CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 86328 OF 2013

[Arising out of Order-in-Original No: 15/ANS-15/Nitin Castings/Th-I/2012 dated 24th January 2013passed by the Commissioner of Central Excise, Thane – I.]

Nitin Castings Ltd
Eastern Express Highway, Thane (W) - 400601 … ***Appellant***

versus

Commissioner of Central Excise
Thane – I
Navprabhat Chambers, Ranade Road, Dadar (W)
Mumbai - 400028 ***…Respondent***

WITH

EXCISE APPEAL NO: 86329 OF 2013

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Nitin Castings Ltd
Eastern Express Highway, Thane (W) - 400601 … ***Appellant***

versus

Commissioner of Central Excise
Thane – I
Navprabhat Chambers, Ranade Road, Dadar (W)
Mumbai - 400028 ***…Respondent***

APPEARANCE:

Shri Rajesh Ostwal, Advocate for the appellant

Shri P K Acharya, Superintendent (AR) for the respondent

CORAM:

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

FINAL ORDER NO: A / 86067-86068/2023

DATE OF HEARING: 20/06/2023
DATE OF DECISION: 20/06/2023

PER: C J MATHEW

We dispose off two appeals in the common order as the issue involved, *viz*., entitlement to CENVAT credit of tax paid on specified services procured by them, is identical in both differing only for the period from April 2007 to October 2011 and from November 2011 to September 2012 respectively for which two separate notices, of 1st May 2012 and 29th November 2012, had proposed recovery of ₹ 1,03,29,526[1] and ₹ 14,06,234[2] respectively. Commissioner of Central Excise, Thane–I confirmed the two demands in the notices, amounting to ₹1,17,35,760, under rule 14 of CENVAT Credit Rules, 2004 read with section 11A of Central Excise Act, 1944, along with interest as applicable, and imposed penalty of like amount under rule 15 of CENVAT Credit Rules, 2004 read with section 11AC of Central Excise Act, 1944.

2. The appellant is a manufacturer of 'tubes', 'pipes' and other 'articles of stainless steel' and 'parts of industrial or laboratory furnace' on which appropriate duties of central excise are discharged.

[1] [order-in-original no. 14/ANS-14/Nitin Castings/Th-1/2012 dated 24th January 2013]
[2] [order-in-original no. 15/ANS-15/Nitin Castings/Th-1/2012 dated 24th January 2013]

For the impugned period, the adjudicating authority held that the goods procured do not conform to rule 2(l) of CENVAT Credit Rules, 2004 inasmuch as these do not find use in or in relation to manufacture but for goods after clearance.

3. According to Learned Counsel for the appellant, the disputed services were all received before 1st April 2011 and covered by

'activities relating to business'

in the 'inclusive' leg of 'input services' as defined in section 2(l) of CENVAT Credit Rules, 2004. Reliance was placed by him on the decision of the Hon'ble High Court of Bombay in *Coca Cola India Private Limited v. Commissioner of Central Excise, Pune-III [2009 (15) STR 657 (Bom)]* expounding on that very phrase, as existing in the definition then, thus

> *'23. We now propose to consider some of the expressions used in the definition of input service. Firstly what does the expression means and includes mean. The definition of input service uses the term means and includes. These expression must be understood as now judicially recognized. In Regional Director v. High Land Coffee Works - 1991 (3) SCC 617, the Hon'ble Supreme Court has held as under :*
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> > *The word include in the statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension, and not with restriction. The word include is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but*

also those things which the interpretation clause declares that they shall include. [See (i) Strouds Judicial Dictionary , 5th edn. Vol. 3, p. 1263 and (ii) C.I.T. v. Taj Mahal Hotel 1, (iii) State of Bombay v. Hospital Mazdoor Sabha.

This has been reiterated in C.I.T. v. T.T.K. Health Care Ltd. - (2007) 11 SCC 796.

In M/s. Mahalakshmi Oil Mills v. State of Andhra Pradesh, AIR 1989 Supreme Court 335, the Court dealing with the expression means and includes observed as under :

As Lord Watson observed in Dilworth v. Commissioner of Stamps (1899) AC 99 the joint use of the words "mean and include" can have this effect. He said, in a passage quoted with approval in earlier decisions of this Court :

Section 2 is, beyond all question, an interpretation clauses, and must have been intended by the Legislature to be taken into account in construing the expression "charitable device or bequest," as it occurs in Section 3. It is not said in terms that "charitable bequest" shall mean one or other of the things which are enumerated, but that it shall "include" them. The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word "include" is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include" and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions. (emphasis supplied)

The Supreme Court in the case of Bharat Coop. Bank (Mumbai) Ltd. v. Coop. Bank Employees Union - (2007) 4 SCC 685 observed as under :

