CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 1937 of 2010

(Arising out of Order-in-Original No. 39/BR-39/TH-I/2010 dated 03.08.2010 passed by the Commissioner of Central Excise, Thane-I)

M/s. JSW Steel Ltd. **Appellant**
Village: Vasind, Taluka: Shahapur,
Dist. Thane 421 604, Maharashtra.

Vs.

Commissioner of Central Excise, Thane-I **Respondent**
4th floor, Navprabhat Chambers,
Ranade Road, Dadar (W), Mumbai 400 028.

WITH

Excise Appeal No. 372 of 2011

(Arising out of Order-in-Original No. 52/BR-52/TH-I/2010 dated 31.12.2010 passed by the Commissioner of Central Excise, Thane-I)

M/s. JSW Steel Ltd. **Appellant**
Village: Vasind, Taluka: Shahapur,
Dist. Thane 421 604, Maharashtra.

Vs.

Commissioner of Central Excise, Thane-I **Respondent**
4th floor, Navprabhat Chambers,
Ranade Road, Dadar (W), Mumbai 400 028.

WITH

Excise Appeal No. 1391 of 2011

(Arising out of Order-in-Original No. 26/BR-26/TH-I/2010 dated 23.06.2011 passed by the Commissioner of Central Excise, Thane-I)

M/s. JSW Steel Ltd. **Appellant**
Village: Vasind, Taluka: Shahapur,
Dist. Thane 421 604, Maharashtra.

Vs.

Commissioner of Central Excise, Thane-I **Respondent**
4th floor, Navprabhat Chambers,
Ranade Road, Dadar (W), Mumbai 400 028.

AND

Excise Appeal No. 491 of 2012

(Arising out of Order-in-Original No. 84/BR-84/TH-I/2011 dated 16.01.2012 passed by the Commissioner of Central Excise, Thane-I)

M/s. JSW Steel Ltd. **Appellant**
Village: Vasind, Taluka: Shahapur,
Dist. Thane 421 604, Maharashtra.

Vs.

Commissioner of Central Excise, Thane-I **Respondent**
4th floor, Navprabhat Chambers,
Ranade Road, Dadar (W), Mumbai 400 028.

Appearance:

Shri Sachin Chitnis, Advocate, for the Appellant
Shri R.K. Dwivedy, Additional Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/86675-86678/2021

Date of Hearing: 04.08.2021
Date of Decision: 04.08.2021

PER: SANJIV SRIVASTAVA

These appeals are before us on remand by the Hon'ble Bombay High Court vide their order dated 28th March 2014 in Central Excise Appeal No. 30 of 2013, order dated 2nd May 2014 in Central Excise Appeal No.116 of 2012, order dated 25th June 2014 in Central Excise Appeal No.44 of 2013 and order dated 20th March 2017 in Central Excise Appeal No.82 of 2015. While remanding the matter to CESTAT. Hon'ble High Court observed in order dated 28th March 2014, as follows:

"1 The Appeal challenges the order passed by the Customs Excise and Services Tax Appellate Tribunal, West Zone Bench at Mumbai, Court No.2 dated 26th February 2011.

2 The respondent assessee filed an Appeal before the said Tribunal against the order passed by the Commissioner of Central Excise, Thane-1. The respondent also applied for stay of recovery of the duty pending the Appeal. Such application was placed before the Tribunal and the Tribunal proceeded by the consent of both sides took up the Appeal itself and disposed it of finally. It is this final order which is challenged before us.

4 The issue involved is whether the services which have been availed of could be said to be input services within the meaning of Rule 2(1) of the CENVAT Credit Rules, 2004. It is submitted that the words "input services" has been defined to mean any services used by 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. The latter part may be inclusive but, in the instant case, the assessee claims CENVAT Credit on commission of export sales, bank commission charges and aviation charges. These could not be said to be falling within the definition. Therefore, the adjudication order could not have been set aside.

