble Supreme Court judgment in the case of *Ultratech Cement Ltd – 2018 (9) GSTL 337*

(SC) the issue is settled against the assessee. He submits that the demand is not sustainable on the ground that CENVAT Credit taken in respect of GTA only to the extent of 25% of the total gross value of transportation, which was paid by them, whereas 100% of GTA was added in the assessable value of the final product on which excess duty was paid. This amounts to reversal of credit availed in respect of outward GTA. Therefore, as a result of this exercise there is revenue neutral. Hence, the demand is not sustainable. He submits that the demand for extended period is time barred for the reason that during the relevant period prior to judgment in the case of *Ultratech Cement Ltd. (supra),* Board Circular No. 97/8/2007-ST dated 23.8.2007 was prevailing. In terms of Board's Circular, the credit on outward transportation was available subject to condition that if the freight is included in the value of final product and the same is FOR, it means the delivery is made at the customer's place and the seller bears the risk of loss or damage of the goods. He submits that in fact the sale of goods and its transportation was included in the total sale value. Therefore, the risk of loss or damage was on account of the appellant. Since the same is on FOR basis, the sale is at buyer's place. Therefore, in terms of Board's Circular, they were entitled for the CENVAT Credit on outward transportation. Since they acted upon the Board's Circular, there cannot be any *mala fide* intention. Therefore, the extended period was not invocable.

3. Shri M.R. Melvin and Shri N.N. Prabhudesai, learned Superintendents (AR) are appeared for the Revenue. Shri Prabhudesai submits that the extended period was rightly invocable for the reason that the appellant did not disclose to the

department regarding the fact that they are availing CENVAT Credit in respect of outward transportation, which they were not entitled and the wrong availement of credit was detected by Audit and before that, it was not disclosed by the department. Therefore, it is clear suppression of the fact on part of the appellant. Hence, demand for extended period is legal and correct, which need not to be disturbed.

3.1 He submits that the Circular was not correctly interpreted for the reason that w.e.f. 1.4.2008 definition of input service was amended whereby the term for 'place of removal' was changed 'upto place of removal'. Therefore, thereafter there is no question of any bona fide belief of the appellant. Hence, the demand is not time barred.

4. I have carefully considered the submissions made by both sides. I find that during the relevant period, there was a clarification of Board vide Circular No. 97/8/2007-ST dated 23.8.2007, according to which the credit on outward transportation was allowed when the following criteria are fulfilled: -

> *(i) the ownership of goods and the property in the goods remained with the seller of the goods till the delivery of the goods in acceptable condition to the purchaser at his door step;*
>
> *(ii) the seller bore the risk of loss of or damage to the goods during transit to the destination; and*
>
> *(iii) the freight charges were an integral part of the price of goods. In such cases, the credit of the service tax paid on the transportation up to such place of sale would be admissible if it can be established by the claimant of such credit that the sale and the transfer of property in goods (in terms of the definition as under Section 2 of the Central Excise Act, 1944 as also in terms of the provisions under the Sale of Goods Act, 1930) occurred at the said place.*

From the reading of the above Circular, it is clear that terms ‘place of removal’ was interpreted and it was clarified that if sale of goods is on FOR basis that is upto the destination of the purchaser, the risk upto the place of delivery was borne by the supplier and the freight charges were integral part of the price of goods. Therefore, the place of removal of goods shall be the destination of the buyer of the goods. As per the facts of the present case, the sale is undisputedly on FOR basis as transportation charges is included in the assessable value of the goods, which is seen from the purchase order. Since it is on FOR basis the risk upto the place of removal was borne by the purchaser. Therefore, looking all the three criteria required by Board, the place of removal is at buyer’s place. Therefore, in terms of the circular, appellant was very much entitled for the CENVAT Credit. However, the Hon'ble Supreme Court in the case of *Ultratech Cement Ltd. (supra)* held otherwise and negated the clarification of the Board. In these circumstances, it cannot be said that the appellant had any mala fide intention. In fact appellant have acted and followed according to the Board’s Circular, therefore, credit taken by them at that time was correct and legal. Therefore, the extended period was not invocable. Accordingly, the demand for the extended period is not sustainable, hence the same is set aside. Demand for the normal period in respect of both the show-cause notices is upheld.

4.1 As per my above discussion, since appellant did not have any mala fide intention, penalty imposed under Section 11AC is also not sustainable. Hence, the penalty imposed under Section 11AC for the entire period is set aside.

4.2 As regards the submissions made by the learned C.A. that since 100% of transportation charges included in the assessable value of the final product, the CENVAT Credit taken over and above the amount on 25% of transportation charges stands reversed, I do not agree with this submission for the reason that assessment of the final product attained finality. There is no dispute raised either by the assessee or by the Revenue. Therefore, once the assessment attained finality, no benefit can be taken from the final assessed position of the final product for the purpose of adjustment of separate credit taken on outward transportation.

5. As per my above discussions, the impugned orders stand modified to the above extent. The appeal is partly allowed.

(Dictated and pronounced in Court)

(Ramesh Nair)
Member (Judicial)

Sinha