



ORDER-IN-APPEAL :

M/s. K.P.G. Enterprise, Fol No. 21, Ship Hearing Yard, Arang, Dist. Bhanagar (hereinafter referred to as 'the appellant') filed the present appeal against the Order in Original No. 300ACRural/DV3/RR2015-18 dated 19.01.2016 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Central Excise, Rural Division, Bhanagar (hereinafter referred to as 'the lower adjudicating authority').

2. The facts of the case are that during the course of audit it was found that the appellant had availed Central Credit of Service tax of Rs. 8,66,472/- which was paid on transportation charges for removal of goods from the factory gate to the premises of Consignment Agent and that the Service tax was being paid by their Consignment Agent through Sale Note and collected from the appellant. The appellant availed Central Credit of Service tax paid on GTA on the basis of this Sale Note. Since sale Note is not the document prescribed for availment of Central Credit, the appellant did not satisfy Rule 9(2) of Central Credit Rules, 2004 (hereinafter referred to as 'Central Credit Rules') and Rule 4A of Service tax Rules, 1994 (hereinafter referred to as 'Service tax Rules'), therefore, SCN No. Y CH-01-104AD16/III/SCN/15-18 dated 23.12.2015 was issued to the appellant demanding duty of Rs. 8,81,472/- and for recovery of interest and imposition of penalty. The adjudicating authority, vide impugned order, confirmed Central Excise Duty of Rs. 8,86,472/- under Section 11A (4) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') and also ordered recovery of interest under Section 11AA and also imposed equivalent penalty of Rs. 8,66,472/- under Section 11AC of the Act read with Rule 15 of Central Credit Rules.

3. Being aggrieved by the impugned order, the appellant files the present appeal inter-alia, on the following grounds:

(i) The adjudicating authority has not interpreted provisions of Rules 9(1)(a) of Central Credit Rules, 2004 and Rule 4A of Central Excise Rules, 2002 properly. When taxable goods are transferred to the place of Consignment Agent, the actual freight charges are required to be added to arrive at the assessable value in terms of Rule 5, read with Explanation I of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 (hereinafter referred to as 'Central Excise Valuation Rules').

(ii) The Department has not contended that Consignment Agent has paid Service Tax on the actual freight incurred towards removal of excisable goods from factory gate to place of Consignment Agent; that as per Central Excise Valuation Rules, Service tax was not required to be paid on such freight charges, as the cost of actual freight was duly paid; that sales of excisable goods had not been completed upto the place of Consignment Agent, till completion as soon as the excisable goods were sold to the independent buyers who were not related to the appellant; that the Department cannot levy two indirect taxes without & by authority of law.

(vi) The Impugned order has been passed without proper application of mind; that it is admitted fact that Computed Central credit has been availed on the basis of 'Consignment Sale Notes'; that the appellant submitted sample copy of Consignment Sale Notes and stated that they had correctly availed Central credit on documents as per Service Tax Rules; that from the documents, it is seen that Service Tax or Central Excise duty was duly assessed and the actual freight charges was shown separately in Central Excise invoices issued by the appellant; and the appellant had also paid Central Excise duty on amount of the actual freight.

(vii) The lower adjudicating authority has failed to give his findings that the 'Sale Note' is not proper document for availing Central Credit; that ownership of said goods remained with the appellant and therefore such transportation charges are to be considered as forwarding charges and they are entitled to avail Central credit on such transportation charges under the category of GTA.

(viii) Upon transfer of goods to Consignment Sales Agents, there was no sale of 'consignor or consignee, as Appellant had simply transferred the excisable goods to the place of consignment sales agent.

(ix) Consignment Sale Agent is acting on behalf of the appellant for subsequent sale of the excisable goods to the independent customers; that service tax paid by Consignment Sale Agent has to be considered to have been paid by the appellant; that the appellant has paid Central Excise duty on freight, as well as Service Tax under the category of GTA.

