

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 353 of 2010

And

TAX APPEAL No. 204 OF 2011

For Approval and Signature:

**HONOURABLE MR.JUSTICE AKIL KURESHI
HONOURABLE MS.JUSTICE HARSHA DEVANI**

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1 Whether Reporters of Local Papers may be
1 allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the
3 fair copy of the judgment?

4 Whether this case involves a substantial
4 question of law as to the interpretation
of the constitution of India, 1950 or any
order made thereunder?

5 Whether it is to be circulated to the
5 civil judge?

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COMMISSIONER OF CENTRAL EXCISE, AHMEDABAD - II -
Appellant(s)

Versus

M/S CADILA HEALTHCARE LTD. - Opponent(s)

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Appearance:

MR DARSHAN M PARIKH for Appellant(s) : 1,
MR J C PATEL with MR DHAVAL SHAH for Opponent(s) : 1,

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**CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MS.JUSTICE HARSHA DEVANI**

Date: 18/10/2012 & 07/11/2012

ORAL JUDGMENT

(Per: HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. Both these appeals at the instance of the revenue are directed against the common order dated 3.8.2009 passed by the Customs Excise & Service Tax Appellate Tribunal, West Zone Bench, Ahmedabad (hereinafter referred to as "the Tribunal") in Central Excise Appeal No. E/775 and E/1355 of 2008 by proposing the following question :

"Whether the CESTAT was right in considering the services namely Technical Testing and Analysis Service, Technical Testing and Certification Service, Business Auxiliary Service (Service rendered by the Commission agent), Service rendered by clearing and Forwarding Agent, Courier Service, Commercial and Industrial Construction Service, Maintenance or Repair service, Interior Decorator Service, Management Consultancy Service, availed by the assessee, as eligible services for availing input service credit as defined under Rule 2(l) of the CCR, 2004?"

2. The respondent-assessee is engaged in the manufacture of P. & P. medicines classifiable under Chapter 30 of the First Schedule of the Central Excise Tariff Act, 1985 and is also availing CENVAT facility as provided under the Central Credit Rules, 2004 (hereinafter referred to as "the Rules"). During the course of Audit by the Head Quarters Audit, it was noticed that the assessee had availed CENVAT credit in respect of services, which according to the department were not eligible as input services as defined under rule 2(l) of the Rules. Accordingly, two show cause notices came to be issued to the assessee. Show cause notice dated 8.6.07 came to be issued in respect of

the following input services: (1) Technical Testing and Analysis - Rs.1,23,09,894/- (2) Commission paid to the foreign agents - Rs.39,45,791/- (3) Courier service - Rs.36,54,709/- (4) Clearing and Forwarding Service - Rs.6,87,098/- (5) (i) Repairs and maintenance of ACs, Split ACs, water cooler, cold room - Rs.1908/-, (ii) Repairs and maintenance of photocopier - Rs.7,166/- (iii) Management Consultancy service - Rs.24,480/- (iv) Interior Decorator service - Rs.137/- (v) Construction service - Rs.1,726/- (Rs.35,416/-) Total Rs.2,06,32,909/-. Show cause notice dated 04.03.2007 came to be issued in respect of the following input services: (1) Technical Testing and Analysis - Rs.1,70,24,431/-, (2) Technical Inspection and Certification - Rs.6,08,226/- (3) Commission paid to the foreign agents - Rs.1,93,421/-, (4) Courier service - Rs.1,72,58,378/-, (5) Clearing and Forwarding Service - Rs.6,41,977/-, and (6) (i) Repairs and maintenance service Rs.7,23,330/- (ii) Commercial Construction service - Rs.2,41,404/-, (iii) Management Consultancy service - Rs.1,09,48,135/- (iv) Interior Decorator service - Rs.31,750/- (Rs.1,19,44,619/-) Total Rs.4,76,71,052/-. Under the said show cause notices the assessee was called upon to show cause as to why the aforesaid amounts should not be recovered under rule 14 of the Rules read with section 11A(1) of the Central Excise Act, 1944 (hereinafter referred to as "the Act").

3. The aforesaid two show cause notices came to be adjudicated by the Commissioner, Central Excise,

Ahmedabad-II vide Orders-in-Original dated 31.03.2008 and 31.07.2008 respectively, whereby the demand came to be confirmed in respect of both the show cause notices along with interest as well as penalty under rule 15(3) of the Rules. The assessee carried the matter in appeals before the Tribunal. Both the appeals came to be decided by the Tribunal by a common order dated 03.08.2009, which is subject matter of challenge in these appeals.

4. Having heard Mr. Darshan Parikh, learned senior standing counsel for the appellant and Mr. J.C. Patel learned counsel for the respondent, this court is of the view that appeals require consideration. Hence Admit. The following substantial question of law arises for determination:

Whether the Customs, Excise and Service Tax Appellate Tribunal was justified in holding:

- (i) Technical Testing and Analysis services
 - (ii) Commission paid to foreign agents,
 - (iii) Courier service,
 - (iv) Clearing and forwarding service,
 - (v) Management and Consultancy service,
 - (vi) Interior Decorator service,
 - (vii) Construction service,
 - (viii) Technical Inspection and Certification,
 - (ix) Repairs and maintenance service,
 - (x) Commercial construction service,
- to be "input service" as envisaged under rule 2(1) of the CENVAT Credit Rules, 2004?

5. Each of the above services would be required to be examined independently. For the sake of convenience, where the service in question is common in respect of both the show cause notices, reference is made to the facts relating to the show cause notice dated 04.03.2008.

5.1 Technical Testing and Analysis services. The assessee had availed of CENVAT credit of Rs.1,07,83,766/- on "Technical Testing and Analysis services" in respect of clinical samples tested by M/s Perfect Technical Services, M/s. B.A. Research India Limited, M/s. Micro Therapeutic Research Pvt. Ltd., M/s. Lotus Labs Pvt. Ltd, Reliance Clinical Research Services, etc., during the period from 01.02.2007 to 30.09.2007. From the records it was observed that the assessee had not started commercial production of products of which clinical samples were got tested by various agencies. Upon calling the assessee to explain as to whether the product which was got tested had been registered with the Drug Authority, the assessee replied that drug license would be obtained as and when commercial production of tested products was planned. Thus, the product was not yet registered with the competent authority. The adjudicating authority was of the view that the above services received by the assessee could not be considered as input services as they had not been used directly or indirectly, in or in relation to the manufacture of final products as no manufacturing of final products pertaining to these

clinical samples had been undertaken, and accordingly held that the assessee had wrongly availed of CENVAT credit on Technical Testing and Analysis services and the said credit was required to be recovered along with interest under rule 14 of the Rules read with section 11A and 11AB of the Act.

