

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.79534 of 2018

(Arising out of Order-in-Appeal No.120/KOL-V/2018 dated 29.08.2018 passed by Commissioner of CGST & CX, (Appeal-I), Kolkata.)

M/s. Moulded Fibreglass Products

(Gangarampur, Banerjee Para, P.O. Raipur, Maheshtala, Kolkata-700141.)

...Appellant

VERSUS

Commissioner of CGST & CX, Kolkata South Commissionerate

.....Respondent

(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

APPEARANCE

Shri Akshat Agarwal, Advocate for the Appellant (s)

Shri A.Roy, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

FINAL ORDER NO. 75030/2023

DATE OF HEARING : 1 February 2023

DATE OF DECISION : 03 February 2023

P.K.CHOUDHARY :

The Appellant is in Appeal assailing the order of the Ld.Commissioner(Appeals), whereby he has upheld the Order-in-Original and rejected the Appeal before him.

2. Briefly stated the facts of the case are that the Appellant is a manufacturer of tailor made goods as per individual customer's requirement. The products are manufactured as per specific drawings, designs and technical specifications supplied by individual customers viz. Zonal Railways and Integral Coach Factories (ICF) etc.. The goods manufactured by the Appellant fall under Chapter 86 as well as Chapter 39 depending upon the usage as well as classification criteria. The procurement of purchase orders from the buyers is the pre-condition for manufacture of such tailor made goods. Show Cause Notice dated

31.03.2016 was issued alleging contravention of the provisions of Rule 3(i) read with Rule 2(l) of the CENVAT Credit Rules, 2004. It is the case of the Department that the assessee during the period from 01.04.2011 to 31.03.2015 irregularly availed input service credit to the tune of Rs.7,99,328/-, on services of Sales Commission, which did not qualify as input service of the Service Tax paid on Commission paid to different commission agents such as C.R. Kaliaraj, Nandan Steels & Power Ltd., Coromandel Liaisoners etc. for sale of their finished products and utilize such credit of Service Tax towards payment of duty of Central Excise leviable on their finished goods. The Show Cause Notice further proposed to recover the amount of irregularly availed CENVAT Credit along with interest and to impose penalty. The Adjudicating authority disallowed the CENVAT Credit as proposed in the Show Cause Notice and also imposed penalty of equal amount in terms of Rule 15(2) of the CENVAT Credit Rules, 2004 read with Section 11AC (1)(c) of the Central Excise Act, 1944. On Appeal, the Ld.Commissioner(Appeals) upheld the Order-in-Original and rejected the Appeal before him. Hence the present Appeal before the Tribunal.

3. The matter was heard on various dates and the Ld.Advocate appearing on behalf of the Appellant filed Written Submission and other documents in support of his submissions. The Ld.Advocate submitted that the business of the Appellant revolves around client specific requirement therefore it is necessary that it procures purchase orders from all over India and accordingly Appellant engages numerous commission agents in various places spread all over India in order to procure purchase orders from the Railways, ICFs and other similar industries. He vehemently argued that the scope of the said commission agents is not just limited to the extent of procuring purchase orders, but also extends to liaison services, letter of credit services, resolution of any disagreements or disputes, expediting the interests of the Appellants and various other allied services in the interest of the Appellant. Against such services received from the commission agents, the Appellants pays commission charges to the said

agents against issuance of invoices by the said agents, whereby the said agents also charge Service Tax at the applicable rate. The flow chart of manufacture operation in context of the agents, details of commission paid and bills of commission have already been submitted. Further, they have also submitted the appointment letters and various communications made with the commission agents. Ld.Advocate relied upon various case laws in support of his submissions.

4. The Ld.Authorized Representative for the Department submitted that the credit availed by the Appellant being sales commission in nature does not qualify as eligible input services credit. He further submitted that the CENVAT Credit has been rightly disallowed and the impugned order should be upheld and the Appeal filed by the Appellant being devoid of any merits may be dismissed.

