CERA.

OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX
PLOT NO. 6776/B1, "SIDDHI SADAN" BUILDING,
NARAYAN UPADHYAY MARG,
BHAVNAGAR – 364 001.

F. No. V/15-18/Dem/HQ/2009

Date of order : 30.12.2011
Date of issue : 27.02.2012

Passed by Shri Harcharan Singh, Additional Commissioner

ORDER-in-ORIGINAL No. 20/ADC/BVR/201112

This copy is granted free of charge for private use of the person(s) to whom it is sent.

Any person(s) deeming himself aggrieved by this order may appeal against this order to the Commissioner Central Excise (Appeals), Rajkot, Central Excise Bhavan, Race Course Ring Road, Rajkot-360001 within 60 days from the date of its communication. The appeal should bear a court fee stamp of Rs. 2.50 paise only.

The appeal should be filed in form EA-1 in duplicate, as per the provisions of Section 35(1) of the Central Excise Act, 1944 read with Rule 3 of the Central Excise (Appeals) Rules, 2002. It should be signed by the appellants in accordance with the provisions of sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2002.

- It should be accompanied with the following :
- Copy of appeal in duplicate

Copies of the order, one of which shall be certified copy OR the other must bear a court fee stamp of Rs. 2.50 paise as per Schedule 1 to Article 6 of the Court Fee Stamp Act, 1870.

Sub:- Show Cause Notice Number F. No. V/15-18/Dem/HQ/2009 dated 07.05.2009.

Brief fact of the case:

1.1 M/s. Dhrangdhra Chemical Works Limited, Opposite Railway Station, Dhrangadhra (herein after referred to as "Noticee"), holding Central Excise Registration No. AAACD0559NXM001 are engaged in the manufacture of Soda Ash, Soda Bicarbonate and detergent falling under Chapter heading No. 2836 and 3402 of the First Schedule of Central Excise Tariff Act, 1985. The Noticee are availing the benefit of Cenvat credit scheme as envisaged in Central Credit Rules, 2004 and also maintaining the records to that effect.

1.2 During the course of audit of the Noticee by the CERA Audit Party, it was noticed that it had paid Service Tax amounting to Rs 20,96,634/- (including Education Cess) during the period from May, 2005 to February, 2008 against sales commission payment of Rs. 1,75,16,221/- to the agent for sale promotion and took the Cenvat credit of Rs 20,96,634/- considering the said service as "input service" as defined under Rule 2(l) of the Cenvat Credit Rules,2004. It was objected by the CERA that the services of sale promotion is not an activity relating to business used in relation to manufacture and clearance of final product. Further, it was also objected by the CERA that the services of sale promotion has been provided beyond the stage of manufacture and clearance of final products from the place of removal and hence Cenvat credit taken by the Noticee on the basis of invoices issued by the sale promotion agent is not correct and required to be recovered in accordance with the provisions of the Central Excise Act, 1944, Central Excise Rules, 2002 and Cenvat Credit Rules, 2004. Accordingly, Show Cause Notice No. V/15-18/Dem/HQ/2009 dated 07.05.2009 was issued asking the Noticee to show cause as to why Cenvat credit of Rs.20,96,634/- wrongly taken / availed by it in respect of Service Tax as shown in Annexure-A attached to the Show Cause Notice should not be recovered from it, interest at the prescribed rate should not be charged from it and penalty should not be imposed upon it under the provisions of Rule 14 & 15 of the Cenvat Credit Rules, 2004 read with section 11A, 11AB & 11AC of the Central Excise Act, 1944.

Written submission :

2.1 The Noticee submitted its reply vide letter dated 12.06.2009, interalia, stating that sales commission is undoubtedly an activity intricately connected with the manufacture and sale / clearance of excisable goods and could not be considered to be an activity or service relatable to anything beyond factory gate i.e. the place of removal of goods; that it is already held by the Hon'ble Supreme Court in the case of Bombay International and ors reported in 1983 ELT 1896 that sales promotion, marketing etc were activities directly connected with and relatable to clearance of excisable goods because these expenses enrich the value of excisable goods and accord marketability to goods; that it is already held by the Appellate Tribunal in the case of Bhilai Auxiliary Industries reported in 2009 (92) RLT 97 that Cenvat credit of Service Tax paid on sales promotion was permissible under the Cenvat scheme; that the invocation of extended period of limitation is wholly illegal as they have admittedly recorded all the transactions about availment of Cenvat credit of Rs. 20,96,634/- in their statutory records like RG. II as well as Monthly Returns and thus, the allegation that Noticee had never informed the Department about availment of this credit is without any justification; that for all these reasons, the Show Cause Notice deserves to be withdrawn at once in the interest of justice.

