

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.8.2019

CORAM

THE HONOURABLE DR.JUSTICE VINEET KOTHARI
AND
THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

C.M.A.Nos.1933 to 1935 of 2018

M/s.Alkraft Thermotechnologies

(Pvt.) Ltd.,

35-A&B/1,

Ambattur Industrial Estate,

Chennai 600 058.

rep. by Authorised Signatory

Mr.P.Sirajudeen

Appellant

Versus

Commissioner of Central GST and

Central Excise,

Chennai North-Ambattur Division,

R-40, A-1, 1st Floor, Mogappair East,

Chennai 600 037.

Respondent

Prayer: Civil Miscellaneous Appeals filed under Section 35G central Excise Act, 1944 against the Final Order Nos.41949 to 41951 of 2018 dated 9.7.2018 in Appeal No.E/40311/2018, E/40312/2018 and E/40313/2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.M.V.Swaroop

For Respondent : Mrs.Aparna Nandakumar
Senior Standing Counsel

COMMON JUDGMENT

(Judgment of the court was made by Dr.VINEET KOTHARI, J.)

The Assessee is in Appeal before this court aggrieved by the order dated 9.7.2018 passed by the learned CESTAT by which the Appeals filed by the Assessee came to be dismissed and the learned Tribunal held that the Appellant/Assessee was not entitled to Input Tax Credit of Service Tax paid on transportation of excisable goods from its Chennai Unit I to Jamshedpur Unit 2 of the Assessee itself.

2. The learned Tribunal relied upon the decision of the Hon'ble Supreme Court in the case of Commissioner of Central Excise, v. Ultra Tech Cement Limited ((2018) 2 SCC 721). The Tribunal referred to its earlier decisions of CESTAT also in the case of Cadbury India Ltd. v. Commissioner of Central Excise, Mumbai-III (2016(42) STR 155) and Commissioner of Central Excise v. Lafarge India Pvt. Ltd. (2017 (52) STR 350 (Tri. Del.)) in para 7 and 8 of its order respectively, but, the Tribunal disallowed the claim of the Assessee, following the aforesaid decision of Hon'ble Supreme Court in Ultra Tech Ltd (supra).

3. The learned counsel Mr.M.V.Swaroop appearing for the Assessee submitted that the definition of 'place of removal' in Rule 2(qa) extracted by the learned Tribunal includes in clause (iii) thereof any other place or premises from where the excisable goods are to be sold after their clearance from the factory from where such goods are removed and he further submitted that excisable goods in the present case viz., Radiators were manufactured at the Chennai Unit 1 of the Assessee and they were transported to Jamshedpur Unit 2 where they were fitted with intercooler and thereafter, the Composite Unit of Intercooler and Radiators were sold by the Unit 2 viz., Jamshedpur Unit and since the definition of 'Input Services' defined in Rule 2(1) of the Cenvat Credit Rules after its amendment on 1.4.2008 in its clause (iii) included any service used by a manufacture, whether directly or indirectly, or in relation to manufacture of final products and clearance of final goods upto the place of removal, therefore, the Service Tax paid by the Assessee on the transportation of goods viz., Radiators from its Chennai Unit 1 to Unit 2 at Jamshedpur will be covered by the said clause (iii) of the definition and the Assessee was entitled to claim Cenvat credit of such Service Tax paid on the transportation charges incurred for transportation of goods from Unit 1 to Unit 2.

4. He submitted that the Judgment of the Hon'ble Supreme Court in the case of Ultra Tech Cement is distinguishable on facts as the controversy involved in the case before the Supreme Court was one pertaining to the transport of goods from the place of removal of Assessee seller to buyer's premises, which is an outward transport service ending at the terminal point of consignment and obviously that could not be included in view of the definition of 'Input Service' after its amendment which substituted the words 'from the place of removal' by 'upto the place of removal'. He, therefore, submitted that the learned Tribunal has erred in dismissing the Appeals filed by the Assessee.

