CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 439 OF 2012

[Arising out of Order-in-Original No: 11/COMMR(KAP)/LTU/Ex/2011 dated 19th December 2011 passed by the Commissioner of Central Excise & Service Tax, LTU, Mumbai.]

ACC Limited
Cement House, 121 Maharshi Karve Road
Mumbai - 400020 … ***Appellant***

versus

Commissioner of Central Excise & Service Tax
Large Taxpayers Unit
29th Floor, Centre – I, World Trade Centre, Cuffe Parade
Mumbai - 400005 ***…Respondent***

APPEARANCE:

Shri Vivek Sharma, Advocate for the appellant

Shri S Anantha Krishnan, Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 86133/2022

DATE OF HEARING:	09/06/2022
DATE OF DECISION:	09/06/2022

PER: C J MATHEW

The issue in this appeal of M/s ACC Ltd against order-in-original no. 11/COMMR(KAP)/LTU/Ex/2011 dated 19th December 2011 of Commissioner of Central Excise & Service Tax, LTU, Mumbai, is the denial of eligibility of ` 5,11,63,022/- as CENVAT credit and consequent recovery thereof under rule 14 of CENVAT Credit Rules, 2004, along with appropriate interest thereon, besides imposing penalty of like amount under rule 15 of CENVAT Credit Rules, 2004. It has been held that 'input service distributor' was ineligible to do so on tax borne, between April 2005 and March 2007 under reverse charge mechanism, as recipient of 'goods transport agency service' for outward transportation of goods from factory/depot to premises of customers.

2. The show cause notice dated 9th November 2009 alleged that 'post-clearance' transportation did not qualify as

'(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 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 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;'*

in rule 2(l) of CENVAT Credit Rules, 2004 as it existed prior to 1st April 2008 owing to the enumeration in the inclusive leg circumscribing 'outward transportation' only upto place of removal.

3. It is the contention of the Learned Counsel for appellant that the issue stands covered by the decision of the Hon'ble Supreme Court in *Commissioner of Central Excise, Belgaum v. Vasavadatta Cements Ltd [2018 (11) GSTL 3 (SC)]* which disposed off, *inter alia,* the appeal of Revenue against the upholding, by the Hon'ble High Court of Karnataka in *Commissioner of Central Excise, Bangalore v. ABB Ltd [2011 (23) STR 97 (Kar.)],* of the order of the Tribunal in favour of M/s ABB Ltd in a similar dispute.

4. Learned Authorised Representative contends that finality had not crystallized on the issue when show cause notice was issued. It was also pointed out that the decision of the Hon'ble High Court of Karnataka in *re ABB Ltd,* though available at the time of adjudication , had been distinguished for non-applicability and that the adjudicating authority had, instead, tested compliance with the three conditions laid down by Hon'ble High Court Punjab & Haryana in *Gujarat Ambuja*

Cements v. Union of India [2009 (14) STR 3 (P&H)] thus

> *'28. The defense looks appealable, except for the fact when the demand in this case Is for the period from April 2005 to March to March 2007, copies of six purchase orders is far from sufficient to arrive at a positive conclusion. It is also seen from the records that during the impugned period, the assessee had sales on 'FOR destination' basis as well as ex factory. Besides the credits were availed based on the invoices of ISD. Further in support of the claim that the risk is borne by them, the assessee could produce a copy of the Insurance (on a common PAW basis) issued by the National Insurance Company Limited, for the period from 01-6-2004 to 31-05-2005; whereas the demand is from April 2005 to March 2007. It is well neigh impossible to satisfy oneself that the entire transactions in this demand satisfy the three conditions. In other words, while conceding that as far as the Impugned period is concerned, the issue is well settled, it is equally necessary to hold that the assessee has not been able to justify their availment with proper and acceptable evidence that they satisfy the requirements of the circular, which is a basic necessity for claiming any relief. Had the assessee provided with sufficient documentary evidence to the effect that all sales were TOR destination' and the risk was borne by them with proper evidence, the order probably would have been different. Under these circumstances, it Is to be held that there is no alternative but to hold that the assessee has failed to justify their availment of the credit of tax paid by them on GTA with sufficient documentary evidence. And hence the demand has to be sustained.'*

5. Considering that the Hon'ble Supreme Court has, in *re Vasavadatta Cements Ltd*, held that

> *'9. In view of the aforesaid discussion we hold that the appeals are bereft of any merit and are accordingly dismissed.'*

the decision in *re ABB Ltd*, which did not find the reliance placed by the Tribunal on the decision in *re Gujarat Ambuja Cements* to be inappropriate, has attained finality.

6. We find no reason to consider any other aspect in the impugned proceedings. Accordingly, the impugned order is set aside and the appeal allowed.

(Operative Part of the Order pronounced in the open court on 9th June 2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*