2.2 The Noticee further stated that under the Cenvat Credit Rules, 2004, credit of Service Tax paid on 'input service' is allowed to a manufacturer and the term 'input service' is defined under Rule 2(1) of the above Rules to mean any service used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of the final products and the clearance of the final products from the place of removal; that various services are included under Rule 2(1) of the above rules by way of inclusive definition of the term 'input service' and among such inclusions, services used in relation to advertisement or sales promotion are also covered; that even otherwise, marketing expenses including commission to wholesale distributors are elements which have to be included in the value of excisable goods; that the commission paid to the wholesale distributors for sales promotion is therefore an element forming part of the assessable value / transaction value of the excisable goods and therefore service of the wholesale distributors for selling of goods in the market is also 'input service' under the Cenvat Credit Rules, 2004; that the entire basis of the Show Cause Notice is illegal and service of commission agents could not be excluded from the scope of 'input service' on the ground that it was a service beyond the stage of manufacturing and clearance of goods from the factory.

2.3 The Noticee further stated that the extended period of limitation would not be available to the Department in the present case; that the extracts of Cenvat Register were submitted with the Monthly Returns filed for the disputed period and there was no objection of whatsoever nature from the Range Officers while assessing the returns; that there is no suppression of facts on their part; that this view is taken by the Appellate Tribunal in a number of cases viz. India Tin Industries V/s. Commissioner of Central Excise, Bangalore – 1994 (70) ELT 731, Bony Rubber Co. Pvt. Ltd., V/s. Collector of Central Excise New Delhi – 1996 (84) ELT 58 and D.J.Vora, Batliboi & Co. Ltd., V/s. Collector of Central Excise Surat – 1999 (30) RLT 223; that even in cases where certain information was not disclosed as the assessee was under bonafide impression that it was not duty bound to disclose such information, it would not be a case of suppression of the facts as held by Hon'ble Supreme Court in the case of Padmini Products and Chemphar Drugs & Liniments reported in 1989 (43) ELT 195 (SC) and 1989 (40) ELT 276 (SC) respectively; that in present case, all the facts discussed in the Show Cause Notice were within the knowledge of the Department right from day one, hence Show Cause Notice issued to them is barred by limitation; that the invocation of extended period of limitation is illegal and unjustified and therefore proposal to charge interest and imposing penalty under Section 11AB & 11AC of the Central Excise Act, 1944 is not maintainable; that the demand of duty raised therein and also the proposal of penalty and interest deserve to be dropped.

Personal Hearing :

3.1 Shri Dhawal K.Shah, Avocate of the Noticee appeared for personal hearing on 05.12.2011. He stated that allegations are not tenable in view of the judgements reported in 2010(17) S.T.R.350 (Tri.Banglore) & 2011 (124) S.T.R. 505 (Tri.Delhi). He further stated that in view of settled legal position, Noticee are eligible for Cenvat credit of sales commission.

Discussion & findings:

4.1 I have gone through the records of the case, subject Show Cause Notice, relevant documents and defence reply filed by the Noticee and submissions at the time of personal hearing. In the subject case, it is undisputed fact that the Noticee has utilized the services of sale commission agent for the promotion of sale of the goods being manufactured by them and have taken Cenvat credit of Rs.20,96,634/- considering it as "input service" as defined under Rule 2(l) of the Cenvat Credit Rules, 2004. The only point of dispute in this Show Cause Notice is as to whether the service of commission agent provided after the manufacture of goods for sale of goods beyond the place of removal of goods falls within the definition of "input Service" under Rule 2(l) of the Cenvat Credit Rules, 2004.

