
(2021) 03 CESTAT CK 0097

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 86516 Of 2019

M/s Hawkins Cookers Limited

APPELLANT

Vs

Commissioner Of CGST, Thane

RESPONDENT

Date of Decision : 19-03-2021

Acts Referred:

Factory Act, 1948 — Section 46
Maharashtra Factory Rule, 1963 — Rule 79
Code of Civil Procedure, 1908 — Section 11
Cenvat credit Rules, 2004 — Rule 2(I), 9(5)

Citation : (2021) 03 CESTAT CK 0097

Hon'ble Judges : Dr. Suvendu Kumar Pati, J

Bench : Single Bench

Advocate : Prakash Shah, Sanjay Hasija

Final Decision : Allowed

Judgement

1. Denial of availment of CENVAT credit on Air and Rail Travel, Club and Association service, Outdoor Catering service and Goods Transport Operator service to the appellant-manufacturer for the period between February, 2016 and June, 2017 amounting to Rs.20,77,501/- along with confirmation of interest and equivalent penalty on the said amount by the Commissioner of CGST and Central Excise, Thane is assailed in this appeal.

2. Facts of the case, in a nutshell, is that appellant is a manufacturer of pressure cooker and its parts and accessories who was issued with periodical show-cause notices by the respondent department proposing to deny CENVAT credit availed on various services that ultimately took him to the Commissioner (Appeals)'s stage, after the entire demand against credits, as proposed in the show-cause notice, was confirmed by the adjudicating authority. Learned Commissioner (Appeals) vide his order dated 11.03.2019 allowed a portion of credit but disallowed the above referred credits primarily on the ground that "business related activities" are no longer covered within the definition of input service

w.e.f. 01.04.2011 and exclusion clause appended to such definition disentitled the appellant to avail CENVAT credit on those services. Appellant questions the legality of such order in this Tribunal.

3. Both parties argued at length on the issue with reference to CENVAT credit rules and judicial precedent, which will be dealt at the appropriate places. Before going to the issue in hand it is imperative to have a look at Rule 2 that defines input service existing w.e.f. 01.04.2011

"Input service" means any service, -

(i) used by a provider of taxable service for providing an output service; or

(ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal, and includes services used in relation to modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage up to the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal; but excludes, -

(A) Services portion in the execution of a works contract and construction services including service under clause

(b) of Section 66E of the Finance Act (hereinafter referred as specified services) in so far as they are used for (a) Construction or execution of works contract of a building or a civil structure or a part thereof; or (b) laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified services; or

(B) services provided by way of renting of a motor vehicle, in so far as they relate to a motor vehicle which is not a capital goods; or (BA) service of general insurance business, servicing, repair and maintenance, in so far as they relate to a motor vehicle which is not a capital goods, except when used by -

(a) a manufacture of a motor vehicle in respect of a motor vehicle manufactured by such person; or

(b) an insurance company in respect of a motor vehicle insured or reinsured by such person; or

(C) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee.

4. A close reading of the rule in respect of a manufacturer like that an appellant would bring three stages in which credits on input services is to be extended to the manufacturer - They are:

(a) Any service used by a manufacturer, whether directly or indirectly, in or in relation to the manufacturer of final products and clearance of final products up to the place of removal. A clear meaning that can emerge from this sentence is that whatever input services are utilised during the manufacturing process till the final product is brought for clearance would be covered within the definition of input service and the manufacturer is entitled to get credits on all those input services;

(b) The second component of Clause 2(ii) contains item wise categorisation of inputs which are peripheral to such manufacturing process but may not be essential requirements to carry out the manufacturing. Those inputs are included within the definition for availment of CENVAT credits and when the unamended definition puts those in categories with starting words that reads "such as", the present Rule defines and confines it to those specific services like renovation modernization, advertisement sale promotion, marketing research, legal services etc. by way of substitution of the words "such as" with the word "includes". These services though are optional without which manufacturing can be completed, they have become some time essential to the manufacturing process under specific circumstances. For example availment of legal services will not be a requirement unless a dispute has arisen or relief is required to be sought in a court of law. Like wise advertisement and sales promotion would not be a requirement when there is a good market that would absorb the products soon after completion of its manufacturing. Therefore, substitution of word "such as" in the Rule existing before 01.04.2011 by the word "includes" and deletion of the word 'activities relating to business' has undoubtedly brought the input service definition out of an illustrative meaning to a definite meaning with an exhaustive list for which no other item can be included in the definition of input service by way of inference. It is in this context the case laws cited by learned Authorised Representative namely Regional Director Vs. High Land Coffee Works - (1991) 3 SCC 617, Mahalakshmi Oil Mills Vs. State of Andhra Pradesh - (1989) 1 SCC 164, Bharat Coop. Bank (Mumbai) Ltd. Vs. Coop Bank Employees Union - (2007) 4 SCC 685, Good Year India Ltd. Vs. Collector of Customs - 1997 (95) ELT 450 etc. are relevant.