5 On the other hand, the learned counsel appearing for the assessee supported the Tribunal's order by relying on the judgment of this Court in the case of Commissioner of Central Excise Vs. Ultratech Cement Ltd, 2010(20) Services Tax Reporter 577.

6 Having perused the order passed by the Tribunal and impugned in this case, we are of the opinion that in certain matters and depending upon the agreement between the parties, the Tribunal may dispose of an Appeal finally at the stage of hearing of stay application or while disposing of and deciding the stay application. However, beyond that, the Tribunal is not expected to pass a cryptic order and by not assigning cogent and satisfactory reasons for its conclusion. It is too well settled to require any reiteration that appeal is a creature of the statute. A right of Appeal would confer in a litigant so as to enable the litigant to assail the original order on law and facts. The Court of Appeal is therefore expected to apply its independent mind and not endure same finding or conclusions in the original order. In the case of Patesinghrao Vs. R.V. Deshmukh, 1981 Mh.L.J. 936, it has been observed that the appellate authority is not a mere rubber stamp, but expected to independently apply its mind to the facts and circumstances, analyse the submissions and the legal provisions. Equally, it should consider as to whether the *decisions cited have any application to the facts of the case brought before it. In that case, this is what is held:*

……….

7 By the cryptic orders as are passed in this case, it is difficult for the higher Court then to find out as to what prevailed with the appellate authority in reaching a particular conclusion. In the present case, when we were taken through the definition of the term "input service" and the facts in the present case, that we found that none of these aspects have been considered by the Tribunal. The Tribunal merely proceeds on the footing that being an exporter, all services have been availed of during the course of export of goods and that is how this CENVAT Credit was admissible. Which of the services during the course of export availed of by the present assessee would be covered by this definition and the judgment of this Court has not been considered or decided by the impugned order. Such unsatisfactory and unhappy disposal of Appeals in matters of Revenue and Taxes therefore leaves a lot to be desired. The expectation given from the Appellate Tribunal is therefore not fulfilled and particularly when it is manned by persons drawn from judicial services. In these circumstances, we have no alternative but to allow this Appeal only on this short, but substantial question of law and that is that the Appeals cannot be disposed merely by recording rival submissions and not discussing them elaborately but, in a perfunctory manner.

7 The impugned order is therefore quashed and set aside. The order of CENSTAT shall be treated as confined and restricted to the stay application. It will be held that the assessee has made out a strong prima facie case for grant of an unconditional stay, but beyond that the Appeal cannot be said to be finally disposed of by the impugned order."

2.1 As noted by the tribunal in its earlier order dated 11.07.2014, issue involved in all these appeals is in respect of admissibility of CENVAT Credit on following services which have been received by the appellant, after the removal of goods from the factory:

a) Clearing charges paid to the Custom House Agent for export of goods.
b) Commission on export sale.
c) Material Handling Charges.
d) Terminal Handling Charges.
e) Bank Commission Charges.
f) Aviation Charges.
g) Courier Services.

2.2 For disallowing the CENVAT Credit in respect of these services Commissioner has in impugned order observed as follows:

“16.02 It is, therefore, necessary to analyze the definition in question itself. Rule 2(1) of the Cenvat Credit Rules, 2004, clearly defines 'input service' as: '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 from 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 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".

16.03. From the careful reading of the definition it is clear that the definition is an inclusive one and not the exclusive one. The conditions that a service must satisfy to qualify as input service are:

i) It must be used by the manufacturer, *ii) It must be used, either directly or indirectly, in or in relation to the manufacture of final products. In the end, it enlists the services which are included in the definition and these are, services used in relation to setting up, modernization, renovation or repairs of a factory or 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 and activities relating to business.*

16.04 The definition of input service is expressed in the form of 'means' and includes'. Means' part of the definition contains, inter alia, service used by the manufacturer whether directly or indirectly or in relation to the manufacture of final products and clearance of final products from the place of removal. This definition, of course, is worded to include variety of services used not only for, but in relation to manufacture of final products and also for clearance of final products up to the place of removal. The term "activities relating to business" has been further elaborated by giving examples, terming them as "such as". These examples are "accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security". Finally, the list also includes inward transportation of inputs or capital goods, and outward transportation up to the place of removal. Thus, the term "input service" is restricted to include inward transportation of inputs or capital goods, and outward transportation up to "place of removal".