4.2 The Noticee have not accepted the charges framed in the subject Show Cause Notice denying Cenvat credit and in support of their argument, they have placed reliance mainly on two judgements reported in 2010(17) S.T.R.350 (Tri.Banglore) & 2011 (124) S.T.R. 505 (Tri.Delhi) wherein it has been clearly held that Cenvat credit can not be denied on the sales commission. As the Noticee have exclusively relied upon these two judgements in support of their arguments, I would like to go through the issue decided in these judgements. A relevant paragraph of the judgement reported in 2010(17) S.T.R.350 (Tri.Banglore) are reproduced here.

> ***"2. The relevant facts that arise for consideration are : that the appellant herein is a manufacturer of Pig Iron, Ductile Iron (Spun Pipes), Slag Cement falling under various chapters of the Central Excise Tariff Act., 1985 and are clearing the same on payment of appropriate Central Excise duty. The appellants are also availing Cenvat credit of inputs as well as on the Service Tax paid by them on the services received by them. On scrutiny of the Monthly Returns for the month of March 2006, it was noticed by the lower authorities that the appellants had availed Cenvat credit on the commission paid to their sales commission agents, during the period 2004-2005 and 2005-2006. Service Tax was paid on the sales commission under the category of Business Auxiliary Services. It was noticed by the lower authorities that the said credit of Service Tax paid on the sales commission paid to the agents does not qualify to be an input service and hence the availment of such credit and utilization of the same for the discharge of duty liability on the final products by the appellant was irregular. A Show Cause Notice was issued to the appellant for reversal of such Cenvat Credit and interest thereon and also for imposition of penalty under Rule 15 of the Cenvat credit Rules. The appellants filed a detailed reply, mainly contending that the sales commission paid to their agents and the services tax on such sales commission would fall under the category of 'Input Services' as defined under Rule 2(l) of Cenvat Credit Rules, 2004. They also raised various legal contentions. The learned Adjudicating Authority, after considering the written and oral submissions, vide impugned order, confirmed the demand and also imposed penalty of Rs. 2,000/- besides directing them to pay interest. The appellants are aggrieved by such an order and are before us.***
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> ***5. We have considered the submissions made by both sides and perused the records. There are two issues which require our consideration. They are as follows:-***
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> ***"(1) Whether demanding of excess availed Cenvat credit of Rs. 5,41,304/- being the credit of service tax taken twice, and demand of irregular availment of Cenvat credit of Rs. 6,16,123/- being the credit of service tax paid prior to 10-9-2004 is tenable and whether demand of interest and proposing to imposing penalty is correct in view of provisions of sub-section 2(B) of Section 11A Central Excise Act, 1944 even after reversal of the same by the party before issue of notice is legally tenable.***
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> ***(2) Whether demanding of Cenvat credit of Rs. 49,82,605/- availed, being the credit of service tax paid on Business Auxiliary Services (Sales Agents Commission), treating the said service as not falling under Input Services, is legally tenable."***
>
> ***5.1 As regards the issue No. (1) as noted herein above recorded by us, it is found that the appellants had not contested the said issue before the lower authorities nor are they***

being contested before us. It is also seen that the amounts in issue No. (1) have already been reversed by the appellants and they claim that it was done so due to mistake on their part. They are only contesting the penalty imposed on them under both the issues. Since the appellants are not challenging the amounts on which they have availed Cenvat credit wrongly, we uphold the Adjudicating Authority's order to the extent that it confirms the amount reversed by the appellant having been taken by mistake or otherwise.