(i) Mr. Darshan Parikh, learned Senior Standing Counsel for the appellant, invited the attention of the court to the provisions of rule 2(l) of the Rules which defines "input service" to submit that the definition is in two parts. One is the main definition, which is followed by the clarifying inclusive part. Accordingly, all those services are defined as input services which are used by the manufacturer, whether directly or indirectly, in or in relation to manufacture of final product and clearance of final product from the place of removal. In the inclusive part some services which are related to specified activities are listed. It means that if the service is not used in or in relation to manufacture of final product and clearance of the same from the place of removal and further does not fall within the inclusive part, then such service cannot be treated as an input service and CENVAT credit taken on such service is not admissible.

(ii) It was submitted that insofar as input service tax credit in respect of Technical Testing and Analysis services is concerned, the said service was rendered in respect of a final product which was

produced on trial basis but has not been manufactured and sold. Hence, the service tax, if any, paid in respect of such services cannot be taken credit of. Reference was made to the definition of manufacture as defined under section 2(f) of the Act, to submit that from the said definition it is clear that the Technical Testing and Analysis service availed by the assessee is not used for manufacture of final product or for clearance of the final product from the place of removal and is also not related to the activities specified in the inclusive part of the definition of input service. The input credit on a service is available in or in relation to the manufacture of final product only and not for Research and Development (R & D) of the product of which production has not been started. The definition of input credit is in the context of tax paid on input services used in or in relation to the manufacture of final product and cannot be extended to the product which is not manufactured on commercial basis. Therefore, this service does not fall within the ambit of input service, hence, CENVAT credit was not admissible in respect of the service tax paid in respect thereof.

(iii) On the other hand, Mr. J.C. Patel learned counsel for the respondent-assessee submitted that input service as provided in rule 2(l) of the Rules is divided into two parts. The first part giving specific meaning and the second part gives the inclusive meaning of the same. In the second part, and inclusive meaning is given to an input service, which otherwise

would not have been covered in the main first part. The expression used in the rule is "such as" which means the stipulated activities that follow the said expression in the definition are only illustrative. The expanded part of the definition is an inclusive one and not an exhaustive list of the activities on which the input service credit can be taken by a manufacturer. In support of such submission, the learned counsel placed strong reliance upon the decision of this court in case of **Commissioner of C. Ex. & Customs v. Parth Poly Wooven Pvt. Ltd.**, 2012(25) S.T.R. 4(Guj.), wherein the court has, bearing in mind various judicial pronouncements on the question of interpretation, held that the definition of 'input service' which is coined in the phraseology of "means and includes" is wide in its expression and includes a large number of services used by the manufacturer. Such services may have been used either directly or indirectly. To qualify for input service, such service should have been used for the manufacture of the final products or in relation to manufacture of final product or even in the clearance of the final product from the place of removal. The expression 'in relation to manufacture' is wider than 'for the purpose of manufacture'.

(iv) Reliance was also placed upon the decision of the Karnataka High Court in the case of **Commr. Of C. Ex., Bangalore-III v. Stanzen Toyotetsu India(P) Ltd**, 2011(23)S.T.R. 444(Kar.), wherein the court in the context of the definition of 'input service' as

contained in rule 2(l) of the Rules held that test is whether the services utilised by the assessee are for the manufacture of final product. Such services may be utilised directly or indirectly. The services mentioned in the section are only illustrative and not exhaustive. Therefore, when a particular service not mentioned in the definition clause, is utilised by the assessee/manufacturer and service tax paid on such service is claimed as CENVAT credit, the question is as to what are the ingredients that are to be satisfied for availing such credit. If the credit is availed by the manufacturer, then the said service should have been utilised by the manufacturer directly or indirectly in or in relation to the manufacture of final product or used in relation to activities relating to business. If any one of these two tests is satisfied, then such a service falls within the definition of "input service" and the manufacturer is eligible to avail CENVAT credit of the service tax paid on such service.

(v) The decision of Karnataka High Court in the case of **Commr. Of C.Ex.& Service Tax, LTU, Bangalore v. Micro Labs Ltd., 2011(24)S.T.R. 272 (Kar)** was cited for a similar proposition of law. Reliance was also placed upon the decision of this court in the case of **Commissioner of Central Excise v. Excel Crop Care Ltd., 2008(12) S.T.R. 436(Guj.)** as well as on an unreported decision of this court in the case of **Commissioner of Central Excise v. M/s Ambalal Sarabhai Enterprises Ltd.,** rendered on 21.4.2011 in

Tax Appeal No.433/2010. The decision of the Karnataka High Court in the case of ***Toyota Kirloskar Motors Pvt. Ltd. v. C.C.E., LTU, Bangalore, 2011(24) S.T.R. 645(Kar)*** was cited wherein the court held that in the definition of the word "input service", the legislature has used both the words 'means' as well as 'includes' but not 'means and includes'. Therefore, insofar as clauses (i) and (ii) of the definition are concerned, the word used is 'means' and therefore, it is exhaustive. Therefore, after specifically referring to the output service and the input service rendered directly or indirectly in the manufacture of final products and clearance of final products, the inclusive definition sets out various services and further enlarges the scope by saying that all activities relating to business constitutes input service.

(vi) Dealing with the issue as to whether in the facts of the present case, the Technical Testing and Analysis services availed by the assessee would fall within the ambit of input service as defined under rule 2(l) of the Rules, Mr. Patel submitted that the assessee is engaged in the manufacture of drugs/medicines under the authority of Drug Manufacturing Licence issued under the Drugs and Cosmetics Act, 1940 and the Drugs and Cosmetic Rules, 1945 which provide for issue of licence to manufacture a drug for the purpose of examination, test or analysis. Before any new drug can be manufactured for sale, the assessee is required under rule 122-B of the

Drugs and Cosmetic Rules, 1945, to obtain the approval of the licensing authority. For the purpose of obtaining such approval, it is necessary to first manufacture small batches of such drug and get the same subjected to clinical trials and to submit to the licensing authority, the results of such clinical trials. The assessee manufactures small batches of such new drug under the authority of a licence issued under rule 89 of the Drugs and Cosmetic Rules, 1945. The same are then cleared on payment of Central Excise duty and sent to laboratories which carry out clinical testing/trials in respect of such new drugs. Such clinical testing/trials of drugs/formulations constitutes the taxable service of technical "testing and analysis" as defined under Section 65(106) of the Finance Act 1994 and is liable to service tax. The laboratories which provide the said service to the respondent, pay service tax on the said service and the respondent takes CENVAT credit of the same.

