

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, WEST ZONAL BENCH AT MUMBAI**

Appeal No. E/85637/18

(Arising out of Order-in-Appeal No. GOA-EXCUS-000-APP-104-2017-18 dated 25.09.2017 passed by Commissioner of CGST & Customs (Appeals), Goa)

Dura Line India Pvt. Ltd.

Appellant

Vs.

**Commissioner of CGST & Customs
Goa**

Respondent

Appearance:

Ms. Anjali Hirawat, Advocate
Shri A.B. Kulgod, Asst. Commr (AR)

for appellant
for respondent

CORAM:

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing & Decision: 22.05.2018

FINAL ORDER NO : A/86806/2018

Per: Sanjiv Srivastava

The issue in the appeal is in respect of admissibility of CENVAT credit availed in respect of services provided by the over-seas commission agent including the services of sales promotion by the appellant.

2. The matter was represented by Ms Anajali Hirawat, Advocate on behalf of the appellant and Shri A.B. Kulgod, Authorised Representative on behalf of Revenue.

3. Heard both sides and perused the records.

4. Relying on following decisions, learned Counsel argued that in respect of the same services provided by the overseas commission agents, CENVAT Credit have continuously been allowed:-

(a) *Commissioner of Central Excise v. Ambika Overseas – 2012 (25) STR 3348 (P&H).*

(b) *Commissioner of Central Excise & ST v. Plastiblends India Ltd. (Unit-I) – 2017 (52) STR 370 (T)*

(c) *Stanley Seating v. CCE – 2017 (3) GSTL 137 (T)*

(d) *Monarch Catalyst Pvt. Ltd. v. CCE – 2016 (41) STR 904 (Tri.-Mum)*

(e) *Bhuruka Gases Ltd. v. CCE C & ST – 2015 (37) STR 818 (Tri. – Bang)*

4.1 She also relied upon the Circular of CBEC No. 943/4/2011-CX dated 29.04.2011 wherein it has been clarified that CENVAT credit in respect of such services shall be admissible. She also submitted that in 2016 amendments were made in Rule 2(l) of Cenvat Credit Rules, 2004 by insertion of explanation to effect “for the purpose of this clause, sales promotion includes services by way of sale of dutiable goods on commission basis.” This explanation has been held by various benches of this Tribunal in retrospective in nature.

- (a) *CCE & ST v. Dwarikesh Sugar Industries Ltd. – 2017 (50) STR 37 (Tri. – All).*
- (b) *Essar Steel India Ltd. v. CCE & ST – 2016 (335) ELT 660 (Tri. – Ahmd)*
- (c) *CCE ST v. Shivalik Rasayan Ltd. – 2016 –TIOL-3412-CESTAT-Del*
- (d) *Beloorbayir Biotech Ltd. v. CCE – 2018 (5) TMI 24 – CESTAT Bangalore*
- (e) *CCE v Shree Rathi Steel (Dakshin) Ltd – 2018 (5) TMI CESTAT New Delhi.*

4.2 Lastly, on limitation, she submitted that since there was contradicting views on the issue, larger period of limitation should not be invoked in view of the decision of the Hon'ble Apex Court as follows:-

- (a) *Blue Star Ltd. v. Union of India – 2015 (322) ELT 820 (SC)*
- (b) *Continental Foundation Jt. Venture v. CCE – 2007 (216) ELT 177 (SC).*

5. On the contrary learned A.R. reiterated the finding of the Commissioner.

6. I have considered the matter along with the sample agreement with the commission agents. From the agreement

produced by the appellant which has been made between M/s. MAZER-the foreign commission agents and the appellant clearly placed the responsibility to undertake activities to promote the sale and other business objective of the company on the said commission agents.

5. Description of Processes

- (a) DURALINE will supply “said products’ to MASER OR end customers in the TERRITORY on receiving specific orders subject to availability of stocks or under specifically agreed lead times for dispatches.
- (b) MASER shall be further entitled to sell the ‘said products’ in the markets in the said TERRITORY and tenders in the said TERRITORY only.
- (c) It will be the responsibility of MASER to obtain license for the import of the goods in its country and to pay all the customs duties, import duties and other clearance charges for clearing the goods from the ship and carrying them to its factory or go-down unless agreed otherwise under different INCOTERMS (2000).
- (d) Similarly it will be the responsibility of DURALINE to take out an export license if required by the law of its country and to pay all charges for transport and shipment of the said goods unless otherwise agreed by both the parties.
- (e) MASER will be responsible for (i) developing marketing plans to generate sales of products; (ii) identifying the key decision makers and contacts for the purchase of Products; (iii) aggressively promoting the sale of products and other business objectives of DURALINE; (iv) providing guidance to DURALINE concerning the customs and practices of public agencies and private business and liaison between DURALINE and such agencies and businesses; (v) occasionally providing translation, interpretation, administrative support and other similar

services as requested, (vi) Jointly preparing tenders and compliance statements and other submission and compliances. As an independent contractor, MASER shall be responsible for the manner in which and the time during which the above-described services are performed; however, in so doing MASER agrees to use its best efforts to promote the sale of the said products.