(c) In the definition of input service as introduced w.e.f. 01.04.2011, certain exclusions are provided under its sub clauses but as can be read from the definition reproduced above, those are not absolute exclusion but are conditional exclusions that has a link to specific purpose of availment and in the context of the issue under dispute before this Bench, it remained confined to sub Clause (c) on the categories namely outdoor catering service, travel benefit, membership of club etc., which when used primarily for personal use or consumption by the employees are to be excluded from availment of credits on those expenditures by

the manufacturer. To put it in another way, outdoor catering or club membership or travel expenses as such would not disentitle a manufacturer to avail CENVAT credits on those expenses unless it fails to establish that those were not used primarily for the employees personal use or consumption. It is in this background that item wise rejection of CENVAT credit by the Commissioner (Appeals) is to be discussed.

5. Outdoor Catering:- The dispute concerning outdoor catering service had brought forth several litigations between the manufacturer and respondent-department till the issue has been set at rest by the Larger Bench of this Tribunal in the case of M/s Wipro Limited Vs. CCE Bangalore -III reported in 2018 - TIOL-3256- CESTAT-BANG.-LB, in which reference of a Single Member Bench about availability of CENVAT credit to the manufacturer on "outdoor catering service" is made and it was held to be not eligible for input service credit post amendment dated 01.04.2011 vide Notification No. 03/2011 dated 01.03.2011. Going by the reference order at sub-para 3(1) of the above referred M/s Wipro Limited judgment it can be noticed that the judgment of Hindustan Coca Cola Beverages Pvt. Ltd. Vs. CCE, Hyderabad reported in 2016-TIOL-2223-CESTAT Hyderabad, wherein such canteen services provided in the factory premises by the employer in compliance with the Factory Act, 1948 was allowed for availment of CENVAT credit, was referred to the Larger Bench for an answer as to if such statutory requirements are covered and argument of the appellant there was also placed on record at para 4.2 of the said M/s Wipro Limited judgment to the effect that such statutory compliance cannot be equated with "primarily for personal use of consumption of employees" but it was not dealt with and answered in the M/s Wipro Limited judgment by the Larger Bench, for which apparently another reference was made by a Division Bench of CESTAT Mumbai on the same issue in its judgment reported in 2020-TIOL-1614-CESTAT-Mum in the case of Bank of America Vs. Principal Commissioner, on which reliance is placed by the learned Authorised Representative of the respondent-department, who argued with reference to the judgment reported in 2015 (316) ELT 353 (Bom.) for adherence to judicial discipline.

5.1 In response to the position of law that was prevailing on the field on the issue of availment of CENVAT credit on outdoor catering service, Learned advocate for the appellant Shri Prakash Shah, in demonstrating the requirement of establishment of a canteens under Section 46 of the Factory Act, 1948 and Rule 79 of the Maharashtra Factory Rule, 1963 vis. a vis. appellant's company staff strength of more than 250 employees in all these years, argued that for the earlier period the CESTAT had allowed CENVAT credit to the appellant by placing reliance on Hindustan Coca cola case referred above, that has been approved by the Hon'ble Madras High Court in the case of Ganesh Builders Limited Vs. Commissioner of Service Tax, Chennai reported in 2019 (20) GSTL 39 (Mad.). He also submitted, with reference to the decision of Larger Bench of this Tribunal reported in 2003 (153) ELT 686 (TRI-LB) in the case of Mira Silk Mills Vs. Commissioner of Central Excise, Mumbai, that it has been laid down by the

Larger Bench itself that if there is conflict between law laid down by a High Court and the ratio of the decisions of the Tribunal, whether it is of a Larger Bench or not, the Hon'ble High Court decision will prevail over the Tribunal's decision unless the same is in conflict with a decision of the Hon'ble Apex Court. I find force in the submissions of the learned Counsel for the appellant while rejecting the contention of the learned Authorised Representative for the respondent-department that Larger Bench decision in M/s Wipro Limited case was not referred during argument made before the Hon'ble Madras High Court and outdoor catering issue was not discussed therein for the simple reason that the ratio of the judgment concerning credit availment on insurance/ health insurance of the employees was made in compliance to the statutory requirement of Workman Compensation Act, 1996 which is quite applicable to meet the statutory need of establishment of a canteen, may be through outdoor catering, under the Factories Act. Therefore, in the absence of the finding in the M/s Wipro Limited judgment that has not dealt with the reference to it on statutory requirement vis. a. Vis. availment of CENVAT credit and in view of the decision of Hon'ble Madras High Court that held it in favour of such availment of CENVAT credit on statutory requirement, I am of the considered view that appellant is entitled to avail such credit provided the amount is paid by it and not collected from the individual employees to meet the expenses and such a settled position of law is not required to be reopened by any further reference to the larger bench in view of the operation of explanation-V to Section-11 of the CPC and not the main provision of Section 11, placing reliance on which judgement of Sunbel Alloys Co. Of India Ltd. reported in 2015 (316) ELT, 353 (Bom.) that was delivered in an altogether different factual matrix. When a factory can't functioning without fulfilling statutory requirements, tax paid to meet such requirement is to be accepted as eligible credit otherwise there is no way out to avoid double taxation.