(vii) It was further submitted that the process of developing a new drug and getting its approval from the Drug Licensing Authority is an ongoing process which may be spread over a long period of time. If the results of the clinical trials are not satisfactory or are not approved by the licensing authority, the assessee has to carry out the necessary improvements until satisfactory results are obtained on clinical trials/testing. After satisfactory results are obtained on clinical trials/ testing which are approved by the licensing authority, the assessee can

manufacture the new drug for sale. It would thus be seen that such service of "technical testing and analysis" has necessarily to be availed by the assessee for the purpose of carrying out the manufacture of new drugs and without availing such service it is impossible for the assessee to manufacture new drugs. Such service is, therefore, clearly a service used by a manufacturer in relation to its activity of manufacture of final products and it cannot be said that the said service is unrelated to the assessee's activity of manufacture of final products. The same is, therefore, covered by the "means" part of the definition of input service contained in rule 2(l) of the CENVAT Credit Rules, 2004.

(viii) It was argued that the department has sought to deny the CENVAT credit of the service tax paid on the said service on the ground that many of such new drugs in respect of which the assessee availed the said service had not reached the stage of commercial production. It was submitted that the mere fact that the stage of commercial production had not been reached at the time of the issuance of the show cause notice cannot mean that the said service was not received in relation to the assessee's activity of manufacture of final products. According to the learned counsel, the process of developing a new drug and getting its approval from the Drug Licensing Authority is an ongoing process which may be spread over a long period of time. The fact however remains

that without availing the said service, it would be impossible to undertake manufacture of any new drug. Many of the drugs which had not reached stage of commercial production at the time when the show cause notice was issued have now reached stage of commercial production and the same is an ongoing process. The said service is, therefore, clearly used in relation to the activity of manufacture of the final products.

(ix) Next it was submitted that it is settled law that the definition of 'input service' is an expansive definition and covers services which are directly or indirectly used in relation to the manufacture of final products. Since availing of the said service is the starting point for undertaking the manufacture of new drugs, it is clearly used in relation to the activity of manufacture of final products.

(x) Without prejudice to the aforesaid submission, it was submitted that in any event, the said service of "technical testing and analysis" received by the respondent is a service received in relation to its activity relating to business. The same is, therefore, covered by the "includes" portion of the definition of "input service".

(xi) It was further submitted that the respondent is in the business of manufacture and sale of drugs. The service of "technical testing and analysis" is received solely for the purpose of and in the course of the said business activity and for no other

purpose. The same is, therefore, clearly in relation to the respondent's business activity. The significance of "service received in relation to activity relating to business in the "includes" portion of the said definition would become apparent if it is borne in mind that service tax is a consumption based tax to be borne by the consumer and which cannot be a charge on the business. In this regard, the learned counsel placed reliance upon the following observations of the Supreme Court in the case of **All-India Federation of Tax Practitioners and ors v. Union of India**, (2007) 7 SCC 527:

"6. At this stage we may refer to the concept of "Value Added Tax (VAT) which is a general tax that applies, in principle, to all commercial activities involving production of goods and provision of services. VAT is a consumption tax as it is borne by the consumer."

In the light of what is stated above, it is clear that service tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer..."

(xii) It was submitted that since service tax cannot be a charge on business, the law provides for availing of CENVAT credit thereof if such service tax is paid on a service received in relation to business. If CENVAT credit is to be denied in respect of a service

received in relation to business, it would mean that the manufacturer who received such service in relation to his business has to bear the burden thereof and it would thereby be a charge on his business, which is against the very nature of service tax as laid down by the Supreme Court in the aforesaid decision.

(xiii) It was submitted that applying the above principles it would follow that when any service is received by the manufacturer in relation to his business activity, it would constitute input service and he should be entitled to take credit thereof. To deny such credit would mean that the manufacturer has to bear such service tax and in that event it would be a charge on his business which would be against the concept of service tax being destination based consumption tax.

(xiv) The Tribunal in the impugned order has agreed with the submission made on behalf of the respondent that the manufacturing process of medicaments is not comparable to other products. A medicine, before it is released in the market, has to undergo several stages of testing and technical analysis, etc. All such products taken up by the Company for production may not reach the customers as commercial products. However, even the trial manufacture and R & D conducted in respect of such drugs which did not reach to the market has to be considered as part of the manufacturing process and business activity. The Tribunal, therefore, did not agree with the view taken

by the department that in case the goods have not reached the commercial production stage, credit is not admissible.

(xv) The moot question which arises for determination is as to whether the Technical Testing and Analysis services availed by the assessee in respect of the clinical samples tested by various agencies prior to commencement of commercial production can be stated to be 'input service' within the meaning of such expression as defined under rule 2(l) of the Rules?

(xvi) "Input service" has been defined under rule 2(l) of the Rules and as it stood at the relevant time reads thus:

"(l) "input service" means any service, –

(i) used by a provider of taxable service for providing an output service; or

(ii) used by a 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, modernisation, 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 up to 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 up to the place of removal; "

(xvii) Before advertng to the merits of the issue, reference may be made to various decisions rendered in the context of the expression 'input service' as defined under rule 2(l) of the Rules. This court in the case of **Parth Poly Wooven Pvt. Ltd.** (supra) has, after referring to various decisions on the question of interpretation of the said rule as well as interpretation of statutory provisions, held that to qualify for input service, such service should have been used for the manufacture of the final products or in relation to the manufacture of final product or even in the clearance of the final product from the place of removal. Thus, what is required to be examined is as to whether the Technical Testing and Analysis services availed by the assessee can be said to have been used for the manufacture of the final product or in relation to the manufacture of the final product?

(xviii) In **ITC Ltd. v. Collector of Central Excise, Patna**, (2003) 1 Supreme Court Cases 678, the Supreme Court was dealing with a converse case where the

appellant Company was a manufacturer of cigarettes. The department issued a number of show cause notices to the appellant alleging therein that the appellant had been clearing without payment of excise duty a certain quantity of sticks of cigarettes daily as samples for test in its quality control laboratory within the factory premises. The case of the appellant was that excisable goods contemplated under section 3(1)(a) of the Act were those which were marketable. Since the cigarettes removed for the purpose of testing in the quality control laboratory situated within the factory premises had not been kept in packets as required under rule 93 of the Central Excise Rules, 1944 the process of their manufacture was not completed and they were not marketable. The court observed that definition of manufacture under section 2(f) very clearly includes process which is incidental or ancillary to the completion of the manufactured product. Manufacture of cigarette is completed when the same emerges in the form of sticks of cigarettes which are sent to the laboratory for quality control test. Sticks of cigarettes can be consumed and manufacture of the end product i.e. cigarette, which is commercially known in the market as such, is completed before its removal for test and after testing only packing of the same is done. Therefore, the sticks of cigarettes which are removed for the purpose of test in the quality control laboratory within the factory premises of the appellant Company are liable to excise duty.

