

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 20.03.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR. JUSTICE R.KARUPPIAH

C.M.A. No.307 of 2010

The Commissioner of Central Excise
Chennai II Commissionerate,
No.692, MHU Complex, Anna Salai,
Nandanam, Chennai - 600 035.

... Appellant

- Vs -

1. M/s.Borg Warner Morse Tec Murugappa Pvt. Ltd.,
Plot No.78, 79, 92, 93 Kakkalur Industrial Estate,
Putlur Village, Tiruvallur - 602 003.
2. The Customs, Excise and Service Tax
Appellate Tribunal,
South Zone Bench, Shastri Bhavan Annex,
1st Floor, No.26, Haddows Road,
Chennai - 600 006.

... Respondents

Appeal filed under Section 35-G of the Central Excise Act,
against the order dated 16.10.2009 passed by Customs, Excise &
Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in
Final Order No.1478, 1479 of 2009.

For Appellant

: Mr.E.Vijay Anand
Standing Counsel

For Respondents

: Mr.M.Sivavarthan - R1

R2

- Tribunal

J U D G M E N T

(DELIVERED BY R.SUDHAKAR, J.)

This Civil Miscellaneous Appeal filed by the Revenue as against
the order of the Customs, Excise and Service Tax Appellate Tribunal
allowing the appeal filed by the assessee granting the benefit of

Cenvat credit on the service tax paid on outdoor catering services provided in the factory for employees of the factory and outward freight services was admitted by this Court on the following substantial questions of law:

"1. In the facts and circumstances of the case, whether the first respondent can avail CENVAT Credit of Service Tax paid on canteen service treating them as as "Input Service" and Service Tax paid on outward freight treating them as 'Input Service', when those services are not in relation to the manufacture of final products?

2. Whether the second respondent was correct in law in applying the ratio of the Larger Bench of the Tribunal's decision in the case of CCE , Mumbai v. GTC Industries Ltd., (2008 (12) STR, 468 (TR-LB) and ABB Ltd., Vs. CCE Bangalore as reported in 2009 (15) STR 23 (Tri-LB) when these were appealed before the Hon'ble High Court, Bombau on 02.06.2009 with a Central Excise Appeal Lodging No.34 of 2009 and before Hon'ble High Court of Karnataka with a Central Excise Appeal (CEA) No.121 of 2009?"

2. The brief facts are as follows:

The assessee in this case availed credit of service tax paid for transportation and delivery of goods to their customers and also service tax paid for providing food and beverage at the factory production to their staff and labourers and that was objected to by the Department stating that outdoor catering services and outward freight do not fall within the ambit of definition 'input service', specified under Rule 2(1) of the Cenvat Credit Rules, 2004. The Department was of the view that catering/canteen services and outward freight services were neither used in or in relation to the manufacture or clearance of final product nor it could be said to be an activity relating to business and proceed to disallow the cenvat credit. The Adjudicating Authority vide order-in-original, supported the view of the Department and disallowed the cenvat credit. Aggrieved by the Order-in-Original, the assessee pursued the matter before the Commissioner (Appeals), who allowed the credit with respect to the canteen services and disallowed the credit with respect to freight. As against the said order of the Commissioner (Appeals), the Department as well as the assessee went before the Tribunal.

3. The Tribunal following the Larger Bench decision of the Tribunal in the case of Commissioner of Central Excise, Mumbai V. GTC Industries Ltd. reported in 2008 (12) STR 468 (Tri.-LB) and ABB Ltd., Vs. CCE Bangalore as reported in 2009 (15) STR 23 (Tri-LB) dismissed the appeal filed by the Department and allowed the appeal filed by the assessee holding that Cenvat credit is admissible on 'outdoor catering service' as well as 'outward freight service' as the same are input service relating to business.

4. Being aggrieved by the orders of the Tribunal, the Revenue has filed the present appeal before this Court.

5. Heard learned Standing Counsel appearing for the Revenue and the learned counsel appearing for the assessee and perused the materials placed before this Court.

6. The core issue involved in this appeal is whether the assessee can utilise the cenvat credit facilities in respect of outdoor catering services, provided in the factory for its employees and outward freight service as input service.