5. On the other hand, the learned Senior Standing Counsel Mrs.Aparna Nandakumar appearing for the Respondent/Revenue urged that Clause (iii) of definition in Rule 2(qa) of CENVAT Credit Rules, 2004 defines the words place of removal as a depot,

premises of a consignment agent or any other place or premises from where the excisable goods are transported by the Assessee in the same form and thereafter, without any change of form, if such excisable goods are sold from that depot or premises or the consignment agent, the same would be included within the definition place of removal as defined under Rule 2(qa). She further submitted that the decision of the Hon'ble Supreme Court in Ultra Tech Cement Limited (supra) would govern the present case of the Assessee as the present case of the Assessee is also in respect of the period after the amendment on 1.4.2008 with the words upto the place of removal. She further submitted that both the Units of the Assessee in the present case are separately registered with the Excise Department and therefore, the transport charges incurred by the Assessee for transporting the goods in semi-finished condition viz., the Radiators from its Chennai Units to Jamshedpur Unit cannot be included within the definition of place of removal and therefore, the learned Tribunal was justified in denying the Cenvat Credit for the Service Tax paid on transport charges for transporting the goods from Chennai to Jamshedpur.

6. We have heard the learned counsels at length and perused the order of the learned Tribunal as well as the Judgment of the Hon'ble Supreme Court cited at the Bar.

7. We are of the clear opinion that the Judgment of the Hon'ble Supreme Court in the case of Ultra Tech Cement Limited supports the case of the Assessee rather than that of the Revenue. A closer and finer reading of the said judgment of the Hon'ble Supreme Court would clearly reveal that the Hon'ble Supreme Court was concerned only with the controversy of Cenvat Credit on goods transported from the place of removal to the buyers' premises and not the transport of goods from one Unit of the Assessee to another Unit of the same Assessee. In the context of the factual background, the judgment of the Hon'ble Supreme Court, in view of the amended definition of the place of removal wherein the word 'upto' has been substituted for the word 'from' in clause 3 of Rule 2(l) which defines Input Services, cannot be applied to the facts of the present case.

8. On the other hand, a careful reading of the definition of place of removal which is quoted below would reveal that in clause (iii) thereof, besides the words "a depot, premises of a consignment agent", as contended by the learned counsel for the Revenue, there are further words in the said clause (iii) and which are "or any other place or premises from where the excisable goods are to be sold after their clearance from the factory". These words added to the other two clauses as emphasised by the learned counsel for the Revenue are not without a meaning and redundant. These words, on the other hand, enlarges the definition of place of removal in clause (iii) wherein besides a Depot of the Assessee itself or premises

of the consignment agent, any other place or premises including the like one of Unit 2 at Jamshedpur in the case of the Assessee in the present case would be covered, where the excisable goods are to be sold after their clearance from the factory. Though the semi-finished goods (Radiators) were sent from Chennai Unit 1 of the Assessee, the further manufacturing process at Unit 2 at Jamshedpur does not negate it or oust it from the definition of "place of removal" in any manner. On the contrary, the goods sold as excisable goods viz., Intercooler with Radiators in the present case, clearly fall within clause (iii) of Rule 2(qa). We are not persuaded to take an unnecessarily narrow or restricted view of the said definition, as canvassed by the learned counsel for the Revenue.

9. The Judgment of the Hon'ble Supreme Court in the case of Ultra Tech indirectly supports the view which we have taken above, where the Hon'ble Supreme Court held that the Cenvat on goods transport agency availed for transport of goods from the place of removal of Assessee to the buyer's premises was not admissible to the respondent and that by necessary implication would mean that Input Services for transport of goods upto the final place of removal of goods by way of sale to the buyers would be so included. The definition of place of removal and para 11 to 13 of the Judgment in Ultra Tech case are quoted below for ready reference:-

"Place of removal" means-

(i) a factory or any other place or premises of production or manufacture of the excisable goods;

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;

(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory;

from where such goods are removed."

The relevant portion of the Judgment in the Ultra Tech case is also quoted below:-

"11. As can be seen from the reading of the aforesaid portion of the circular, the issue was examined after keeping in mind judgments of CESTAT in Gujarat Ambuja Cement Ltd. and M/s.Ultratech Cement Ltd. Those judgments, obviously, dealt with unamended Rule 2(1) of Rules 2004. The three conditions which were mentioned explaining the 'place of removal' as defined under Section 4 of the Act, there is no quarrel upto this stage. However, the

important aspect of the matter is that Cenvat Credit is permissible in respect of 'input service' and the Circular relates to the unamended regime. Therefore, it cannot be applied after amendment in the definition of 'input service' which brought about a total change. Now, the definition of 'place of removal' and the conditions which are to be satisfied have to be in the context of 'upto' the place of removal. It is this amendment which has made the entire difference. That aspect is not dealt with in the said Board's circular, nor it could be.

12. Secondly, if such a circular is made applicable even in respect of post amendment cases, it would be violative of Rule 2(1) of Rules, 2004 and such a situation cannot be countenanced.

13. The upshot of the aforesaid discussion would be to hold that Cenvat Credit on goods transport agency service availed for transport of goods from the place of removal to buyer's premises was not admissible to the respondent. Accordingly, this appeal is allowed, judgment of the High Court is set aside and the Order-in-Original dated August 22, 2011 of the Assessing Officer is restored."

10. We further notice that the learned Tribunal, after quoting para 7 of the Judgment of the Hon'ble Supreme Court in the case of Ultra Tech not only did not discuss anything about para 11 to 13 of the said Supreme Court decision as quoted above, but also did not give its own findings and reasons as to how the ratio of the Hon'ble Supreme Court Judge was being applied to the facts of the present case where the transport services were involved from Chennai Unit 1 to Jamshedpur Unit 2 of the Assessee only and not to the place of buyer of Composite Unit of Intercooler with Radiators by the Jamshedpur Unit of the Assessee.

11. The stark distinction of facts of the case before the Tribunal and the facts before the Hon'ble Supreme Court in Ultra Tech case should have been noticed by the final fact finding authority viz., the Tribunal before applying the judgment of the Apex Court to the facts of the case before it rather mechanically. It is the duty of the final fact finding body to analyse the facts of the case on hand appropriately and only after comparing the facts of the case before the higher Constitutional Courts, it should proceed to apply the ratios of the Judgments from the Constitutional Courts to the case before it. The misapplication of the Judgments without comparing the

facts, can result in serious miscarriage of justice and can expose the non-application of mind by the responsible appellate forums like the CESTAT in the present case.

12. Having analysed the facts of the case on hand before us and the facts of the case before the Hon'ble Supreme Court, we reiterate that the ratio of the Judgment of the Supreme Court in Ultra Tech case supports the view which we have taken rather than the contention raised by the learned counsel for the Revenue.

13. Therefore, we allow the Appeals of the Assessee and set aside the order of the Adjudicating Authority as well as the Tribunal and direct the Revenue Department to allow the Cenvat Credit in respect of Service Tax paid by the Assessee on transport of its goods from its Chennai Unit 1 to Jamshedpur Unit 2 in the present case. No costs.

Sd/-

Assistant Registrar(Insp cell)

//True Copy//

Sub Assistant Registrar

ssk.

To:

1.Commissioner of Central GST and
Central Excise,
Chennai North-Ambattur Division,
R-40, A-1, 1st Floor, Mogappair East,
Chennai 600 037.

2.The Customs Excise & Service Tax,
Appellate Tribunal, No.26
Shashtri Bhavan, Annexe Building
Haddoas Road, Chennai-6.

+lcc to Mr.M.V.Swaroop, Advocate SR.71391
+lcc to Mrs.Aparna Nandakumar, Advocate SR.72197

C.M.A.Nos.1933 to 1935 of 2018

RR(CO)
CB(17/10/2019)