



W.P.(MD) No.17906 of 2020

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 10.04.2024

CORAM:

THE HONOURABLE MR.JUSTICE C.SARAVANAN

**W.P.(MD) No.17906 of 2020
and
W.M.P.(MD) No.14933 of 2020**

M/S.Hi Tech Arai Pvt Ltd.,
represented by its
Senior Manager – Taxation T.Raathakrishna
No.33, Sarojini Street,
Chinna Chokkikulam,
Madurai.

... Petitioner

/vs./

The Assistant Commissioner of
Central Goods and Service Tax and Central Excise,
Trichy II Region,
No.1, Williams Road,
Contonment,
Trichirappalli 620 001.

... Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari, calling for the records in order in Original No.4 and 05/2020 C.Ex dated 30.09.2020 issued by the Respondent and quash the



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same is wholly without jurisdiction and clear violation of circular No. 1065/4/2018-CX dated 08.06.2018 issued by the Central Board of Indirect Taxes and Customs.

For Petitioner : Mr.N.Sudalaimuthu

For Respondent : Mr.R.Nandha Kumar
Senior Standing Counsel

ORDER

The petitioner has filed this writ petition for a Certiorari calling for the records in order in Original Nos.4 and 05/2020 C.Ex dated 30.09.2020 passed by the respondent and to quash the same.

2.This is a second round of litigation in respect of the demand that was confirmed earlier in respect of the show cause notice dated 28.04.2016, vide Order in Original Nos.3 and 4 of 2018 dated 29.03.2018. The petitioner had earlier preferred an appeal before the Appellate Commissioner against the aforesaid order, which culminated in an adverse order of the Appellate Commissioner dated 09.01.2019 in Order in Appeal Nos.3 and 4 of 2019 – TRY (Cex).



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3. Aggrieved by the aforesaid order, the petitioner preferred further appeal before the Customs Excise and Service Tax Appellate Tribunal (CESTAT), Chennai in Excise Appeal Nos.40626 and 40627 of 2019.

4. By an order dated 21.02.2020 bearing Final Order Nos.40500-40501 of 2020, the Tribunal allowed the appeal by way of remand with the following observations:-

“5.Ld. Counsel has produced before me sample invoice/purchase orders to contend that they have paid Central Excise duty after including freight charges; that it is also argued by her that since the goods have been delivered at the buyer's premises without collecting freight charges from the customer and the same is borne by the appellant, they are eligible for credit of service tax paid on the freight charges upto the buyer's premises. I find that to peruse the documents relating to the issue under consideration it is best to remit the case back to the adjudicating authority who shall look into the documents furnished by the appellant to determine the place of removal. If the appellant has included the freight charges in the transaction value while discharging the excise duty, they would be eligible for the credit of service tax paid on freight charges incurred by them upto the buyer's premises. The decision in the case of Roofit Industries Ltd. (supra) would then apply. From the above, I hold that



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the impugned order is set aside and the appeals are remanded to the adjudicating authority for fresh consideration after giving an opportunity to the appellant to furnish documents.”

5.Pursuant to the aforesaid remand order, the respondent has now passed the impugned order re-confirming the demand proposed in the show cause notice issued to the petitioner. The relevant portion of the impugned order reads as under:-

“18.In view of the above decisions of the Courts and the Central Excise Act and Rules, I find that 'place of removal' will not include buyer's premises. M/s. Roofit Industries Ltd. reported in 2015 (319) E.LT 221 (S.C.) covering the period 1.1.96 to 30.06.2000 before the amendment of Rule 2(1) of the Cenvat Credit Rules, 2004 and before the insertion of Rule 2(qa) of the CENVAT Credit Rules, 2004 The Rule 2(qa) inserted vide Notification No. 21/2014-Central Excise (N.T.) on July 11, 2014.

19.In the instant case, the basic issue of the admissibility of Cenvat Credit of Service Tax paid on outward transportation from the factory gate/depots to the premises of the customers. In this connection I would like to discuss the relevant statutory provisions on what constituted as input service:



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Rule 2(1) Of the erstwhile Cenvat Credit Rules, 2004 during the relevant period, read as under:

"input service" means any service, - (w.e.f 01.04.2008)

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 product upto the place of removal,

and includes services used in relation to modernization, renovation or repairs of 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, 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 upto the place of removal, but excludes services.-

20.I find that the issue of eligibility to credit in respect of the service tax paid on outward freight incurred for transportation of the goods from the factory to the places of customers for the period from 01.04.2008 onwards stands decided by the latest judgment dated 01.02.2008 of the Hon'ble Supreme Court in the case of M/s.Ultratech



