IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

Central Excise Appeal No.2/2014

(The Commissioner of Central Excise, Customs & Service Tax, Nagpur Vs. M/s Manikgarh Cement, Tah. Korpana, Dist. Chandrapur & anr.)

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders	Court's or Judge's orders.
	Shri S.N. Bhattad with K.K. Nalamwar, Advocates for appellant. Shri H.V. Thakur, Advocate for Respondent.

CORAM : M.S. SANKLECHA &
MANISH PITALE, JJ.

DATE : 06.7.2017.

This reference under Section 35G of the Central Excise Act, 1944 (Act) read with Section 83 of the Finance Act (Act) challenges the order dated 19th July, 2013 passed by the Customs Excise & Service Tax Appellate Tribunal (Tribunal).

2. This appeal was admitted on 7th April, 2016 on the following substantial question of law:-

> "Whether the CESTAT was right in placing reliance on the Karnataka High Court judgment in the case of CCE Vs. ABB Ltd. Reported in 2011(23) STR 517 and the Gujrat High Court judgment in the case of CCE Vs. Parth Polywoven Private Ltd., reported in 2012(25) STR 4 when the department has filed Special Leave Petition bearing No. 25857 of 2011 before the Hon'ble Supreme Court of India against the

judgment in the case of M/s ABB Ltd and the judgment has not attained finality?

3. The aforesaid decisions referred in the above substantial question for law have to be considered in the light of following facts arising in this appeal.

(A) The respondent is engaged in manufacture of cement falling under Chapter 25 of the Central Excise Tariff Act, 1985. The respondent avail of Cenvat Credit on service tax paid on input services under the provisions of Cenvat Credit Rules, 2004. The respondent inter-alia took credit of duty in respect of service tax paid on the GTS (Goods Transport Service) from its place of removal i.e. Factory gate/warehouse to the destination of its customers during the period of February 2005 to March, 2006.

(B) The impugned order of the Tribunal allowed the respondent – Assessee's appeal before it by following the decisions of the ***Karnataka High Court Karnataka High Court judgment in the case of CCE Vs. ABB Ltd. Reported in 2011(23) STR 517 and the Gujrat High Court***

in the case of CCE Vs. Parth Polywoven Private Ltd., reported in 2012(25) STR 4. Both the High Courts held that the Assessee is entitled to benefit of Cenvat Credit paid on GTS services in taking its goods from the place of removal to its customer's premises inter-alia on interpretation Rule 2(l) of the Cenvat Credit Rules, 2004 is in force prior to 2008. Besides, both the above decisions also advert to and placed reliance upon the Circular No.97/6/2007 dated 23 August, 2007 issued by the Central Board of Excise and Customs (CBEC). The aforesaid circular extended the benefit of service tax paid on GTS services for carriage of goods from the place of removal to the customer's destination subject to the satisfaction of the conditions laid down in the aforesaid Circular. The condition laid down to the effect "that the terms of the sale contract/ agreement provide:-

(i) the ownership of goods and the property in the goods remained with the seller of the goods till the delivery of the goods in acceptable condition to the purchaser at his door step;

(ii) the seller bore the risk of loss of or damage to the goods during transit to the destination; and

(iii) the freight charges were an integral part of the price of goods.

In the above cases, the credit of the service tax paid on the transportation up to 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 (in terms of the definition as under Section 2 of the Central Excise Act, 1944 as also in terms of the provisions under the Sale of Goods Act, 1930) occurred at the said place. "

4. It is on the satisfaction of the aforesaid 3 conditions, the Circular states that credit of service tax paid on transportation upto customer's destination from the place of removal where the sales take place would be available to the seller of the goods. In-fact, ***the Punjab and Hariyana High Court in Ambuja Cements Ltd. vs. Union of India, 2009(14) STR 3*** relied upon the aforesaid circular and held that it is not open to the Revenue to deny service tax credit of tax paid on GTS services for carrying goods from the place of removal (Factory

gate/warehouse) to the customer's destination where the sales take place.

5. In the present facts, it is an admitted position before us that the respondent - Assessee had responded to the notices demanding service tax on the basis of interpretation of 2(l) of the Cenvat Credit Rules, 2004 and had not placed any reliance upon the aforesaid CBEC Circular before the Authorities under the Act. It is only now, before us, that the respondents are seeking to rely upon the above CBEC Circular dated 23.08.2008 as it is also adverted to the above decisions referred in the question of law. However, the Revenue did not have any occasion to examine whether or not the conditions precedent provided in the aforesaid Circular of CBEC are satisfied by the Assessee or not to avail of its benefit.

6. It may also be pointed out that the Karnataka High Court, Gujrat High Court, Punjab and Hariyana High Court in the decision referred to hereinabove have taken a view in favour of the Assessee on the issue arising herein. The Calcutta High Court in the case of ***Commissioner of Central Excise, Kolkata-VI vs. Vesuvious India Ltd., 2014(34) STR 26(Cal.)*** while disagreeing with the view of the Karnataka High Court in ABB Ltd (supra) and Gujarat High Court in Parth Poly Wooven Pvt. Ltd (supra) refers to the circular and states that the CBEC in its Circular No. 96/6/2007 dated, 23.08.2007 has

made relaxation in respect of taking Cenvat Credit on GTS Services upon the factual background as indicated in the circular. It is the respondent – Assessee's case before us that it satisfies requirement of the Circular and therefore, the relaxation mentioned in case of Vesuvious India Ltd (supra) would be applicable to it.

7. In the above view, as the respondent – Assessee seeks to place reliance upon the CBEC Circular, it would be appropriate as suggested by the parties before us, that the impugned order dated 19 July, 2013 passed by the Tribunal is set aside. Further, the issue be restored to the file of the Assessing Officer for fresh examination.

8. At this stage, we are not deciding the appropriate interpretation of 2(l) of the Cenvat Credit Rules, 2004 in the facts of the present case, as the issue of the applicability of the Circular to the facts is still an unresolved issue. Needless to state all the issues, both on merits i.e. interpretation of 2(l) Cenvat Credit Rules, 2004 as well as applicability of the CBEC circular are left open for consideration of the Assessing Officer who would pass an appealable order after following the principles of natural justice.

9. Therefore, at this stage, the substantial question of law is not being decided. It would be appropriate to decide this only if the

question still remain relevant after the second round of proceedings before authorities under the Act.

10. Appeal disposed of in the above terms. No order as to costs.

(MANISH PITALE, J.) **(M.S.SANKLECHA, J.)**

Gohane