Commissioner Of Central Excise Service ... vs Ultra Tech Cement Ltd on 1 February, 2018

Equivalent citations: AIR 2018 SUPREME COURT 706, 2018 (2) AKR 526 AIR 2018 SC (CIVIL) 1146, AIR 2018 SC (CIVIL) 1146

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Bench: Ashok Bhushan, A.K. Sikri

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REPO

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 11261 OF 2016

COMMISSIONER OF CENTRAL EXCISE
SERVICE TAX .....APPELLA

VERSUS

ULTRA TECH CEMENT LTD. .....RESPONDENT

JUDGMENT

A.K. SIKRI, J.

The core issue involved in the present case is with regard to the admissibility or otherwise of the Cenvat Credit on Goods Transport Agency service availed for transport of goods from the place of removal to buyer's premises. This issue has arisen in the following factual background:

> The respondent M/s. Ultratech Cement Ltd. (hereinafter referred to as the 'assessee') is involved in packing and clearing/forwarding of cement classifiable under Chapter sub heading 25232910 of Central Excise Tariff Act, 1985, with Central Excise Registration No. AAACL6442LEM014. The assessee is also availing the benefit of Cenvat Credit facility under the Cenvat Credit Rules, 2004 ('Rules, 2004' for short). The assesseeherein gets finished goods (cement) from its parent unit on stock transfer basis and sells the same in bulk form and packed bags. The assessee during

the period from January, 2010 to June, 2010 availed Cenvat Credit of service tax paid on outward transportation of goods through a transport agency from their premises to the customer's premises. According to the appellant/Revenue, the transport agency service used by the assessee for transportation of their final product from their premises to customers premises cannot be considered to have been used directly or indirectly in relation to clearance of goods from the factory viz., place of removal in terms of Rule 2(l) of the Rules and as such cannot be considered as input service to avail Cenvat credit.

Accordingly, the Office of the Commissioner of Central Excise:

Bangalore II Commissionerate issued show cause notice dated February 3, 2011 to the assessee inter alia stating that on scrutiny of ER-1 return submitted by the assessee for the period January, 2010 to June, 2010, it was noticed that the assessee have wrongly availed the Cenvat Credit of Service Tax paid on outward transportation of goods from the factory to the Customer's premises, inasmuch as the Goods Transport Agency Service used for the purpose of outward transportation of the goods from factory to customer's premises is not input service within the ambit of Rule 2(l)(ii) of the Rules, 2004. It was further mentioned that the total Cenvat Credit claimed was in the sum of Rs. 25,66,131/- and the assessee was called upon to show cause as to why the said amount be not recovered and penalty be not imposed. The assessee submitted its reply to the show cause notice contesting the position contained therein.

2) After hearing, the Adjudicating Authority passed Order-in-Original dated August 22, 2011 holding that once the final products are cleared from the factory premises, extending the credit beyond the point of clearance of final product is not permissible under Cenvat Credit Rules and post clearance use of services in transport of manufactured goods cannot be input service for the manufacture of final product. Further, the Adjudicating Authority held that CBEC vide its Circular No. 97/8/2007-ST dated August 23, 2007 has clarified the definition of place of removal.

With respect to fulfillment of requirement of Circular dated August 23, 2007, it was held that the assessee has not produced any documentary evidence to prove that conditions laid down vide Circular dated August 23, 2007 has been fulfilled. Accordingly, the Adjudicating Authority passed the order as under:

"(i) Demanding the irregular Cenvat credit availed on outward transportation of goods amounting to Rs.25,66,131/- under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11A of Central Excise Act, 1944;

(ii) Demanding interest under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11AB of Central Excise Act, 1944 read with Section 75 of the Finance Act, 1994;

(iii) Did not order for initiation of action under Rule 15(1) of Cenvat Credit Rules, 2004 read with Rule 25 of Central Excise Rules, 2002;

(iv) Imposed penalty of Rs.25,66,131/- under Rule 15(3) of Cenvat Credit Rules, 2004;

(v) Imposed penalty of Rs.1,00,000/- under Rule 25 of Central Excise Rules, 2002."

3) Aggrieved by the Order-in-Original No. 24/2011 dated August 22, 2011, respondent/assessee preferred an appeal before Commissioner (Appeals). The Commissioner (Appeals) vide Order-in-Appeal No. 57/2012-CE dated March 15, 2012 allowed the appeal and set aside the Order-in-Original holding that assessee is eligible for availment of service tax paid on GTA service on the outward freight from the factory to the customers' premises as per the Board's Circular 97/8/2007-Service Tax dated August 23, 2007. It was now the turn of the Revenue to feel aggrieved by the order. Accordingly, appeal was filed before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) by the Revenue which was rejected vide judgment dated May 1, 2015. Further appeal to the High Court preferred by the assessee has met the same fate as the said appeal has been dismissed by the High Court of Karnataka vide its judgment dated June 29, 2016, which is the subject matter of the present appeal.

4) As mentioned above, the assessee is involved in packing and clearing of cement. It is supposed to pay the service tax on the aforesaid services.