(xix) In the facts of the present case the assessee is engaged in the manufacture of medicaments. By their very nature, the drugs manufactured by the assessee prior to final production thereof are required to be subjected to technical testing and analysis before entering into commercial production. For such purpose, the products are manufactured in small trial batches and thereafter, sent for testing and analysis purpose. Undisputedly, when the goods are removed for testing and analysis, excise duty has been paid thereon. Since production of medicaments are subject to approval by the regulatory authorities of various countries to which such drugs are exported, the assessee is required to obtain approval before starting commercial production. Thus the final product can be manufactured only upon approval of the regulatory authority after the product undergoes technical testing and analysis. Under the circumstances, it cannot be gainsaid that the activity of testing and analysis of the trial batches is in relation to the manufacture of final product. Unless such testing and analysis is carried out, it would not be possible to produce the final product inasmuch as unless the trial batches are sent for testing and analysis and approval is obtained, the final product cannot be manufactured. Under the circumstances, the services availed in respect of technical testing and analysis services are directly related to the manufacture of the final product. The contention of the department that unless the goods have reached the commercial production stage, CENVAT credit is not admissible in respect of the technical

testing and analysis services availed in respect of the product at trial production stage, does not merit acceptance. Besides, the learned counsel for the assessee is justified in contending that when the product which is sent for testing and analysis is subject to payment of excise duty, the respondents cannot be heard to contend that CENVAT credit is not admissible on the service tax paid in respect of such service. Under the circumstances, the Tribunal was justified in holding that the assessee was entitled to avail of CENVAT credit in relation to service tax paid in relation to technical testing and analysis services availed by it.

5.2 Commission paid to the foreign agents: The assessee availed of CENVAT credit of Rs.39,45,791/- towards commission paid to foreign agents. According to the assessee, out of the total amount paid as service tax, they had availed of CENVAT credit only on that part which was attributable to dutiable products manufactured in their plant only and that no CENVAT credit has been availed on exempted goods. It was contended that service tax paid on commission paid to commission agents for sale of final products is available as credit according to the inclusive part of the definition of 'input service', which includes services in relation to sales promotion. Reference was made to the definition of business auxiliary service as defined under section 65(19) of the Finance Act, 1994 which lays down that business auxiliary service means any service in relation to (i) promotion or

marketing or sale of goods produced or provided by or belonging to the client or (ii) promotion or marketing of service provided on behalf of the client and includes services as a commission agent.

(i) The Adjudicating Authority held that on a perusal of the definition of commission agent as defined under clause(a) to the Explanation under section 65(19) of the Act, a commission agent is a person who acts on behalf of another person and causes sale or purchase of goods. In other words, he is directly responsible for selling or purchasing on behalf of another person and that such activity cannot be considered as sales promotion. According to the Adjudicating Authority there is a clear distinction between sales promotion and sale. A commission agent is directly concerned with sales rather than sales promotion. He, accordingly, held that service provided by commission agent does not fall within the purview of the main or inclusive part of the definition of 'input service' as laid down in rule 2(l) of the Rules and, therefore, the assessee was not eligible for CENVAT credit in respect of the service tax paid on commission paid to foreign agents.

(ii) The Tribunal has held that foreign commission agent service is in the nature of sales promotion and without any elaborate discussion in respect thereof has held that CENVAT credit was admissible on service tax paid in respect of such service. The Tribunal while reversing the findings recorded by the

Adjudicating Authority has not given any reasons in support thereof and has merely placed reliance upon its findings in relation to the services rendered by the Clearing and Forwarding agents.

(iii) The learned counsel for the appellant placed reliance upon the findings recorded by the Adjudicating Authority to submit that the commission paid to foreign agent is being availed in the category of Business Auxiliary Service. However, this service is not used for manufacture of final product and is not used for clearance of final product from the place of removal. The commission agent is directly concerned with the sales and not with production, therefore, it is also not related to any activity specified in the inclusive part of the definition of input service. Besides, the activities carried out by the commission agent do not fall within the ambit of sales promotion and, therefore, also the commission paid to the foreign agents would not fall within the ambit of the expression 'input service' as envisaged under rule 2(1) of the Rules.

(iv) On the other hand, the learned counsel for the assessee supported the impugned order of the Tribunal by submitting that the assessee avails of services of commission agents for sale of its final products. The commission agents find buyers for the assessee's goods and thereby promote the sales of the assessee's goods. The 'includes' portion of the definition specifically mentions services used in relation to sales promotion.

The service of commission agents is, therefore, covered by the definition of input service. Moreover, such service is received in relation to the assessee's business only and not for any other purpose. The same is, therefore, a service in relation to the activity relating to business which is also covered by the 'includes' portion of the definition. It was argued that the show cause notice had proposed to deny CENVAT credit merely on the ground that the said service is a post-manufacturing activity and is not used directly or indirectly in the manufacture of final products, completely ignoring the 'includes' portion of the definition. It was also submitted that the service tax paid to a commission agent for sale of final product would fall within the ambit of sales promotion which is a 'business auxiliary service' and would, therefore, also fall within the purview of 'input service'.

(v) In the backdrop of aforesaid facts and contentions, reference may be made to the definition of 'business auxiliary service' as defined under section 65(19) of the Finance Act, 1994, which to the extent the same is relevant for the present purpose reads thus:

"Business Auxiliary Service" means any service in relation to, –

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

promotion or marketing of service provided on behalf of the client; or

and includes services as a commission agent but does not include any information technology service and any activity that amounts to manufacture within the meaning of clause(f) of section 2 of Central Excise Act, 1944

Explanation - For the removal of doubts, it is hereby declared that for the purposes of this clause, -

(a) "Commission Agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration,

and includes any person who, while acting on behalf of another person -

(i) deals with goods or services or documents of title to such goods or services; or

(ii) collects payment of sale price of such goods or services; or

(iii) guarantees for collection or payment for such goods; or

(iv) undertakes any activities relating to such sale or purchase of such goods or services;"

(vi) As noted hereinabove, according to the assessee the services of a commission agent would fall within the ambit of sales promotion as envisaged in clause (i) of section 65(19) of the Finance Act, 1994, whereas according to the appellant a commission agent is a person who is directly concerned with the sale or purchase of goods and is not connected with the sales promotion thereof. Under the circumstances, the question that arises for consideration is as to whether services rendered by a commission agent can be said fall within the ambit of expression 'sales

promotion'. It would, therefore, be necessary to understand the meaning of the expression 'sales promotion'.

(vii) The expression 'sales promotion' has been defined in the "Oxford Dictionary of Business" to mean an activity designed to boost the sales of a product or service. It may include an advertising campaign, increased PR activity, a free-sample campaign, offering free gifts or trading stamps, arranging demonstrations or exhibitions, setting up competitions with attractive prizes, temporary price reductions, door-to-door calling, telephone selling, personal letters etc. In the "Oxford Dictionary of Business English", sales promotion has been defined as a group of activities that are intended to improve sales, sometimes including advertising, organizing competitions, providing free gifts and samples. These promotions may form part of a wider sales campaign. Sales promotion has also been defined as stimulation of sales achieved through contests, demonstrations, discounts, exhibitions or tradeshow, games, giveaways, point-of-sale displays and merchandising, special offers, and similar activities. The Advanced Law Lexicon by P. Ramanatha Aiyar, third edition, describes the term 'sales promotion' as use of incentives to get people to buy a product or a sales drive. In the case of **Commissioner of Income-tax v. Mohd. Ishaque Gulam**, 232 ITR 869, a Division Bench of the Madhya Pradesh High Court drew a distinction between the expenditure made for sales promotion and

commission paid to agents. It was held that commission paid to the agents cannot be termed as expenditure on sales promotion.

(viii) From the definition of 'sales promotion', it is apparent that in case of sales promotion a large population of consumers is targeted. Such activities relate to promotion of sales in general to the consumers at large and are more in the nature of the activities referred to in the preceding paragraph. "Commission agent" has been defined under the explanation to "business auxiliary service" and insofar as the same is relevant for the present purpose means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration. Thus, the commission agent merely acts as an agent of the principal for sale of goods and such sales are directly made by the commission agent to the consumer. In the present case, it is the case of the assessee that service tax had been paid on commission paid to the commission agent for sale of final product. However, there is nothing to indicate that such commission agents were actually involved in any sales promotion activities as envisaged under the said expression. The term input service as defined in the rules means any service used by a provider of taxable service for providing an output service or 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 various activities of the description provided therein including advertisement or sales promotion. Thus, the portion of the definition of input service insofar as the same is relevant for the present purpose refers to any service used by the manufacturer directly or indirectly in relation to the manufacture of final products and clearance of final products from the place of removal. Obviously, commission paid to the various agents would not be covered in this expression since it cannot be stated to be a service used directly or indirectly in or in relation to the manufacture of final products or clearance of final products from the place of removal. The 'includes' portion of the definition refers to advertisement or sales promotion. It was in this background that this court has examined whether the services of foreign agent availed by the assessee can be stated to services used as sales promotion. In the absence of any material on record, as noted above to indicate that such commission agents were involved in the activity of sales promotion as explained in the earlier portion of the judgement, in the opinion of this court, the claim of the assessee was rightly rejected by the Tribunal. Under the circumstances, the adjudicating authority was justified in holding that the commission agent is directly concerned with the sales rather than sales promotion and as such the services provided by such commission agent would not fall within the purview of the main or inclusive part of the definition of input service as laid down in

rule 2(l) of the Rules.

(ix) As regards the contention that in any event the service rendered by a commission agent is a service received in relation to the assessee's activity relating to business, it may be noted that the includes part of the definition of 'input service' includes "activities relating to the business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security". The words "activities relating to business" are followed by the words "such as". Therefore, the words "such as" must be given some meaning. In **Royal Hatcheries (P) Ltd. v. State of A.P.**, 1994 Supp (1) SCC 429, the Supreme Court held that the words "such as" indicate that what are mentioned thereafter are only illustrative and not exhaustive. Thus, the activities that follow the words "such as" are illustrative of the activities relating to business which are included in the definition of input service and are not exhaustive. Therefore, activities relating to business could also be other than the activities mentioned in the sub-rule. However, that does not mean that every activity related to the business of the assessee would fall within the inclusive part of the definition. For an activity related to the business, it has to be an activity which is analogous to the activities mentioned after the words "such as". What follows the words "such as" is "accounting, auditing, financing, recruitment and quality control, coaching

and training, computer networking, credit rating, share registry, and security". Thus, what is required to be examined is as to whether the service rendered by commission agents can be said to be an activity which is analogous to any of the said activities. The activity of commission agent, therefore, should bear some similarity to the illustrative activities. In the opinion of this court, none of the illustrative activities, viz., "accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security" is in any manner similar to the services rendered by commission agents nor are the same in any manner related to such services. Under the circumstances, though the business activities mentioned in the definition are not exhaustive, the service rendered by the commission agents not being analogous to the activities mentioned in the definition, would not fall within the ambit of the expression "activities relating to business". Consequently, CENVAT credit would not be admissible in respect of the commission paid to foreign agents.

(x) For the reasons stated hereinabove, this court is unable to concur with the contrary view taken by the Punjab and Haryana High Court in *Commissioner of Central Excise, Ludhiana v. Ambika Overseas* (supra). Insofar as this issue is concerned, the question is answered in favour of the revenue and against the assessee.

5.3 Courier service: The assessee availed of CENVAT credit of Rs.36,54,709/- towards courier service provided by M/s FEDEX ltd. for export of goods. According to the assessee, the inclusive part of the definition of input service allows CENVAT credit in respect of the amount paid towards courier services. It was also the case of the assessee that the contention in the notice that credit is not available on the service rendered by a courier agency is contrary to what is reflected in Notification No. 41/2007-ST dated 6.10.2007 as amended by Notification No.3/2008-ST dated 19.2.2008. The adjudicating authority placed reliance upon a decision of the Tribunal in the case of Universal Cables Ltd. v. Commissioner of Central Excise, 2007(7) STR 310 (Tri-Del) and was of the view that the present case is squarely covered by the said decision. In the said case, the Tribunal held that the charges paid on courier service are charges for the delivery of finished goods, akin to outward transportation from the factory of the assessee to its customers. The definition of "input service" permits the credit of outward transportation upto the place of removal, which in this case is the factory gate from where the courier collects the parcel for further transportation. It was held that credit on outward transportation was not permissible. The adjudicating authority also was of the view that the notifications on which reliance was placed by the assessee were exemption notifications and would not be applicable to the present case. He, accordingly, held that the

assessee had wrongly availed of CENVAT credit in respect of service tax paid towards courier service. The Tribunal in the impugned order has placed reliance upon other decisions of the Tribunal in respect of courier services and held that CENVAT credit is admissible in respect of the service tax paid on such services.

(i) The learned counsel for the appellant submitted that the courier service used by the respondent is not used in or in relation to the manufacture of final product and is also not used for clearance of final product from the place of removal. Such service is also not related to any activity specified in the inclusive part of the definition of input service; hence, CENVAT credit is not admissible on the service tax paid in respect of such service. Per contra, Mr. Patel for the respondent submitted that courier service is used for clearance of the goods from the place of removal and is, therefore, covered by the 'means' portion of the definition of input service. Moreover, such service is availed by the respondent only in relation to its business activity and not for any other purpose. The same is, therefore, also covered by the 'includes' portion of the definition.

(ii) As can be seen from the order of the adjudicating authority, it has placed reliance upon the decision of the Tribunal where the definition of 'input service' permitted the credit of outward transportation upto the place of removal. In this regard it may be germane

to refer to the decision of this court in **Commissioner of Central Excise & Customs v. Parth Poly Wooven Pvt. Ltd.** (supra) wherein it has been held thus:

"18. Bearing in mind the above judicial pronouncements, if we revert back to the definition of the term 'input service', as already noticed, it is coined in the phraseology of "means and includes". Portion of the definition which goes with the expression means, is any service 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. This definition itself is wide in its expression and includes large number of services used by the manufacturer. Such service may have been used either directly or even indirectly. To qualify for input service, such service should have been used for the manufacture of the final products or in relation to manufacture of final product or even in clearance of the final product from the place of removal. The expression 'in relation to manufacture' is wider than 'for the purpose of manufacture'. The words 'and clearance of the final products from the place of removal' are also significant. Means part of the definition has not limited the services only upto the place of removal, but covers services used by the manufacturer for the clearance of the final products even from the place of removal. It can thus be seen that main body of the definition of term 'input service' is wide and expansive and covers variety of services utilized by the manufacturer. By no stretch of imagination can it be stated that outward transportation service would not be a service used by the manufacturer for clearance of final products from the place of removal.

19. When we hold that outward transportation would be an input service as covered in the expression 'means' part of the definition, it would be difficult to exclude such service on

the basis of any interpretation that may be offered of the later portion of the definition which is couched in the expression 'includes'. As already observed, it is held in several decisions that the expression 'includes' cannot be used to oust any activity from the main body of the definition if it is otherwise covered by the expression 'means'. In other words, the expression 'includes' followed by 'means' in any definition is generally understood to be expanding the definition of the term to make it exhaustive, but in no manner can the expression 'includes' be utilized to limit the scope of definition provided in the main body of the definition. To our mind this was also not the intention of the Legislature in the present case.

20. There, of course, are certain areas which still remain to be cleared. It was vehemently contended before us by the counsel for the Revenue that later portion of the definition which provides for the inclusion clause limits the outward transportation service up to the place of removal. That being so, according to them, the outward transport service utilized by the manufacturer beyond the place of removal would not qualify as an input service within the definition of Rule 2(l). We may only notice two things in this regard. Firstly, in our view, when we find that outward transport service is covered by the main body of the definition which provides for means part, as specifically including any service directly or indirectly in or in relation to manufacture of final product or clearance of final product from the place of removal, no interpretation of the later part of the definition would permit us to exclude such a service from the sweep of the definition. Secondly, we notice that the definition of the term 'input service' came to be amended with effect from 1-4-08 and instead of words "clearance of final products from the place of removal", the words "clearance of final products upto the place of removal" came to be substituted. What would be the position if the case had arisen after 1-4-2008 is a situation we are not confronted with. We, therefore, refrain from making any observations in this regard. We, however, cannot help noticing the change in the statutory provisions which is at the heart of the entire controversy. In so far as the cases on hand are concerned, the statutory provisions cover the service used by the manufacturer in relation to

the manufacture of the final products or even the clearance of final products from the place of removal.

21. We must, however, for our curiosity reconcile the expression "from the place of removal" occurring in the earlier part of the definition with words 'upto the place of removal' used in inclusive part of the definition. Counsel for the assessee submitted that when a manufacturer transports his finished products from the factory without clearance to any other place, such as godown, warehouse etc. from where it would be ultimately removed, such service is covered in the expression 'outward transportation up to the place of removal' since such place other than factory gate would be the place of removal. We do appreciate that this could be one of the areas of the application of the expression 'outward transportation upto the place of removal'. We are unable to see whether this could be the sole reason for using such expression by the Legislature.

22. Be that as it may, we are of the opinion that the outward transport service used by the manufacturers for transportation of finished goods from the place of removal upto the premises of the purchaser is covered within the definition of "input service" provided in Rule 2(l) of the CENVAT Credit Rules, 2004."

(iii) Examining the facts of the present case in the light of the aforesaid decision, it may be noted that the period is from 01.02.2007 to 30.09.2007, that is before the definition of the term 'input service' came to be amended with effect from 1.4.2008 and instead of the words 'clearance of final products from the place of removal' the words "clearance of final products upto the place of removal came to be substituted. Under the circumstances, this case would be squarely covered by the above decision and the courier services availed by the assessee whereby the courier collects the parcel from the factory gate for further transportation would fall within the ambit of the term

'input service' as defined under rule 2(l) of the Rules. The question, insofar as this issue is concerned is answered in favour of the assessee and against the revenue.

5.4 Clearing and Forwarding services: In this regard it was the case of the assessee that service rendered by C&F agents were in relation to "sales promotion" and, therefore, input service. The adjudicating authority after considering the definition of 'clearing and forwarding agent' as defined under section 65(25) of the Finance Act, 1994 found that the contention that the services rendered as C&F agents were in relation to sales promotion was not acceptable. The assessee in its reply had stated that CENVAT credit availed by it was towards C&F services provided by various C&F agents in different states in India for activities related to sale of goods in domestic market. The adjudicating authority was of the view that the role of C&F agent here is in the sale of goods as admitted by the assessee. Such service would commence only after clearance of final product. According to the adjudicating authority, the service tax paid in respect of post clearance activity is not in relation to the manufacture of final product and, therefore, not an input service. The assessee was, therefore, not eligible to avail of CENVAT credit on the service tax paid towards Commission paid to C&F agents.

(i) The Tribunal was of the view that C&F agents

have a definite role to play in promotion of sales by storing goods and supplying the same to customers. Thus, he is actually promoting sales.

(ii) The learned counsel for the appellant submitted that the service rendered by the C&F agents is also related to sales. It is used after the manufacturing activity is over and after clearance of the final products, that is, after the place of removal, therefore, it does not fall in the main part of the definition of input service and is also not in relation to any of the activities specified in the inclusive part of the definition. It was further submitted that the services rendered by C&F agents can in no manner said to be sales promotion so as to fall within the ambit of the expression 'input service. On the other hand the learned counsel for the assessee submitted that the respondent appointed C&F agents in different States for the purpose of sale of the respondent's final products. The goods are stock transferred to the C&F agents who store the same and thereafter sell them. In these cases there is no sale from the respondent's factory gate. The goods are sold from the premises of the C&F agents. Accordingly, in these cases "the place of removal" is the premises of the C&F agents. As per section 4(3)(iii) of the Central Excise Act, where goods are sold from the premises of the consignment agent or any other place or premises after clearance from the factory, such premises from where the goods are sold is the 'place of removal'. The services of the C&F agents are,

therefore, received for clearance of goods at the place of removal. The same is, therefore, input service in terms of the 'means' portion of the definition.

(iii) In the backdrop of the above facts and contentions reference may be made to the definition of "clearing and forwarding agent" as defined under section 65(25) of the Finance Act, 1994 which reads thus:

"Clearing and forwarding agent" means any person who is engaged in providing any service, either directly or indirectly connected with the clearing and forwarding operations in any manner to any other person and includes a consignment agent."

(iv) Ordinarily, a C & F agent receives goods from the factory or premises of the manufacturer (the Principal) or his agents and stores these goods, dispatches these goods as per orders received from the Principal, arranges transport, etc. for the purpose and prepares invoices on behalf of the Principal. In respect of such service, the C&F agent receives commission on the basis of agreed terms. Therefore, an essential characteristic of any service, to fall in the category of C & F agent, is that the relationship between the service provider and receiver should be in the nature of principal (owner) and agent. The C & F Agent carries out all activities in respect of goods right from the stage of their clearances from the

premises of the principal to its storage and delivery to the customers.

(v) At this stage reference may be made to the definition of the expression "place of removal" as defined under clause (c) of sub-section (3) of section 4 of the Act which reads thus:

(c) "place of removal" means-

(i) a factory or any other place or premises of production or manufacture of excisable goods;

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited 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.

(vi) Thus, the clearing and forwarding agent is an agent of the principal. The goods stored by him after clearance from the factory would therefore, be stored on behalf of the principal, and as such the place where such goods are stored by the C & F agent would fall within the purview of sub-clause (iii) of clause (c) of section 4(3) of the Act and as such would be the place of removal. Viewed from that light the services rendered by the C & F agent of clearing the goods from the factory premises, storing the same and delivering the same to the customer would fall within

the ambit of rule 2(l) of the Rules as it stood prior to its amendment with effect from 1.4.2008, namely clearance of final products from the place of removal. However, this court is not in agreement with the view adopted by the Tribunal that such services would amount to sales promotion and is, therefore, an input service. For the reasons stated while discussing the issue as regards service commission paid to foreign agent, the services rendered by the C & F agents cannot be said to be in the nature of sales promotion. This issue stands answered accordingly, in favour of the assessee and against the revenue.

5.5 Miscellaneous Services: The assessee availed of CENVAT credit in respect of service tax paid on various services, viz. Repair and Maintenance of copier machine, air conditioner, water cooler, Management Consultancy, Interior Decorator, Commercial or Industrial Construction Service. According to the assessee these services are input services which are categorically covered under sub-rule (5) of rule 6 of the Rules and that the inclusive part of the definition of "input service" clearly covers services used in relation to renovation or repairs of factory or office relating to factory. The assessee's contention was that in view of rule 6 of the Rules, Interior Decorator, Management Consultant, maintenance and repair and commercial or industrial construction are input services and a manufacturer is allowed to take the credit of the whole of the service tax paid on such input services unless such services are used

exclusively in or in relation to the manufacture of exempted goods.

(i) The adjudicating authority, after considering the submissions advanced on behalf of the assessee, held that the context of rule 6(5) and rule 2(l) of the Rules are totally different. He found that the services mentioned by the assessee such as interior decorator, Commercial or Industrial construction etc. as admissible under rule 6(5) and the term "services used in relation to renovation or repairs of a factory, or office relating to factory used in rule 2(l) of the Rules have a co-relation in that they specifically mention the services used in renovation and repairs of a factory or office and not the services availed by the assessee towards repair and maintenance of copier machine, air conditioner, water cooler, etc. The services availed by the assessee are not for the renovation or repairs of their factory or office but for the repair of certain equipments which are not related to the manufacture of the final product in any way. He, accordingly, disallowed CENVAT credit of Rs.35,417/- taken in respect of service tax paid on miscellaneous services qua the show cause notice dated 8.6.2007 and Rs.1,19,44,619/- in respect of service tax paid on miscellaneous services qua the show cause notice dated 4.3.2008.

(ii) The Tribunal, in the impugned order has held that without maintenance and repair or management, the factory cannot be run and therefore, service tax paid

on these services is admissible. In respect of CENVAT credit availed on service tax paid on repair and maintenance of photo copier, air conditioner, water cooler etc., the Tribunal placed reliance upon several decisions of the Tribunal cited by the assessee and held that CENVAT credit was admissible on such services.

(iii) The learned counsel for the appellant submitted that the above referred miscellaneous services availed by the assessee do not fall in the main clause of the definition of input service and are also not related to the activities specified in the inclusive part of the definition of input service.

(iv) On the other hand, the learned counsel for the assessee drew the attention of the court to the provisions of sub-rule (5) of rule 6 of the Rules to submit that in the light of the said provision it is apparent that credit of the whole of service tax paid on taxable service specified thereunder is admissible unless such service is used exclusively in or in relation to the manufacture of exempted goods or providing exempted services. It was pointed out that the services availed by the assessee are specifically mentioned in the said sub-rule and as such the CENVAT credit is admissible in respect of the service tax paid on such input services.

(v) In the light of the facts and contentions noted hereinabove, it may be necessary to refer to the

provisions of sub-rule (5) of rule 6 of the Rules which read thus:

6(5)Notwithstanding anything contained in sub-rules (1),(2) and (3), credit of the whole of service tax paid on taxable service as specified in sub-clause (g), (p), (q), (r), (v), (w), (za), (zm), (zp), (zy), (zsd), (zsg), (zsh), (zsh), (zzi), (zsk), (zsq) and (zsr) of clause (105) of section 65 of the Finance Act shall be allowed unless such service is used exclusively in or in relation to the manufacture of exempted goods or providing exempted services.

(vi) Thus, sub-rule (5) of rule 6 of the Rules specifically provides that credit shall be allowed in respect of the services mentioned therein unless such service is used in the manufacture of exempted goods. The present case undisputedly does not relate to the manufacture of exempted goods. Hence, what is required to be examined is as to whether the miscellaneous services availed by the assessee fall within the categories specified in sub-rule (5) of rule 6 of the Rules. It may be pertinent to note that repair and maintenance services fall under sub-clause (zsg), Management Consultancy services are covered under sub-clause (r), services rendered by an Interior Decorator fall under sub-clause (q) and Commercial or Industrial Construction Services fall under sub-clause (zsq) of clause (105) of section 65 of the Finance Act. Thus, all the above miscellaneous services availed by the assessee find a specific mention in sub-rule (5) of rule 6 of the Rules in respect of which credit of the whole of service tax paid on taxable service is admissible.

(vii) The question that next arises for consideration is as to whether the provisions of sub-rule (5) of rule 6 of the Rules can be taken into consideration while construing the import of the term 'input service'. It is well settled as a canon of construction that no provision or word in a statute has to be read in isolation. In fact, the statute has to be read as a whole. A statute is an edict of the legislature. It is incumbent on the court to avoid the construction if possible on the language which would render a part of the statute devoid of any meaning or application. In the interpretation of statutes, the courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have an effect. (**V. Jaggannadha Rao v. State of A.P.**, (2001) 10 SCC 401).