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Cement Ltd. has given a conclusive finding to the effect that the credit of service tax paid on outward freight incurred for transportation of goods from the factory to the customers premises is not admissible as cenvat credit. The issue involved in this case is identical to the issue invoiced in the case of M/s.Ultratech Cement Ltd judgement dated 01.02.2008 of the Hon'ble Supreme Court. Going by the Central Excise Act/ Rules and Principles of Judicial Discipline, I hold that Service tax paid on the outward transportation of the final products from the factory gate/depots of the noticee to the premises of the customers is not admissible as cenvat credit under Rule 3(1) read with Rule 2(1) of the Cenvat Credit Rules, 2004. I find that the assessee had taken cenvat credit of service tax paid on outward transportation service beyond the place of removal, even when they were fully aware that the said service do not fall within the definition of 'input service' as defined under Rule 2(1)(i) of CCR, 2004, with an intent to avail ineligible cenvat credit and utilize the same for payment of duty. Further the assessee have not disclosed the fact of taking of credit of service tax paid on 'outward transportation service' and this fact would not have come to the knowledge of the department but for the audit conducted by the department. The assessee neither submitted any documents at the time of filing of monthly ER1 returns nor informed the department at any point of time Therefore, I find that the invocation of extended time limit under proviso to section 11A(1)/11A(4) of CEA as it existed during the relevant time read with



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Rule 14 of CCR, has rightly been invoked in this case. In the Commissioner (A) vide Order Nos. OIA No.3 & 4/2019 setting aside the penalties imposed under Rule 15(1) and 15(2) of the CCR and upheld the rest of the Order of the lower authority.

21. In view of the discussions and findings I pass the following order

ORDER

i) I confirm the demand of Rs.13,03,786/- (Rupees Thirteen lakhs three thousand Seven Hundred and Eighty Six only) (Service Tax 12,66,617/-, Ed. Cess Rs. 24,792/- and SHE Cess Rs. 12,377/-) being the ineligible input service credit availed on outward freight beyond the place of removal for the period from 2011-12 to 2015-16 (upto Oct 2015) and order recovery thereof from them under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11A(2) /11A(10) of the Central Excise Act, 1944, as it existed at the relevant time.

(ii) I confirm the demand of Rs 5,23,586/- (Rupees Five Lakh Twenty Three Thousand Five Hundred and Eighty Six Only) (Service Tax Rs. 4,91,476/- SB Cess Rs. 17,420/-, KK Cess - Rs 14,690/-) being the ineligible input service credit availed on outward freight beyond the place of removal (from factory to buyer's premises) for the period from November-2015 to June-2017) and order recovery thereof from them under Rule 14 of Cenvat Credit Rules, 2004 read with Section



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(iii) I demand interest at appropriate rates on the amount confirmed at Sl Nos. (i) & (ii) above under Rule 14 of the Cenvat Credit Rules, 2004 read with erstwhile Section 11AB/ present Section 11AA of the Central Excise Act, 1944 from M/s Hi-Tech Arai Pvt. Ltd. (Unit-V), Kuthoor, Trichy.”

6.The learned counsel for the petitioner would draw attention to the decision of the Himachal Pradesh High Court in ***M/S. Inox Products Pvt. Ltd., Vs. The Assistant Commissioner Central Excise and Service Tax Division*** reported in **2024 (4) TMI 32**. Specifically, a reference was made to paras 26 to 38 of the said order, which reads as under:-

“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



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qualifies as 'input service' and is eligible for CENVAT Credit.

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- 15 sessee. As per



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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 its 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 16 transit,



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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 Industries⁶ . 4 AIR 1997 SC 69 5 (2004) 3 SCC 488 6MANU/SC/8792/2008 17.

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



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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 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."

7.The learned Senior Standing Counsel for the respondent on the other hand would submit that the remedy under Article 226 of the Constitution of India is not available to the petitioner, as the petitioner has an alternate remedy before the Appellate Commissioner.

8.I have considered the arguments advanced by the learned counsel for the petitioner and the learned Senior Standing Counsel for the respondent.



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9.The writ petition is liable to be dismissed, as the petitioner has an alternate remedy under Section 35(A) of the Central Excise Act, 1944 before the Commissioner of Central Excise (Appeals). The appellate remedy prescribed under the Act cannot be allowed to be circumvented, merely because the petitioner is of the view that the petitioner may have a case on merits.

10.The fact that the petitioner is required to pre-deposit the amounts before the appeal is entertained under Section 35(A) of the Central Excise Act, 1944 is also of no avail. Further, only 10% of the disputed tax is to be paid by the petitioner for filing an appeal before the first appellate Authority.

11.Considering the same, the Writ Petition is liable to be dismissed with liberty to the petitioner to file statutory appeal under Section 35(A) of the Central Excise Act, 1944 within a period of 30 days from the date of receipt of a copy of this order. If such an appeal is filed within the time stipulated by this Court, the Appellate Commissioner shall entertain the appeal and dispose of the same on merits and in accordance with law.



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12.It is needless to state that the decision cited by the learned counsel for the petitioner in ***M/S. Inox Products Pvt. Ltd., Vs. The Assistant Commissioner Central Excise and Service Tax Division*** reported in ***2024 (4) TMI 32*** will also be considered by the Appellate Commissioner.

13.The Writ Petition stands dismissed with the above liberty. No costs. Consequently, connected Miscellaneous Petition is closed.

Index : Yes / No
Internet : Yes / No
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