It is trite to say that when in the definition clause given in any statute the word "means" is used, what follows is intended to speak exhaustively. When the phrase "means" is used in the definition, to borrow the words of Lord Esher M.R. in Gough v. Gough - (1891) 2 Q.B. 665 it is a "hard and fast" definition and no meaning other than that which is put in the definition can be assigned to the same. (Also see :

> *P. Kasilingam and Ors. v. P.S.G. College of Technology and Ors. MANU/SC/0265/1995). On the other hand, when the word "includes" is iised in the definition, the legislature does not intend to restrict the definition; makes the definition enumerative but not exhaustive. That is to say, the term defined will retain its ordinary meaning but its scope would be extended to bring within it matters, which in its ordinary meaning may or may not comprise. Therefore, the use of the word "means" followed by the word "includes" in Section 2(bb) of the ID Act is clearly indicative of the legislative intent to make the definition exhaustive and would cover only those banking companies which fall within the purview of the definition and no other.*

Considering these judicial pronouncements, it is clear that the expression means and includes is exhaustive. By the word includes services which may otherwise have not come within the ambit of the definition clause are included and by the words means these are made exhaustive.

24. The next expression to be considered from the definition is 'such as'. A few dictionary meanings of the term 'such as' are reproduced. Concise Oxford Dictionary, Such as means for example or of a kind that; Chambers Dictionary, such as means for example :

In Good Year India Ltd. v. Collector of Customs - 1997 (95) E.L.T. 450 the Supreme Court observed as under :

> *The words such as stainless steel, nickel monel, incoloy, hastelloy in sub-heading (2) are only illustrative of the various metals from which valves can be made but the said description is not exhaustive of the metals.*
>
> *The words such as therefore are illustrative and not exhaustive. In the context of business, those are services, related to the business. They may not be exhaustive, but are illustrative.*

25. The expression Business is an integrated/continuous activity and is not confined restricted to mere manufacture of the product. Therefore, activities in relation to business can cover all the activities that are related to the functioning of a business. The term business therefore, in our opinion cannot

be given a restricted definition to say that business of a manufacturer is to manufacture final products only. In a case like the present, business of assessee being an integrated activity comprising of manufacture of concentrate, entering in to franchise agreement with bottlers permitting use of brand name by bottlers promotion of brand name, etc. the expression will have to be seen in that context See (i) Pepsi Foods Ltd. v. Collector - 1996 (82) E.L.T. 33, (ii) Pepsi Foods Ltd. v. Collector - 2003 (158) E.L.T. 552 (S.C.).

The Hon'ble Supreme Court in State of Karnataka v. Shreyas Paper Pvt. Ltd. 2006 SCC affirmed the view taken by the Hon'ble Karnataka High Court reported at 2001 (121) STC 738, which, inter alia, held as under :

> *Business comprises of the regular and systematic activity with an object of earning of profits. The machinery, plant, building and the land over which they have erected or constructed are only the tools of such business. Assets and liabilities including goodwill are the necessary ingredients to constitute a business, besides the stocks and other movable and immovable items connected with the said business.*
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> *In Mazgaon Dock Ltd. v. Commissioner of Income tax and Excess Profits Tax - AIR 1958 SC 861 the Hon'ble Supreme Court held as follows :*
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> *14. The word "business" is, as has often been said, one of the wide import and in fiscal statutes, it must be construed in a broad rather than a restricted sense.*
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> *15. "The word 'business connotes", it was observed by this court in Narain Swadeshi Weaving Mills v. Commissioner of Excess Profits Tax, 1955 1 SCR 952 "some real, substantial and systematic or organisod course of activity or conduct with a set purpose."*

The term "business" therefore, particularly in fiscal, statutes is of wide import.'

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34. It is therefore, clear that the burden of service tax must

be borne by the ultimate consumer and not by any intermediary i.e. manufacturer or service provider. In order to avoid the cascading effect, the benefit of cenvat credit on input stage goods and services must be ordinarily allowed as long as a connection between the input stage goods and services is established. Conceptually as well as a matter of policy, any input service that forms a part of the value of the final product should be eligible for the benefit of Cenvat Credit.

Revenues contention, if accepted as in the present case, would go against the very core and genesis of Cenvat credit scheme. In our opinion, such an interpretation would be plainly unacceptable.

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39. The definition of input service which has been reproduced earlier, can be effectively divided into the following five categories, in so far as a manufacturer is concerned :

(i) Any service used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products

(ii) Any service used by the manufacturer whether directly or indirectly, in or in relation to clearance of final products from the place of removal

(iii) Services used in relation to setting up, modernization, renovation or repairs of a factory, or an office relating to such factory,

(iv) Services used in relation to advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs,

(v) Services used in relation to activities relating to business and outward transportation upto the place of removal.

