IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

SPECIAL JURISDICTION (CENTRAL EXCISE)

ORIGINAL SIDE

RESERVED ON: 20.09.2022
DELIVERED ON: 27.09.2022

CORAM:

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE SUPRATIM BHATTACHARYA

CEXA NO. 04 OF 2022

PRINCIPAL COMMISSIONER OF CENTRAL EXCISE, KOLKATA - IV

VERSUS

M/S. HIMADRI SPECIALITY CHEMICAL LIMITED

Appearance:-
Mr. Uday Sankar Bhattacharyya, Adv.
Ms. Banani Bhattacharyya, Adv.
Ms. Ekta Sinha, Adv.

.....For the Appellant.

Mr. Rajeev Kumar Agarwal, Adv.

.....For the Respondent.

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. This appeal by the revenue is directed against the order passed by the Customs Excise and Service Tax Appellate Tribunal, East Regional Bench, Kolkata (Tribunal) in Excise Appeal No. 78330 of 2018, final order No. 7638 of 2019 dated 07.08.2019. The appeal was admitted on the following substantial questions of law:

i) Whether the agreement entered into by the said noticee with their consignment stockist is essentially a sales promotion agreement or a commission agent agreement for sale of goods?

ii) Whether services rendered by their consignment stockists are considered to be eligible input service under Rule 2(l) of the CENVAT Credit Rules, 2004 or not?

iii) Whether the 'Explanation' inserted by notification No. 02/2016-CE(NT) dated 03.02. 2016 into the definition of input service under Rule 2(l) of the CENVAT Credit Rules, 2004 is retrospective in nature or otherwise?

iv) Whether the Learned Tribunal erred in setting aside of the order in original dated 24.05.2018 without deciding the core issue?

v) Whether the Learned Tribunal fell in error in not considering the position as specific allegation made in the show-cause notice as the bills raised by the assessee was only for commission on sales and in the explanation to the show-cause notice the assessee had stated that the remuneration paid in the form of commission was not only on account of commission on sales but the consignment stockist undertook much wider responsibility including warehousing, distribution, sales promotion etc. and whether the same should have been adjudicated by the Tribunal being the last fact-finding authority?

2. We have heard Mr. Uday Bhattacharya, learned Senior Standing Counsel assisted by Ms. Banani Bhattacharya and Ms. Ekta Sinha, learned Advocates for the appellant and Mr. Rajeev Kumar Agarwal, Learned Advocate for the respondent.

3. The respondent is engaged in the manufacture of coal pitch, Naphthalene, HC Oil and Carbon Black and similar preparations falling under TSH 2708 1010, 2707 4040, 2707 9100 and 2803 0000 of the First Schedule to the Central Excise Tariff Act, 1985. An audit was conducted on the respondent for the period from April, 2014 to March, 2015 and the appellant noticed that the respondent has availed and utilized input credit of service tax against the commission paid to various service providers who are acting as commission agents. The department noticed that the respondent had entered into agreement with those agents for selling their goods who had raised bills merely for commission for sales and it was so mentioned in the bills under the head "Description". Thus, the Department was of the prima facie view that the role of the commission agent cannot be treated as input service and credit cannot be availed by the respondent. It was further alleged that the respondent deliberately suppressed material facts from the Department to evade payment of tax. These allegations led to issuance of show-cause notice dated 04.11.2016 calling upon the respondent to show cause as to why the CENVAT duty amounting to Rs. 3,99,07,593/- (including Cess) for the period from October, 2011 to February, 2016 shall not be confirmed and recovered from the respondent with interest and penalty as per Rule 14 of the CENVAT Credit Rules, 2004

read with Sections 11A(4), 11AA and 11AC of the Central Excise Act, 1944 (the Act). The assessee submitted their reply contending that they had entered into agreement with consignment stockists for warehousing, distribution and sale of their products and the remuneration paid to the consignment stockist was not only on account of commission on sales as the consignment stockist undertook much wider responsibilities including promotion and marketing activities for the respondent's products and, therefore, they are eligible for CENVAT Credit. The adjudicating authority rejected the explanation offered and by order dated 24th May, 2018 confirmed the proposal in the show-cause notice and imposed penalty. Aggrieved by the same, the assessee preferred appeal before the learned Tribunal which was allowed. Challenging the said order, the revenue has filed the present appeal.

