Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Service TaxAppeal No. 10929 of 2013

[Arising out of Order-in-Appeal/Original No AHM-CEX-003-COM-33TO34-2012 dated 28.12.2012 passed by Commissioner of Central Excise-AHMEDABAD-III]

Gujarat State Petronet Ltd .... **Appellant**
Plot No. E-18, Gidc Electronic Estate, Nr. K-7
Circle, Sector 26,
GNADHINAGAR,GUJARAT

VERSUS

C.C.E. & S.T.-Ahmedabad-iii .... **Respondent**
CUSTOM HOUSE... 2ND FLOOR,
OPP. OLD GUJARAT HIGH COURT,
NAVRANGPURA,
AHMEDABAD,GUJARAT,380009

APPEARANCE:
Shri K.I. Vyas, Advocate for the Appellant
Shri H.K. Jain, Assistant Commissioner Authorised Representative) for the Revenue

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. A/ 10348 /2021

DATE OF HEARING: 10.11.2020
DATE OF DECISION: 02.02.2021

Raju

This appeal has been filed by M/s Gujarat State Petronet Ltd. against denial of Cenvat Credit, demand of interest and imposition of penalty.

2.1 Learned Counsel appearing on behalf of the appellant argued that the appellant is engaged in the business of transporting gas through pipeline for its customers. On these services, the appellant was liable to pay output Service Tax, which it has been duly discharging in accordance with law. For construction of these pipelines, the appellant appoint EPC (Engineering Procurement & Construction) Contractors. The EPC contractors would charge Service Tax (Under the category of construction services etc.) on their invoice raised on the Appellant and the Appellant pay for these services and the service tax thereon to the EPC contractors. The appellant, on receipt of the services and on the strength of the invoices raised by the EPC contractors, claim Cenvat Credit of such service tax charged on the invoices raised on the Appellant, treating them as "input services". The credit of the service tax charged on the input service was taken by the Appellant, for purposes of adjusting the same against its output service tax liability on the provision of transportation of gas through pipeline.

2.2 Learned Counsel argued that the issue involved in the present case is if the appellant (engaged in transportation of gas through pipeline) was eligible to claim input service tax credit of the Service Tax charged by its EPC contractors (who were appointed directly by the Appellant) in connection with construction of the pipeline where such Service Tax was being paid by the Appellant to such EPC contractors?

2.3 Learned Counsel pointed out that the precise issue under consideration in this appeal has already been decided in favour of the Appellant in two decisions of the Tribunal including one in their own case. He argued that the issue being covered by the decisions of the Hon'ble Tribunal, the Appellant seeks that the ratio laid down in these decisions be applied in the present Appeal as well:

(i) Decision in the Appellant's own case for the period June 2005 to March 2009 (GSPL vs CCE, Order no. 10474-10477/WZB/AHMD/2013 dated 15.04.2013 read with ROM Order dated 18.09.2013). This decision of the Tribunal in the appellant's case was taken in appeal by revenue to the Hon'ble Gujarat High Court, but has not been stayed till date. He pointed out that the Hon'ble High Court, having admitted the appeal, has not granted stay in favour of the Revenue and as such therefore, the favourable decision of the Tribunal on the aspect of input service tax credit continues to hold good and has not eclipsed, as on date.

(ii) Decision in the case of Reliance Gas Transportation Infrastructure Ltd. vs Comm. Service Mumbai-II, 2016-TIOL-1593-CESTAT-Mum.

2.4 Learned Counsel also relied on following:

(i) Decision in the case of Maharashtra Cricket Association vs CCE, 2016 (41) STR 833 (Tri- Mum)

(ii) Decision in the case of Commissioner of Central Excise vs Sai Samhita Storages (P) Ltd. 2011 (23) STR 341 AP

(iii) Decision in the case of Raipur Treasure Island Private Ltd vs CCE, Indore, 2019-VIL-410-CESTAT-DEL-ST

