

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Excise Appeal No. 10984 of 2021

(Arising out of OIA-CCESA-SRT-APPEALS-PV-024-2021-22 dated 12.10.2021 passed by Commissioner of Central Excise, CUSTOMS & Service Tax-Surat-I)

APAR Industries Ltd.

.....Appellant

A-201/202, BEZZOLA COMPLES, CHEMBUR SION-TROMBAY ROAD
MUMBAI-MUMBAI, MAHARASHTRA

VERSUS

C.C.E. & S.T.-Surat-I

.....Respondent

NEW BUILDING...OPP. GANDHI BAUG,
CHOWK BAZAR,
SURAT, GUJARAT-395001

APPEARANCE:

Shri Prakash Shah, Sr. Counsel with Shri Mohit Raval & Shri Yash Prakash,
Advocates appeared for the Appellant
Shri Rajesh Nathan, Assistant Commissioner (Authorized Representative) for
the Respondent

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

Final Order No. 10324 /2024

DATE OF HEARING: 23.11.2023
DATE OF DECISION: 05.02.2024

RAMESH NAIR

The brief facts of the case are that the Appellant is manufacturer of transformer oil, aluminium conductor falling under chapter heading 27 and 76 of the First Schedule to the Central Excise Tariff Act, 1985. The Appellant availed outward transportation service from GTA to transport the goods from the factory to customer's premises and discharged service tax under RCM on the said GTA services. The Appellant availed the credit of the said service tax paid under RCM. However, due to prevailing ambiguity regarding the admissibility of the credit the Appellant reversed the said credit under protest.

1.1 The Appellant was issued a show cause notice dated 02.12.2009 demanding the wrongly availed CENVAT credit of service tax paid on GTA services under RCM for the period January 2005 to June 2007. The said

demand of the wrongly availed CENVAT credit was confirmed by the adjudicating authority, which was upheld by the Commissioner (Appeals). This Tribunal, vide its Order dated 06.01.2020, remanded the proceedings to the adjudicating authority for fresh adjudication. The remand proceedings were also concluded by denying and confirming the demand of the said credit by both the lower authorities. The present appeal is against the Order of the Commissioner (Appeals) rejecting the Appellant's appeal against the demand of the wrongly availed credit.

2. Shri Prakash Shah along with Shri Mohit Raval, Advocates for the Appellant submit that the Appellant availed the GTA services for outward transportation of the final products on which the service tax is paid under RCM by the Appellant and since the said services are availed for transporting goods from the factory to the customer's premise, the said service qualify as 'input service' and CENVAT credit of same is admissible to the Appellant. The issue of admissibility of the credit on GTA service for outward transportation is no longer res-integra as the Hon'ble Supreme Court, Hon'ble High Courts and this Tribunal in various judgments allowed the CENVAT of service tax paid on the outward transportation services prior to the amendment of the definition of input services under Rule 2(l) of CCR in March 2008. He placed reliance on the following judgments: -

- Commissioner of Central Excise, Belgaum v. M/s. Vasavadatta Cements Ltd., 2018 (11) G.S.T.L. 3 (S.C.)
- Commissioner of Cus., C. Ex. & S.T., Guntur vs Andhra Sugars Ltd., 2018 (10) G.S.T.L. 12 (S.C.)
- Commissioner v. Parth Poly Wooven Pvt. Ltd., 2012 (25) S.T.R. 4 (Guj.)
- Commr., CGST & C.Ex., Vadodara-II Vs. Gujarat Guardian Limited, 2018 (12) G.S.T.L. 300 (Guj.)
- ABB Limited vs CCE, Bangalore, 2009 (15) STR 23 (Tri.-LB)

- Evonik Specialty Silica India Private Limited vs C.C.E. & S.T. -Surat-II, 023 (11) TMI 261 - CESTAT Ahmedabad
- India Cements Ltd vs CCGST & CX, Trichy – 2022 (5) TMI 904 – CESTAT Chennai

It is his submission that the judgment of the Hon'ble Supreme Court in the case of CCE v. Ultratech Cement Ltd., 2018 (9) G.S.T.L. 337 (S.C.) though analysed the definition of the input services post amendment effective from April 2008, it was held that the benefit of credit was available beyond the place of removal only upto 31.03.2008. The Board vide its Circular no. 1065/4/2018-CX., dated 8.6.2018 clarified that CENVAT credit of GTA services after the amendment shall be available only upto the place of removal. The period of dispute in the present case being prior to amendment, the Appellant is eligible to the credit of GTA services for outward transportation.