5. Heard both sides and perused the Appeal records.

6. I find that the instant case arbitrates around the admissibility of the input service credit on sales commission paid to various agents. It has been observed that during 01.04.11 to 31.03.2015, the appellant had taken CENVAT Credit of input service on sales commission paid to different agents. Rule 2(I) of the CENVAT Credit Rules, 2004 defines input service. With effect from 01.04.2011, the definition of input service got narrowed and the expression 'activities related to business' was omitted. Department referred to Cadila judgement to confirm the demand, as sales commission is not covered in the inclusive part of the definition of Input Service.

6.1. The Appellant rightly referred to Circular No. 943/4/2011-CX, dated 29.04.2011 wherein department unambiguously accepted the legality of availment of credit on sales commission at serial no. 5. Relevant portion of the circular is as under:

Sl.No.5

ISSUE: Is the credit of Business Auxiliary Service (BAS) on account of sales commission now disallowed after the deletion of expression "activities related to business"?

CLARIFICATION : The definition of input services allows all credit on services used for clearance of final products upto the place of removal. Moreover activity of sale promotion is specifically allowed and on many occasions the remuneration for same is linked to actual sale. Reading the provisions harmoniously **it is clarified that credit is admissible on the services of sale of dutiable goods on commission basis.**

6.2. Department inserted an explanation to definition of input service under Rule 2(I) of the Cenvat Credit Rules, 2004. Sales promotion is a valid service to avail and it is covered in the inclusive part of the definition of input service. It is a settled position of law that explanation inserted in a Section/Rule, is generally to explain the meaning of the words contained in the section/ rule. It is also to clarify a doubtful point of law, which would be effective retrospectively. In the present case, the explanation inserted vide notification 2/2016-CE dated 03.02.2016 was issued for explaining the clause 'sales Promotion' in the context of rule 2(I) of the CCR' 04. It provided an additional support to 'Sales Promotion' to make it meaningful and purposeful. It is also in consonance with the CBEC Circular dated 29.04.2011. the retrospectively. The Appellant rightly referred judgement of M/s Essar Steel India Ltd., Vs. CCE, Surat (Tri.-Ahmed.) in this context. I find, department had intention to allow credit on sales commission and circular is binding on departmental officers read with notification 2/2016-CE[Supra].

7. I find that the sales commission is directly attributable to sales of the products. Any activity which amounts to sale of the products is deemed to be sales promotion activity in the normal trade parlance. The commission paid on sales of the products/services with an intention to boost the sales of the Company. The commission paid on sales becomes part of sales promotion resulting in increased manufacturing activity. The sales commission has a direct nexus with the sales, which in turn is related to the manufacture of the products. If there is no sale, there would not be any need to manufacture the

products. Be that so as it may, to increase the manufacturing activity an encouragement is being given by way of sales commission for achieving increased sales.

8. I also observe that the Hon'ble High Court of Punjab & Haryana in the case of Commissioner of Central Excise, Ludhiana Vs. Ambika Overseas : 2012 (25) STR 348 (P & H), had clearly held that the sale and manufacture are directed inter-related and the commission paid on sales needs to be accounted for as services related to sales promotion. Further, I follow the ratio of the decision of the Division Bench of this Tribunal in the case of Essar Steel India Ltd. cited supra, wherein the Tribunal, after discussing all the previous cases and Rules of interpretation, have held that the "Explanation" inserted in Rule 2 (I) of Cenvat Credit Rules, 2004 vide Notification No.2/2016-CE (N.T.) dated 03.02.2016 is declaratory in nature and is applicable retrospectively.

9. In view of the above discussions, the impugned order cannot be sustained and is, therefore, set aside.

10. The Appeal filed by the Appellant is allowed with consequential relief as per law.

(Order pronounced in the open court on 03 February 2023.)

Sd/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

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