At the same time, it is entitled to avail the benefit of Cenvat Credit in respect of any input service tax paid. In the instant case, input service tax was also paid on the outward transportation of the goods from factory to the customer's premises of which the assessee claimed the credit. The question is as to whether it can be treated as 'input service'.

5) 'Input service' is defined in Rule 2(l) of the Rules, 2004 which reads as under:

"2(l) "input service" means any service:-

(i) Used by a provider of taxable service for providing an output services; 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 upto 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;"
>
> 6) It is an admitted position that the instant case does not fall in sub-clause
>
> (i) and the issue is to be decided on the application of sub-clause (ii).

Reading of the aforesaid provision makes it clear that those services are included which are used by the 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'.

7) It may be relevant to point out here that the original definition of 'input service' contained in Rule 2(l) of the Rules, 2004 used the expression 'from the place of removal'. As per the said definition, service used by the manufacturer of clearance of final products 'from the place of removal' to the warehouse or customer's place etc., was exigible for Cenvat Credit. This stands finally decided in Civil Appeal No. 11710 of 2016 (Commissioner of Central Excise Belgaum v. M/s. Vasavadatta Cements Ltd.) vide judgment dated January 17, 2018. However, vide amendment carried out in the aforesaid Rules in the year 2008, which became effective from March 1, 2008, the word 'from' is replaced by the word 'upto'. Thus, it is only 'upto the place of removal' that service is treated as input service. This amendment has changed the entire scenario. The benefit which was admissible even beyond the place of removal now gets terminated at the place of removal and doors to the cenvat credit of input tax paid gets closed at that place. This credit cannot travel therefrom. It becomes clear from the bare reading of this amended Rule, which applies to the period in question that the Goods Transport Agency service used for the purpose of outward transportation of goods, i.e. from the factory to customer's premises, is not covered within the ambit of Rule 2(l)(i) of Rules, 2004. Whereas the word 'from' is the indicator of starting point, the expression 'upto' signifies the terminating point, putting an end to the transport journey. We, therefore, find that the Adjudicating Authority was right in interpreting Rule 2(l) in the following manner:

> "... The input service has been defined to mean any service used by the manufacturer whether directly or indirectly and also includes, interalia, services used in relation to inward transportation of inputs or export goods and outward transportation upto the place of removal. The two clauses in the definition of 'input services' take care to circumscribe input credit by stating that service used in relation to the clearance from the place of removal and service used for outward transportation upto the place of removal are to be treated as input service. The first clause does not mention transport service in particular. The second clause restricts transport service credit upto the place of removal. When these two clauses are read together, it becomes clear that transport services credit cannot go beyond transport upto the place of removal. The two clauses, the one dealing with general provision and other dealing with a specific item, are not to be read disjunctively so as to bring about conflict to defeat the laws' scheme. The purpose of interpretation is to find harmony and reconciliation among the various provisions.

> 15. Credit availability is in regard to 'inputs'. The credit covers duty paid on input materials as well as tax paid on services, used in or in relation to the manufacture of the 'final product'. The final products, manufactured by the assessee in their factory premises and once the final products are fully manufactured and cleared from the factory premises, the question of utilization of service does not arise as such services cannot be considered as used in relation to the manufacture of the final product. Therefore, extending the credit beyond the point of removal of the final product on payment of duty would be contrary to the scheme of Cenvat Credit Rules. The main clause in the definition states that the service in regard to which credit of tax is sought, should be used in or in relation to clearance of the final products from the place of removal. The definition of input services should be read as a whole and should not be fragmented in order to avail ineligible credit. Once the clearances have taken place, the question of granting input service stage credit does not arise. Transportation is an entirely different activity from manufacture and this position remains settled by the judgment of Honorable Supreme Court in the cases of Bombay Tyre International 1983 (14) ELT, Indian Oxygen Ltd. 1988 (36) ELT 723 SC and Baroda Electric Meters 1997 (94) ELT 13 SC. The post removal transport of manufactured goods is not an input for the manufacturer.

Similarly, in the case of M/s. Ultratech Cements Ltd. v. CCE, Bhatnagar 2007 (6) STR 364 (Tri), it was held that after the final products are cleared from the place of removal, there will be no scope of subsequent use of service to be treated as input. The above observations and views explain the scope of relevant provisions clearly, correctly and in accordance with the legal provisions."

8) The aforesaid order of the Adjudicating Authority was upset by the Commissioner (Appeals) principally on the ground that the Board in its Circular dated August 23, 2007 had clarified the definition of 'place of removal' and the three conditions contained therein stood satisfied insofar as the case of the respondent is concerned, i.e. (i) regarding ownership of the goods till the delivery of the goods at the purchaser's door step; (ii) seller bearing the risk of or loss or damage to the goods during transit to the destination and; (iii) freight charges to be integral part of the price of the goods. This approach of the Commissioner (Appeals) has been approved by the CESTAT as well as by the High Court. This was the main argument advanced by the learned counsel for the respondent supporting the judgment of the High Court.