2.1 Further, he brought to our notice that on the very issue for other unit of the Appellant, the adjudicating authority, Belapur Commissionerate, by relying on the judgment in the case of Vasavadatta (supra) has sanctioned the refund of the credit availed on GTA service for outward transportation and reversed subsequently.

3. On the other hand, Shri Rajesh Nathan, Learned Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. We have carefully considered the submissions made by both sides and perused the records. We find that this second round of the litigation and dispute relates to admissibility of CENVAT credit on the GTA services availed for outward transportation of goods manufactured by the Appellant from their factory gate till customers premises. The Appellant

is clearing the manufactured goods at ex-factory price and provides additional service of delivering the said goods to customers premise, for which the Appellant is availing GTA services and service tax on such services was paid under RCM. The definition of 'input service' as it stood prior to and after 1.4.2008 is reproduced as under:

"Prior to 01.04.2008:

(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.....

W.e.f. 01.04.2008:

(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 upto the place of removal, and includes....."

From the above definition, it can be seen that prior to 1.4.2008, in sub-clause (ii) 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, is covered under the definition of input service. However, post 01.04.2008, only those services which are used upto the place of removal were covered within ambit of input services. The period involved in the present appeal is prior to 01.04.2008.

5. The adjudicating authority and the appellate authority denied the CENVAT credit on the ground that the sale was not on FOR basis and the sale was at factory gate. The price on which the excise duty was paid did not include the cost of transportation.

6. The issue is considered by various judgements, which are discussed hereunder, which clearly hold that, prior to 01.04.2008, the outward transportation services were specifically covered by main body of the definition of input service, which provides for means part of the definition and it is not necessary to examine the inclusive part of the definition of input services.

7. The Hon'ble Apex Court in Andhra Sugars Limited-2018 (10) GSTL 12, in paragraph 8 clearly holds that *"once it is accepted that the place of removal is the factory premises of the assessee, the outward transportation from the said place would clearly amount to input services. That place can be warehouse of the manufacturer or it can be customer's place if from the place of removal the goods are directly dispatched to the place of the customer. One such outbound transportation from the place of removal gets covered by the definition of input service."*

8. In Commissioner of Central Excise, Belgaum v. M/s. Vasavadatta Cements Ltd., 2018 (11) G.S.T.L. 3 (S.C.), it is held that:

"7. As mentioned above, the expression used in the aforesaid Rule is "from the place of removal". It has to be from the place of removal upto a certain point. Therefore, tax paid on the transportation of the final product from the place of removal upto the first point, whether it is depot or the customer, has to be allowed.

8. Our view gets support from the amendment which has been carried out by the rule making authority w.e.f. 1-4-2008 vide Notification No. 10/2008-C.E. (N.T.), dated 1-3-2008 whereby the aforesaid expression "from the place of removal" is substituted by "upto the place of removal". Thus from 1-4-2008, with the aforesaid amendment, the Cenvat credit is available only upto the place of removal whereas as per the amended Rule from the place of removal which has to be upto either the place of depot or the place of customer, as the case may be. This aspect has also been noted by the High Court in the impugned judgment in the following manner :

"However, the interpretation placed by us on the words 'clearance of final products from the place of removal' and the subsequent amendment by Notification 10/2008-C.E. (N.T.), dated 1-3-2008

substituting the word 'from' in the said phrase in place of 'upto' makes it clear that transportation charges were included in the phrase 'clearance from the place of removal' upto the date of the said substitution and it cannot be included within the phrase 'activities relating to business'."

9. *In view of the aforesaid discussion we hold that the appeals are bereft of any merit and are accordingly dismissed."*

8. In Commissioner v. Parth Poly Wooven Pvt. Ltd., 2012 (25) S.T.R. 4 (Guj.), the Hon'ble Gujarat High Court 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."*

9. In Commr., CGST & C. Ex., Vadodara-II Vs. Gujarat Guardian Limited, 2018 (12) G.S.T.L. 300 (Guj.), the Hon'ble Gujarat High Court held thus:

"2. It is not in dispute that the issues arising in the present Tax Appeal are squarely covered by the judgment in case of Commissioner of C. Ex. & Customs v. Parth Poly Wooven Pvt. Ltd. reported in 2012 (25) S.T.R. 4 in which it was observed as under:

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(1). 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 1-4-2008 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. Insofar 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.