5.2 Now, we record our findings on issue No. (2). The issue No. (2) is regarding the credit of the Service Tax paid on Business Auxiliary Service (Sales Agent Commission) treating it as an 'input service'. The Adjudicating Authority has given an elaborate finding regarding the said service tax credit. We find that it is undisputed that the appellants had given sales commission to their commission agents and such commission agents have charged service tax on the said sales commission. We find that an identical issue of eligibility of credit on service tax on agents commission, was decided by a coordinate bench of the tribunal in the case of Metro Shoes Pvt. Ltd. (supra). The ratio as laid down by the said decision is as under :-

"6. Considered the submissions made at length by both sides and perused the records. The issue involved in this case is regarding the denial of credit of the input services utilized by the appellant for the finished goods manufactured and cleared by them. For the proper appreciation of the said provisions we read the definition of the input services as given in Rule 2(l) of the Central Excise Rules, 2004:

"(l) "input service" means any service-

> *(i)used by a provider of taxable service for providing an output service; or*
>
> *(ii)used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal, and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or on office relating to such factory or premises, advertisement or sales promotion, market research, storage up to the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation up to the place of removal."*

It can be seen from the above reproduced portion that the input services definition is having three different parts. Presumably, the first part i.e. "used by provider of taxable service for providing an output service" is not an issue in this case. The second part of the definition "used by the manufacturer .... from place of removal" is being strongly contested by both sides. On a plain reading of the second part of the definition, we find that any input service used by the manufacturer, whether directly or indirectly in or in relation to the manufacture of final product and clearance of final product from the place of removal, stands eligible for availing as credit. It is undisputed, in this case, that the appellant had manufactured shoes in their factory premises and cleared the same to their own showrooms situated at various places. It is also undisputed that the sale of said shoes takes place from the said showrooms only and did not take place from the factory premises. If that be so, it has to be accepted that the show rooms which are belonging to the appellant herein, have to be considered as place of removal. The services utilized by the appellant till the place of removal and the service tax paid thereon are to be considered as services utilized by him for the manufacture of final product and clearance of the same from the place of removal."

5.3 It can be seen from the above reproduced ratio that the definition of input service was exhaustively gone into by the Tribunal. It is also undisputed that the sales

commission, which has been paid by the appellant to the commission agent, is only in respect of the sales made through the commission agents. If it is so, the decision of the Tribunal in the case of Metro Shoes Pvt. Ltd. (supra) covers the issue in favour of the appellant.

5.4 Accordingly, respectfully following the said decision, we hold that the impugned order to the extent that it denies the credit of service tax paid on the input services of sales agent commission is unsustainable and we set aside the same."

4.3 A relevant paragraph of the judgement reported in 2011 (124) S.T.R. 505 (Tri.Delhi) are reproduced here:

"2.1 Mrs. Rimjhim Prasad, the learned Departmental Representative, assailed the impugned order by reiterating the grounds of appeal and pleaded that as per the definition of input service as given in Rule 2(l) of Cenvat Credit Rules, 2004, only the services received up to the place of removal would be covered by this definition, that the service, in question, is received after the sale of the goods and, hence, the same is not covered by the definition of input service, that in this regard she relies upon the judgment of Hon'ble Punjab & Haryana High Court in the case of Ambuja Cements Ltd. v. Union of India reported in 2009 (236) E.L.T. 431 (P & H) = 2009 (14) S.T.R. 3 (P & H), wherein Hon'ble High Court held that the service of outward transport from the factory/depot to the customers premises would be treated as input service only if the sales are on FOR destination basis, that in this judgment Hon'ble High Court held that extended the credit beyond the point of duty would be contrary to the scheme of Cenvat Credit Rules, that ratio of this judgment of Punjab & Haryana High Court squarely applicable to this case, and that in view of this, the impugned order is not correct.

2.2 Shri Vikas Gupta, C. A., the learned Counsel for the respondent defended the impugned order by reiterating the findings of the Commissioner (Appeals) and pleaded that the activity of commission agent is procuring orders for their clients for sale of their goods for which they receive the commission, that this activity of the commission agents is in the nature of sale promotion, that advertisement and sales promotion is squarely covered in definition of 'input service' is in Rule 2(l) of Cenvat Credit Rules, that this Tribunal in a series of judgments - C.C.E., Raipur v. H.E.G. Ltd. reported in 2010 (06) LCX 0136, Lanco Industries Ltd. v. C.C.E., Tirupathi reported in 2009 (022) STT 0380-CESTAT = 2010 (17) S.T.R. 350 (Tri. - Bang.); C.C.E., Raipur v. Bhillai Auxiliary Industries [Final Order No. 1611/2008-SM (BR), dated 10-12-2008 - 2009 (14) S.T.R. 536 (Tri. - Del.)] and C.C.E., Ludhiana v. Abhishek Industries Ltd. reported in 2007 (10) LCX 253 = 2008 (9) S.T.R. 562 (Tri. - Del.) has held that the service of commission agents for procuring orders for commission is an activity related to business of the manufacturer and is covered by the definition of 'input service', that the judgment of Hon'ble Punjab & Haryana High Court in the case of Ambuja Cements Ltd. v. Union of India (supra) cited by the learned Departmental Representative is in respect of service of outward transport from the factory/depot to the customer's premises and the ration of that judgment is not applicable to this case and that in view of this, there is no infirmity in the impugned order.

