CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH COURT NO.IV

Excise Appeal No. 52955 / 2019

[Arising out of Order-in-Appeal No. JAI-EXCUS-002-APP-829-2019 dated 23.9.2019 passed by the Commissioner (Appeals) Central Goods and Service Tax, Jodhpur (Rajasthan]

M/s. CHITTOR POLYFAB LTD. **APPELLANT**
Village Semalpura, Bundi Road,
Chittorgarh (Rajasthan)

Vs.

COMMISSIONER OF CENTRAL EXCISE,
CENTRAL GOODS AND SERVICE TAX,
142-B, Hiran Magri, Sector No.11, **RESPONDENT**
Udaipur Rajasthan.

APPEARANCE:

Shri Anand Bhattacharya, Advocate for the Appellant
Shri P Juneja, Authorised Representative for the Department

CORAM:

HON'BLE MRS RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: July 07, 2021
DATE OF DECISION: 25-08-2021

FINAL ORDER No. 51775 /2021

PER RACHNA GUPTA

The present appeal is arising out of Order-in-Appeal bearing No. 829/2019 dated 23.09.2019. The facts, in brief, relevant for the adjudication are as follows:

That the appellant is engaged in the manufacture of HDPE/PP Woven fabrics and sacks; that the appellant is having service tax

registration for payment of service tax on reverse charge basis and was paying it on GTA and other services.

2. During the course of audit of the appellant, it was noticed that the appellant has wrongly availed the CENVAT Credit on Service Tax on outward freight amounting to Rs. 6,26,073/- during the period April, 2015 to June, 2017 in contravention of Rule 2(l) and Rule 3 of CENVAT Credit Rules, 2004. Accordingly, vide Show Cause Notice dated 16.7.2018, CENVAT Credit of the aforesaid amount was proposed to be disallowed and recovered from the appellant along with interest, imposition of penalty was also proposed. The proposal was initially confirmed vide Order-in-Original No. 01/2019 dated 23.01.2019. The appeal thereof has been rejected vide the order being assailed. Being aggrieved, the appellant is before this Tribunal.

3. I have heard Shri Anand Bhattacharya, learned Counsel for the appellant and Shri P Juneja, learned Authorised Representative for the department.

4. It is submitted on behalf of the appellant that appellant was selling the goods on FOB basis to the location of the buyer. The purchase order is received by the appellant from the buyer is impressed upon, according to which the final product of the appellant was subject to inspection at the buyers place and cost was to be paid thereafter only. The rates are on FOB delivery basis to be delivered at buyers plant. It is impressed upon that the transit risk and insurance were also to be borne by the appellant. Buyer had the right to reject and return the damaged goods and payment as per the purchase order was to be made by the buyer only after the said inspection and the receipt of goods thereafter. It is submitted that these facts are sufficient to hold that propriety in the goods remains with the appellant till the inspection being done at the buyers place. Learned Counsel has laid emphasis upon the decision of **Commissioner of Customs and Central Excise**

Aurangabad vs. Roofit Industries Ltd. reported in [**2015 (319) ELT 221 (SC)**] and on the decision of **Ranadey Micronutrients vs. CCE** reported in **[1996 (87) ELT 19(SC)]**. Accordingly, place of removal is the buyers place and the GTA service received are therefore the valid input for the appellant. Availment of CENVAT Credit has wrongly been denied by the learned Commissioner (Appeals) and order is accordingly prayed to be set aside.

5. With respect to the extended period being invoked by the Department it is submitted that the appellant was regularly submitting the returns mentioning the payment of service tax as well as availment of CENVAT Credit. No suppression can be alleged against the appellant. Otherwise also there was a prevalent confusions in terms of several decisions and circulars as far as liability of GTA services from the place of removal is concerned specially due to amendment of definition of 'input' in the year 2008. The department has thus wrongly invoked the extended period. Confirmation of demand therefore gets hit by time limitation. Order accordingly, is prayed to be set aside the appeal is prayed to be allowed.