(viii) The Supreme Court in **RBI v. Peerless General Finance & Investment Co. Ltd.**, (1987) 1 SCC 424, held thus:

"33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words

may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

(ix) Thus, for the purpose of determining the intention of the legislative or the rule making authority, the statute has to be read as a whole. The above principles would also be applicable to subordinate legislation. Therefore, for the purpose of understanding the scope of the definition of 'input service' it is permissible to look to the provisions of sub-rule (5) of rule 6 which gives an insight of the intention of the rule making body. Sub-rule (5) of rule 6 gives a clear indication that the rule making body intended the services mentioned therein to be input service. Otherwise, there was no necessity for specifically providing that CENVAT credit would be admissible in respect of the services specified therein. If the services mentioned in sub-rule (5) of rule 6 of the Rules are not considered to be 'input services' it would not be possible to reconcile rule 2(1) and sub-rule (5) of rule 6 of the Rules, inasmuch as the rules contemplate entitlement to CENVAT credit on service tax paid on input service. If the services mentioned in sub-rule (5) are not considered as 'input services' one fails to understand how the said provision can be given effect to. It may be noted that

rule 3 of the Rules makes provision for CENVAT credit, and, interalia, provides that a manufacturer or producer of final products or a provider of taxable service shall be allowed to take CENVAT credit of the duties, service tax leviable under section 66 of the Finance Act and cesses enumerated thereunder, paid on (ii) any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004. Thus, CENVAT credit is admissible on service tax paid on any input service. If the services mentioned in sub-rule (5) of rule 6 of the Rules are not in the nature of input service, the provisions of sub-rule (5) would be in conflict with the provisions of rule 3 of the Rules which certainly cannot be the intention of the rule making body.

(x) Besides, the inclusive part of the definition of 'input service' specifically includes services used in relation to renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, activities relating to business, such as accounting, computer networking etc. Thus, the services rendered by interior decorator, commercial and industrial construction services would squarely fall within the inclusive definition of 'input service'. Such services would, therefore, fall within the ambit of 'input service' as defined under rule 2(l) of the Rules.

(xi) As regards services availed by the assessee towards repair and maintenance of copier machine, air

conditioner, water cooler, etc. it cannot be gainsaid that such equipment are necessary for factory buildings as well as for activities relating to business and are, therefore, integrally connected with the business of the assessee. Under the circumstances, no infirmity can be found in the view taken by the Tribunal that such services are eligible services for the purpose of taking CENVAT credit on the service tax paid thereon.

5.6 Technical Inspection and Certification: The assessee had availed CENVAT credit of Rs.6,08,226/- on input service viz., "Technical Inspection and Certification Service" in respect of inspection and checking of instruments by the service provider against their known standard and record difference between the actual and the known standard. The adjudicating authority was of the view that certification of instruments has no nexus with the manufacture of final products and, therefore, cannot be considered to be an input service in terms of rule 2(l) of the Rules.

(i) The learned counsel for the appellant reiterated the reasoning adopted by the adjudicating authority and submitted that such service is not used in or in relation to the manufacture of final products directly or indirectly and is, therefore, not covered by the definition of input service.

(ii) On the other hand, Mr. Patel for the assessee submitted that in the course of manufacture of drugs/medicines, the respondent uses various

instruments/equipment such as gauges, scales, vernier calipers, temperature indicators, thermo hygrometers, etc. In terms of the Drugs and Cosmetics Rules, 1945, the respondent is required to observe "Good Manufacturing Practices", one of the requirements of which is that instruments, balances and other equipments have to be of appropriate range, accuracy and precision and these have to be properly calibrated and checked from time to time. The respondent, therefore, avails services of "Technical Inspection and Certification agencies" that inspect/examine such instruments/equipment, and certify their standards/accuracy. These agencies pay service tax on the said service and the respondent avails CENVAT credit on the same.

(iii) It was further submitted that the said instruments/equipment are used for the manufacture of final products and for that purpose they have to be of the desired standards/accuracy/precision. The service of "Technical Inspection and Certification agencies" is availed to ensure that the said instruments/equipments are of the standard/accuracy/precision which is required for manufacture of the final products. There can, therefore, be no manner of doubt that the said service is received in relation to the manufacture of final products. The 'means' portion of the definition is an expansive one and covers all services used in or in relation to the manufacture of final products and it is immaterial whether such use is direct or indirect. Further, such service is used in relation to the respondents business activity only

and not for any other purpose. The same is, therefore, covered by the 'includes' portion of the definition.

(iv) From the facts and contentions noted hereinabove, it is apparent that technical inspection and certification services have been availed of by the assessee in respect of inspection and checking of instruments which are used for the purpose of measuring size: gauges and vernier calipers, measuring weight: scales, and measuring temperature: temperature indicators, and instruments like thermo hygrometers for measuring humidity and temperature, etc. which are all in the nature of precision instruments which measure various factors with precision. Such instruments/equipments, by their very nature are required to be of the required standards, accurate and precise. For the purpose of maintaining such qualities the instruments/equipments are required to be checked and properly calibrated from time to time for which purpose the respondent requires to avail of the services of technical inspection and certification agencies. It cannot be gainsaid that the above instruments are used in or in relation to the manufacture of final products. Considering the fact that it is a requirement of the Drugs and Cosmetics Act and the rules framed there under that such instruments/equipment be properly calibrated and checked from time to time, it would appear that such certification is a statutory requirement and it is necessary for the assessee to avail of such service, inasmuch as in the absence of such certification, the assessee may have to face the consequences of breach

of such statutory provisions. When, the above referred instruments/equipment are used in and in relation to the manufacture of the final products, maintenance, checking and calibration of such instruments would as a necessary corollary, also fall within the expression "in relation to manufacture of the final products". Under the circumstances, the service of technical inspection and certification agencies availed by the assessee would clearly fall within the ambit of input service. The contention that such certification has no nexus with the manufacture of final product is evidently fallacious as it would not be permissible for the assessee to use the necessary instruments without certification. Another aspect of the matter is that services rendered by a technical inspection and certification agency fall under sub-clause (zzi) of clause (105) of section 65 of the Finance Act which is one of the clauses specified under sub-rule (5) of rule 6 of the Rules. The Tribunal was, therefore, justified in holding that such service fell within the purview of input service as contemplated under rule 2(l) of the Rules. This issue, accordingly, stands answered in favour of the assessee and against the revenue.

6. In the light of the above discussion, the appeal partly succeeds and is allowed to that extent. The impugned order of the Tribunal to the extent the issues are decided in favour of the revenue is hereby quashed and set aside. The rest of the order is sustained.

(Akil Kureshi, J.)

(Harsha Devani, J.)

(raghu)