(x) That during the discussed period Appellant filed periodical returns and maintained Central credit accounts and raised Central Excise invoices. All such all such particulars had been mentioned and they had provided the information before their unit was audited and therefore they had not suppressed any facts with intent to evade payment of Central Excise duty and therefore penalty under Section 11AC of the Act is not sustainable.

(xi) It has not been denied that the input service has not been availed in or in relation to excisable goods sold through Consignment Sale Agent. The appellant relied on following case laws to submit that Central credit has been correctly availed by them :

- Pushpam Phani Sankulala Vs. - 1985 (76) ECT 407
- Ramabhai M. Chembhak Vs. CCE - 2555 (179) F.T.R. (SC)
- UCL Vs. CME Computers - 2115 (160) LLJ 20 (SC)

- Graphite (I) – 2007 (217) ELT 54 (Tri.-Mumbai)
- M/s P. & Sons Vs CCE 2007(3) STR 236 (CESTAT)
- R Kumar Ltd. Vs CCE 2007(211) ELT 124 (CESTAT)

4. Personal hearing in the matter was attended to by Shri N.K. Manu, Consultant and authorized representative, who reiterated grounds of Appeal and also made further written submission dated 16.03.2016.

4.1 In written submission, Appellants reiterated the grounds raised in Appeal Memorandum and submitted that they transferred the goods from factory gate of Appellant to the place of Consignment Sales Agents under Central Excise invoice. Appellant had paid Central Excise duty on the transaction value, inclusive of actual freight, under Section 4 of Central Excise Act, 1944 read with Rule 5 of Central Excise Valuation Rules. Thus, the Consignment Sales Agent was not required to pay Service tax under GTA but he paid Service tax on Goods Transport Agency, which has to be treated as having paid on behalf of Appellant as he was Approved Consignment Sales Agent for sale of goods on behalf of Appellant only. Appellants referred to definition of "assessees" provided under Section 65 of the Finance Act, 1954 and claimed that they paid two taxes viz. (1) Central Excise duty and (2) Service tax on same transaction i.e. payment of GTA, however, the adjudicating authority has failed to give findings in this regard even if the Consignment Agent in the instant case was nothing but essential part of Appellant as per definition of Consignment Sales Agent.

4.2 They availed Central credit on the basis of "Consignment Sale Note" which contained name of the service provider, nature of service, Registration No. of Consignment Sales Agent. Therefore, those documents were legal documents for availment of central credit paid on GTA. Appellants relied on decision in the case of M/s. Graphite reported as 2007 (210) ELT 54 (CESTAT-3rdB) wherein Central credit on basis of cash memo was held admissible and it was also held that type: technician should not be made basis to disallow Central credit.

4.3 It was also submitted that the Final audit report No. BRJTM/2015EQ/4-19 was issued on 12.05.2015 whereas the Show Cause Notice has been issued on 23.12.2015 after lapse of one year from the date of disclosing the facts and hence remainder of time lapse that they relied on decision in the cases of M/s. Tyres & Tubes India P. Ltd. Vs CCE. Cited reported at 2010 (257) HT 126 (Tri. Del.) in this regard.

4.4 The term "assessees" as defined under Section 65 of Finance Act, 1954 according to which the said "assessees" was nothing but the "Appellant".

4.5 There is no revenue implication as the appellant has paid two taxes, Central Excise duty, as well as Service Tax on GTA freight charges and therefore, entire transaction

is revenue neutral. They referred to the C.A. No. EHV-EXCUS-000 APP (24-2017-14) dated 12.09.2016 in the case of M/s. G. N. Ship Breakers, Alang and C.A. No. EHV-EXCUS (24-APP-006) to 07-2017-13 dated 25.01.2016 in the case of M/s. Navyug Ship Breaking Co. and submitted that their case is similar to those cases and therefore, the impugned order needs to be set aside.