4. The allegation against the respondent is that the commission paid to various parties was only for the purpose of procuring orders for the respondents and nothing more. Reliance was placed on copies of the sample bills wherein description of the work has been stated as commission on sales and, therefore, the Department was of the view that the Commission Agents apart from sale of the goods manufactured by the assessee have no role in respect of promotion of sales of the goods and thereby it cannot be treated as their input service and credit is not available to the respondent. The assessee's case in the reply to the show-cause notice was that the remuneration paid to the commission stockist in the form of commission was not only on account of commission on sales but they took wider

responsibilities including warehousing, distribution, sales promotion and marketing activities for the respondent's products and focused on the buyer/ manufacturing industries to represent the respondent with regard to the quality of the product, competitive prices etc. Further, consignment stockist undertook advertisement campaign, participated in trade exhibition and other modes for promoting sale of the products manufactured by the respondent. The respondent referred to a sample agreement entered into with the commission stockist wherein there were conditions to say that the appointment of commission stockist is for warehousing, distribution and sale of the products; they will make every endeavour to promote, develop and extend the sales of the product; they will work diligently and faithfully to foster and promote sales of the products within the territory/ area of their operation and safeguard the interest of the respondent to the best of their ability; that they shall convey to the respondent all information regarding demand and enquiries of the products also outside its territory/ area, that may come to their knowledge; that they will provide not only warehousing, distribution, sales but also all other associated services including delivery to customers from the warehouse and for all these activities the respondent will allow the consignment stockist commission at the rate of 3% on the sales made to the customers. The assessee/respondent referred to the definition of input services as defined under rule 2(l) of the CENVAT Credit Rules and submitted that warehousing, market research and sales promotion are specifically included as input service and other associated services provided by the consignment stockist are nowhere falling under the specific exclusion category as

mentioned in Rule 2(l) and, therefore, they are eligible for taking CENVAT Credit. The respondent referred to the circular issued by the Department in Circular No. 943/04/2011-CX dated 29.04.2011 which clarifies the scope of Business Auxiliary Service on account of sales commission. It was stated that the clarification was to the effect that 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. It has thus been clarified that on a harmonious reading of the provisions, credit is admissible on the services of sale of dutiable goods on commission basis. The respondent placed reliance on the decision in the case of ***Commissioner of Central Excise, Ludhiana Versus Ambika Overseas.***[1]

5. The respondent also placed reliance on Central Excise Notification No. 02/2016 dated 03.02.2016 which states sales promotion includes services by way of sale of dutiable goods on commission basis in terms of the definition of Input Tax Service as amended by the said notification. Further, it was submitted that the basis of the show-cause notice appears to be the decision in the case of ***CCE, Ahmedabad-II Versus Cadila Healthcare*** [2] wherein it has been held that services provided by selling agents are not eligible input services. The respondent distinguished the said decision on facts as well as on the basis that services provided by consignment agents include sale promotion, warehousing and other services which are specifically included in the definition of input service as an input

[1] 2012 (25) STR 348 (P&H)
[2] 2013 (30) STR 3 (Guj)

service. Further, it was submitted that in view of the conditions faced by the assessees across the country and credit being denied, an amendment was made in the CENVAT Credit Rules by adding an explanation under Rule 2(l) vide notification dated 03.02.2016, which states that for the purpose of Clause 2(l) sales promotion includes services by way of sale of dutiable goods on commission basis. By referring to the said explanation, it was submitted that in view of the same, the entire controversy for disallowing the credit on services provided by commission agents came to an end and the department has not raised any objection with regard to the availability of credit on the subject services for the period from 03.02.2016. It is submitted that the explanation which was inserted is applicable retrospectively as the same was clarificatory in nature. With regard to the invoking of the extended period of limitation, the respondent stated that there is no wilful suppression of facts in as much as the services availed from the consignment agents and commission paid to them and input credit available and the service tax charged by them has been duly disclosed in the ER-1 return and all facts are known to the Department and, therefore, the show-cause notice issued for a period of more than one year is barred by time. Further, it was submitted that when previously the audit was conducted, no objection was raised and, therefore, extended period could not have been invoked. In support of such contention reliance was placed on the decision in ***Commissioner of Central Excise, 4 Bangalore-I Versus MTR Foods Ltd.***[3] Further, it was submitted that when the matter involves interpretation of statutory provision, question of imposing penalty does not