16.05Turning to the phrase "place of removal" it can be seen that the Section 4 of the Central Excise Act, 1944 defines it as

"(i) a factory or any other place or premises of production or manufacture of excisable goods;

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be stored without payment of duty,

(iii) a depot, premises of 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;"

16.06 As the definition of the "place of removal" has been restricted by adding the words "from where such goods are removed " at the end of the definition, the "place of removal " cannot be the place of destination or any other place other than those three categories mentioned in the above definition. Hence services used beyond these three places cannot be said to be service used up to "place of removal" and so, will be ineligible for the Cenvat credit, on this account. This, analysis, thus, shows that the services in dispute in the present notice, which are used beyond the place of removal, are unqualified.

16.07. Since the main dispute in the SCN relates to the services which the assessee has contended as covered by "activities relating to business", it is now expedient to actually identify these services. As can be seen, by further elaboration of the term by giving examples, terming them as "such as", the definition enumerates services; accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, and similar services to be the "activities relating to business". It is essential to understand here that though the definition for this category does not give a complete list, and by using the term "such as" expands the scope, it, at the same time by use of the said term "such as", implies that services similar only to those given as example can fall under this category. This method of interpretation of an inclusive definition is based on the principle of Ejusdem Generis, discussed and upheld by many Courts of Law. On applying this principle it can be seen that the services which do not belong to the genre created by the list given in the definition will not fall under the definition. Thus, the services now under dispute, i.e. banking, aviation etc. can hardly be of the genre and so will not qualify as "input service".

16.08 The assessee have contested the demand notice mainly based on only one argument, that is, that the definition of the input services under scrutiny now, is not a restrictive definition and that the word "such as" used at the end of the category, "activities relating to business", expands its scope and so, not *only those services given as example but other services of activities of business are also covered by the definition. It is also contended that by use of words, directly or indirectly' and 'in or in relation to the manufacture of the final products the scope is further widened. All the contentions of the assessee are emphasizing this basic argument. On examining this contention against the allegation in the SON and analysis of the definition done above, it is seen that the notice is not based on the restrictive meaning of the term "such as", as mis-presented by the assessee, and does not allege that only the services as actually mentioned in the definition are covered, but, the notice alleges that only those services which are of Ejusdem generis to the given examples are covered. Thus the services which are used by the assessee at their office, for banking or the services which are not in conformity with the genre created by the service given as example in the definition, for example aviation service' are proposed for disqualification. The contention of the assessee, therefore, up to this point is misplaced and hence, the case laws given by them do not address the proposed action against them.*

16.09 The assessee have also discussed at length the use of the services "in or in relation to the manufacture" and that the term "business" is a wider one to encompass not only the manufacture or clearance but also the activities beyond it. However, the definition as analyzed in detail above allows only the services which are defined and so the services merely answering to only one condition (i.e used in or in relation to the manufacture) cannot qualify but have to answer to all the conditions. The provisions have to be read in totality and not in isolation.

