CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 86151 OF 2015

[Arising out of Order-in-Original No: GOA-EXCUS-000-COM-011-2014-15 dated 27th February 2015 passed by the Commissioner of Central Excise & Service Tax, Goa.]

Godrej Consumer Products Ltd
Pilerne Industrial Estate, Pilerne, Bardez, Goa … ***Appellant***

versus

Commissioner of Customs, Central Excise& Service Tax
ICE House, EDC Complex, Patto Plaza
Panaji, Goa – 403 001 ***…Respondent***

WITH

EXCISE APPEAL NO: 86446 OF 2015

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Commissioner of Customs, Central Excise& Service Tax
ICE House, EDC Complex, Patto Plaza
Panaji, Goa – 403 001 … ***Appellant***

versus

Godrej Consumer Products Ltd
Pilerne Industrial Estate, Pilerne, Bardez, Goa ***…Respondent***

APPEARANCE:

Shri Rajesh Ostwal, Advocate for the assessee-appellant

Shri Rajiv Ranjan, Assistat Commissioner (AR) for Revenue

CORAM:

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

FINAL ORDER NO: 85879-85880/2024

DATE OF HEARING: 11/03/2024
DATE OF DECISION: 10/09/2024

PER: C J MATHEW

M/s Godrej Consumer Products Ltd, a manufacturer of popular brands of aerosol based products, is before us with a dispute about repellent, marketed by them as 'HIT', that, owing to having been produced and cleared by 'contract manufacturers' at Vapi and Jammu for trading thereafter from the depots of the appellant, was held as not only eligible only for partial availment of tax paid on 'advertising service' as CENVAT credit from 2008-09 to 2011-12 but also, for having failed to comply with requirement in rule 6 of CENVAT Credit Rules, 2004 of maintaining separate records of consumption of 'advertisement services', rendering proportionate reversal to be insufficient compliance thereof.

2. The impugned order[1] of Commissioner of Central Excise segregated the demands as ₹ 99,59,147 pertaining to the period prior to 1st April 2011, when 'trading' was legislated in as 'exempt service' by insertion of *Explanation* in rule 2 (e) of CENVAT Credit Rules, 2004 and ₹ 1,89,22,839 for the remaining one year but, while upholding the

[1] [order-in-original no. GOA-EXCUS-000-COM-011-2014-15 dated 27th February 2015]

eligibility of entire tax paid on procurement of 'advertising service' for availment as CENVAT credit, confirmed recovery only for 2011-12 owing to non-maintenance of separate records of consumption after 'trading' was deemed, by law, to be 'exempted service' warranting, in the absence of recourse to specified alternatives, reversal at the rate specified in rule 6(3) of CENVAT Credit Ruled, 2004. The assessee is aggrieved by fastening of such rate on the value of 'traded goods' while the jurisdictional Commissioner of Central Excise, aggrieved by the finding that credit attributable to 'exempted service' was permitted to be retained in the books for 2008-09 to 2010-11, is also in appeal. Thus, we note that, even with discharge of excise duty liability by 'contract manufacturers' on clearance of the advertised goods, availing of credit of tax paid on 'advertising service' at the time of procurement in full, is not an issue in dispute; only retention to the extent attributable to 'traded goods' is. In dispute is the requirement for reversal in proportion to that of 'traded goods' in the overall turnover and, in the event of such mandate, the extent of reversal. It is in the context of this framework that the impact of insertion of Explanation *supra* and the primacy of the first option in rule 6(3) of CENVAT Credit Rules, 2004 are the focus in resolving the claims of both sides.

3. A brief survey of the asseesee's practice is sufficient. The contract manufacturers clear the goods after affixing 'maximum retail price' and, upon discharge of duties of central excise leviable under section 3 and in

accordance with section 4A of Central Excise Act, 1944, effected shipments to depots of the assessee. The contracted price for reimbursement included the duties so discharged. The assessee, as owner of the brand undertook advertising promotions, and availed credit of tax paid to providers of service. Such credit was taken by the head office of the assessee, as 'input service distributor (ISD)', and distributed thereafter to the single unit of theirs manufacturing the said product at Goa.