[3] 2012 (282) ELT 196 (Kar.)

arise. Further, as credit had been correctly availed and there is no short payment of excise duty, question of payment of interest does not arise.

6. The adjudicating authority after taking note of the submissions, opined that the scope of service in the agreement entered into and between the respondent and the commission stockist does not speak about the modalities of the sales promotion under taken by the said stockist and only speaks about the associated service to the sales performed. Therefore, it was held that if the remuneration for sales promotion is linked to sales, it does not change the essential nature of the agreement between the parties. The warehousing services, advertisement services, sales promotion etc. were treated as ancillary activities and it was held that the commission agent is only for the sale and goods and not for the sales promotion. Further the adjudicating authority held that in the respondent's case sale of goods was the main activity undertaken by the consignment stockist and sales promotion is only an ancillary service along with other associated services to the main activity and therefore they are not eligible for trading. Accordingly, the proposal in the show cause notice was confirmed.

7. Before the learned tribunal, the respondent reiterated the stand taken by them in the reply to the show cause notice. The learned tribunal perused the agreement, took into consideration the definition of input service as defined under Rule 2(l) of the rules with effect from 01.04.2011 and held that the services under taken by the concerned agents for sales promotion are included in the definition of the input services and the very basis for the adjudicating authority to deny credit was by placing reliance on the decision

in ***Cadila Heath Care Limited*** for denying credit. The Learned tribunal also perused the amendment made to the definition of input service by way of insertion of the explanation vide a notification dated 03.02.2016 and after taking note of the certain decisions of the tribunal, it was held that the explanation being in the nature of clarification has to be held to be retrospective and accordingly agreed with the submissions made on behalf of the respondent. Further the learned tribunal held that invoking extended period of limitation is not sustainable.

8. Mr. Bhattacharyya, learned standing counsel for the appellant vehemently contended that in the appeal before the tribunal, the correctness of the order of the adjudicating authority ought to have been tested but the learned tribunal has independently taken a decision in the matter de-horse the findings recorded by the adjudicating authority and not undertaking an exercise to examine whether the findings was justified or not. We are not impressed with the said submission as the learned tribunal is the last fact finding authority in the hierarchy of the authorities. It can only confirm, modify, reverse an order passed by the adjudicating authority and for such purpose, it had to independently examine the facts of the case and such procedure adopted by the learned tribunal in the case on hand can hardly be faulted. As noticed by the learned tribunal, the basis of the show cause notice itself was the decision in the case of ***Cadila Health Care Limited*** which departs from the view taken in other earlier decisions namely ***Coca Cola India Private Limited Versus Commissioner of Central Excise***

Pune – III [4]***, Commissioner of Central Excise Bangalore - III Versus Stanzen Toyotetsu India Private Limited*** [5]***, Commissioner of Central Excise, Nagpur Versus Ultratech Cement Limited*** [6]***, Commissioner of Central Excise and Services Tax, LTU, Bangolore Versus Micro Labs Limited*** [7] ***and Commissioner of Central Excise, Ludhiana Versus Ambika Overseas*** [8]**.** All the aforementioned decisions clearly support the case of the respondent assessee.

