CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Excise Appeal No. 1680 of 2011

(Arising out of Order-in-Original No. 02/Commr/M-II/2011 dated 28.09.2011 passed by the Commissioner of Central Excise, Mumbai II)

M/s. Mahanagar Gas Ltd. …..**Appellant**
MGL House G 33
Bandra Kurla Complex
Bandra East, Mumbai

Vs.

Commissioner of Central Excise …..**Respondent**
5th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaug,
Parel, Mumbai II

APPEARANCE:

Shri M.H. Patil, Advocate for the appellant
Shri Ajay Kumar, Addl. Comm (AR) for the respondent

CORAM: **Hon'ble Mr C J Mathew, Member (Technical)**
Hon'ble Dr. Suvendu Kumar Pati, Member (Judicial)

FINAL ORDER No: A/87634 / 2019

DATE OF HEARING : 18.04.2019
DATE OF DECISION : 18.04.2019

PER: C J MATHEW

This appeal of M/s Mahanagar Gas Ltd, arising from order-in-original no. 02/Commr/M-II/2011 dated 29th September 2011 of Commissioner of Central Excise, Mumbai-II, challenges the finding of ineligibility to credit of ₹99,74,816, availed between 2005-06 and 2009-10, on tax paid for procurement of services used in laying of 'pipelines' intended for distribution of 'compressed natural gas (CNG)' and 'piped natural gas (PNG)' with consequent recovery thereon under section 11A of Central Excise Act, 1944, along with appropriate interest under section 11AB of Central Excise Act, 1944, and imposition of penalty of like amount under section 11AC of Central Excise Act, 1994.

2. According to Learned Counsel for appellant, the output in question are products of manufacture and, while 'compressed natural gas' is liable to duty, 'piped natural gas' is not. It is submitted that the 'natural gas' is compressed and dispensed, as well as filled up, at different locations which, while not within the factory of manufacture, nevertheless, constitute place of removal of the product. It is contended by him that the demand for the subsequent period was set aside by order dated 8th July 2016 of the first appellate authority thus

> *'As per Rule 2(1) of the CCR,2004 'Input Service' means:*
>
> *(l) "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 up to to the place of removal,*

and includes services used in relation to setting up, modernisation, 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 up to 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 up to the place of removal;

The detailed examination of the above 'Input service' definition clearly indicates that any service which are directly or indirectly related to manufacturing activities is allowable as Cenvat Credit. In this case, the appellant's basic product is CNG. They are entitled to CENVAT credit on the service tax paid on lying on the pipelines. During the personal hearing, the appellant has also made a submission that they take credit on the CNG portion only by availing Rule 6. Accordingly, CENVAT credit is allowed for the services incurred for laying pipeline for movement of CNG by following Rule 6 of CENVAT Credit Rules. With regard to penalty, this is purely an interpretational issue and also in the absence of fraud, suppression and malafide intention or positive concealment from the department, there is no justification for imposing penalty. Accordingly penalty is set aside in toto.'

3. He cited the decision of the Tribunal in *Reliance Gas Transportation Infrastructure Ltd v. Commissioner of Service Tax, Mumbai-II [2016 (45) STR 286 (Tri-Mumbai)]* in which, though the demand pertains to eligibility of credit on input services availed for pipelines prior to and after commissioning, it has recorded that the original authority had held the availment of services after commissioning to be admissible. He contends that the decisions in *Maharashtra Seamless Ltd v. Commissioner of Central Excise, Raigad [2012 (25) STR 167 (Tri-Mumbai)]* and in *Endurance Technologies P Ltd v. Commissioner of Central Excise, Aurangabad [2012 (27) STR 320 (Tri-Mumbai)]*, holding that the utilisation of services within the factory of manufacture is not mandated by CENVAT Credit Rules, 2004, invalidates the allegation in the notice that the usage outside the factory premises does not fall within the ambit of rule 2 (l) of CENVAT Credit Rules, 2004.

4. Learned Authorised Representative contends that the premises at which the dispensing and filling occurs are not registered under Central Excise Rules, 2002 and, therefore, cannot be considered as part of the factory. He drew attention to the finding in the impugned order that

> *'A careful reading of the said definition reveals that any service can qualify as input service in the case of manufacturer, provided it meets the condition laid down*

i.e. used whether directly or indirectly, in or in relation to the manufacture of final products and "clearance of final products from the place of the place of removal" (upto 31/3/2008) and "clearance of final products upto the place of the place of removal" (with effect from 1/4/2008). The legislative intention clearly appears that the CENVAT credit of duty paid on the services or inputs shall be admissible provided those service and inputs are used in or in relation to manufacture of final products and clearance thereof from and up to the place of removal. The term 'place of removal' is defined under section 4 of the Central Excise Act 1944 "place of removal" means –

(i) A factory or any other place or premises of production or manufacture of the excisable goods;

(ii) A warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;

(iii) A depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory;

from where such goods are removed. In terms of the definition the place of removal could be a factory or any other place or premises of production or manufacture of excisable goods or a warehouse or any other place or premises wherein excisable goods have been permitted to be deposited without payment of duty or a depot, premises of consignment agent or any other place or

> *premises from where the excisable goods are to be sold after clearance from the factory.'*

as the appropriate conclusion. He relied upon

> *'13.4 The definition of service specifically excludes construction of roads, airports, railway, transport terminals, bridge, tunnel, long distance pipelines and dams. In this regard, it is clarified that any pipeline other than those running within a industrial and commercial establishment such as factory, refinery and similar industrial establishments are long distance pipelines. Thus, construction of pipeline running within such an industrial and commercial establishment is within the scope of the levy.',*

circular no. 80/10/2004-ST dated 17th September 2004 of Central Board of Excise & Customs and notification no. 1/2006-ST dated 1st March 2006 to buttress his argument of non-eligibility. Further, according to him, the pipelines were laid for effecting outward transportation in which the qualifications laid down by the Hon'ble High Court of Karnataka in *Commissioner of Central Excise & Service Tax, LTU, Bangalore v. ABB Ltd [2011 (33) STR 97 (Kar)]* should be the test for determining eligibility. He further contends that the argument advanced of manufacturing at the place of distribution did not find acceptance of the Tribunal in *Mahanagar Gas Ltd v. Commissioner of Central Excise, Mumbai-II [2016-TIOL-497-*

CESTAT-MUM] and, hence, the contention of eligibility of ‘input services’ for availment till the place of distribution is negated.

5. In re *Reliance Gas Transportation Infrastructure Ltd*, the Tribunal framed the issue in appeal as

> *‘5. The notice issued to the appellant sought to deny the credit availed by it on the services rendered by the pipeline laying contractor only on the ground that the said input services resulted in the creation of an immovable property. Insofar as credit on the services rendered by the other service providers, i.e. other than the pipeline laying contractors as also in respect of capital goods is concerned the only ground on which the notice sought to deny credit was that the same were required by the pipeline laying contractors for rendering their services and could not be said to be input services and capital goods for the appellant.’*

before rendering the finding that

> *10. Insofar as the denial of the credit of tax paid by the pipeline laying contractors is concerned, the ground assigned by the respondent for denying credit is clearly fallacious and contrary to the definition of input services, which is reproduced herein below for ease of reference.*
>
> *(l) ”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.

A perusal of the definition of input services shows that the definition of input service has two main limbs qua one a service provider and another qua a manufacturer. There is also an inclusive limb which is common to both, a service provider and a manufacturer.

11. The main limb of the definition of input service provides qua a service provider stipulates that credit would be admissible in respect of any service used by a provider of output service for providing an output service. We are concerned here with credit of service that has been used for laying a pipeline, which by itself was used for providing the output service of transportation of gas through pipeline. There cannot be a more direct immediate nexus, between availing the input services and rendition of output service.

It is beyond our comprehension as to how the appellant could have rendered its output service without availing of the services of the pipeline laying contractors. The said services in our view are clearly eligible to credit by virtue of the main limb of the definition of input services.

12. Even otherwise the inclusive limb of the definition also specifically covers services used in relation to setting up, modernization or repair of a factory, premises of a provider of output service or an office relating to such factory or premises. It is not in dispute that the services used for laying of the pipeline were used for setting up the premises of the provider of output service. What is being contended by the Revenue is that the credit of the input services used for setting up was not admissible as the premises that were set up, were an immovable property. We do not find any merit in the contention of the Revenue that credit would be admissible only in respect of such factory/premises that are not immovable. This artificial division and distinction which the Revenue seeks to introduce in the definition of input service is clearly baseless and contrary to the plain language used in the definition of input service. To us it appears completely inconceivable that when the Central Government framed the definition of input service to cover therein services used for setting up a factory/premises of an output service provider, it intended to cover only such input services that were consumed in relation to setting up a factory/office that was mobile or could be moved from one place to other and not a factory or office that was attached to earth and immovable. To our understanding it is only in exceptional situations that one can have factory/premises which are not *immovable, most factories and premises will be immovable. In our view any service used in relation to setting up a premises of output service provider is eligible for credit and the concept of movability or immovability, is irrelevant for determining eligibility to input service credit.*

13. The aforesaid view of ours also finds support in the judgment of the Hon'ble Punjab and Haryana High Court in the case of Bellsonica Auto Components India Pvt. Ltd. - 2015 (40) S.T.R. 41 (P&H), wherein the Hon'ble High Court had upheld the order of the CESTAT holding that credit was admissible on the input services used for construction of a factory building for a manufacturer. The Hon'ble High Court held that credit was admissible by virtue of the main limb of the definition of input services as also the inclusive limb of the definition. The relevant observations of the Hon'ble High Court are extracted hereinbelow for ease of reference:

"8. The land was taken on lease to construct the factory. The factory was constructed to manufacture the final product. The land and the factory were required directly and in any event indirectly in or in relation to the manufacture of the final product and for the clearance thereof up to the place of removal. But for the factory the final product could not have been manufactured and the factory needed to be constructed on land. The land and the factory are used by the manufacturer in any event indirectly in or in relation to the manufacture of the final product, namely, metal-sheets. The respondents' case, therefore, falls within the first part of Rule 2(l) aptly referred to by Mr. Amrinder Singh as the "means part".

9. The respondents' case also falls within the second part of Rule 2(l) i.e. the "inclusive" part. The definition of the words "input service" also specifically includes the services used in relation to setting up of a factory. Mr. Amrinder Singh rightly contended that it was not the Appellant's case that the services were not used for the setting up of the factory. The doubt in this regard is set at rest by the second part of Section 2(l)(ii) which includes within the ambit of the words 'input service' the setting up of a factory and the premises of the provider of the output service. The inclusive definition, therefore, puts the matter, at least so far as the payment for services rendered by the civil contractor for setting up the factory is concerned, beyond doubt. As the plain language of Section 2(l)(ii) indicates, the services mentioned therein are only illustrative. The words "includes services" establish the same. It can hardly be suggested that the lease rental is not for the use of the land in relation to the manufacture of the final product."

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17. The other decision which the ld. Counsel of the Revenue relied upon was that the Larger Bench of the Tribunal in the case of Tower Vision India Pvt. Ltd. v. CCE - 2016 TIOL 539 CESTAT-DEL-LB. The said judgment also was dealing with the dispute with respect to eligibility of Cenvat credit of then duty paid on MS angles, channels/parts of tower, etc., which were used for fabrication of telecom towers, as inputs or capital goods. This judgment also does not deal with eligibility of Cenvat credit on input services and consequently cannot be relied *upon to deny input service credit in the hands of the appellant.*

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19. The mere fact that some of these services could as well have been contracted for, by the pipeline laying contractors if the agreement between the appellant and the pipeline laying contractor so envisaged, such a hypothetical possibility cannot lead to denial of credit in the hands of the appellant, who has contracted for and availed of the services. In any service contract, it is the scope of the agreement between the service provider and the service recipient that is relevant and needs to be examined for determining the scope of service. To give a simple illustration, a maintenance contract may provide that in case of a break down the part to be replaced be provided by the service recipient it can as well provide as in the case of in a comprehensive contract, that it is the service provider's responsibility to source and replace that part that is to be replaced. In the former example, if the part being replaced is of a specified machinery falling under Chapters 85, 84, 90, the part so procured would be eligible for credit in the hands of the service recipient as capital goods. While on the other hand in the later type of contract, where it is service provider's obligation to supply and replace the part, then the very same part would have been eligible to credit in the hands of the service provider as an input being used for rendition of an output service. We are not concerned in this case with the later type of contract. From the record it clearly comes out that the privity of contract in the instant case was between the appellant and the service provider

> *and that these service providers were under no obligation whatsoever to the pipeline laying contractors nor were the pipeline laying contractors under any obligation to pay for the said services or to compensate or otherwise for the deficiency in the services of the said service providers. This being the case the finding that services availed of from the other service providers as also the capital goods were used by the pipeline laying contractors is clearly untenable.*

has settled the issue now before us.

6. Furthermore, the eligibility for credit having been upheld for the subsequent period, it is not open to the respondent herein to take a contrary stand before us.

7. Following the decision of the Tribunal, we set aside the impugned order and allow the appeal.

(Operative part pronounced in Court)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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