Each limb of the definition of input service can be considered as an independent benefit or concession exemption. If an assessee can satisfy any one of the limbs of the above benefit, exemption or concession, then credit of the input service would be available. This would be so even if the assessee does not satisfy other limb/limbs of the above definition. To illustrate, input services used in relation to setting up, modernization, renovation or repairs of a factory will be allowed as credit, even if they are assumed as not an activity relating to business as long as they are associated directly or indirectly in relation to manufacture of final products and transportation of final products upto the place of removal. This would follow from the observation of the Supreme Court in Kerala State Co-operative Marketing Federation Ltd. and Ors. v. Commissioner of Income-tax - 1998 (5) SCC 48, which is as under :

> *7. We may notice that the provision is introduced with a view to encouraging and promoting growth of co-operative sector in the economic life of the country and in pursuance of the declared policy of the Government. The correct way of reading the different heads of exemption enumerated in the section would be to treat each as a separate and distinct head of exemption. Whenever a question arises as to whether any particular category of an income of a co-operative society is exempt from tax what has to be seen is whether income fell within any of the several heads of exemption. If it fell within any one head of exemption, it would be free from tax notwithstanding that the conditions of another head of exemption are not satisfied and such income is not free from tax under that head of exemption.'*

4. Relying upon the decision of the Hon'ble High Court of Bombay in *Commissioner of Central Excise, Nagpur v. Ultra Tech Cement Ltd [2010 (20) STR 577 (Bom)]*, which held that the term is

sufficiently wide to encompass all kinds of services thus

> *'28. In the present case, the question is, whether outdoor catering services are covered under the inclusive part of the definition of "input service". The services covered under the inclusive part of the definition of input service are services which are rendered prior to the commencement of manufacturing activity (such as services for setting up, modernization, renovation or repairs of a factory) as well as services rendered after the manufacture of final products (such as advertisement, sales promotion, market research etc.) and includes services rendered in relation to business such as auditing, financing ..... etc. Thus, the substantive part of the definition "input service" covers services used directly or indirectly in or in relation to the manufacture of final products, whereas the inclusive part of the definition of "input service" covers various services used in relation to the business of manufacturing the final products. In other words, the definition of "input service" is very wide and covers not only services, which are directly or indirectly used in or in relation to the manufacture of final products but also includes various services used in relation to the business of manufacture of final products, be it prior to the manufacture of final products or after the manufacture of final products. To put it differently, the definition of input service is not restricted to services used in or in relation to manufacture of final products, but extends to all services used in relation to the business of manufacturing the final product.*
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> *29. The expression "activities in relation to business" in the definition of "input service" postulates activities which are integrally connected with the business of the assessee. If the activity is not integrally connected with the business of the manufacture of final product, the service would not qualify to*

be a input service under Rule 2(l) of the 2004 Rules.

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34. Therefore, the definition of input service read as a whole makes it clear that the said definition not only covers services, which are used directly or indirectly in or in relation to the manufacture of final product, but also includes other services, which have direct nexus or which are integrally connected with the business of manufacturing the final product. In the facts of the present case, use of the outdoor catering services is integrally connected with the business of manufacturing cement and therefore, credit of service tax paid on outdoor catering services would be allowable.

35. The argument of the Revenue, that the expression "such as" in the definition of input service is exhaustive and is restricted to the services named therein, is also devoid of any merit, because, the substantive part of the definition of 'input service' as well as the inclusive part of the definition of 'input service' purport to cover not only services used prior to the manufacture of final products, subsequent to the manufacture of final products but also services relating to the business such as accounting, auditing..... etc. Thus the definition of input service seeks to cover every conceivable service used in the business of manufacturing the final products. Moreover, the categories of services enumerated after the expression 'such as' in the definition of 'input service' do not relate to any particular class or category of services, but refer to variety of services used in the business of manufacturing the final products. There is nothing in the definition of 'input service' to suggest that the Legislature intended to define that expression restrictively. Therefore, in the absence of any intention of the Legislature to restrict the definition of 'input service' to any particular class or category of services used

> *in the business, it would be reasonable to construe that the expression 'such as' in the inclusive part of the definition of input service is only illustrative and not exhaustive. Accordingly, we hold that all services used in relation to the business of manufacturing the final product are covered under the definition of 'input service' and in the present case, the outdoor catering services being integrally connected with the business of the manufacture of cement, credit of service tax paid out on catering services has been rightly allowed by the Tribunal.'*

he urged us to set aside the findings in the impugned order for not taking required cognizance. According to him, all twenty of the services in dispute are eligible to be taken as credit and he relied upon specific decisions pertaining to each in support of his contention.

5. Learned Authorized Representative submitted that the adjudicating authority had rendered elaborate reasoning for the findings in the impugned order and urged us to reject the appeal.