4. According to the appellant, they as owner of the goods and having borne the duty liability, could not be barred from availment of such credit. The first leg of the claim rests on factual circumstances while the other leg was sought to be buttressed by Learned Counsel for appellant with decision of the Tribunal in *Colgate Palmolive v. Commissioner of Central Excise [2012 (25) STR 268 (T)]* and of the Hon'ble High Court of Bombay in *Coca Cola India v. Commissioner of Central Excise [2009 (15) STR 657 (Bom)]*. This was sought to be further strengthened by concatenation of rule 2(m) and rule 7 of CENVAT Credit Rules, 2004 to submit that 'outsourced manufacturing unit', introduced with effect from 1st April 2016, was covered in the definition of 'input service distributor' even before the said incorporation as the pre-amended rule 7 did not restrict coverage to 'own manufacturing units' in providing for manner of distribution of credit. Reliance was placed on the decision of a Larger Bench of the Tribunal in *Krishna Food Products v. Additional Commissioner of*

CGST & Central Excise [2021 (5) TMI 906 – CESTAT NEW DELHI], in *Krishna Food Products v. Additional Commissioner of CGST & Central Excise [2021 (7) TMI 296 – CESTAT NEW DELHI]*, in *Sweety Industries v. Commissioner of Central Excise [2024 (2) TMI 768 – CESTAT]*, in *Ajmer Food Products Pvt Ltd v. Commissioner, CGST [2023 (5) TMI 1129 – CESTAT]* and in *Shahi Food Products v. Commissioner, CGST [2022 (10) TMI 1075 – CESTAT]*.

5. That, prior to 1st April 2012, there was no restriction of *pro rata* distribution of credit was the submission of Learned Counsel for which reliance was placed on the decision of the Tribunal in *ECOF Industries v. Commissioner of Central Excise [2010 (17) STR 515 (T)]* which found affirmation in decision of the Hon'ble High Court of Karnataka in *Commissioner of Central Excise v. ECOF Industries [2011 (271) ELT 58 (Kar)]*. In addition, Learned Counsel submitted that, in the light of the decision of the Hon'ble High Court of Bombay in *Commissioner of Central Excise v. Ultratech Cement Ltd [2010 (20) STR 577 (Bom)]*, credit of tax paid on 'advertising services' could not be denied and that 'trading' could be construed as an 'exempted service' only after specific incorporation in CENVAT Credit Rules, 2004. It would appear that these submissions were in support of the impugned order to the extent that it favoured their stand.

6. Learned Authorised Representative argued that 'trading' could

by no stretch be deemed as other than 'exempted service' prior to 1st April 2011 in the light of decision of the Tribunal in *Mercedes Benz India Pvt Ltd v. Commissioner of Central Excise, Pune -I [2014 (36) STR 74 (Tri-Mumbai)]* and that, in several decisions, the Tribunal has held that, prior to 1st April 2011, 'trading' was not a service.

7. It may be seen that the relief sought by the appellant-Commissioner is limited to retrospective applicability of the *Explanation* inserted in rule 2 of CENVAT Credit Rules, 2004 with effect from 1st April 2011 to validate the demand in the notice for the prior period on the ground that the decision of the Tribunal in *re Mercedes Benz India Pvt Ltd* should have guided the adjudicating authority all through. The decision cited in the appeal has been disposed off on challenge before the Hon'ble High Court of Bombay by remand back to the Tribunal owing to which it no longer is good law; furthermore, the Tribunal, in disposing off the remand, set aside the order of the original authority for further remand back. Per contra, the decision of the Tribunal in *Ingersoll Rand Technologies and Services Private Ltd v. Commissioner of Central Excise, Ghaziabad [2022 (8) TMI 877- CESTAT ALLAHABAD]*, has held that

> *'18. It is clear from the definition of 'exempted services' w.e.f. 1-4-2011 that 'exempted services' included trading. The issue that arises for consideration is whether the Explanation to rule 2(e) is prospective in nature as submitted by the appellant or it merely*

clarifies that trading activities were always an 'exempted service', as is contended by the department.

19. To understand the scope of 'Explanation', it would be useful to refer to the decision of the Supreme Court in Sedco Forex. The Supreme Court clarified that if Explanation' widens the scope of the main provision, then it would be presumed to have only prospective effect, unless a contrary intention is expressed by the legislature. The same view was expressed by the Supreme Court in Martin Lottery. The Supreme Court, in effect, held that the use of the phrases, 'it is hereby declared' or 'removal of doubts', in itself will not enable a presumption to be drawn that the Explanation is retrospective.

20. The Tribunal in Trent Hypermarket, while dealing with the definition of 'exempted service' under rule 2(e) of the Credit Rules, held that trading cannot be treated as an 'exempted service' for the period prior to 1-4-2011 and the Explanation added on 1-4-2011 was prospective and not retrospective. The relevant portion of the decision is reproduced below:

> *"5.5 It is evident from the amending provisions of Cenvat statute w.e.f. 1-3-2011 that a substantive law was enacted to consider the activities of trading as an exempted service. Now the issue remains for resolution, as to whether, such amendment in the statutory provisions is to be construed as retrospective in effect or prospective, in order to be given effect to. In this context, the law is amply clear that if a substantive law is introduced, the date of effect of the instrument through which the decision of legislation was conveyed should be considered as the relevant date, when the same was issued or published in the official gazette for the knowledge of the general public. In this contest, the Hon'ble Supreme Court in the case of Martin Lottery Agencies Ltd. (supra) have ruled that by reason of an explanation, a substantive law may also be introduced and if a substantive law is introduced, it will have no retrospective effect. We find that the Hon'ble Madras High Court in the case of Ruchika Global Interlinks (supra) have held that inclusion in Explanation to Rule 2(e) "trading" was only clarificatory. It is further observed that the arguing counsels before the Hon'ble Madras High Court did not refer to or relied upon the judgment of Hon'ble Supreme Court in the case of Martin Lottery Agencies Ltd. (supra). Since, the law is well settled by the Hon'ble Apex Court in context with*

retrospective or prospective operation of the statute, the principles enunciated in the case of Martin Lottery Agencies Ltd. (supra) will be considered as the guiding factor for deciding the issue involved in the present case.

5.6 In view of the above discussions, we do not find any infirmity in the findings recorded in the impugned order, holding that amendment to Rule 2(e) by Notification No. 3/2011-C.E.(N.T.) dated 1-3-2011 will have the prospective effect and cannot be applied retrospectively. Thus, we do not find any merits in the appeal filed by the appellant."

(emphasis supplied)

21. The same view was expressed by the Tribunal in Lenovo (India) and the relevant paragraph is reproduced below:

"7. We find that for the period 1-4-2011, the issue stands decided in the case of Mercedes Benz India Pvt. Ltd. (supra) wherein it was held that trading is not an exempted service prior to 1-4-2011; provisions of Rule 6 requiring reversal of 6% of trading turnover is not applicable."

22. It is, therefore, clear that trading was not an 'exempted service' prior to 1-4-2011. The demand confirmed in the impugned order cannot, therefore, be sustained and is liable to be set aside.'

The issue agitated by the appellant-Commissioner is, thus, no longer *res integra*. Prior to 1st April 2011, 'trading' was not an 'exempted service' and the assessee was not obliged to comply with the mandate of rule 6 insofar as the deployment of 'advertising services' for publicizing the goods manufactured by them was concerned.

8. The sweep of the arguments on behalf of appellant-assessee, to the extent that it attempted to counter the proposal for retrospective applicability of the finding that is under dispute in their appeal, is understandable. However, it was puzzling to take note that several propositions that were neither concerned with the dispute nor, indeed,

anything other than settled law were vehemently made in their submissions. Indeed, in the light of the amendment incorporating ‘trading’ as ‘exempted service’ and settled law on its enforceability with effect from 1st April 2011, the appellant-assessee was restricted in relief sought to the most appropriate method of neutralizing that portion of credit of tax paid on procurement of ‘advertising services’ attributable to value of the goods supplied by their ‘contract manufacturers’ to them during 2011-12.

9. It is within that appreciation of the dispute remaining that we were unable to contextualize the submission that the definition of ‘input service’, notwithstanding the amendment therein for exclusion of expressions, did not exclude ‘advertising services’; that was not a finding in the impugned order and nor a ground in appeal at the instance of reviewing Chief Commissioners. The submission that there was no requirement for availment of credit for service to be restricted to location at which service was received is similarly misplaced; at no stage was a case made out by central excise authorities that credit distributed by ‘input service provider’ was proposed to be denied for that reason. The submission that the amendment, effective from 1st April 2016, to rule 7 of CENVAT Credit Rules, 2004 permitting distribution of credit to ‘contract manufacturer’ and that the Larger Bench of the Tribunal, in *re Krishna Food Products*, permitted such distribution even for the period prior to the amendment appeared, to us, to be superfluous inasmuch as the appellant-assessee had

not only ventured upon such distribution but also pertained to changes not coincident with the period of dispute. All of these set out eligibility for ‘input service distributor’ not to be constrained by ownership of manufacturing facilities to source ‘advertising services’ and to take credit thereof for proportionate distribution to every facility that manufactured the advertised goods. These could assume some semblance of relevance only upon perusal of the remaining submissions, *viz*., that of being ‘brand owner’ and that discharge of duty liability on ‘maximum retail price’, by inclusion in cost incurred by appellant-assessee, renders these to be validly taken by the appellant-assessee. The proposition impressed upon these submissions are two-fold: that appellant-assessee, insofar as ‘contract manufacture’ is concerned, stands in the place of ‘deemed’ manufacturer and that credit of tax paid on ‘advertising service’ is vested in them for utilization without being ‘input service distributor’ at all.

10. There is an inherent contradiction in the proposition which, if taken at face value for adoption, would have the effect of disembodying the ‘contract manufacturers’ for a ‘ghostly’ merger with the factory at Goa. The headquarters of the appellant had taken credit, and rightly so, as ‘input service distributor’ which was to be spread over all the manufacturing facilities. The argument, at this stage of the dispute, that it was not as ‘input service distributor’, but as the manufacturing facility at Goa deemed to be the aggregate of all manufacturing facilities, is not in conformity with facts.

11. Further, the appellant-assessee has stood the principle established in *re Krishna Food Products* on its head. We are afraid that this proposition has no basis in law: both Central Excise Act, 1944 and Finance Act, 1944 are separate enactments with distinct taxable events and even objects of the levy with 'manufacturer' in one and 'provider' in the other are mutually exclusive entities and, though levy and 'person liable to tax' in both are referred to CENVAT Credit Rules, 2004, such Rules are not the foundation of a bridge between the two and a statutory instrument cannot alter the contours of enacted law. Under Central Excise Act, 1944, any entity undertaking manufacture is the 'manufacturer' and flexibility in discharge of duty liability by 'principal manufacturer' neither alters the taxable event nor the person with default responsibility for discharge of tax; it may at best be attuning to business arrangement through notification or rules. Therefore, the facilitation of credit availment or even the provisions for valuation of excisable goods cannot distort section 3 of Central Excise Act, 1944. The assessee is not a manufacturer of goods manufactured outside their factory and even, admittedly, have not discharged liability on such goods. Consequently, the assessee has 'traded' in goods manufactured by their contract manufacturers.

12. It is settled law that 'advertising services' is an input service for goods manufactured as long as it relates to goods being sold. That the procurement of such service for 'HIT' has been undertaken by the

appellant-assessee is not in dispute by either side. That such credit could have been distributed to contract manufacturers is in the realm of the hypothetical as that is not a fact in the present dispute. The distribution of the eligible credit to the one unit of the appellant-assessee manufacturing the product is also not disputed by the appellant-Commissioner.

13. We are left only with determination of credit eligible to utilised by the sole manufacturing facility in proportion to the contribution to the total turnover of the advertised product. The impugned order has not erred in computing the proportion and, indeed, there is no dispute on that score. It is only the remedy that is under dispute. The adjudicating authority has adopted the harshest of the methods without allowing the assessee to seek the most facilitative option. To enable that to be done, we set the impugned order to the extent of recovery determined therein and remand the matter back to the original authority to re-adjudicate the matter after taking into consideration the correctness of the reversal adopted by the appellant-assessee.

(Order pronounced in the open court on 10/09/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*