7. In an identical circumstance, this Court dealt with the issue with regard to outdoor catering service, in a batch of appeals in C.M.A.Nos.2 of 2010 batch and vide judgment dated 13.02.2015 held in favour of the assessee by following the decision of the Bombay High Court in the case of CCE V. Ultratech Cement Ltd. reported in 2010 -TIOL - 745 - HC- MUM - ST, wherein all the contentions raised by the Revenue has been considered in extenso including the definition of 'input service' as defined in the case of Maruti Suzuki Ltd. V. CCE reported in 2009 (240) ELT 641 (SC) . The Bombay High Court came to the conclusion that the decision of the Larger Bench of the CESTAT in the case of CCE V. GTC Industries Ltd. 2008 (12) STR 468 is a correct law, however, with a rider that where the cost of the food is borne by the worker, the manufacturer cannot take credit of that part of the service tax which is borne by the consumer.

8. For better clarity, the relevant portion of the decision of the Bombay High Court in the case of CCE V. Ultratech Cement Ltd. reported in 2010 -TIOL - 745 - HC- MUM - ST reads as follows:

"28. In the present case, the question is, whether outdoor catering services are covered under the inclusive part of the definition of "input service". The services covered under the inclusive part of the definition of input service are services which are rendered prior to the commencement of manufacturing activity (such as services for setting up, modernization, renovation or repairs of a factory) as well as services rendered after the manufacture of final products (such as advertisement, sales promotion, market research etc.) and includes services rendered in relation to business such as auditing, financing ... etc. Thus, the substantive part of the definition "input service" covers services used directly or indirectly in or in relation to the manufacture of final products, whereas the inclusive part of the definition of "input service" covers various services used in relation to the business of manufacturing the final products. In other words, the definition of "input service" is very wide and covers not only services,

which are directly or indirectly used in or in relation to the manufacture of final products but also includes various services used in relation to the business of manufacture of final products, be it prior to the manufacture of final products or after the manufacture of final products. To put it differently, the definition of input service is not restricted to services used in or in relation to manufacture of final products, but extends to all services used in relation to the business of manufacturing the final product.

29. The expression "activities in relation to business" in the definition of "input service" postulates activities which are integrally connected with the business of the assessee. If the activity is not integrally connected with the business of the manufacture of final product, the service would not qualify to be a input service under rule 2(1) of the 2004 Rules.

30. The Apex Court in the case of Maruti Suzuki Ltd. (supra) has considered the expression 'used in or in relation to the manufacture of final product' in the definition of "input" under rule 2(k) of 2004 Rules and held as follows :-

"14. ... Moreover, the said expression, viz., "used in or in relation to the manufacture of the final product" in the specific/substantive part of the definition is so wide that it would cover innumerable items as "input" and to avoid such contingency the Legislature has incorporated the inclusive part after the substantive part qualified by the place of use. For example, one of the categories mentioned in the inclusive part is "used as packing material". Packing material by itself would not suffice till it is proved that the item is used in the course of manufacture of final product. Mere fact that the item is a packing material whose value is included in the assessable value of final product will not entitle the manufacturer to take credit. Oils and lubricants mentioned in the definition are required for smooth running of machines, hence they are included as they are used in relation to manufacture of the final product. The intention of the Legislature is that inputs falling in the inclusive part must have nexus with the manufacture of the final product.

16. In our earlier discussion, we have referred to two considerations as irrelevant, namely, use of input in the manufacturing process, be it direct or indirect as also absence of the input in the final product on account of the use of the expression "used in or in relation to the manufacture of final product". Similarly, we are of