3. I have carefully considered the submissions from both the sides and perused the record.

4. The service received by the respondent from commission agent is of procuring sales orders from the customers for which the commission is paid to the commission agents. This service can be treated as in the nature of sales promotion and in any case, an activity related to business of the manufacturer, as it is an essential activity for sale. Inclusive part of the definition of 'input service', as given in Rule 2(l) specifically covers advertisement and sales 'promotion and activities relating to business. Hon'ble Bombay High Court's judgment in the case of C.C.E., Nagpur v. Ultratech Cement Ltd. reported in 2010 (260) E.L.T. 369 (Bom.) = 2010 (20) S.T.R. 577 (Bom.) interpreting the term 'input service' as defined in Rule 2(l) of Cenvat Credit

Rules, has held that the term "activities in relation to business" in the definition of "input service" would cover all the activities integrally connected with the business of manufacture and that the definition is not restricted to services used directly or indirectly in or in relation to manufacture of final product, but also cover various services used in relation to business of manufacture, whether prior to manufacture or after manufacture. Every manufacturer for selling the goods manufactured by him would have to use the service of commission agents. There is nothing in the definition of 'input service' from which it can be concluded that the services, either mentioned in the main definition or mentioned in the inclusive portion of the definition of 'input service' have to be provided upto the place of removal only, as, if this criteria is adopted, a number of services like coaching and training, market research, credit rating, share registry etc. would not be eligible for Cenvat credit. The judgment of Hon'ble Punjab & Haryana High Court in the case of Ambuja Cements Ltd. v. Union of India (supra) cited by the learned Departmental Representative is in respect of the service of outward transportation from the factory/depot and in respect of that service only Hon'ble High Court has held the same would be treated as input service only if the sales are on FOR destination basis. However, the ratio of this judgment would not be applicable to this case. I also find that the Tribunal in the series of judgment - C.C.E., Raipur v. Bhillai Auxiliary Industries (supra) and C.C.E., Ludhiana v. Abhishek Industries Ltd. (supra) has held that the service of commission agents received by a manufacturer is an input service eligible for Cenvat credit. In view of this, I do not find any infirmity in the impugned order. The Revenue's appeal is dismissed."

4.4 On going through the above judgments, it can be seen that an identical issue has been settled by the apex authority and hence I hold that the Noticee are eligible for taking Cenvat credit of Service Tax paid to the commission agent considering it as "input service" as defined under Rule 2(l) of the Cenvat Credit Rules, 2004. Accordingly, I pass the following orders.

Order

4.5 I drop the proceedings initiated against M/s Dhrangadhra Chemical Works Limited, Opposite Railway Station, Dhrangadhra, District Surendranagar vide Show Cause Notice F. No. V/15-18/Dem/HQ/2009 dated 07.05.2009.

sd/-

(HARCHARAN SINGH)
ADDL. COMMISSIONER

To,
M/s Dhrangadhra Chemical Works Limited,
Opposite Railway Station,
Dhrangadhra–363 310,
District Surendranagar

Copy to.
(i) Commissioner, Central Excise, Bhavnagar.
(ii) Assistant Commissioner, Central Excise, Surendranagar.
(iii) Deputy Commissioner (Audit), Central Excise, Bhavnagar.
(iv) Superintendent, Central Excise, AR-Dhrangadhra.
(v) Superintendent (Recovery Cell), Central Excise (Hqrs), Bhavnagar.
(vi) Guard File.

27/12/2012
ADDL. COMMISSIONER