5.2 Air Travel Agent, Rail Travel Agent and Tour Operator Services:- In respect of those services credits having denied to the appellant on the ground that appellant failed to produce substantial evidence to support its stand that travel by its employees were meant for official work like sales promotion or to enhance the business of the company. Learned Commissioner (Appeals) also placed it on record (para 8.1) that the invoice No. DB702908 dated 17.06.2017 issued by M/s Ritco Travels and Tours Pvt. Ltd. for appellant's General Manager Mrs. Divyakata Khadikar travel to Chennai from Mumbai could not substantiate the purpose. During the course of argument learned Counsel for the appellant submitted that without seeking for any evidence to substantiate the same such an order had been passed and being directed by this Bench he produced email communications made to candidates for interview at Chennai Office for the post of Stenographer that was scheduled on July 2, 2017 and justified the travel of General Manager to hold such interview. There is no reason to disbelief the call letters placed in additional submission at page 30 and 32 and accept the same as additional evidence as per Rule 23(2) of the CESTAT Procedure Rules so as to

meet the requirement of Rule 9(5) of the CENVAT credit Rules, 2004. Even otherwise also presumption of an official tour goes in favour of the invoice referred above that had been disbelieved by the learned Commissioner (Appeals), in view of the short duration of the travel by the General Manager of the appellant's Company alone. However, this is not the stage to scrutinise documents while deciding an appeal to find out conclusive proof of the nature of CENVAT credit availed, for which reassessment at the adjudication level would be the only way out.

5.3 Courier Services :- Going by the case on record and the Orderin-Appeal passed by the Commissioner of GST & Central Excise (Appeals -Thane), Mumbai, it would be a disappointing revelation to state that the Commissioner (Appeals) had refused to honour the order passed by the CESTAT in appellant's own case on dated 29.11.2017 vide order No. A/90989/2017 on the ground that the reasoning of the said order was not in conformity to the definition of input service given in Rule 2(I) of the CENVAT Credit Rules, 2004. This is contrary to judicial discipline, decorum and an unfortunate scenario. This also clearly demonstrates lack of acumen of the Commissioner (Appeals) who read part of the reasoning given in the above referred CESTAT judgment at para 7 and failed to record the specific ground cited in its subsequent narrations wherein the Hon'ble CESTAT had observed that movement of goods from factory to depot that is the place of removal were done on stock transfer basis through service of courier from factory to depot. This being the findings of the Tribunal in respect of previous period of the appellant that allowed courier service inputs for necessary availment of credit on it, I honour the same and bind myself to judicial precedent in allowing credits on courier services to the appellant.

5.4 Goods Transport Operator:- Last but not the least claim of the appellant to avail goods transport operator service for a meagre amount of Rs. 624/- needs no consideration as the same had been allowed by the Commissioner (Appeals) in para 9 of his order and the amount placed in the table of appeal memo matches with the figures shown for which this amount of Rs. 624/- against which claim is made is based on typographical error in the order of the Commissioner (Appeals) in computing the amount. Appellant's claim on availment of input services on goods transport service is therefore to be read as allowed in full.

5.5 Club & Association Service:- Under the heading club and association service appellant's claim for availment of CENVAT credits to the tune of Rs. 7491/- as proportional taxable services had been refused by the learned Commissioner (Appeals) on the ground that payment towards monthly maintenance charges levied by the society of the building in which corporate office is located is not included within the definition of Rule 2(I) of CENVAT Credit Rules, 2004 post 01.04.2011. I am surprised to find such an interpretation of the Commissioner (Appeals) who is of the view that each and every item is required to be placed within the definition to make it an eligible credit. When it has been clearly mentioned in Rule 2(I) the premises of the provider of the output service or an

office relating to such factory or premises of the manufacturer is covered for availment of CENVAT credit, I find no reason to denied such credit to the appellant since it negativates personal use of the employees as being spent for maintenance of corporate office. Hence the order.

ORDER

6. The appeal succeeds and the order passed by the learned Commissioner of GST & Central Excise (Appeals -Thane), Mumbai vide Order-in-Appeal No. PVNS/441/APPEALS THANE/TH/2018- 19/652 dated 11.03.2019 in respect of denial of CENVAT credit on outdoor catering service, courier service, air and rail travel as well as tour operator service and club & association services is here by set aside. Availment of service of outdoor catering for meeting statutory requirement of canteen service is allowed to the extent of non-realisation of the said amount from the employees that would be verified by the adjudicating authority for which a limited remand is made solely for the verification of documents vis-a-vis for verification of documentary evidence to justify travels for business purpose. The entire exercise is to be completed within three months of communication of this order and appellant is duty bound to produce documentary proof upon notice by the adjudicating authority.

(Order pronounced in the Court on 19.03.2021)