the view that consideration such as input being used as packing material, input used as fuel, input used for generation of electricity or steam, input used as an accessory and input used as paint are per se also not relevant. All these considerations become relevant only when they are read with the expression "used in or in relation to the manufacture of final product" in the substantive/specific part of the definition. In each case it has to be established that inputs mentioned in the inclusive part is "used in or in relation to the manufacture of final product". It is the functional utility of the said item which would constitute the relevant consideration. Unless and until the said input is used in or in relation to the manufacture of final product within the factory of production, the said item would not become an eligible input. The said expression "used in or in relation to the manufacture" have many shades and would cover various situations based on the purpose for which the input is used. However, the specified input would become eligible for credit only when used in or in relation to the manufacture of final product. Hydrogen gas used in the manufacture of sodium cyanide is an eligible input, since it has a significant role to play in the manufacturing process and since the final product cannot emerge without the use of gas. Similarly, Heat Transfer Oil used as a heating medium in the manufacture of LAB is an eligible input since it has a persuasive role in the manufacturing process and without its use it is impossible to manufacture the final product. Therefore, none of the categories in the inclusive part of the definition would constitute relevant consideration per se. They become relevant only when the above crucial requirement of being "used in or in relation to the manufacture" stands complied with. In our view, one has to therefore, read the definition in its entirety."

31. In our opinion, the ratio laid down by the Apex Court in the case of Maruti Suzuki Ltd. (supra) in the context of the definition of 'input' in rule 2(k) of 2004 Rules would equally apply while interpreting the expression "activities relating to business" in rule 2(l) of 2004 Rules. No doubt that the inclusive part of the definition of 'input' is restricted to the inputs used in or in relation to the manufacture of final products, whereas the inclusive part of the definition of input service extends to services used prior to/during the course of/after the manufacture of the final products. The fact that the definition of 'input service' is wider than the definition of 'input' would make no difference in applying the ratio laid down in the case of Maruti Suzuki Ltd. (supra) while interpreting the scope of 'input

service'. Accordingly, in the light of the judgment of the Apex Court in the case of Maruti Suzuki Ltd. (supra), we hold that the services having nexus or integral connection with the manufacture of final products as well as the business of manufacture of final product would qualify to be input service under rule 2(1) of 2004 Rules.

32. As rightly contended by Shri Shridharan, learned Counsel for the respondent - assessee, in the present case, the assessee carrying on the business of manufacturing cement by employing more than 250 workers is mandatorily required under the provisions of the Factories Act, 1948 to provide canteen facilities to the workers. Failure to do so entails penal consequences under the Factories Act, 1948. To comply with the above statutory provision, the assessee had engaged the services of an outdoor caterer. Thus, in the facts of the present case, use of the services of an outdoor caterer has nexus or integral connection with the business of manufacturing the final product namely, cement. Hence, in our opinion, the Tribunal was justified in following the Larger Bench decision of the Tribunal in the case of GTC Industries Ltd. (supra) and holding that the assessee is entitled to the credit of service tax paid on outdoor catering service.

33. It is argued on behalf of the revenue that not only the ratio but the decision of the Apex Court in the case of Maruti Suzuki Ltd. (supra) must be applied ipso facto to hold that the credit of service tax paid on outdoor catering services is allowable only if the said services are used in relation to the manufacture of final products. That argument cannot be accepted because unlike the definition of input, which is restricted to the inputs used directly or indirectly in or in relation to the manufacture of final products, the definition of 'input service' not only means services used directly or indirectly in or in relation to manufacture of final products, but also includes services used in relation to the business of manufacturing the final products. Therefore, while interpreting the words used in the definition of 'input service', the ratio laid down by the Apex Court in the context of the definition of 'input' alone would apply and not the judgment in its entirety. In other words, by applying the ratio laid down by the Apex Court in the case of Maruti Suzuki Ltd. (supra), it cannot be said that the definition of 'input service' is restricted to the services used in relation to the manufacture of final products, because the definition of 'input service' is wider than the definition of 'input'.

34. Therefore, the definition of input service read as a whole makes it clear that the said definition not only covers services, which are used directly or indirectly in or in relation to the manufacture of final product, but also includes other services, which have direct nexus or which are integrally connected with the business of manufacturing the final product. In the facts of the present case, use of the outdoor catering services is integrally connected with the business of manufacturing cement and therefore, credit of service tax paid on outdoor catering services would be allowable.

35. The argument of the revenue, that the expression "such as" in the definition of input service is exhaustive and is restricted to the services named therein, is also devoid of any merit, because, the substantive part of the definition of 'input service' as well as the inclusive part of the definition of 'input service' purport to cover not only services used prior to the manufacture of final products, subsequent to the manufacture of final products but also services relating to the business such as accounting, auditing etc. Thus, the definition of input service seeks to cover every conceivable service used in the business of manufacturing the final products. Moreover, the categories of services enumerated after the expression 'such as' in the definition of 'input service' do not relate to any particular class or category of services, but refer to variety of services used in the business of manufacturing the final products. There is nothing in the definition of 'input service' to suggest that the Legislature intended to define that expression restrictively. Therefore, in the absence of any intention of the Legislature to restrict the definition of 'input service' to any particular class or category of services used in the business, it would be reasonable to construe that the expression 'such as' in the inclusive part of the definition of input service is only illustrative and not exhaustive. Accordingly, we hold that all services used in relation to the business of manufacturing the final product are covered under the definition of 'input service' and in the present case, the outdoor catering services being integrally connected with the business of the manufacture of cement, credit of service tax paid out on catering services has been rightly allowed by the Tribunal.

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38. We concur with the above decision of this Court in the case of Coca Cola India (P.) Ltd. (supra). However, in that case, this Court has also held that the cost of any input service that forms part of value of final

products would be eligible for CENVAT credit. That observation of the Division Bench is made in the context of a service which is held to be integrally connected with the business of manufacturing the final product. Therefore, the observation of the Division Bench in the case of Coca Cola India (P.) Ltd. (supra) has to be construed to mean that where the input service used is integrally connected with the business of manufacturing the final product and the cost of that input service forms part of the cost of the final product, then credit of service tax paid on such input service would be allowable.

39. The Larger Bench of CESTAT in the case of GTC Industries Ltd. (supra) has also observed that the credit of service tax would be allowable to a manufacturer even in cases where the cost of the food is borne by the worker. That part of the observation made by the Larger Bench cannot be upheld, because, once the service tax is borne by the ultimate consumer of the service, namely the worker, the manufacturer cannot take credit of that part of the service tax which is borne by the consumer. Shri Shridharan, learned Counsel for the assessee fairly conceded to the above position in law and in fact filed an affidavit affirmed by a responsible officer of the assessee wherein it is stated that the proportionate credit to the extent embedded in the cost of food recovered from the employee/worker has been reversed.

40. For all the aforesaid reasons, the question of law framed by the revenue is answered in the affirmative, i.e., in favour of the assessee and against the revenue. However, the CENVAT credit reversed by the assessee, belatedly, having not been verified by the Excise Authorities, the Excise Authorities are directed to verify the same and pass an appropriate order in that behalf. "

9. It is relevant to note that various High Courts have concurred with the above-said principle of the Bombay High Court and followed the above-said decision.

10. Therefore, the issue as decided by the Tribunal and the various Courts clearly settled the issue that the Cenvat Credit has been properly availed in respect of outdoor catering services.

11. With regard to the outward freight charges, the Kanartaka High Court in the case of CCE V. ABB Ltd., Bangalore reported in [2011] 44 VST 1, which was rendered on the appeal filed by the Department as against the decision of the full Bench of the Tribunal, while answering the issue whether the services availed by a manufacturer for outward transportation of final products from the place of removal should be treated as an input service in terms of Rule 2 (1) (ii) of the CENVAT Credit Rules, 2004 and thereby enabling

the manufacturer to take credit of the service tax on the value of such services, held as follows:

"30. The definition of 'input service' contains both the word 'means' and 'includes', but not 'means and includes'. The portion of the definition to which the word means applies has to be construed restrictively as it is exhaustive. However, the portion of the definition to which the word includes applies has to be construed liberally as it is extensive. The exhaustive portion of the definition of 'input service' deals with service used by the manufacturer. Whether directly or indirectly, in or in relation to the manufacture of final products. It also includes clearance of final products from the place of removal. Therefore, services received or rendered by the manufacturer from the place of removal till it reached its destination falls within the definition of input service. What are the services that normally a manufacturer

