IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.08.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.2707 OF 2017

Commissioner of Central Excise,
Coimbatore. .. Appellant / Appellant

versus

1. M/s.PRICOL, Unit-I,
S.R.K.V. Post,
Perianaickenpalayam,
Coimbatore 641 020.

2. The Customs, Excise & Service
Tax Appellate Tribunal,
South Zonal Bench,
Shastri Bhawan Annexe I,
Ist Floor, 26, Haddows Road,
Chennai 600 006. .. Respondents / Respondents

Prayer: Civil Miscellaneous Appeal is filed under Section 35G of Central Excise Act, 1944, against the Final Order No.41146 of 2015, dated 03.09.2015, on the file of Customs, Excise and Service Tax Appellate Tribunal (CESTAT), South Zonal Bench, Chennai 600 006.

For Appellant : Mr.A.P.Srinivas

JUDGMENT

(Judgement of this Court was made by S.MANIKUMAR, J.)

Commissioner of Central Excise, Coimbatore, has filed the instant Civil Miscellaneous Appeal, against the Final Order No.41146 of 2015, dated 03.09.2015, on the file of Customs, Excise and Service Tax Appellate Tribunal (CESTAT), South Zonal Bench, Chennai 600 006.

2. Short facts leading to the appeal are that M/s.Pricol, Unit-I, Coimbatore, assessee and holder of Central Excise Registration Certificate No.AABCP2380CXM001, is the manufacturer of various mechanical appliance, automobile parts, measuring

instruments and parts thereof, falling under Chapter 84, 85, 87 and 90 of the schedule, to the Central Excise Tariff Act, 1985. As manufacturer of the above excisable goods, the assessee availed credit of duty paid on inputs, capital goods and service tax on input services, as per Cenvat Credit Rules, 2004 and utilized the said credit to discharge the duty liability on their final products.

3. During the period from July' 2006 to August' 2009, the assessee availed Cenvat credit of Rs.21,93,734/-, in their cenvat credit account, on service tax paid on the "Man Power Recruitment or Supply Agency" services provided by M/s.Industrial Canteen Services, Coimbatore. According to the Commissioner of Central Excise, Coimbatore, appellant herein, the input service tax credit in respect of service tax paid, cannot be availed, inasmuch as the said service is, neither an input service, for the assessee, in the manufacture of excisable goods, considering the fact that catering service is not used by them, either directly or indirectly or in relation to the manufacture of final products, and clearance of final products, nor for providing, output service.

4. In this regard, a Show Cause Notice Sl.No.16/2009 (ADC), dated 30.09.2009, was issued to the assessee, demanding the wrongly availed and utilized Cenvat Credit, amounting to Rs.21,93,734/-, under Rule 14 of the CENVAT Credit Rules, 2004, read with proviso to Section 11A(1) of Central Excise Act, 1944, and for imposition of Penalty, under Rule 15(3) of CENVAT Credit Rules, 2004.

5. After due process, the adjudicating authority, vide Order-in-Original, dated 25.11.2010, held that the assessee is entitled to the benefit of service tax paid by "Manpower Recruitment or Supply Agency", for the purpose of running an Industrial Canteen, at the factory premises of the assessee, since the abovesaid service, has been used in relation to their business activity.

6. Aggrieved by the same, Customs department has preferred an appeal before the Commissioner (Appeals), Coimbatore. Following the decision of the Bombay High Court in CCE, Nagpur vs. Ultratech Cement Ltd [2010 (20) STR 577 (Bom.HC)], the Commissioner (Appeals), Coimbatore, vide Order-in-Appeal No.CMB-CEX-000-APP-225-11, in A.No.02/2011-C.Ex.(Deptl), dated 30.11.2011, held as follows:

> "a) the CENVAT Credit on 'Manpower Recruitment or Supply Agency' for the purpose of running the Industrial Canteen at the factory premises of the respondents is allowed to the extent of incidence of service tax borne by the respondents and not on the

incidence of service tax embedded in the value received from the employees towards the cost of food supplied to them, that was sourced from the caterer;

b) the-lower authority may re-compute the eligible service tax credit on the catering service in terms of (a) above.

c) The appeal filed by the department is rejected and the order of the lower authority is modified to the above extent."

7. Testing the correctness of the Order-in-Appeal, dated 30.11.2011, of Commissioner (Appeals), vide Final Order No.41146 of 2015, dated 03.09.2015, the CESTAT, Chennai, has ordered as follows:

"The only dispute in this appeal is whether Cenvat Credit on the service of Man-Power Recruitment or Supply Agency availed by respondent is permissible to the respondent. There is no finding in the appellate order, as to the use of such service nor also any finding as to the requirement of man-power for running the canteen, which was the part of the factory. Therefore, there is no need to interfere with the order of learned Commissioner (Appeals), for which, the Revenue appeal is dismissed."