22. Be that as it may, we are of the opinion that the outward transport service used by the manufacturer 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(1) of the Cenvat Credit Rules, 2004."

3. In the result, Tax Appeal is dismissed."

10. We also find that the Hon'ble Supreme Court in the case of Ultratech Cement Ltd., 2018 (9) G.S.T.L. 337 (S.C.) has held that the benefit which was admissible even beyond the place of removal was post amendment restricted upto the place of removal. The relevant para is as under:

"7. It may be relevant to point out here that the original definition of 'input service' contained in Rule 2(I) of the Rules, 2004 used the expression 'from the place of removal'. As per the said definition, service used by the manufacturer of clearance of final products 'from the place of removal' to the warehouse or customer's place etc., was exigible for Cenvat Credit. This stands finally decided in Civil Appeal No. 11710 of 2016 (Commissioner of Central Excise Belgaum v. M/s.

Vasavadatta Cements Ltd.) vide judgment dated January 17, 2018. However, vide amendment carried out in the aforesaid Rules in the year 2008, which became effective from March 1, 2008, the word 'from' is replaced by the word 'upto'. Thus, it is only 'upto the place of removal' that service is treated as input service. This amendment has changed the entire scenario. The benefit which was admissible even beyond the place of removal now gets terminated at the place of removal and doors to the Cenvat credit of input tax paid gets closed at that place. This credit cannot travel therefrom. It becomes clear from the bare reading of this amended Rule, which applies to the period in question that the Goods Transport Agency service used for the purpose of outward transportation of goods, i.e. from the factory to customer's premises, is not covered within the ambit of Rule 2(l)(i) of Rules, 2004. Whereas the word 'from' is the indicator of starting point, the expression 'upto' signifies the terminating point, putting an end to the transport journey."

11. In view of above judgments, we hold that the Appellant is entitled to CENVAT credit of service tax paid under RCM for transportation of goods from its factory to customer's premises. No case is made out by the revenue for denial of the CENVAT Credit on the ground that goods were not sold on FOR basis.

12. As regards the inclusion of the cost of transportation in the assessable value of the goods cleared by the Appellant, we find that this very issue was considered by the Larger Bench's in the case of ABB Limited – 2009 (15) STR 23 (Tri.-LB), which was ultimately upheld by the Hon'ble Supreme Court in case of Vasavdatta (Supra), and in which it is held as under:

"18. For admissibility to credit for outward transportation there is no requirement that the cost of freight should enter into the transaction value of the manufactured goods. According to the department, since the cost of outward transportation does not form part of the transaction value of the manufactured goods as defined in Section 4 of the Central Excise Act, 1944, any service tax paid for the outward transportation of goods from place of removal cannot be allowed as credit to the manufacturer, although, the question of denial of credit does not arise if the cost of freight is included in the transaction value. However, this stand is not tenable. In other words, credit is not to be automatically disallowed in those cases where the freight cost does not form part of the transaction value.....

.....

22. There is an additional reason for holding that CENVAT credit is admissible on services even if the value thereof is not part of the value subjected to duty. This is because the interpretation of the expression "input services" cannot fluctuate with the change in the

definition of "value" in Section 4 of the Central Excise Act and cannot vary depending on whether the goods are levied to duty under Section 4A of the Central Excise Act or tariff value under Section 3(2) of the Central Excise Act or the product attract specific rate of duty....."

13. Following the decision of the larger bench in ABB Limited, we hold that non-inclusion of the costs of the transportation in assessable value is no ground to deny the CENVAT credit.

14. We further find that demand in the present case relates to the period January, 2005 to June, 2007 and the show cause notice was issued on 02.12.2009. The entire demand is beyond normal period of one year. The issue involved is of interpretation of Cenvat Credit Rules and on this issue there are number of judgements. In these circumstances it cannot be said that the Appellant had a mala fide intention to evade the excise duty by taking the wrong credit. We do not find any suppression of fact or misstatement on the part of the Appellant. Thus, we are of the opinion that extended period cannot apply in the facts of the present case.

15. We accordingly set aside the impugned order both on merits and on limitation. The Appeal is allowed with consequential relief, if any.

(Pronounced in the open court on 05.02.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha