IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CEA No.2 of 2019
Reserved on: 11.03.2024
Decided on: 21.03.2024

M/s INOX Air Products Pvt. Ltd. ...Appellant

Versus

The Assistant Commissioner Central
Excise & Service Tax Division ...Respondent

Coram
The Hon'ble Mr. Justice M.S. Ramachandra Rao, Chief Justice
The Hon'ble Ms. Justice Jyotsna Rewal Dua, Judge
Whether approved for reporting?

For the appellant: Mr. Gopal Krishan Mundhra, Advocate (through Video Conferencing) and Mr.Prince Chauhan, Advocate.
For the respondent: Mr. Vijay Arora, Advocate.

M.S. Ramachandra Rao, Chief Justice

This appeal was admitted on 10.06.2019.

2) The following substantial questions of law are considered for decision in this appeal:

> *"(a) Whether in the facts and circumstances of the case, the Tribunal was justified in holding that place of removal for the GTA Services provided under a F.O.R sale contract is the manufacturer's premises and not the place where the goods are sold?*
> *(b) Whether in facts and circumstances of the case, the Tribunal was justified in holding that GTA*

services in present case are being received beyond the place of removal and therefore not covered within the definition of 'Input Service' under Rule 2(1) of Credit Rules?

(c) Whether in the facts and circumstances of the case, the Tribunal was justified in rejecting the appeal filed by the Appellant solely on the basis of the judgment of Apex Court in the case of CCE v. Ultra Tech Cements Ltd. [Civil Appeal No. 11261 of 2016]?

(d) Whether in the facts and circumstances of the case, the Tribunal was justified in upholding the levy of interest under Section 11AB of the Act?"

The background facts

3) Before we deal with the said questions of law, briefly we shall set out the factual background leading to this appeal.

4) The appellant is a company incorporated and registered under the Companies Act, 1956 and is primarily engaged in manufacturing of industrial gases such as Liquid Oxygen, Liquid Nitrogen, Liquid Medical Oxygen and Liquid Argon falling under Chapter 28 of the Central Excise Tariff Act, 1985.

5) For its operations, the appellant had entered into an agreement with the customers for the manufacture of various gases

mentioned above for delivery of it's products upto the premises of the customers.

6) The case of the appellant is that as per purchase orders placed by its customers with it, the transportation of the liquid gases from the factory premises of the appellant to the customer's premises is the appellant's responsibility; the purchase order reflects only one agreed value for the entire transaction as the consideration payable by the customer is inclusive of transportation charges; the excise duty and VAT at appropriate rates is to be paid on the basic rate, transportation charges and facility charges; the appellant is responsible for any loss in transit as it is the responsibility of the appellant to deliver the goods; and the ownership is transferred only when the goods are delivered and accepted by customers.

7) The appellant's stand is that it is availing and utilizing the CENVAT Credit of duty paid on Inputs and Capital Goods as well as credit of Service tax paid on Input Services, including GTA Services in terms of Rule 3(1) read with Rule 3(4) of the CENVAT Credit Rules, 2004.

8) The Audit officers conducted an audit of the financial records of the appellant, and during the course of scrutiny of records of the

appellant, they observed that the appellant has taken CENVAT Credit of Service tax paid by them on the outward freight for transporting the gases from factory gate to the buyers' premises by treating the same as Input Services and felt that the appellant has wrongly availed CENVAT Credit of Service tax amounting to Rs.6,90,027/- for the period from March 2011 to September 2012 and has utilized the same for payment of duty.

The show cause notices issued to the appellant by the respondent

9) Accordingly, show cause notices dt. 27.03.2012, 17.09.2012 and 08.03.2013 were issued to the appellant for the period March 2011 to August 2011, September 2011 to February 2012 and March 2012 to September 2012, respectively.

10) The gist of the allegation in the show cause notices was that the appellant had wrongly availed CENVAT Credit alongwith interest though it was not eligible to avail the same on the outward transportation of the liquid gases from the factory gate, which is the place of removal of excisable goods to the buyers' premises; and that credit of Service tax paid on outward transportation of goods is only admissible upto the place of removal as defined under Rule 2(1) of the CENVAT Credit Rules, 2004.

The reply of the appellant to the show cause notices

11) The appellant denied the said allegations in its replies to the show cause notices and contended that the place of removal is not the factory gate and it is the buyers' premises only as the sale of gases terminates at the buyers' premises. It contended that due to the peculiar nature of facts of the instant case, the place of removal cannot be the factory gate as the responsibility to transfer the gases to the buyers' premises is that of the appellant, and the said responsibility cannot be shifted to the buyers. It also relied on certain circulars issued by Central Board of Excise and Customs (CBEC) issued from time to time. It also contended that no penalty should be imposed and no interest can also be levied upon it.

The order of the primary authority dt.28.2.2014.

12) The Assistant Commissioner passed Order- in-Original No.10-12/D/AC/SML/2013 dt. 28.02.2014, directing recovery of CENVAT credit amounting to Rs.6,90,027/- for the period from March 2011 to September 2012 alongwith applicable interest under Rule 14 of CENVAT Credit Rules, 2004 read with Section 11 AB/AA of the Act and also imposed penalty of

Rs.6,90,027/- under Rule 15 of the CENVAT Credit Rules, 2004 read with Section 11AC of the Act.

13) The said Authority relied on the definition of term 'Input services' in Rule 2(1) of the CENVAT Credit Rules, 2004, which defines the said term as meaning "any service used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final product *upto* the place of removal"; and held that in view of the said definition, credit on outward transportation of goods beyond the place of removal is not admissible.

He held that credit of transportation of goods upto the place of removal alone is relevant and it would not cover transportation from the place of removal.

He also rejected the contention of the appellant that (i) their product being of special nature, it requires special type of transport vehicles and the issue of invoices for the quantity actually delivered at the buyers' premises, (ii) that property in the goods remains with them till the goods are delivered at buyers' premises, (iii) that their sale being on FOR basis, the place of removal shifts to the door step to the buyer.

The Authority held that simply because price is fixed on F.O.R basis and goods are delivered in special type of vehicles, it does not give rise to a conclusion that ownership is transferred at buyers' door steps or buyer's premises becomes the place of removal; and even delivery to a carrier or transporter, whether or not named by the buyer, constitutes delivery to the buyer under Sales of Goods Act, 1930.

The First Appeal

14) Challenging the above order, the appellant filed Appeal No.124CE/APPL/CHD-I/2014 to the Commissioner Central Excise (Appeals), Chandigarh-II.

15) The said appeal was also dismissed on 22.09.2017 upholding the findings of the primary Authority.

16) The First Appellate Authority also reiterated that as per Rule 2(1) of the CENVAT Credit Rules, 2004, credit is not admissible to the appellant as they were not found eligible to avail the service tax credit against the said service tax liability of outward transportation of the liquid gases from the factory gate, which is the place of removal of excisable goods to the buyer's premises.

He held that credit on service tax paid on outward transportation of goods is only admissible upto the place of removal as defined under Rule 2(1) of the CENVAT Credit Rules, 2004.

He held that the appellant had not placed on record any evidence to prove that the ownership of the goods sold to their buyers remained with them till the same had been handed over to their buyer at the door step and so they were not entitled to any relief.

Appeal to the Customs, Excise and Service Tax Appellate Tribunal, Chandigarh

17) Challenging the said judgment of the First Appellate Authority, the appellant had filed Appeal No.E/60934 of 2017 to the Customs, Excise and Service Tax Appellate Tribunal, Chandigarh.

18) The said appeal was dismissed on 27.02.2018.

19) The Tribunal held that the issue arising for consideration is "whether the appellant is eligible for input service credit on outward transportation of their final product from their factory to buyers' premises?" and that the said issue is covered by the

judgment of the Supreme Court in ***CCE vs. Ultra Tech Cement Ltd.,***[1] dt. 01.02.2018.

According to the Tribunal, the issue of input service credit availed for transport of goods from place of removal to buyers' premises was considered by the Supreme Court as per the amended Rule 2(1) of the CENVAT Credit Rules, 2004 in this judgment and that the Supreme Court held that a manufacturer/consignor can take credit of service tax paid on outward transport of goods upto the place of removal and not beyond that; the phrase 'place of removal' needs determination taking into account the facts of an individual case and the applicable provisions; in case of a factory gate sale, sale from a non-duty paid warehouse, or from a duty paid depot from where the excisable goods are sold, after their clearance from the factory, the determination of the 'place of removal' does not pose much problem. However, there may be situations where the manufacturer/consignor may claim that the sale has taken place at the destination point because in terms of the sale contract/agreement the ownership of goods and the property in the goods remained with the seller of the goods till the delivery

[1] (2018) 2 SCC 721

of the goods in acceptable condition to the purchaser at his door step or the seller bore the risk of loss or damage to the goods during transit to the destination and the freight charges were an integral part of the price of goods. In such cases, the credit of the service tax paid on the transportation upto such place of sale would be admissible if it can be established by the claimant of such credit that the sale and the transfer of property in goods occurred at the said place.

20) The Tribunal held that the entire argument of the appellant is based on the fact that goods were delivered on F.O.R basis; under special procedure for removal of gases pass out system, the pass-out document indicates, the description, net quantity of goods being dispatched and duty liability on such net quantity; this net quantity and duty leviable thereon (provisional) is provisionally entered/recorded in the Daily Stock Account at the time of clearance from the factory; the said procedure has expressly clarified that such "provisional calculation of duty" and "provisional entry" shall not be construed as Provisional assessment under Rule 7 of the Rules; on completion of deliveries, the quantity actually delivered, the quantity actually returned in tanker and the quantum of loss, if any is duly

recorded in the Daily Stock Account; the provisional entry relating to quantity of removal and the duty liability is thus converted into final entry in Daily Stock Account immediately after the return of the tanker (after a single trip/transportation) or latest by next morning; and it is therefore evident that the above arrangement is purely provisional arrangement considering special nature of goods and finalization of Daily Stock Account at the point of clearance from the factory itself indicates that the place of removal is the factory gate.

21) The Tribunal, however, held that levy of penalty under Section 11AC is not justified as the elements of Section 11AC do not exist in the present case and thus set aside the penalty imposed under the said provision while upholding the demand of CENVAT Credit and levy of interest thereon.

The instant Appeal

22) Challenging the same, this appeal is filed.

23) Learned counsel for the appellant has placed reliance on the Circular No.1065/4/2018-CX dt. 08.06.2018 issued by the Central Board of Indirect Taxes & Customs (CBIC). He pointed out that the said Circular of the Board considered the judgment in ***Ultra Tech Cement Ltd***. (1 supra) relied upon by the

Tribunal and specifically carved out an Exception to the principles laid down in the said decision stating as under:-

> *"4. Exceptions:*
>
> *(i) The principle referred to in para 3 above would apply to all situations except where the contract for sale is FOR contract in the circumstances identical to the judgment in the case of* ***CCE, Mumbai-III vs. Emco Ltd.*** *2015(322) ELT 394 (SC) and* ***CCE vs M/s Roofit Industries Ltd.*** *2015(319) ELT 221 (SC). To summarise, in the case of FOR destination sale such as M/s Emco Ltd and M/s Roofit Industries where the ownership, risk in transit, remained with the seller till goods are accepted by buyer on delivery and till such time of delivery, seller alone remained the owner of goods retaining right of disposal, benefit has been extended by the Apex Court on the basis of facts of the cases."(emphasis supplied)*

24) He, therefore, contended that since there is no dispute that in the instant case the sale of gases is on F.O.R contract basis; and since ownership, risk in transit, remained with the seller till goods are accepted by buyer on delivery, and till such time of delivery, the seller alone remained the owner of the goods retaining right of disposal, the judgment in ***Ultra Tech Cement (1 supra)*** would have no application and the judgments cited

in the circular ***CCE, Mumbai-III*** *vs.* ***Emco Ltd.***[2] ***and CCE*** *vs.* ***M/s Roofit Industries Ltd.***[3] would apply.

25) Learned counsel for the respondent refuted the said submissions and supported the order passed by the lower Authorities.

Consideration by the Court

26) It is not in dispute that for a manufacturer/consignor, the eligibility to avail credit of the service tax paid on the transportation during removal of excisable goods would depend upon the "place of removal" as per the definition contained of the said term in the Central Excise Act,1944. Such place of removal is the place where the sales take place.

27) It is also not in dispute that in an F.O.R sale which the appellant was doing in the instant case, freight charges form part of assessable value, the ownership of goods remains with seller till delivery at customer's doorstep, seller bears risk of loss or damage to the goods during transit to the destination, and property in the goods is not transferred till delivery. So outward transportation qualifies as 'input service' and is eligible for CENVAT Credit.

---

[2] 2015(322) ELT 394(SC) = (2015) 10 SCC 321
[3] 2015(319) ELT 221(SC) = (2015) 8 SCC 229

28) The sale being of **gases** manufactured by the appellant, due to the peculiar nature, sale happens at the buyer's premises and admittedly such sale is on F.O.R basis.

29) In **M/s Roofit Industries** (3 Supra), the Supreme Court held:

"***13.*** *The principle of law, thus, is crystal clear. It is to be seen as to whether as to at what point of time sale is effected, namely, whether it is on factory gate or at a later point of time i.e. when the delivery of the goods is effected to the buyer at his premises. This aspect is to be seen in the light of the provisions of the Sale of Goods Act by applying the same to the facts of each case to determine as to when the ownership in the goods is transferred from the seller to the buyer. The charges which are to be added have put up to the stage of the transfer of that ownership inasmuch as once the ownership in goods stands transferred to the buyer, any expenditure incurred thereafter has to be on buyer's account and cannot be a component which would be included while ascertaining the valuation of the goods manufactured by the buyer. That is the plain meaning which has to be assigned to Section 4 read with the Valuation Rules.*

14. *In the present case, we find that most of the orders placed with the respondent assessee were by the various government authorities. One such order i.e. order dated 24-6-1996 placed by Kerala Water Authority is on record. On going through the terms and conditions of the said order, it becomes clear that the goods were to be delivered at the place of the buyer and it is only at that place where the acceptance of supplies was to be effected. Price of the goods was inclusive of cost of material, Central excise duty, loading, transportation, transit risk and unloading charges, etc. Even transit damage/breakage on the assessee account which would clearly imply that till the goods reach the destination, ownership in the goods remain with the supplier, namely, the as-*

sessee. As per the "terms of payment" clause contained in the procurement order, 100% payment for the supplies was to be made by the purchaser after the receipt and verification of material. Thus, there was no money given earlier by the buyer to the assessee and the consideration was to pass on only after the receipt of the goods which was at the premises of the buyer. From the aforesaid, it would be manifest that the sale of goods did not take place at the factory gate of the assessee but at the place of the buyer on the delivery of the goods in question.

***15.** The clear intent of the aforesaid purchase order was to transfer the property in goods to the buyer at the premises of the buyer when the goods are delivered and by virtue of Section 19 of the Sale of Goods Act, the property in goods was transferred at that time only. Section 19 reads as under:*

*"**19. Property passes when intended to pass**.—(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.*

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in Sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer." "

30) This was reiterated in **Emco case (2 supra).**

31) The CBIC, in it's circular dt.8.6.2018 has considered these two decisions and also the decision in **Ultra Tech cement** (1 Supra) and had specifically held (as set out in para 23 supra) that in the case of FOR destination sale where the ownership, risk in

transit, remained with the seller till goods are accepted by buyer on delivery and till such time of delivery, seller alone remained the owner of goods retaining right of disposal, benefit has been extended by the Apex Court on the basis of facts of the cases.

32) This circular binds the respondents though it had been issued by the CBIC on 8.6.2018 after the decision was rendered in the instant case by the CESTAT on 27.2.2018.

33) In ***Ranadey Micronutrients etc.*** *vs.* ***Collector of Central Excise,***[4] the Supreme Court held that in view of Section 37B of the Central Excise & Salt Act, 1944, instructions issued by the Board in order to ensure uniform practice of assessment of excisable goods throughout the country get statutory status and significance, and they are binding on officers of the Central Excise Department.

34) Similar view was also taken by the Supreme Court in ***Commissioner of Customs, Calcutta and others*** *vs* ***M/s Indian Oil Corporation Ltd. & another,***[5] ***Commissioner Of Central Excise, Bolpur*** *vs* ***M/s Ratan Melting & Wire Industries***[6]**.**

---

[4] AIR 1997 SC 69
[5] (2004) 3 SCC 488
[6] MANU/SC/8792/2008

35) We may also point out that the decisions of the Supreme Court in ***EMCO Ltd.*** (2 supra) and ***M/s Roofit Industries Ltd.*** (3 supra) which specifically dealt with FOR contract sales were not referred to or considered in **Ultra Tech Cement Ltd.** case (1 supra) and the said case was not a case of F.O.R contract.

36) Learned counsel for the respondent has also brought to our notice decision rendered in the very case of the appellant in ***M/s. Inox Air Products Limited*** vs. ***Commissioner of GST and Central Excise***,[7] by the Customs, Excise and Service Tax Appellate Tribunal, Chennai rendered on 22.02.2024, where a plea similar to that one raised by the appellant in the instant case was accepted by the Customs, Excise and Service Tax Appellate Tribunal, Chennai. In the said case, the Tribunal has also held that there is no dispute in the payment of service tax or in regard to the documents and the appellant need not to produce one-to-one co-relation and it has no need to establish nexus of the input services with manufacturing activity.

37) Reliance was also placed by the Tribunal on its Larger Bench decision in ***M/s Ramco Cements Limited*** *vs.* ***Commissioner of Central Excise, Puducherry***,[8] dt. 21.12.2023, wherein the

[7] Excise Appeal No.41117 of 2013dt.22.2.2024
[8] Appeal No.E/40575/2018

Larger Bench had held that the credit availed on outward transportation services is eligible when the freight charges are included in the taxable value.

38) Therefore, we hold on issues mentioned above that the Tribunal was not justified in holding that place of removal for the GTA Services provided under FOR sale contract is the manufacturer's premises and not the place where the goods are sold; that the Tribunal was not justified in holding that the GTA services in the present case are being received beyond the place of removal and therefore not covered within the definition of Input Service under Rule 2(1) of CANVET Credit Rules, 2004.

39) Accordingly, the appeal is allowed and the impugned orders are set aside.

40) Pending applications, if any, also stand disposed of. No costs.

(M.S. Ramachandra Rao)
Chief Justice

(Jyotsna Rewal Dua)
Judge

March 21, 2024
(vt)