16.10 Having come up to this point of the assessee's contention, a very important aspect that comes out from the allegations raised in the notice is that the services namely, banking, clearing / brokering of exports, material handling, aviation, etc. are availed at places beyond the factory gate and they have availed the Cenvat credit of the Service Tax paid on the same. The notice disputes this credit. From the submission made by the *assessee, generally, it is seen that they have contended that even these services used are also in or in relation to the business and so are eligible as input services. They have explained the services individually in their reply and the explanation clearly shows that these services are not in consonance with the meaning coming out from the analyses done above and so these services cannot qualify as 'input service'.*

16.11 The assessee have contended that in the event of export of finished goods from the factory, on FOB value basis, the place of removal is the port of export and hence, services categorized as post removal services, including the services received for export of goods in the port ought to be viz. CHA charges, terminal handling charges incurred at the place of export ought to be considered as 'input service' and tax paid on it be allowed as CENVAT credit. Also, when goods are cleared for export on FOB basis, then the place of removal is the place of shipment. They have cited some case laws also in this regard. They have also drawn a parallel from the principle of valuation that all the expenses incurred up to port are included in the value for export goods (FOB) and so the services used till that point should be allowed as input service. However, since the valuation of the goods is governed by a separate Section of the Central Excise Act, 1944 and the Rules thereunder, the principle of valuation cannot be applied to the definition of the services.

16.12 To examine this contention further, again the definition of terms "input service" has to be referred to. In this definition, there is reference to the concept of "place of removal" for only two services. These are, "storage up to the place of removal", and "outward transportation up to “place of removal””. “Place of removal” as discussed above is defined under section 4 ibid, storage service and the service of transportation have been specifically included in the second part of definition and restricted to include only transportation up to place of removal. Incidentally, vide Notification No. 10/2008 - CE(NT) dt.01.03.2008 the words "clearance of final products from the place of removal" were substituted by the words "clearance of *final products up to the place of removal". The replacement of the words indicates that the definition has been widened to incorporate situations where clearances are by transportation up to the place of removal. However, it also emphasizes the fact that any other services used beyond the place of removal are not covered by the definition of "input service" in the period prior to and even after the amendment.*

16.13 As regards the contention that the words in the first part "used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal," specify the category of the services that can be called as input services, it is observed that as discussed above and when in the later part of the definition, a few services have been specified, meaning cannot be given to these wordings separately. The combined meaning of the definition is that services used in or in relation to manufacture of and clearance of final products from the place of removal will qualify and as far as transportation is concerned it will include outward transportation up to place of removal only. This view is upheld in case of M/s Ambuja Cements Ltd. vs U01 , 2009(236) ELT 431 (P&H) and M/s Ultratech Cement Ltd vs CCE 2007(6) STR 364 (Tn.- Ahmedabad). The CBEC in Circular no. 97/6/07-ST dated 23.08.07 while clarifying the issue as to up to what stage a manufacturer can take the Cenvat credit on the Service Tax paid on Goods Transport by road has relied upon the two judgments, supra and so the contention that credit even beyond place of removal will be available is wrong. Also the definition of "place of removal" does not categorically take into it's ambit the port of export as place of removal in the case of export clearances."

3.1 We have heard Shri Sachin Chitnis, Advocate for the Appellant and Shri R K Dwivedy, Additional Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the Appellants, learned Counsel submitted a brief synopsis tabulating the nature of services etc, the same is reproduced below:

Service	Utilization	Submission Summary
Clearing Charges of (Export)-CHA (Rs. 12796055)	Clearing charges are relating to those services rendered by the Customs House Agents (CHA) relating to export of finished goods (i.e. for preparation of various documents and compliance with Customs Rules & Regulations relating to export of finished goods)	(i) In case of Export , 'Port Export' is "Place of removal' and hence covered under Rule 2(1) of CCR, 2004; (ii) Section 4(3)(c) of the Central Excise Act, 1944; (iii) Section 5 of the Central Sales Tax Act; (iv) Section 23 and Section 39 of the Sale of Goods Act, 1930; (v) Honest Biovet - 2014 (310) ELT 526 (T-LB), has held that in case of 'Port of Export' is 'Place of removal'; (vi) CBEC Circular No. 999/6/2015-CX dated 28.02.2015; (vii) CBEC Circular No. 1065/4/2018-CX dated 08.06.2018; (viii) Judgements
Commission on Export Sales (Rs. 21021179)	Commission on export sales relates to the payments made for the services received from Overseas Commission Agents, who promote the overseas sales of finished product.	(i) Specifically covered under 'Sales Promotion' and hence covered under Rule 2(1) of CCR, 2004; (ii) Illustrative agreement with M/s. Abdurahaman Abubker Sherif; (iii) Notification 2/2016-CE(NT) dated 03.02.2016; (iv) CBEC Circular No.943/04/2011-CX dated 29th April, 2011; (v) Circulars issued by

		dept. are binding; (vi) Judgements
Material Handling Charges (Rs. 3085317)	Material handling charges for which service tax is paid by the service providers relates to loading and unloading of finished goods in the factory premises and also at the various Depots, from where the goods are ultimately sold.	(i) Clearance of final product upto the 'place of removal i.e. factory/depot and hence covered under Rule 2(1) of CCR, 2004; (ii) 'Place of removal' factory/depot; (iii) Judgements
Terminal Handling Charges (Rs. 16698877)	Terminal handling charges (Exports), i.e. charges incurred in the port area relating to export of finished goods.	(i) In case of Export , 'Port of Export' is "Place of removal' and hence covered under Rule 2(1) of CCR, 2004; (ii) Section 4(3)(c) of the Central Excise Act, 1944; (iii) Section 5 of the Central Sales Tax Act; (iv) Section 23 and Section 39 of the Sale of Goods Act, 1930; (v) Honest Biovet - 2014 (310) ELT 526 (T-LB), has held that in case of Port of Export' is 'Place of removal'; (vi) CBEC Circular No. 999/6/2015-CX dated 28.02.2015; (vii) CBEC Circular No. 1065/4/2018-CX dated 08.06.2018; (viii) Judgements
Bank Commission	Bank Commission charges relates to various banking	(i) Specifically covered under 'financing' and

Charges (Rs. 19486244)	transactions/ services rendered by the Banks in the course of sale of finished goods in the domestic as well as overseas market like opening of L/C, negotiation of documents/bills, etc.	hence covered under Rule 2(1) of CCR, 2004; (ii) Judgements
Aviation Charges (Rs. 66290)	For the purpose of advertising and promotion of the final products, the Appellants Senior executives/employees are required to attend seminars in various parts of the country as well as in foreign countries, which is in relation to the business. The Appellants also have units in different parts of the country. For travelling of technical engineers to their own factories in case of urgencies also, the Appellants avail the services of Aviation Service.	(i) Specifically covered under Sales Promotion and hence covered under Rule 2(1) of CCR, 2004; (ii) Judgements
Courier Charges (Rs. 15947)	Delivery of documents to customers and also the Statutory Bodies etc.,	(i) 'in or in relation to business of manufacture'; (ii) Judgements

3.3 Learned Authorized Representative reiterates the findings recorded by the Commissioner and places his reliance on the decision in case of UltraTech Cement Ltd vs CCE 2007(6) STR 364 (Tn.- Ahmedabad)

4.1 We have considered the impugned order along with the direction of Hon’ble Bombay High Court while remanding the matter to tribunal and the submissions made during the course of arguments.

4.2 On the specific issue of "place of removal" in case of export of goods, CBEC has vide its circular 999/6/2015-CX dated 28.02.2015, clarified as under:

"Attention is invited to Circular No. 988/12/2014-CX dated 20.10.2014 issued from F. No. 267/49/2013-CX.8 on the above subject wherein it was clarified that the place of removal needs to be ascertained in terms of provisions of Central Excise Act, 1944 read with provisions of the Sale of Goods Act, 1930 and that payment of transport, payment of insurance etc are not the relevant considerations to ascertain the place of removal. The place where sale takes place or when the property in goods passes from the seller to the buyer is the relevant consideration to determine the place of removal.

2. In this regard, a demand has been raised by the trade that it may be clarified that in the case of exports, for purposes of CENVAT credit of input services, the place of removal is the port or the airport from where the goods are finally exported.

3. The matter has been examined. It is seen that section 23 of the Sale of Goods Act, 1930 provides that where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract, and therefore, in view of the provisions of the Section 23 (1) of the Sale of Goods Act, 1930, the property in the goods would thereupon pass to the buyer. Similarly, section 39 of the Sale of Goods Act, 1930 provides that where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not for the purpose of transmission to the 2 buyer, or delivery of the goods to a wharfinger for safe custody, is prima facie deemed to be a delivery of the goods to the buyer.

4. In most of the cases, therefore, it would appear that handing over of the goods to the carrier/transporter for further delivery of the goods to the buyer, with the seller not reserving the right *of disposal of the goods, would lead to passing on of the property in goods from the seller to the buyer and it is the factory gate or the warehouse or the depot of the manufacturer which would be the place of removal since it is here that the goods are handed over to the transporter for the purpose of transmission to the buyer. It is in this backdrop that the eligibility to Cenvat Credit on related input services has to determined.*

5. Clearance of goods for exports from a factory can be of two types. The goods may be exported by the manufacturer directly to his foreign buyer or the goods may be cleared from the factory for export by a merchant exporter.

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****."*

4.3 Tribunal larger bench has in case of Honest Biovet [2014 (310) ELT 526 (T-LB)] has held as follows:

"12. As goods in question were cleared under ARE-1 for export under bond, in our view the sale would be completed at load port only as per definition of "Place of Removal" given u/s 4(3)(C)(iii) of the Central Excise Act, 1944. Under these circumstances, ownership of the goods and duty liability is also extended up to the load port and if, the goods are not exported, concerned manufacturer will be required to discharge the duty liability. Therefore, 'removal' also gets extended up to the port of shipment from where the sale would be completed and when the goods were to be exported. Hence, if the goods cleared for export under Bond are destroyed before the export, ownership of

the said goods and also duty liability, if any, would be always to the account of appellant assessee and that the said goods could be considered having been destroyed before removal and the benefit of Remission of duty is allowable in such an exceptional situation in terms of Rule 21 of Central Excise Rules, 2002. Clause (iii) in Section 4(3)(C) for "Place of removal" was inserted w.e.f. 14-5-2003 vide Section 136 of the Finance Act, 2003 which has stipulated as under :-

"(iii) 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."

Hence, the provision under clause (iii) in Section 4(3)(C) for "Place of Removal" will be applicable in the case under consideration."

4.4 In view of the Board Circular and Larger Bench decision referred above, we hold that the place removal in case of the exports, would be upto the point when goods are loaded on the ship or the depot from where the goods are finally sold, and all the services that are received for exporting the goods till that point shall be covered by the definition of "input services" as per Rule 2 (l) of The CENVAT Credit Rules, 2004. Hence the services of Custom House Agent (Clearing Charges), Material Handling Charges, Terminal Handling Charges will be admissible to the Appellant.

4.5 Commission on the Export Sales is the commission paid by the Appellant to their foreign commission agent for promoting the sale of their products in that country. Service Tax in respect of these services is paid by them on reverse charge basis. The issue in respect of admissibility of CENVAT Credit of the Service Tax paid on the Commission Charges paid for export of goods has been considered by

Hon'ble Madras High Court in case of Intimate Fashions India [2019 (31) GSTL 22 (Mad)] and Hon'ble High Court held:

"6. *Having heard the Learned Counsel for the parties, we are of the clear opinion that the Learned Tribunal has taken a correct view of the matter and has rightly found that the foreign agents* *of the assessee in question were rendering the services not only post-sales or post-export by the assessee but, were engaged in the activities of exploring the market, advising the designs for manufacture and supplies to specific orders procured by them and assisting the clearance of the garments in question and export the same to the foreign countries and earn foreign currency in terms of their obligations as 100% EOU and therefore, the service tax paid on commission to foreign agents could not denied the benefit of Cenvat credit under Cenvat Credit Rules, 2004."*