would render to a customer from the place of removal? They may be packing, loading, unloading, transportation, delivery etc,. Though the word transportation is not specifically used in the said section in the context in which the phrase 'clearance of final products from the place of removal' is used. It includes the transportation charges. Because, after the final products has reached the place of removal, to clear the final products nothing more needs to be done, except transporting the said final products to the ultimate destination i.e. the customer's/buyer of the said product, apart from attending to certain ancillary services as mentioned above which ensures proper delivery of the finished product upto the customer. Therefore, all such services rendered by the manufacturer and included in the definition of 'input service'. However, as the legislature has chosen to use the word 'means' in this portion of the definition, it has to be construed strictly and in a restrictive manner. After defining the 'input service' used by the manufacturer in are restrictive manner, in the later portion of the definition, the legislature has used the word 'includes'. Therefore, the later portion of the definition has to be construed liberally. Specifically what are the services which fall within the definition of 'input service' has been clearly set out in that portion of the definition. Thereafter, the words 'activities relating to business' - an omni-bus phrase is used to expand the meaning of the word 'input service'. However, after using the omni-bus phrase, examples are given. It also includes transportation. The words used are (a) inward transportation of inputs or capital goods (b) outward transportation upto the place of removal. While dealing with inward transportation, they have specifically used the words 'inputs' or 'capital goods'. But, while dealing with outward transportation those two

words are conspicuously missing. The reason being, after inward transportation of inputs or capital goods into the factory premises, if a final product emerges, the final product has to be transported from the factory premises toll the godown before it is removed for being delivered to the customer. Therefore, 'input service' includes not only the inward transportation of inputs or capital goods but also includes outward transportation of the final product upto the place of removal. Therefore, in the later portion of the definition, an outer limit is prescribed for outward transportation, ie... up to the place of removal.

31. The phrase 'activities relating to business' is an omnibus one and it finds a place in the inclusive definition. The question is, by a judicial interpretation, outward transportation of the final product from the place of removal till it is delivered to the customer, could be construed as falling within the definition of 'input service'. It is a well settled rule of interpretation that, while interpreting a provision, the Court must take note of not only the express words used but also the words which are not used. If the legislature has expressly used the words 'in respect of the transportation' in a particular manner and did not choose to include within the ambit of the word 'transportation'. Certain aspects. Having regard to the scheme of the Section, the way it is worded, it is not open to the Court to include something which the legislature deliberately did not include in the definition. If the Courts indulge in such interpretation, it amounts to rewriting the provision which is impermissible. Yet another reason for coming to such a conclusion is, in the first part of the restrictive definition 'clearance of final products from the place of removal' is expressly stated. If transportation of final product from the place of removal is included in the phrase 'clearance of final products from the place of removal' again cannot be read into the provision under the words 'activities relating to business'. When a particular service was included within the definition, it is not necessary to interpret other provisions of the very same rule to include the said services over again. When a specific provision is made in the first part of the definition portion of the Cenvat Rules which refers to 'clearance of final products from the place of removal' and in the second part (inclusive) of the definition when the phrase used is 'activities relating to business such as', merely because in that portion of the definition either transportation charges is not included or service rendered for clearance of final products is not included, it is impermissible to read those words as in the earlier portion of the definition, it is specifically provided for. It is a well known rule of interpretation that

when the statute uses words and phrases in a particular section, meaning has to be given in each of those sections. When the statute provides specifically for a particular contingency, it is to be so interpreted and after so interpreting, it cannot be said in another portion where general words are used, it also includes what is specifically provided. Therefore, the finding recorded by the CESVAT that the phrase and expression 'activities relating to business' admittedly covers transportation upto the customer's place was entirely unnecessary. This interpretation of ours find support from the subsequent conduct on the part of the Central Government, which amended Rule 2 (i)(ii). By notification No.10/2008-C.E.(N.T.) dated 1.3.2008, the words 'clearance of final products upto the place of removal' were substituted in the place of the words 'clearance of final products from the place of removal'. The intention of the legislature is thus manifest. Till such amendment, the words 'clearance from the place of removal' included transportation charges from the place of removal till it reached the destination, namely the customer. Therefore, the said input service was included in the early part of the definition 2(i)(ii). Consequently, we cannot read what is expressly provided in the early part of the rule as having been included in the later part of the rule while interpreting the words 'activities relating to business', though it has been amplified by saying it is only an inward transportation of inputs or capital goods and outward transportation upto the place of removal. The phrase "outward transportation upto the place of removal" used in the inclusive portion of the definition (the second part), has to be read along with the word inward transportation of input or capital goods. It has no reference to 'clearance of final products'. However, when the claims are put forth on the basis of the said circular of 23.8.2007, for benefit of CENVAT credit, even in the cases where the aforesaid conditions are not satisfied relying on the words clearance of final products from the place of removal, the Central Government it fit to amend the provision from 1.4.2008 by substituting the word 'upto' in place of 'from', in Clause (ii) of Rule 2(i) making the intention clear i.e whether it is an inward transportation of input of capital goods or clearance of final products upto the place of removal, any service rendered and service tax paid would fall within the definition of 'input service'. Therefore, it is clear that till such amendment made effective from 1.4.2008 notwithstanding the clarification issued by the Central Government by way of their circular, transportation charges incurred by the manufacturer for 'clearance of final products from the place of removal' was included in the definition of input service. Therefore, the interpretation placed by the tribunal on the words 'activities relating to

