IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

CENTRAL EXCISE APPEAL NO. 117 OF 2018

The Commissioner, Central Tax,
Pune-I Commissionerate .. Appellant

Versus

M/s. Oerlikon Balzers Coating India P Ltd .. Respondent

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- Mr. Pradeep S. Jetly a/w Ms. Maya Majumdar for the Appellant
- Mr. Bharat Raichandani a/w Ms. Pragya Koolwal i/by UBR Legal for the Respondent

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CORAM : AKIL KURESHI &
M.S. SANKLECHA, JJ.

DATE : DECEMBER 19, 2018.

P.C.:

1. This appeal under Section 35G of the Central Excise Act, 1944 (**"the Act"** for short) challenges the order dated 29.3.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal ("**CESTAT"** for short).

2. The Revenue has urged the following question of law for our consideration:-

> "(a) Whether in the facts and circumstances of the case and in law, the CESTAT was right in setting aside the Order-in-Original No. PUN-EXCUS-002-PR.COM-015-15-16 dated 29.01.2016 and extending the benefit of revenue neutrality without

giving any findings on the aspect of the settled law that "where the demand is confirmed on account of fraud or collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of the Finance Act or the rules made thereunder with the intent to evade payment of service tax in that case the benefit of revenue neutrality cannot be given?"

3. The respondent - assessee has unit at Pune and also at various other places such as Gurgaon, Chennai, Jamshedpur etc. It is engaged in the activity of providing IT services, intellectual property right services, renting of immovable property services and transport of goods by road services and also coating services. It is coating service which is the subject of the appeal and the same is subject to tax under the head 'Business Auxiliary Services'.

4. During the period October 2009 to March 2014, the Pune unit of the respondent - assessee received Intellectual Property Right Services' and 'Information Technology Software Services. The service tax liability on the above two services was discharged by the respondent-assessee's Pune unit on reverse charge mechanism. Thereafter, it took the cenvat credit on the above account in its books at the Pune Unit. This cenvat credit was utilized to discharge the service tax payable on the coating services at Pune.

5. It is the case of the Revenue that the respondent-assessee should have distributed the tax credit to the various units situated across the country and should not have availed CENVAT credit only at Pune. This for the reason that the intellectual property rights and I.T. software services were to he used by all the units of the respondent and not restricted only to the Pune unit. Therefore, the Pune unit could not have availed all the CENVAT credit on the above two services only at Pune but had to distribute the same amongst its various units situated all over the country in terms of Rule 7 of CENVAT Credit Rules, 2004. It was on the aforesaid basis that the duty demand was made upon the Pune unit by holding that availment of the CENVAT credit at Pune in respect of the IT services was not justified. This view of the Revenue was upheld by the Commissioner of Service Tax by his order dated 29.1.2016.

6. On appeal, the impugned order dated 29.3.2017 of the Tribunal held that even if the respondent assessee Pune unit had distributed the credit and not utilized it in Pune, the

entire exercise would have been revenue neutral. This if it had distributed the credit which being demanded by the Revenue to its other units, the credit would have been utilized by other units as all of them are paying service tax on the service of coating. Thus, reducing the service tax payable by the other units on the service of coating. The impugned order hold that there is no dispute that service tax has been paid on the services rendered and the question is only of utilization of credit.

7. Mr. Jetly, in support of the appeal, submits that in terms of Rule 7 of the CENVAT Credit Rules as existing pre & post 2012 requires the respondent - assessee to distribute the credit of the input services amongst its various units. Our attention is drawn to Rule 7 of the CENVAT Credit Rules prior to amendment and also to Rule 7 post amendment in 2012 of Cenvat Credit Rules which introduced in the context of present facts sub-clause (d) therein. Thus, it is submitted by the Revenue that it was obligatory on the part of the respondent - assessee to have distributed the excess CENVAT credit available in Pune unit to its other units on pro

rata basis. Therefore, the respondent could not utilize the same at Pune unit to pay the service tax on its services of coating.

8. It would be appropriate that we reproduce Rule 7 as existing prior to 2012 and post 2012 which is as under:-

> **Rule 7 as Existing Prior to 2012**:-
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> **RULE 7. Manner of distribution of credit by input service distributor** - The input service distributor may distribute the CENVAT credit in respect of the service tax paid on the input service to its manufacturing units or units providing output service, subject to the following condition, namely :-
>
> (a) The credit distributed against a document referred to in rule 9 does not exceed the amount of service tax paid thereon; or
>
> (b) credit of service tax attributable to service use in a unit exclusively engaged in manufacture of exempted goods or providing of exempted services shall not be distributed.
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> **Rule 7 Post 2012**- amendment
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> **RULE 7. Manner of distribution of credit by input service distributor** - The input service distributor may distribute the CENVAT credit in respect of the service tax paid on the input service to its manufacturing units or units providing output service, subject to the following condition, namely :-
>
> (a) The credit distributed against a document referred to in rule 9 does not exceed the amount of service tax paid thereon; or
>
> (b) credit of service tax attributable to service use in a unit exclusively engaged in manufacture of exempted goods or providing of exempted services shall not be distributed;
>
> (c) credit of service tax attributable to service used wholly in a

unit shall be distributed to the unit; and

(d) credit of service tax attributable to service used in more than one unit shall be distributed pro rate on the basis of the turnover during the relevant period of the concerned unit to the sum total of the turnover of all the units to which the service relates during the same period.

9. From reading of the above Rules both pre and post amendment, it would be noticed that both provisions give an option to the assessee concerned whether to distribute input services tax available to it amongst its other manufacturing units which are providing output services. This is evident from the use of word "may distribute the CENVAT credit" is found in Rule 7 both prior and also post 2012. Thus, from the reading of the Rules, the option was available to the assessee whether to distribute the CENVAT credit or not. In fact, our attention is invited to Rule 7 of the CENVAT credit Rules, 2004 as substituted w.e.f. 1.4.2016 which has made it mandatory for distribution of input services to the various units providing output services. This is evidence by the use of words "shall distribute the Cenvat Credit" in the substituted Rule 7 as Cenvat Credit Rules 2004 w.e.f. 1.4.2016. Therefore, on plain reading of Rule 7 as existing both pre and post amendment 2012 covering period

involved in these proceedings, the respondent - assessee was entitled to utilize the CENVAT credit available at its Pune unit.

10. In any event, the Tribunal, on facts found that the entire exercise would be revenue neutral. This is so as the distribution of Cenvat Credit to the various units would result lesser service tax being paid by cash on their activity of coating as they would have utilized the cenvat credit available for distribution.

11. In this view of the matter, the question of law as proposed does not give rise to any substantial question of law as the entire exercise would be revenue neutral. Thus, making the entire exercise academic. Therefore, the question is not entertained.

12. Accordingly, the Appeal is dismissed.

[M.S. SANKLECHA, J.] **[AKIL KURESHI, J]**