By referring to the Explanation inserted in Rule 2 (l) by Notification No 2/2016 – CX (NT), Ahmedabad Bench of Tribunal has held as follows:

"22. *An explanation inserted in a Section/Rule, is generally to explain the meaning of the words contained in the Section/Rules. The purpose of explanation is to explain the meaning and intendments of the Section/Rule. Sometimes, the explanation may be inserted to clarify a doubtful point of law, which would be effectively retrospectively. In the present case, the expressions in the explanation as inserted by Notification No. 2/2016-C.E. (supra), make it clear that it is for explaining the meaning of clause "sales promotion" in the context of Rule 2(l) of the Rules, 2004. It is to provide an additional support to the dominant object of the word "sales promotion" in Rule 2(l) in order to make it meaningful and purposeful. The language of the explanation is consistent with Board Circular to the benefit of the assessee and it would be effective retrospectively. The Hon'ble Supreme Court in the case of Vatika Township Pvt. Ltd. (supra), in the identical situation, held that if a legislation confers a benefit on some other person or on the public generally, and where to confer such benefit appears to have been the legislature's object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. The relevant portion of the decision in the case of Vatika Township Pvt. Ltd. (supra) is reproduced below :-*

“We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In Government of India & Ors. v. Indian Tobacco Assn, the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in Vijay v. State of Maharashtra. It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are (sic not) confronted with any such situation here.””

In view of the decisions as above we hold that the Commission paid on export sales is nothing but for sale promotions and is covered by the definition of input services under Rule 2 (l) of the CENVAT Credit Rules, 2004.

4.6 Issue in respect of “Bank Commission charges” has been considered by tribunal on number of occasions, and tribunal has constantly held in the favour of allowing the CENVAT Credit of Service tax paid on these charges. In case of Sundaram Clayton Ltd [2016 (42) STR 741 (T)], following was observed:

“We appreciate that the financial service is a covered service under Rule 2(l) of CCR, 2004. Added to that finance being the necessary input for the purpose of carrying out the manufacturing activity and money is invested to carryout manufacture, credit cannot be denied for such services availed.”

Respectfully following the said decision, we hold that the Service Tax paid on Bank Commission Charges shall be admissible as CENVAT Credit to the Appellant.

4.7 Courier Services are utilized by the appellants for the delivery of documents to the customers and statutory bodies. In fact these services are used for conducting their business by the Appellants. Tribunal has in case of Apar Industries [2010 (20) STR 624 (T)], while allowing the CENVAT Credit of Service Tax paid on the Courier Services held as follows:

"3. *I have considered the submissions made by both sides. As rightly observed by Commissioner, the input service includes various services related to manufacturing activities as well as business activities. The courier services are used by the respondents for placing order, filing quotation for procurement as well as marketing, dispatch instructions, issuing cheque for procurement, sending stock transfer documents to depots, receiving dispatch instructions from marketing/depots/Head office etc., the activities for which the courier service has been used by the respondent. It is quite clear that services have been used in relation to all kinds of activities which have been said to used in relation to manufacture of final product and clearance of final product as well as business activities, as defined in the definition of input services. In view of the above, I find no reason to interfere with the order passed by Commissioner (Appeals) and accordingly, appeal filed by the Revenue is rejected."*

This decision of tribunal has been upheld by the Hon'ble Gujarat High Court as reported at [2011 (23) STR J 194 (Guj)].

Following the ratio of this decision we hold courier services are input services for appellant for conducting their business. Hence CENVAT Credit will be admissible of Service Tax paid on these services.

