

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. 11007 of 2019-SM

[Arising out of Order-in-Original/Appeal No VAD-EXCUS-001-APP-616-2018-19 dated 27.02.2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-II]

Adroit Pharmachem Private Limited

Plot No 549-550, AT & PO Manjusar
Salvi, VADODARA, GUJARAT-391725

.... **Appellant**

VERSUS

Commissioner of Central Excise & ST, Vadodara

1st Floor, Room No.101, New Central Excise Building,
Vadodara, Gujarat-390023

.... **Respondent**

APPEARANCE :

Shri Vivek Bapat, Advocate for the Appellant
Shri G.Kirupanandan, Supdt (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)

DATE OF HEARING/ DECISION : 31.12.2021

FINAL ORDER NO. A/12641 / 2021

RAMESH NAIR :

The issue involved is that construction services used by the appellant for setting up of Effluent Treatment Plant is eligible for Cenvat credit or otherwise.

2. Shri Vivek Bapat, learned Counsel appearing on behalf of the appellant submits that the construction service received by the appellant is for installation and erection of Effluent Treatment Plant which is nothing but covered under modernization of existing factory. Therefore, the services is covered in the inclusion clause of definition of 'Input Service' provided in Rule 2(I) of Cenvat Credit Rules, 2004. He placed reliance on the following judgments:-

- (a) 2014 (301) ELT. 46 (KAR-HC) Swarnagiri Wire Insulations Pvt. Limited
- (b) 2017 (307) E.L.T. 484 (GUJHC) Kandarp Dilipbhai Dholakia
- (c) 2016 (344) ELT. 923 (CESTAT-Hyd.) - B. Girijapathy Reddy & Co.
- (d) 2018 (12) G.S.T.L. 302 (CESTAT - AHD) - Ion Exchange (I) Limited
- (e) 2018 (12) G.S.T.L. 90 (CESTAT-AHD) - Manakasia Coated Metal & Industries Limited
- (f) 2016 (45) S.T.R. 92 (CESTAT - Hyd) Mahindra & Mahindra Limited
- (g) 2017 (51) S.T.R. 17 (CESTAT-Hyd) -CMC Limited.
- (h) 2011 (24) S.T.R. 572 (CESTAT DEL.) - Medicaps Limited.
- (i) 2013 (291) E.LT. 377 (CESTAT-KOL)- ITC Limited
- (j) 2011 (22) S.T.R. 299 (CESTAT-DEL) - Pushp Enterprises
- (k) 2013 (32) S.T.R. 383 (CESTAT AHD)- Plastichemix Industries
- (l) 2015 (330) E.L.T. 565 (CESTAT-BANG)- VST Industries
- (m) 2016 (43) S.T.R. 347 (KAR-HC) - Sanmar Speciality Chemicals Limited
- (n) 2017 (49) S.T.R. 84 (CESTAT - Hyd) - Sri Sai Sindhu Industries Limited
- (o) 2017 (347) E.LT. 112 (CESTAT BANG) - Cranes & Structural Engineers

3. Shri G. Kirupanandan, learned Superintendent (AR) appearing for the Revenue submits that after 01.04.2011, construction service was excluded from the definition of 'Input Service' therefore, the appellant is not entitled for Cenvat credit. He also reiterates the findings of the impugned order.

4. I have carefully considered the submissions made by both sides and perused the record. I find that the appellant has already existing factory and in the said factory, Effluent Treatment Plant was installed for which they have availed construction service from the contractor. Any activity of

construction in the running existing factory shall be treated as modernization, renovation or repair and maintenance of existing factory.

The definition of Input Service under Rule 2(l) is reproduced below:-

“Rule 2(l) "input service" means any service,-

- (i) used by a provider of taxable service for providing an output service; or
- (ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal, and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal but excludes.....”

From a plain reading of Rule 2(l), it is clear that even though setting up of factory was removed from the exclusion clause however, the service of modernization, renovation or repair and maintenance is still provided in the inclusion clause. Therefore, any activity which related to modernization, renovation or repair and maintenance of factory, the same is eligible for Cenvat credit. There is no dispute on the fact that Effluent Treatment Plant was set up in the existing running factory. Therefore, it is nothing but modernization of the factory.

5. As regards the argument made by learned Authorised Representative that from 01.04.2011, construction services and works contract services were excluded from the definition of input service, I find that though construction service was excluded but since modernization, renovation and repair and maintenance is still continue to be existed in the inclusion clause of definition, credit shall be allowed. This Tribunal has considered the very similar issue and also related to the amended definition of Input Service effective from 01.04.2011 in the case of *Ion Exchange (I) Limited - 2018*

(12) *G.S.T.L. 302 (CESTAT - AHD)* wherein the Tribunal has passed the following order :-

"2. The brief facts of the case are that the appellants are engaged in the manufacture of excisable goods falling under Chapter 39 of CETA, 1985 and availed Cenvat credit of Service Tax paid on 'Construction Service' (modernization, renovation and repair service) of the existing plant and machinery in their factory premises, so as to meet USA, FDA guidelines during the period June, 2011 to March, 2012. Alleging that after amendment to definition of 'input service' with effect from 1-4-2011 'construction service', being placed on the exclusion clause, therefore credit availed by the appellant is irregular; consequently, notices were issued to them on 17-9-2012 for recovery of inadmissible credit of Rs. 12,40,205/- with interest and penalty. On adjudication, the demand was reduced to Rs. 9,82,887/- with interest and penalty. Aggrieved by the said order, the appellant filed appeal before the Commissioner (Appeals), who in turn, further reduced the amount to Rs. 8,86,206/- with interest and penalty. Hence the present appeal.