9) We are afraid that the aforesaid approach of the Courts below is clearly untenable for the following reasons:

> 10) In the first instance, it needs to be kept in mind that Board's Circular dated August 23, 2007 was issued in clarification of the definition of 'input service' as existed on that date i.e. it related to unamended definition. Relevant portion of the said circular is as under:
>
> "ISSUE: Up to what stage a manufacturer/consignor can take credit on the service tax paid on goods transport by road?

COMMENTS: This issue has been examined in great detail by the CESTAT in the case of M/s Gujarat Ambuja Cements Ltd. vs CCE, Ludhiana [2007 (6) STR 249 Tri-D]. In this case, CESTAT has made the following observations:-

"the post sale transport of manufactured goods is not an input for the manufacturer/consignor. The two clauses in the definition of 'input services' take care to circumscribe input credit by stating that service used in relation to the clearance from the place of removal and service used for outward transportation upto the place of removal are to be treated as input service. The first clause does not mention transport service in particular. The second clause restricts transport service credit upto the place of removal. When these two clauses are read together, it becomes clear that transport service credit cannot go beyond transport upto the place of removal. The two clauses, the one dealing with general provision and other dealing with a specific item, are not to be read disjunctively so as to bring about conflict to defeat the laws' scheme. The purpose of interpretation is to find harmony and reconciliation among the various provisions".

Similarly, in the case of M/s Ultratech Cements Ltd vs CCE Bhavnagar 2007-TOIL-429-CESTAT-AHM, it was held that after the final products are cleared from the place of removal, there will be no scope of subsequent use of service to be treated as input. The above observations and views explain the scope of the relevant provisions clearly, correctly and in accordance with the legal provisions. In conclusion, a manufacturer / consignor can take credit on the service tax paid on outward transport of goods up to the place of removal and not beyond that.

8.2 In this connection, the phrase 'place of removal' needs determination taking into account the facts of an individual case and the applicable provisions. The phrase 'place of removal' has not been defined in CENVAT Credit Rules. In terms of sub-rule (t) of rule 2 of the said rules, if any words or expressions are used in the CENVAT Credit Rules, 2004 and are not defined therein but are defined in the Central Excise Act, 1944 or the Finance Act, 1994, they shall have the same meaning for the CENVAT Credit Rules as assigned to them in those Acts. The phrase 'place of removal' is defined under section 4 of the Central Excise Act, 1944. It states that,-

"place of removal" means-

(i) a factory or any other place or premises of production or manufacture of the 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 a 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." It is, therefore, clear that for a manufacturer /consignor, the eligibility to avail credit of the service tax paid on the transportation during removal of excisable goods would depend upon the place of removal as per the definition. In case of a factory gate sale, sale from a non-duty paid warehouse, or from a duty paid depot (from where the excisable goods are sold, after their clearance from the factory), the determination of the 'place of removal' does not pose much problem. However, there may be situations where the manufacturer /consignor may claim that the sale has taken place at the destination point because in terms of the sale contract /agreement (i) the ownership of goods and the property in the goods remained with the seller of the goods till the delivery of the goods in acceptable condition to the purchaser at his door step; (ii) the seller bore the risk of loss of or damage to the goods during transit to the destination; and (iii) the freight charges were an integral part of the price of goods. In such cases, the credit of the service tax paid on the transportation up to such place of sale would be admissible if it can be established by the claimant of such credit that the sale and the transfer of property in goods (in terms of the definition as under section 2 of the Central Excise Act, 1944 as also in terms of the provisions under the Sale of Goods Act, 1930) occurred at the said place."

11) As can be seen from the reading of the aforesaid portion of the circular, the issue was examined after keeping in mind judgments of CESTAT in Gujarat Ambuja Cement Ltd. and M/s. Ultratech Cement Ltd. Those judgments, obviously, dealt with unamended Rule 2(l) of Rules, 2004. The three conditions which were mentioned explaining the 'place of removal' as defined under Section 4 of the Act, there is no quarrel upto this stage. However, the important aspect of the matter is that Cenvat Credit is permissible in respect of 'input service' and the Circular relates to the unamended regime. Therefore, it cannot be applied after amendment in the definition of 'input service' which brought about a total change. Now, the definition of 'place of removal' and the conditions which are to be satisfied have to be in the context of 'upto' the place of removal. It is this amendment which has made the entire difference. That aspect is not dealt with in the said Board's circular, nor it could be.

12) Secondly, if such a circular is made applicable even in respect of post amendment cases, it would be violative of Rule 2(l) of Rules, 2004 and such a situation cannot be countenanced.

13) The upshot of the aforesaid discussion would be to hold that Cenvat Credit on goods transport agency service availed for transport of goods from place of removal to buyer's premises was not admissible to the respondent. Accordingly, this appeal is allowed, judgment of the High Court is set aside and the Order-in-Original dated August 22, 2011 of the Assessing Officer is restored.

.....J. (A.K. SIKRI) .....J. (ASHOK BHUSHAN)
NEW DELHI;

FEBRUARY 01, 2018.