6. On perusal of the order, it is seen that the contentions of the appellant, including legal precedent for admissibility of credit of specific services, was disposed off thus

> *'23. Having discussed the definition in detail, now the assesee's contentions need to be examined. It is seen that in the major part of the submission, the assesee has contested the demand 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 assesee are emphasizing this basic argument The case laws cited by the assesee in this regard are also related to the same issue that the words "such as", expand the scope of definition, and not restrict it. The dictionary meanings of the word given by them also highlight the same. On examining this contention against the allegation in the notice and analysis of the definition done above, it is seen that the notice does not delve on the restrictive meaning of the term such as, as mis-conceived 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 generic to the given example covered. Thus, the services which are used by the assesee which not in conformity -with the genre created by the services given as example in the definition are proposed for disqualification. The contention of the assesee therefore, upto this point is misplaced and therefore, the, case laws and the dictionary meaning etc. given by them do not address the proposed action against them. Therefore, the services such' as renting of property, Security services, insurance service, placement service etc. will not be eligible as input service, being not in the genre and the other services which are for post-clearance activities and again not in the genre will also be ineligible.

24. There are also certain services under dispute in the notice, such as banking and financial services and clearing & forwarding. These, are undisputedly used, beyond the place of

removal of the final products. The assesee has contended that in the case of exports the place of removal is the port of export; as the property of the goods still remains with the supplier. However, the definition of the place of removal discussed above, does not, categorically, take into it's ambit, the port of export as place of removal in the case of export clearances, as it does for depot, consignment-agent's clearances. Further, in the case of M/s Ultratech Cement vs CCE Bhavnagar 2007(6) STR 364 (Tri-Ahmedabad) it is dearly held that place of removal as defined in Section 4(3)(c) of the Central Excise Act,1944 can not be extended to the place of port of shipping. The CBEC in Circular no. 97/6/07-ST dated 23.08.07 while clarifying the issue as to upto what stage a manufacturer can take the Cenvat credit on the Service Tax paid (on Goods Transport by road) has relied upon the judgment, supra and so the contention that credit of the services used at the port of export will be available is wrong.

25. There are other arguments advanced by the assessee based on they seek qualification of the services availed by them as input services. On examining these it is seen that although the credit of the on the input service is broadly allowed: by the law to avoid effect of the taxes on the prices, the law itself has imposed certain restriction on such credit by way of the definition of the input service. Therefore, to avail of the credit merely looking at the broad aim of controlling the cascading effect does not serve the purpose. Similarly even if the services are essential and- important for the smooth running or the functioning of the business, or even if they cater to the welfare of the employees, indirectly promoting the business, or even if the expense[1] on that account forms part of the cost of the product, if the service does not fall in the ambit of the definition for qualification, the

credit can not be allowed. On the same lines, even if the Income Tax Act treats the expenses towards these services as expenditure for the purpose of income tax calculations, they can not automatically qualify as input service without answering to the definition given under the Cenvat Credit Rules.

26. A few case laws have been cited by the assesee in support of their case which hold that particular services such as Telephone and mobile phone, courier services, repairs / maintenance, labour etc. are input services. However, the case laws are subjective and naturally cover particular circumstances of the appellants of those cases, and can not be said to have, hard and fast universal applicability without regard to the individual circumstances. In the assesee's case, services availed have not been shown to be fully rendering only those activities which are in or in relation, either directly or indirectly, to manufacture and clearance their final products at their factory and place of removal. Further all the documents were either not produced or photocopy of the documents were submitted, which the assessee was not entitled to avail Cenvat credit on - the service tax paid on various services. Therefore, in the light of the detailed discussions made earlier these case laws do not help their case. Further, the issue involved in the case is not of any interpretation of law. The definition of the input service is very clear and unambiguous. The claim that they were under a bonafide belief that they are entitled to avail credit on the impugned services is also not correct. Even if they have maintained regular books of accounts and all transactions are duly recorded in it in the usual manner, the details were not submitted; to the Department and there was no means no know that the credit was availed on unqualified services also. The ER-1 returns regularly filed also could not have revealed these facts. The assessee has therefore, contravened the provisions of Rule 3

> *read with sub-rule (I) of Rule 2 of the Cenvat Credit Rules, 2004, having availed and utilized inadmissible credit. In this entire background the demand is not barred by limitation and is correct.'*

which, while remarkable for its explanation, is not cogent reasoning on facts and submissions as such disputes, lying within a factual matrix, ought to be. This is particularly so in the light of the assertion by the adjudicating authority that

> *'26….. Further, the issue involved in the case is not of any interpretation of law. ..'*

7. We find that the discharge of responsibility as adjudicating authority rendering finding on the show cause of this nature is inadequate. Accordingly, we set aside the impugned order and remand the matter back to the adjudicating authority to decide the matter afresh upon consideration of the factual submissions of the appellant and the relevance of judicial determination on each of the services.

(Operative Part of the Order pronounced in the open court on 20th June 2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*