9. As pointed out earlier, the basis for issuance of the show cause notice was the decision in the case of ***Cadila Health Care Limited***. The said assessee was engaged in the manufacture of medicaments and had availed CENVAT Credit on service tax paid on the technical and analysis service, commission paid to the foreign agents, courier service etc. The revenue took a stand that CENVAT Credit of service tax paid on the above services is not admissible. Challenging the findings of the adjudicating authority, appeal was filed before the tribunal. Ultimately the matter travelled to the High Court. The High Court held that in the absence of any material on record, there is nothing to indicate that commission agent were involved in the activities of sales promotion and that the claim of the assessee was accordingly rejected. Thus, the Court took note of the factual position in the case that there was nothing to indicate that the commission agents were involved in the sales promotion activities, contrary to the case on hand

[4] 2009 (15) S.T.R. 657 (Bom.)
[5] 2011 (23) S.T.R. 444 (kar)
[6] 2010 (260) E.L.T. 369 (Bom)
[7] 2011 (270) E.L.T. 156 (kar)
[8] 2012 (25) S.T.R. 348 (P & H)

where agreements were produced before the authority to show what is the nature of services rendered by those commission stockists.

10. Mr. Bhattacharyya referred to the sample invoices and submitted that in the invoices, it has been stated under the column description "commission for sales". The correctness of such an identical submission made before the tribunal was tested and after considering all the facts, the terms and conditions of the agreement and the nature of services rendered by the commission stockist the tribunal recorded an independent finding that the activities of the commission stockist is towards sales promotion as well. Therefore, the reliance placed on the decision in the case of ***Ambika Overseas*** by the respondent assessee was well justified. Further, on and after the insertion of the explanation in Section 2(l) vide notification dated 03.02.2016, the position has become much clearer. The explanation seeks to clarify the intention of the legislature with a view to extend the benefit of credit on services of commission agent as was indicated in the circular dated 29.04.2011 which is to the following effect.

> ***B.30 – Meerut Zone – Cenvat Credit – Admissibility of Cenvat Credit on Service Tax Paid on Sales Agency Commission Service:***
>
> ***Issue:***
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> *C.B.E. & C. Vide its Circular No. 943/4/2011-CX., dated 29.04.2011 at point No. 5 [2011 (267) ELT (T19)] has clarified that credit of service tax paid on sales commission services (Business auxiliary services) used in relation to manufacture/sale of finished goods is admissible under Cenvat Credit Rules, 2004. However, there are conflicting judgments of Hon'ble High Courts in this regard. Hon'ble High Court of Gujarat in case of Cadila*

Health Care [2013 (30) S.T.R. 3] has disallowed the said Cenvat credit whereas Hon'ble Tribunal in case of Birla Corporation Ltd. [2014 (35) S.T.R. 97] followed the judgment of Hon'ble High Court of Bombay and allowed the credit. Board may be requested by the conference to issue necessary clarification on the subject to avoid further litigation and to achieve uniformity in the practice of assessment.

Discussion & Decision:

The conference discussed the issue in detail and the facts of both the cases where apparently conflicting judgements have been delivered. It was noted that the judgment of Hon'ble High Court of Gujarat was in a very specific set of circumstance where the sales commission agent seemed to be only trading in the goods i.e. buying and selling the goods without undertaking any sales promotion or advertising. In the said judgment, Hon'ble Court noted that "there is nothing to indicate that such commission agents were actually involved in any sales promotion activities as envisaged under the said expression. Obviously, commission paid to the various agents would not be covered in this expression since it cannot be stated to be a service used directly or indirectly in or in relation to the manufacture of final products or clearance of final products from the place of removal". Board Circular No. 943/4/2011-CX., dated 29.04.2011 at point no. 5 on the other hand has explained the situation where the commission agent renders the service of sales promotion in following words".....Moreover the activity of sale promotion is specifically allowed and on many occasions the remuneration for same is linked to actual sale.....". Board circular directs that input service credit would be available when there is an element of sales promotion as sales promotion is a service. Thus, the conflict between the judgment and the circular is not as large as is perceived. Both the Board circular and case laws on the subject allow credit of input service, when the activity of the

sales commission agent involves an element of sales promotion.