- (f) MASER represents and warrants to DURALINE that its marketing and sale of DURALINE products shall be in compliance with all applicable laws and regulations and MASER shall not make any material omission or misrepresentation in the sale of “said products”. Under this Agreement Duraline is considered to be the owners of design/specifications of the ‘said products’ and that it takes full responsibility for compliance of specifications thereof.
- (g) MASER undertakes to market the products supplied to it by DURALINE in the packages / containers in which they are received. MASER shall not alter the labels of the containers or packages in any way and shall not defact, remove, obliterate or in any manner modify or alter the trade marks, grade indications and other matters appearing thereon.
- (h) MASER shall promptly forward to DURALINE any complaints, letters, demands or other form of communication received from any consumers solicited by MASER. MASER shall also promptly forward to DURALINE any complaints, letters, demands or other form of communication received from any Governmental agency in regard to the activities contemplated herein under. MASER shall be liable for any representations that DURALINE has not specifically authorized in writing.
- (i) MASER shall perform its business activities in compliance with all the State laws, rules and regulations concerning marketing and sale of DURALINE products while

performing its duties pursuant to this agreement and shall not violate such laws, rules or regulations.

“6. Sales Target:

- a. MASER shall endeavor to secure maximum sale for DURALINE in the said TERRITORY.
- b. MASER will submit sector-wise regular market potential of the said TERRITORY on a quarterly basis as per the attached BBC format.

7. Payment:

On specific orders/requirement of MASER, DURALINE shall supply its products agreed by both parties. The payment for each shall be made by MASER as per the terms and conditions laid down in the relative Purchase Order for the procurement of the products.

However in transactions as described under clause 4.C., MASER shall be entitled to commission based on price realization.

8. Term Of Agreement:

Subject to the provisions of Section 14 below, the term of this Agreement shall be continuous as from 1st April, 2012 onwards until 31st December, 2013 and renewable at mutual consent of DURALINE & MASER.

9. Relationship Of The Parties:

MASER will act as an Distributor of DURALINE with a right to market & sell the “said products” imported by it, in the markets in the said TERRITORY only. None of the employees of MASER shall be considered employees of DURALINE. Maser shall not bind or make commitments for DURALINE in any manner whatsoever unless authorized to do so by DURALINE in writing.

10. Conflicting Activities:

During the term of this Agreement, MASER will not directly or indirectly enter into any activity or business arrangement, which conflicts with its obligations towards DURALINE. MASER and/or any of its associates will not promote or sell any other similar product of any other company, which is directly competitive in nature to DURALINE, subject to the provisions in clause 4 c.

11. Confidentiality:

Except as expressly agreed to in writing by DURALINE, MASER shall not at any time or in any manner, directly or indirectly, use or disclose to any party and trade secrets of DURALINE. During the term hereof and, for a period of 1 year thereafter MASER will treat as proprietary the information belonging to DURALINE disclosed to MASER under this Agreement. MASER agrees that within 72 hours following effective date of termination or non-renewal hereof MASER will return to DURALINE all information and materials in its possession concerning the trade secrets, customer information and lists, proprietary information and research of DURALINE.

12. Termination: Non-Renewal:

- a) All obligations arising out of the commitments made during the tenure of the Agreement shall be fulfilled by both parties even after the termination of the Agreement. Either party has the right to terminate this Agreement at any time by providing the other party with 60 days written notice of the termination date:
 - I. If the other party becomes the subject of a voluntary or involuntary reorganization, or similar law, makes an agreement for the benefit of creditors, consents to the appointment of a receiver of its property, becomes insolvent or bankrupt, or any equivalent event occurs under the laws of the jurisdiction where it is incorporated or carries on its business; or
 - II. Upon receiving notice that 50% or more of the stock or assets of the other party has been acquired by an unaffiliated third party; or
 - III. If the other party has breached any material provision of this Agreement; provided that the non-breaching party has given the breaching party written notice of termination for breach and the breaching party has not cured the breach within thirty (30) days of receipt of notice; or
- b) DURALINE shall have the right to terminate this Agreement on sixty (60) days prior written notice to MASER.

- I. If either party in its own judgment feels that the agreement with other party is either detrimental to or not beneficial to its business in Thailand or any other market.
- II. If MASER fails to meet any of its annual revenue goals for the year; or
- III. If MASER liquidates or discontinues its business or terminates the majority of its sales force in the Territory; or
- IV. If DURALINE discontinues manufacturing/marketing of the Said Products. Under this provision MASER will be given as option of a last time buy.
- V. If MASER starts its own manufacturing of the said products.

13. Jurisdiction:

In the event of any dispute or difference or any other incidental matter relating to this agreement the courts of competent jurisdiction in India only to the exclusion of all other courts shall have jurisdiction and would be competent to adjudicate all the matters arising out of, related to and/or connected with this agreement.

14. Governing Law:

This Agreement has been executed and delivered in India and its interpretations, validity and performance shall be construed and enforced in accordance with the laws in India.

7. From the said Para 6 it is wide evident that the services provided by M/s MASER are inclusive of services of sales promotion. Since the activities undertaken by over-seas commission agents are inclusive of activities of sales promotion,

in view of the decisions relied upon by the learned Counsel and the Board's Circular, admissibility of credit cannot be disputed.

8. Since matter is being allowed on merits, I am not entering into the issue of limitation in this case.

9. Appeal allowed.

(Order dictated in Court)

(Sanjiv Srivastava)
Member (Technical)

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