3. The Ld. Advocate, Shri A. Nainavati, for the appellant submits that both the authorities below had misinterpreted/misunderstand definition of 'input service' brought into from 1-4-2011. He submits that even though the words 'setting up' had been deleted from the definition of input service but the words 'modernization, renovation and repair' of the factory continued to be in the said definition even after 1-4-2011. He submits that exclusion clause inserted with effect from 1-4-2011 should be read in the context while interpreting the applicability of exclusion clause. The Ld. Advocate submits that the 'construction service' excluded from the scope of 'input service' be limited to 'new construction' required in 'setting up' of a factory, however, cannot be made applicable to activities relating to 'repair, renovation and modernization' of the existing factory building, plant and machinery. In support, the Ld. Advocate referred to the clarification at Para 4 of the Circular No. 943/4/2011-CX, dated 29-4-2011 issued by the Board. It is his contention that there is no dispute to the fact that the 'construction service' had been utilized by the appellant in 'renovation and repair' of the factory in compliance with the requirement of USA, FDA guidelines. Therefore, credit is admissible to them.

4. The Ld. AR for the Revenue reiterated the findings of the Ld. Commissioner (Appeals).

5. Heard both sides and perused the records.

6. The short issue involved for determination in the present case is : whether the appellants are eligible to credit of Service Tax paid on 'construction service' relating to modernization/renovation of their factory.

7. It is the contention of the Revenue that after amendment to the definition of 'input service' all 'construction service' undertaken within the factory premises fall outside the scope of the said definition, accordingly, Service Tax paid on 'construction service' is not admissible to credit. The appellant, on the other hand, submits that on deletion of words 'setting up' from the scope of said definition, new construction undertaken, would no longer be eligible, however, the construction relating to 'modernization, renovation or repair' of the existing plant and machinery inside the factory premises is definitely continued to fall within the ambit of said definition. Consequently, the Service Tax paid on 'construction service' involving modernization, renovation and repair work within the factory is eligible to credit. Before scrutiny of the rival contentions, the

relevant old and amended Rule 2(l) of the Cenvat Credit Rules, 2004 are reproduced as below :

Prior to 1-4-2011

- (l) *“input service” means any service, -*
- (i) *used by a provider of taxable service for providing an output service; or*
- (ii) *used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal,*

and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage 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;

From 1-4-2011

- (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 up to 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 up to 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 up to the place of removal;

but excludes, -

- (A) *service portion in the execution of a works contract and construction services including service listed under clause (b) of Section 66E of the Finance Act (hereinafter referred as specified services) in so far as they are used for -*
- (a) *construction or execution of works contract of a building or a civil structure or a part thereof; or*
- (b) *laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified services; or*
- (B) *services provided by way of renting of a motor vehicle, in so far as they relate to a motor vehicle which is not a capital goods; or*

(BA) service of general insurance business, servicing, repair and maintenance, in so far as they relate to a motor vehicle which is not a capital goods, except when used by -

(a) a manufacturer of a motor vehicle in respect of a motor vehicle manufactured by such person; or

(b) an insurance company in respect of a motor vehicle insured or reinsured by such person; or

(C) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee;

Explanation. - For the purpose of this clause, sales promotion includes services by way of sale of dutiable goods on commission basis.

8. A plain reading of the said provisions makes it clear that service utilized in relation to modernization, renovation and repair of the factory are definitely fall within the meaning of 'input service' even though; construction of a building or civil structure or part thereof has been placed under exclusion clause of the said definition of 'input service'. After amendment to the definition of the 'input service', a clarification issued by the Board vide Circular No. 943/4/2011-CX, dated 29-4-2011 whereunder answering to the questions raised on the eligibility of credit of service tax paid on construction service as an 'input service' used in modernization, renovation or repair, it has been clarified that the said services being provided in the inclusive part of definition of 'input service' are definitely eligible to credit. Thus, harmonious reading of the inclusive part of the definition and the exclusion clause mentioned at clause (a) relating to construction service of the definition of 'input service', it is clear that the construction service relating to modernization, renovation and repair of the factory continued to be within the meaning of 'input service' and accordingly, the Service Tax paid on such service is eligible to credit. Undisputedly, the appellant carried out modernization/renovation work to meet USA, FDA guidelines for manufacture of their products therefore, the service tax paid on such construction service is eligible to credit. In the result, the impugned order is set aside and the appeal is allowed with consequential relief, if any, as per the law."

6. From the above judgment of this Tribunal it can be seen that the amended definition of 'Input Service' from 01.04.2011 was considered and it was viewed that though the construction service/ works contract service were excluded but it was interpreted that the said service related to only new construction or setting up of a new factory. But since modernization, renovation or repair and maintenance, even after exclusion category, continue to remain in inclusion clause of definition, credit cannot be denied. Moreover, the show cause notice has not made any charge related to

exclusion category of 'Input Service', it only deals with main clause and inclusion clause of definition. Therefore, the adjudication order deciding the matter on the basis of exclusion category is beyond the scope of show cause notice.

7. As per the discussion made hereinabove which gets support from the Tribunal judgment in the cited case, the appellant is entitled for Cenvat credit. Accordingly, the impugned order is set-aside, appeal is allowed.

(Dictated and pronounced in the open court)

(Ramesh Nair)
Member (Judicial)

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