11. As could be seen from the above clarification, the decision in ***Cadila Health Care*** was also taken note of by the department and the position stood clarified that sales promotion would include services by way of sale of goods on commission basis. As pointed out by the Hon'ble Supreme Court in ***Commissioner of Income Tax Versus Vatika Township Private Limited*** [9] that if a legislation confers the benefit on some persons but without inflicting the corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the object of the legislature, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. In ***Commissioner of Income Tax Versus Archean Granite Private Limited*** [10] amendment made to Section 40(a) (ia) of the Finance Act, 2010 inserting proviso therein was held to be retrospective with effect from the assessment year 2005-2006 and the Court followed the decision in the case of ***Commissioner of Income Tax Versus Calcutta Export Company*** [11]. Therefore, we find that the approach to the issue in the manner done by the learned tribunal cannot be faulted.

12. Mr. Bhattacharyya's reliance was on the decision of the Hon'ble full bench of this Court in the case of ***Prabhat Pan and Others Versus State of West Bengal & Others*** [12] for the proposition that the decision in the

[9] (2015) 1 SCC 1
[10] (2020) 117 Taxmann.com 977 (Madras)
[11] (2018) 93 Taxmann.com 51
[12] (2015) Calcutta 112 (FB)

case of ***Cadila Health Care Limited*** being the latest decision with the same bench composition as that of the other Division Benches of the High Court, the same should be followed.

13. Firstly, the decisions of one other High Court in all cases will not bind another High Court and such decisions were held to be of persuasive value. In any event on facts in ***Cadila Health Care Limited,*** the Court found no material on record to indicate that commission agents were involved in the activities of sales promotion. Therefore, the decision in the case of ***Prabhat Pan*** does not render any assistance to the revenue. Further it is seen that the commission paid by the respondent to the commission stockist is included in the assessable value of the goods on which excise duty has been paid by the respondent on the final products namely carbon black. In fact, this has been noted by the adjudicating authority. While on this issue, it would be relevant to take note of the decision in the case of ***Coca Cola India Private Limited*** wherein it was held as follows:

> - *It is therefore clear that the burden of service tax must be borne by the ultimate consumer and not by any intermediary i.e. manufacturer or service provider. In order to avoid the cascading effect, the benefit of Cenvat credit on input stage goods and services must be ordinarily allowed as long as connection between the input stage goods and service is established. Conceptually as well as a matter of policy, any input service that forms a part of the value of the final product should be eligible for the benefit of Cenvat credit.*
> - *Service tax therefore, paid on expenditure incurred by the assessee on advertisements sales promotion, market research will have to be allowed as input stage credit more particularly if the same forms a part of the price of final product of the assessee on*

which excise duty is paid. In other words, credit of input service must be allowed on expenditure incurred by the assessee which form a part of the assessable value of the final product. If the above is not done, as sought to be done by the department in the present case, it will defeat the very basis and genesis Cenvat i.e. value added tax.

- *What follows from the above discussion is that credit is availed on the tax paid on the input service, which is advertisement and not on the contents of advertisements. Thus it is not necessary that the contents of the advertisements must be that of the final product manufactured by the person advertising, as long as the manufacturer can demonstrate that the advertisement services availed have an effect of or impact on the manufacture of the final product and establish the relationship between the input service and the manufacture of the final product. The manufacture thereby can avail the credit of the service tax paid by him. Once the cost incurred by the service has to be added to the cost, and is so assessed, it is a recognition by Revenue of the advertisement services having a connection with the manufacture of the final product. This test will also apply in the case of sales promotion.*

14. The respondent had also resisted the show cause notice by contending that extended period of limitation could not have been invoked. On plain reading of the show cause notice, it is clear that except for the use of the word "suppression of material facts", that there is nothing on record to indicate as to on what basis the adjudicating authority invoked the extended period of limitation. More so, when the assessee had disclosed all the materials in their returns and the assessee was also subjected to audit earlier and there was no objection raised by the audit department. Therefore, on the said ground also the assessee is entitled to succeed.

15. Thus, for all the above reasons, the appeal filed by the revenue is dismissed and the substantial questions of law are answered against the revenue. No costs.

(T.S. SIVAGNANAM, J.)

I agree

(SUPRATIM BHATTACHARYA, J.)

(P.A.- PRAMITA/SACHIN)