6. To rebut these submissions learned Departmental Representative has laid emphasis on the amended definition of Inputs eligible for CENVAT Credit. It is submitted that the services taken 'upto the place of removal' are the inputs eligible for CENVAT as contrast to earlier situation when inputs 'from place of removal' were eligible for taking CENVAT Credit. It is impressed upon that learned Departmental Representative also has mentioned that the plea of the appellant about applicability of Circular No. 1065/4/2018-CX dated 08.06.2018 being applicable upon the appellant has clearly been dealt with by the Commissioner (Appeals) in paragraph 12 of the Order under challenge. It is categorically been held that in view of the definition of place of removal given in Central Excise Act, it can either be the factory or

other place or premise of manufacturer i.e. ware house/depot/ any other place or premises which apparently is not the fact in the preset case as the goods have been cleared by the appellant from the factory gate itself. GTA services being obtained from factory gate is, therefore, not a valid input in terms of definition of input in Rule 2(l) (i) of CENVAT Credit Rules, 2004 as stand amended from 01.03.2008. The plea of limitation has also been specifically dealt with in paragraph 13 of the said judgement. It is impressed upon that there is no infirmity in the order under challenge. The latest decision on the issue is that of **CCE & ST vs Ultratech Cement Ltd.** reported in **[2018 (9) GSTL 337 (SC)].** The appeal is accordingly prayed to be dismissed.

7. After hearing the both the parties and perusing the entire record of this appeal including the purchase orders received by the appellant, I observe and hold as follows:

The appellant was clearing goods after receiving purchase orders from the customers specifically stating the sales to be made on FOR destination basis with a contract therein for the same. The terms and conditions of sale appear to be as follows:

a) That the appellant has engaged the services of various transporters. The goods manufactured by the company are transported to various destinations only through the said transporters. The special features of the contract, inter alia, are –

(i) the goods have to be delivered within the time period stipulated in the contract, failing which cost of missing consignment shall be debited to the account of the transporter;

(ii) the payment of freight in case of “To Pay” consignments would be made by the Office / Handling Agent of the appellant at the destination point;

(iii) the payment of freight in case of "To be Billed" consignment shall be made by the appellant upon submission of the freight bill along with receipted copy of GR to the appellant;

(iv) Cost of missing consignments shall be recovered from the transporters;

(v) Company reserves right not to pay freight in the case of undelivered consignments;

(vi) the transporter is responsible for damages, shortages in transit, and adulteration in transit. The rates for effecting such transportation are fixed by the company from time to time and intimated to the transporters.

vii) That in most cases Purchase Orders are received from the customers for purchase of cement. The said Purchase Order specifically states that the sales are on FOR destination basis, and a single price is quoted in the said contract. It is worth noticing that it was clearly agreed that any change in rate of freight, would have no effect on the said agreed rate.

These terms make it clear that freight and even engaging the transporter was the responsibility of the appellant till the goods are actually delivered to appellant's buyee and are accepted by the buyer to have been bought.

8. Coming to the legal position with reference to availing credit on outward freight services, I observe that under the provisions of Rule 3 of the CENVAT Credit Rules, 2004, CENVAT Credit is admissible to the manufacturer, inter alia, in respect of service tax paid on "input service" received by the manufacturer. The expression "input service" has been defined in Rule 2(l) of the CENVAT Credit Rules, 2004, which definition is being reproduced hereunder for ease of reference :-

[(l) "input service" means any service, -

(i) used by a provider of [output 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 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 upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal;

Therefore, any service which satisfies the conditions mentioned in the definition qua the manufacturer, would be termed as "input service" for the said manufacturer, and credit would be available in respect of the tax paid on such services by the person liable for payment of service tax.

9. That in order to further analyse the legal position, it would be necessary to examine the definition of the expression "place of removal", which, though not defined in the CENVAT Credit Rules, 2004, but have been defined in Section 4 and 2(h) of the Central Excise Act, 1944. The definitions given therein can well be adopted for the purpose of CENVAT Credit Rules, 2004, by virtue of the provisions of Rule 2(t) thereof, as per which "the words and expressions used in these rules and not defined but defined in the Excise Act or the Finance Act shall have the meanings respectively assigned to them in those Acts". Similarly the definition of the expression "sale" contained in the Sale of Goods Act also requires examination. The relevant definitions/ concepts are being analysed as under:

(a) Section 4 of the Act defines the expression "place of removal" as under:

Definition of the Expression "Place of Removal"

"**Place of removal means**

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

(ii) A warehouse or any other place of 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."

10. A perusal of the above definition would show that the expression "place of removal" also includes any other place, from where the excisable goods are to be sold after their clearance from the factory.

The expression "sale" has been defined under the Central Excise Act, 1944 as well as under Sale of Goods Act, as under:-

"h) "sale" and "purchase", with their grammatical variations and cognate expressions, **mean any transfer of the possession of goods by one person to another** in the ordinary course of trade or business for cash or deferred payment or other valuable consideration; "

As per Section 4 of the Sale of Goods Act, 1930, sale means transfer of property in goods to the buyer for a price. (Section 19 of this Act explains as to when property passes.) It reads as follows:

"4. Sale and agreement to sell.—

(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to, sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. "

A perusal of the above definitions would further make it clear, that as far as interpretation under the Central Excise laws is concerned, as per the above provisions, "transfer of possession with title of goods by one person to another" is the crux of the sale transaction. Therefore, until and unless the goods are delivered to the buyer, and the possession with title of goods is transferred unto the buyer, the sale does not take place and it cannot be said that goods have been sold. Though it may not always be the physical delivery and physical possession.