Findings:-

5 I have carefully gone through the facts of the case, the impugned order, grounds of appeal, oral as well as written submissions made by the appellant. The issue to be decided in the present appeals is whether availment of Cenvat credit of Service Tax paid by the Consignment agent of Appellant on transportation charges from the factory gate of the appellant to the premises of Consignment Agent is correct or not.

6 It is an facts that the appellant at the time of clearance of goods from the factory gate paid Central Excise duty in terms of Explanation-2 to Rule 5 of Central Excise Valuation Rules, an value inclusive of freight charges from the factory gate to the place of consignment agent. The availment of CTA service, and payment of Service Tax by their consignment agents is not under dispute.

7 I find that the lower adjudicating authority has denied Cenvat credit of Service Tax paid by Consignment Agent on the grounds that "Sale Note" issued by Consignment Agent is not a valid document.

7.1 The appellant has ably pleaded that Consignment Agent was acting on their behalf for subsequent sale of excisable goods to the independent customers and hence, Service Tax paid by Consignment Sale Agent is to be treated as having been paid by the Appellant. I find that in common business parlance, role of consignment agent is to receive goods from the principal for the purpose of sale. The ownership of the goods remains with the principal and the agent sells the goods on behalf of the principal, as per the instructions. The agent will then deduct his commission from the proceeds of sale received and transfer the remaining amount to the principal. The "assessee" under Section 4(3)(a) of the Act act as a person who is liable to pay the duty of excise under this Act and includes his agent. Since the dispute is about Cenvat credit of Service Tax paid under CTA, it is important to refer the relevant clause of the Act also. I find that Section 25D (12) of the Finance Act, 1994 defines the phrase "assessee" as "the person who is liable to pay tax and includes his agent". I find that the Consignment agents of the appellant have issued Consignment Sale Notes, wherein the expenses incurred while receiving the goods from the appellant such as freight, loading, etc. and Service Tax on freight charges and their commission are disclosed, have been deducted from the sale proceeds of the excisable goods. Therefore, the expenses incurred in the excisable goods reached from factory gate to the premises of Consignment agent were borne by the appellant. I find that the person liable to pay



regard, is liable to pay service tax, under reverse charge mechanism in case of transportation of goods. I, therefore, find that contention of the appellants that Service Tax paid by Consignment Sales Agent is to be treated as paid by the appellant, is correct. I also find that in the cases of sale of goods through Consignment Agent, the premises of a consignment agent from where the excisable goods are to be sold, is to be considered as "place of removal" as defined under Section 4 of the Act, which reads as under:-

"place of removal" means -

- (i) a factory or any other place of premises of production or manufacture of the excisable goods;
- (ii) a warehouse or any other place or premises to which 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.

7.2 I find that Appellants has availed General credit of Service Tax paid on outward transportation of the excisable goods upto the place of removal i.e. premises of consignment agent, from where the excisable goods have been eventually sold, which is covered under the definition of "input service" as provided under Rule 2(i) of General Credit Rules, which reads as under-

"Input service" means any service -

- (i)
 - (ii) used by a manufacturer, whether directly or indirectly, in or in relation to manufacture of final products and clearance of final products upto the place of removal
- and includes services used in relation to outward transportation upto the place of removal.

[Emphasis supplied]

7.3 From harmonious reading of definitions of "assessee", "place of removal" and the role of consignment agent in selling excisable goods, I find that Service Tax paid in respect of transportation of goods from factory gate to the premises of consignment agent is nothing but "input service" to Appellant which has been used for transportation of goods upto the (extended) place of removal and General credit of Service Tax thereof is allowable to the appellant. I find that Hon'ble CESTAT, New Delhi, in the case of *M/S M.H.K. Springs Ltd.* reported at 2007 (215) E.L.T. 154 (Tri. - Del.) held as under:-

