CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 85715 of 2020

(Arising out of Order-in-Appeal No. NSK/EXCUS/000/APPL/214/19-20 dated 28.02.2020 passed by the Commissioner of CGST & Central Excise (Appeals), Nashik)

M/s Precision Engineers **.... Appellant**
A division of M/s. Grind Master Machines Pvt. Ltd.
Plot No. H-17/2 (part), MIDC Area,
Waluj, Aurangabad – 431136.

Versus

Commissioner of CGST & Customs-Aurangabad **.... Respondent**
Town Centre, N-5, CIDCO, Aurangabad-431030.

Appearance:

None for the Appellant

Shri Xavier R. Mascarenhas, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85625/2023

Date of Hearing: 03.03.2023
Date of Decision: 06.04.2023

Per: Anil G. Shakkarwar

Present appeal is directed against Order-in-Appeal dated 28.02.2020.

2. Brief facts of the case are that the appellant are manufacturers of excisable goods. They have availed service of commission agent for sale of the product manufactured by them. The appellant availed CENVAT Credit of Service Tax paid on the

commission paid to the commission agents, who were involved in sales of the goods manufactured by them. It appeared to Revenue that service of sales commission agent is not input service and therefore, the appellant were issued with a show cause notice dated 23.10.2015 proposing to disallow CENVAT Credit amounting to Rs. 5,38,964/- for the period from August 2011 to June 2015. The original authority through his order dated 24.02.2017 dropped the proceedings. Revenue preferred appeal against the said order dated 24.02.2017 before learned Commissioner (Appeals). The present appellant was respondent before the learned Commissioner (Appeals). The present appellant who was respondent before the learned Commissioner (Appeals) had contended before learned Commissioner (Appeals) that they were eligible to avail such CENVAT Credit as per para 5 of CBEC Circular No. 943/4/2011/CEX dated 29.04.2011. Learned Commissioner (Appeals) accepted the contention of Revenue and by setting aside Order-in-Original dated 24.02.2017 allowed the appeal filed by Revenue. As a result, the appellant were disallowed the availment of aforementioned CENVAT Credit. Aggrieved by the said order, appellant is before this Tribunal.

3. The appellant has filed written submissions in lieu of personal appearance. In the written submissions, appellant has contended that the learned Commissioner (Appeals) has failed to appreciate that as per CBEC Circular No. 943/4/2011/CEX dated 29.04.2011 at para 5 it has been specifically clarified that "the definition of input service allows credit on services used for clearance of final products up to the place of removal. Moreover, activity of sale

promotion is specifically allowed on many occasions, the remuneration for sale is linked to actual sale. Reading the provisions harmoniously it is clarified that credit is admissible on the services of sale of dutiable goods on commission basis."

4. Heard the learned AR. He has relied on ruling by Hon'ble High Court of Gujarat in the case of *Commissioner of Central Excise, Ahmedabad Vs M/s Cadila Healthcare Ltd.* reported at 2013-TIOL-12-HC-AHM-ST and stated that in sub-para (ix) of para 5.2 of the judgment, it is very clearly held that CENVAT Credit of Service Tax paid on services rendered by sales commission agent is not admissible.

5. I have carefully gone through the records of the case and submissions made by both the sides. I have also gone through the ruling by Hon'ble Gujarat High Court relied upon by the learned AR. From the ruling by Gujarat High Court, I come to know that the show cause notice in that case was issued on 04.03.2007 whereas in the present case the period of dispute is from August 2011 to June 2015. Further the said circular issued by CBEC dated 29.04.2011 states that CENVAT Credit Rules, 2004 were amended along with the Budget-2011 Announcement vide Notification No. 3/2011-CE (NT) dated 01.03.2011. It further states that few changes were further effected vide Notification No. 13/2011-CE (NT) dated 31.03.2011. It further states that on a few issue trader has requested for clarity and accordingly the clarifications were issued and at Serial No. 5 the question framed for clarification was "is the credit of Business Auxiliary Service on account of sales

commission now disallowed after the deletion of expression activities related to business?" Further, I find that the appellant in this appeal had pleaded before the learned Commissioner (Appeals) that as per clarification to the above stated question raised at Serial No. 5 of said CBEC circular was applicable to the appellant. However from the impugned order, I did not find any finding by learned Commissioner (Appeals) on applicability or otherwise of the said clarification of CBEC to the present issue. The CBEC's clarifications are biding on the departmental officers. The learned Commissioner (Appeals) should have given her finding on applicability or otherwise of the said clarification in the instant case in her Order-in-Appeal. Since this Tribunal does not have benefit of Commissioner (Appeals) views on applicability of clarification at para 5 of said CBEC circular dated 29.04.2011 to the facts and circumstances of the present case, this Tribunal is not in a position to further examine the issue. Therefore, the matter is remanded to learned Commissioner (Appeals) to examine the issue in the light of said clarification issued by CBEC on 29.04.2011 and also taking into consideration the ruling by Hon'ble Gujarat High Court stated above and pass Order-in-Appeal after giving opportunity to present appellant to present their case.

6. Appeal allowed by way of remand.

(Order pronounced in court on 06.04.2023)

(Anil G. Shakkarwar)
Member (Technical)

Sinha