11. In the instant case, as the facts indicated above would show, present is the case of F.O.R. destination sales. It therefore becomes important to understand its meaning. Section 19 of the Sale of Goods Act, 1930 explains as to when property in goods passes. Section 26 of 1930 Act says:

"S. 26. Risk prima facie passes with property. - Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not :

The prima facie rule in Section 26 is that the goods remain at the seller's risk until the property in the goods is transferred to the buyer. But when the property in the goods is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not.

F.O.R. destination means the seller retains the risk of loss until the goods reach the buyer. Historically this term was used only to refer goods transported by ships to U.K. but it has since been expanded to include all types of transportations. F.O.R. destination as different from FOB origin means that the seller retains the risk of goods until the goods reach the buyer.

The possession in the goods remain with the seller during the transit, and the possession is transferred to the purchaser only when the goods reach him.

12. In the light of the facts of present case, since the buyer had a right to reject the goods after receiving them at his place and he was supposed to make the payment at his place, that too after inspecting the goods also. Also since the appellant had a right to sell the goods to someone else, before the goods reach to the buyer at his destination, it become ample clear that the control and possession of propriety in the goods remained with the appellant till they reach the place of his buyer. Hence when appellant engaged the transporter, he instead of his buyer becomes the service recipient of freight / transport service, and the same, becomes his input.

13. It now becomes important to know as to whether the said input is eligible input for availing CENVAT Credit in terms of the amended definition of inputs being the input used upon place of removal. In such facts and circumstances, clause (iii) of sub clause C of Section 4 of Central Excise Act definition of 'placed of removal' becomes relevant, according to which any place from where goods are sold after their clearance from the factory also become place of removal. In view of this clause the place of buyer becomes the place of removal in case of FOB destination Sale case. Since the title is with the seller till goods reach the buyer's place, the GTA service recipient shall be the seller and not the buyer as

contrary to contracts on FOB origin basis / CIF basis where property gets delivered to buyer even before the physical delivery thereof and the buyer becomes the recipient of the said service. In such circumstances, the place of buyer is definitely is any other place where the excisable goods are sold after their clearance from the factory. Thus, in the present case the outward freight is held to be eligible input for availing the credit in terms of Rule 3 of CENVAT Credit Rules. Otherwise also the decision of Apex Court in the case of **Commissioner of Customs and Central Excise Aurangabad vs. Roofit Industries Ltd.** (supra) as relied upon, is applicable to the facts of the present case. Otherwise during the impugned period, the decision of **Ultratech Cement** (supra)was not in existence. Even the facts of the present case are different from the facts of the **Ultratech Cement**(supra).

14. The circular dated 08.06.2018 also cannot be made retrospectively applicable to the period in question (April 2015 to June, 2017). At the relevant time, circular No. 988/12/2014 CX dated 20.10.2014 / Circular No. 97/8/2007-CX dated 23.8.2007 were applicable. It has been time and again been settled by the Hon'ble Supreme Court that the beneficial circular cannot be retrospectively withdrawn. Consequently benefit of the said circular shall continue to be available to the appellant. Accordingly, I am of the opinion that the Adjudicating Authority Below has wrongly disallowed the CENVAT Credit relying upon the decision of **Ultratech Cement** (supra) and consequent circulars of 2018.

15. Coming to the issue of invoking extended period of limitation. It is observed that the Circular No. 1065/4/2018-CX dated 08.06.2018 as has been relied upon by the Adjudicating Authority below, itself clarifies as under:

> " No extended period : Any new show cause notice issued on the basis of this Circular should not invoke extended period of limitation in cases where an alternate interpretation was taken by the assessee before the date of the Supreme Court judgement (in Ultratech Cement) as the issue is in the nature of interpretation."

Above all, it is apparent on record that credit has been shown in the ER-1 returns filed by the appellant from time to time. Neither suppression nor misrepresentation of facts can be alleged against the appellant. The alleged suppression of facts on part of the appellant that too with an intent to evade payment of duty is therefore not sustainable. It is accordingly held that the Department was not entitled to invoke the extended period of limitation.

16. In view of the entire above discussion, the order under challenge is set aside and appeal is allowed.

(Pronounced in the open Court on 25-08-2021)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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