4.8 Appellant have claimed CENVAT Credit of the service tax paid on travel charges incurred by them towards the transportation of their senior executives/ employees for attending seminars/ conference for conduct of their business. These have been clubbed under category of "Aviation Services". Arguing for the admissibility of Service tax in respect of these Aviation Services, Appellants have relied upon the following decisions:

- ITC Ltd [2017-TIOL-1894-CESTAT-Bang]
- Reliance Industries Ltd. [2016 (45) STR 383 (T)]
- Hindustan Petroleum Corpn [2017 (47) STR 33 (T)]
- Force Motors [2009 (13) STR 692 (T)]

In our view none of the cases support the claim of CENVAT Credit in respect of the travel expenses incurred towards the travel of senior executives/ employees. In case of, -

- Force Motors, tribunal was concerned with services rendered by the Airport Authority, in respect of Aircraft, parked at the Airport;
- Reliance Industries Ltd, tribunal considered the case of admissibility of CENVAT credit in respect of Airport/Civil Enclave/Airport Operator's Service and Air Travel Agent and Rail Travel Agents;
- Hindustan Petroleum Corporation, tribunal has considered catering services, commissioning services, housekeeping services, documentation services, conducting written test for non-mgt.
- ITC, the services under consideration are Air Travel Agents Service, Tour Operator Service and Membership of Club or Association Service

None of the decisions would assist the case of Appellant further the case of the Appellant is for the period November 2005 to 2011, i.e. prior to the amendment of the definition of input services, whereas we find the decisions referred above in case of ITC, Hindustan Petroleum Corporation, are for the period post amendment. In case of Hindustan Petroleum Corporation, after taking the note of amendments made in 2011, learned Member observes:

*"**12.**Post amendment with effect from 1-4-2011, the definition of input service in Rule 2(l) is much wider and broadbanded and takes in its ambit, inter alia, all input services used by the manufacturer, whether directly or indirectly, is or in relation to the manufacture of final products and clearance of final products, except services specifically excluded in clauses A, B*

and C of the Rule. As trend, hereinafter, the impugned services are very much input services for the purposes of Rule 2(l).”

Similarly in case of Reliance Indu8stry, Learned Member observes

6.3 *Now the question that arises is regarding services which were excluded by the amendment after 2-4-2011 to the definition of Rule 2(l) of the Cenvat Credit Rules, 2004. The said services are - outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees such as Leave or Home Travel Concession. The amendment indicates when such services are used purely for personal use for consumption of any employee, the Cenvat credit cannot be allowed. On perusal of the records, we find that the appellants have been taking a consistent stand that in their case Outdoor Catering services, Club or Association service, Health and Fitness Services are three services on which Cenvat credit from 1-4-2011 is sought to be denied relying upon the said amendment to Rule 2(l) of the Cenvat Credit Rules, 2004, which is incorrect as these services are utilized for the business meetings held at various places including AGM.*

The definition of Input Services prior to its amendment in 2011, input services as per Rule 2 (l) was defined as follows:

“(ii) Used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal;”

Thus for qualifying as input service, the use of the service was to be in manufacture of the finished products. In our view the services in respect of which the CENVAT Credit is claimed by putting them under the category of Aviation Services, do not qualify the test laid down as per the Rule 2 (l), hence CENVAT Credit in respect of these services shall not be admissible.

4.9 We also find merits in the submissions of the Appellant that there was no suppression etc, in the case for invoking extended period of limitation. We also note except for the demand in respect of Appeal No E/1937/2010, all other demands have been made in normal period of time without invoking extended period. However as we have held in favour of the Appellants on merit in respect of all the disputed services except for those under category of "Aviation Services" the issue of limitation becomes infructuous in respect of these services.

4.9 Since we hold that there was no case for invoking extended period of limitation, as there was no suppression the penalties imposed on the Appellant equivalent to the demand confirmed cannot be upheld. Hon'ble Supreme Court has in case of Rajasthan Spinning and Weaving Mills, specifically held as follows:

*"**23.** The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides."*

4.10 Thus in view of our discussions as above only the demand of Rs 66,290/- (Rupees Sixty Six Thousand Two Hundred and Ninety only) in respect of services categorized is upheld and all other demands made by the impugned orders are set aside and also the penalties imposed.

5.0 The appeals are partly allowed to the extent indicated in para 4.10.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

tvu