8. Being aggrieved by the same, instant Civil Miscellaneous Appeal has been filed by the Commissioner of Central Excise, Coimbatore, on the following substantial questions of law,

"(i) Whether the Hon'ble CESTAT, Chennai was correct in holding that the respondent is entitled to avail the CENVAT Credit on service used for operating Canteen as input service with respect of which the cost is borne by the assessee, despite the fact that the above service does not fall under the ambit of the definition of "Input service" specified under Rule 2 (l) of the Cenvat Credit Rules, 2004, as the above service are neither used in or in relation to the manufacture or clearance of final product nor can it be said, to be an activity relating to business?

(ii) Whether the Tribunal was right in allowing the CENVAT Credit of service tax paid on service used for operating Canteen, as input service, since the question of eligibility of 'outdoor catering services in the Cenvat Credit issue is pending before the Hon'ble Supreme Court in the case of M/s.Ultra Tech Cement Ltd v. Commissioner of C. Ex, Nagpur?"

Heard Mr.A.P.Srinivas, learned counsel appearing for the appellant, and perused the materials available on record.

9. A Hon'ble Division Bench of the Bombay High Court in CCE, Nagpur vs. Ultratech Cement Ltd [2010 (20) STR 577 (Bom.HC)], has dealt with a substantial question of law, similar to the one, raised by the Revenue, in the instant appeal before us. Substantial question of law therein, is extracted,

> "Whether the CESTAT was correct in holding that the respondent is entitled to avail the CENVAT Credit on outdoor 'catering services' provided in the factory for employees of the factory as a input service credit despite the fact that outdoor catering service does not fall under the ambit of the definition of "Input service" specified under Rule 2(l) of Cenvat Credit Rules, 2004, as the catering/canteen services are neither used in or in relation to the manufacture or clearance of final product nor can it be said, to be an activity relating to business."

While considering the said question of law, as to whether, service of an outdoor caterer availed by an assessee is an `input service'?, the Hon'ble Division Bench of the Bombay High Court, held as follows:

> "27. The definition of "input service" as per Rule 2(l) of 2004 Rules (insofar as it relates to the manufacture of final product is concerned), consists of three categories of services. The first category, covers services which are directly or indirectly used in or in relation to the manufacture of final products. The second category, covers the services which are used for clearance of the final products up to the place of removal. The third category, includes services namely;
>
> a) Services used in relation to setting up, modernization, renovation or repairs of a factory,
>
> b) Services used in an office relating to such factory,
>
> c) Services like advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs,
>
> d) Activities relating to business such as, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit relating, share registry and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal.
>
> Thus, the definition of 'input service' not only

covers services, which fall in the substantial part, but also covers services, which are covered under the inclusive part of the definition.

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(l) of the 2004 Rules.

30. The Apex Court in the case of Maruti Suzuki Ltd., v. CCE, Delhi [2009 (240) ELT 641 (SC)] 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(l) 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 a 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.

36.....

37.....

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. "

10. Though several grounds have been raised in the instant Civil Miscellaneous Appeal and reliance made on Maruti Suzuki Ltd., v. CCE, Delhi [2009 (240) ELT 641 (SC)], Bombay High Court had discussed Maruti Suzuki's case (cited supra), thoroughly and distinguished the said decision. It has also held that for a service, to qualify as 'Input Service', the said service should be integrally connected with the business of the manufacture of final product.

11. Though it is stated that Ultratech's case is under appeal before the Hon'ble Supreme Court, there are no averments, as to whether, the decision of the Bombay High Court has been stayed or set aside. It is settled law that mere filing of an appeal does not amount to stay. Till a final decision is taken on the said appeal, and when there is no stay against the same, the decision rendered in Ultratech's case is valid.

12. It is also to be noted that various High Courts have concurred with the abovesaid principle of the Bombay High Court and followed the same. Accordingly, following the abovesaid

decision, this Court holds that the cenvat credit availed by the assessee on catering services is admissible and therefore, no interference is called for with the order passed by the CESTAT, Chennai.

13. For the foregoing reasons, the appeal is answered in favour of the assessee and against the Revenue. Hence, the Civil Miscellaneous Appeal is dismissed, affirming the Final Order No.41146 of 2015, dated 03.09.2015, passed by CESTAT, Chennai. No costs.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

skm

To

The Customs, Excise and Service Tax
Appellate Tribunal (CESTAT),
South Zonal Bench, Chennai 600 006.

+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.63286

C.M.A.No.2707 of 2017

KK(CO)

RRK(05/12/2017)