8.1 The expression "clearance of final product from the place of removal" has to be understood in the context of the preceding words, which refer to services used by the manufacturer in relation to the manufacture and clearance of final products, from the place of removal, which itself may

input service. Outward transport of final products would start after the clearance of the goods from the place of removal. The clearance of final product, in an activity contemplated for the purpose of removing the final product from the place of removal in the goods they are removed, input service in clearance can properly be called input for the purpose of clearance. The expression 'inward transportation into the place of removal' determines the extent to which 'input service' in respect of transportation, could be availed. The definition of place of removal has expanded by virtue of Section 4 of Central Excise Act, 1944, beyond the factory premises to other place or premises where the goods are certified to be deposited without payment of duty, from where the goods are removed, and also 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. In view of the expansion breadth of the expression 'place of removal', outward transportation into the place of removal has been recognized as 'input service'. It is not the intention of the Legislature to deny credit in respect of credit of input service of inward and outward transportations. Even the services referred to in the inclusive part of the definition should necessarily have to be used by the manufacturer in relation to the manufacture of final products and their clearance in quantity as 'input service'. It cannot be the intention of the Legislature, for all services, not specified in the inclusive part of the definition, used by the manufacturer for manufacture and clearance of final products that outward transport service from the place of removal, be considered as 'input service' and in respect of services specified in the inclusive part of the definition, that outward transportation only into the specified place of removal, should be considered as 'input service'. The word 'clearance' occurring in sub clause (b) of clause (i) of Rule 2 would only mean, removal of the goods and clearing the factory premises of such goods, and would not include any outward transport, which would occur after the clearance from the factory premises or the extended place of removal of such goods, is effected. The removal of the final products from the factory premises so as to clear the factory premises of such goods, would be clearance, and outward transport beyond the place of removal, cannot be read in the word 'clearance', having regard to the context in which it has been used. Therefore, applying the ratio of the decision of the District Judge in *Ms. General Auto's Carriers Ltd. v. CCE, Ludhiana* (supra), the impugned order of the Commissioner (Appeals), holding that the Service Tax paid on transportation of finished goods from the factory to the premises of the customer, can be taken as 'input credit' by the respondent, cannot be sustained.

(Emphasis supplied)

7.4 The adjudicating authority has stated that the appellant has availed Central credit on the basis of "Consignment Sale Note" which is not a valid document for availing of Central credit. The appellant contended that "Consignment Sale Note" contains name of the service provider, nature of service, Registration No. of consignment sale agent. Under the circumstances, even if Service Tax was paid by Consignment agents during the period under reference the amount of Central credit needs to be accorded to the appellant when Service Tax payment on GTA by the consignment agents of the appellant has not been disputed by the Department. In the context I find the stand taken in similar issue in OIA No. DM/EXCISE-DUDI-APP-024-25-17-13 dated 12.03.2018 in the case of M/s. V. Ship Breakers, Alang and OIA No. DM/EXCISE-DUDI-APP-026-16-25-17-13 dated 25.01.2018 in the case of M/s. Bayang Ship Breaking Co issued by this office, accordingly I find that the impugned order is required to be set aside.


6. In view of above I set aside the impugned order and allow the appeal filed by Appellant.

7. अतिरिक्त इस दफ्तर की गई शोल्डिंग का निराकरण उपरोक्त नोटिफिकेशन के अधीन है।

8. The appeals filed by the appellants stand disposed off in the above terms.

Yours faithfully,


P. A. Vazirani
Commissioner (Appeals)


P. A. Vazirani,
Commissioner (Appeals),
Commissioner
GST & Central Excise,
Kutch (Gandhinagar)

F. No. V2/60/DV3/2017

Date: 03.06.2018

By E.P.A.II

To,
M/s. K.P.S. Enterprises,
Plot No. 51, Ship Breaking Yard,
P.O. Alang, Dist. Bhavnagar

Copy to :-

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad for its kind information.
 - 2) The Commissioner, GST & Central Excise, Bhavnagar Commissionerate, Bhavnagar.
 - 3) The Assistant Commissioner, GST & Central Excise, Rural Division, Bhavnagar.
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