business' as including clearance of final products from the place of removal' which occurred already in the first part of Rule 2(i) (ii) prior to 1.4.2008, runs counter to the language employed in the second part of the definition of 'input service' and is to that extent contrary to the legislative intention and therefore, the said finding is unsustainable in law.

32. In Gujarat Ambuja Cements' case, the Principal Bench of CESTAT, New Delhi, had taken the view 'post sale transport of manufactured goods is not an input in manufacture. The two clauses in the definition take care to circumscribe input credit by stating that service used in relation to the clearance from the place of removal and service used for outward transportation up to the place of removal are to be treated as input service. The first clause does not mention transport service in particular. The second clause restricts transport service credit up to the place of removal. When these two clauses are read together, it becomes clear that transport service credit cannot go beyond transport up to the place of removal. The two clauses, one dealing with general provision and another dealing with a specific item, are not to be read disjunctively as to bring about conflict and it defeat the laws scheme. The purpose of interpretation is to find harmony and reconciliation among the various provisions'. Giving effect to the said judgment, when the circular was issued by the Board dated 23.8.2007 the circular came up for consideration before the Punjab and Haryana High Court where it was held that when the ownership of the goods and the property remain with the seller of the goods till the delivery of goods in acceptable condition to the purchaser at his door step, the freight charges incurred by the manufacturer for such sale and supply at the door step of the customer are subjected to service tax and therefore, it falls within the definition of 'input service'. However, the Larger Bench of the CESTAT following the aforesaid judgment held the expression 'activities relating to business' covers transportation upto the customers' place and it is an integral part of the manufacturing business and therefore, credit cannot be denied by relying on a specific coverage of outward transportation upto the place of removal in the inclusive clause. 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 CE(NT) 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'.

33. Therefore, it is not necessary to expand the meaning of the word 'activities relating to business' so as to include the transportation of the final product from the place of removal to its destination. Therefore, though the ultimate order passed by the Larger Bench does not suffer from any infirmity, the aforesaid reason assigned by it in coming to the said conclusion is erroneous.

34. For the reasons, which we have assigned in our order, the final order of the Tribunal is legal and valid. We further make it clear that this interpretation is valid till 01.04.2008. IN that view of the mater, but for the aforesaid modification, we do not see any merit in these appeals. The substantial questions of law raised are answered in favour of the assessee and against the revenue."

12. For the foregoing reasons, we pass the following order:

i) Following the above-said decisions, the issues involved in this appeal are answered in favour of the assessee and against the Revenue;

ii) Accordingly this appeal is dismissed affirming the order of the Tribunal;

No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Customs, Excise & Service Tax Appellate Tribunal
South Zonal Bench, 1st Floor, Shastri Bhavan Annexe
26, Haddows Road, Chennai 600 006.

2.The Commissioner of Central Excise,
Chennai-II Commissionerate,
No.692, MAU Complex, Annasalai,
Nandanam, Chennai -35.

Copy to:The Section Officer,
Record Section, High Court, Madras.

1 cc to Mr. E.Vijay Anand,Advocate, SR.No.15931/15

1 cc to Mr. M.Sivavarthan,Advocate, SR.No.16025/15

C.M.A. No.307 of 2010

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