2.5 Learned Counsel pointed out that the Adjudicating Authority at para 12.28 of the Impugned Order had relied upon the decision of the Tribunal in the case of Mundra Port and held that the services used towards execution of pipeline system cannot be considered as used by the present Appellant for providing the output services of supplying natural gas through pipeline. He pointed out that the aforementioned Tribunal decision in the case of Mundra Port (Supra) relied in OIO has been overturned by the Hon'ble Gujarat High Court as reported in Mundra Ports & Special Economic Zone Ltd vs CCE, Cus. 2015 (39) STR 726 (Guj.) and therefore, can longer be relied upon by the revenue in defending the impugned order. He further argued that the decision of Mundra Ports and SEZ (Tribunal) relied upon by the Learned Commissioner is not applicable to the facts of the present case in view of different fact. The said judgment deals with the credit taken in 'inputs' rather than 'input services'. Since the definition of 'input' and 'input services' are different, this decision ought not to apply to the facts of the present case. He further submitted that in the instant case, the impugned services for construction of pipelines bear an integral nexus with the provision of output services of GSPL, which was not the factual pattern in the case of Mundra Port & Special Economic Zone.

2.6 Learned Counsel further argued that the input services provided by the EPC contractors to GSPL are covered under the first part of the definition of 'input services' the services of Transportation of goods through pipeline services.

(i) He argued that for a service to qualify as input service, such service should be used by an output service provider 'for providing an output service'. He submitted that in the present case, the input services received from the EPC Contractors in respect of laying of gas transmission pipelines are utilised by the Appellant to render taxable output service pertaining to "Transport of goods through pipeline or other conduit service". Without the pipelines, it would not be possible for the Appellant to render the "Transport of goods through pipeline or other conduit service"- a fact that has not been disputed even in the SCNs.

(ii) He argued that the output services of GSPL cannot be performed in absence of the pipeline. The pipeline would never come into existence unless the same is constructed using the constructed services of the EPC contractors.

(iii) He argued that the phrase used in the CENVAT credit Rules vis-a-vis credit availment of input service for output service providers like the Appellant is "used... for providing an output services". This phrase (i.e. "used for") has not been defined or explained under the Act. However, Tribunal in Navratna S.G. Highway vs CST, Ahmedabad, 2012 (28) STR 166 (Tri-Ahmd.) held that the term inputs and input services are parimateria in so far as service providers are concerned as they both use the phrase "used for provision of services". He argued that the principle laid down in the aforementioned judgment would apply on all fours to the present case. The Learned Tribunal had observed that:

> "*without utilising the services, mall could not have been constructed and therefore the renting of immovable property could not have been possible.*

2.7 He argued that construction services received by the Appellant also fall within the inclusive part of the definition of 'input service' (i.e. activities in relation to business) as well. He argued that the inclusive part of the definition of 'input services' includes '**activities in relation to business'**- a phrase of wide and expansive connotations. Accordingly, the construction services received by Appellant are services used in relation to 'activities relating to businesses of Appellants namely the provision of transportation of gas through pipeline services. In support of this argument reliance is placed on the following:

- Bombay High Court decision in case of Coca-Cola India Pvt Ltd vs CCE, 2009 (242) ELT 168 (Bom.)
- Hon'ble Supreme Court decision in the case of Bharat Cooperation Bank v Bank employee Union 2007 (4) SCC 685
- Hon'ble Supreme Court decision of Goodyear India vs Collector of Customs, Bombay 1997 (95) ELT 450 (S.C)

2.8 He argued that Service Tax is a destination-based consumption tax and the entire burden has to be borne by the customer. **OECD guidelines by the Organisation for Economic Cooperation and Development** also reiterate the fact that the burden of Service Tax is to be borne by the consumer and not by the manufacturer or the service provider. Various CBEC Circulars as also the decision of the APEC Court In AIFTP vs UOI (2007 (7) STR 625 (SC) establishes the fact the Service tax is a VAT concept.

Since, Service Tax is a consumption tax, denial of CENVAT Credit to GSPL on the construction services (which are essentially integrally connected to the business of GSPL) would be contrary to the letter and spirit of the principles governing consumption tax.

2.9 He further argued that construction services received by the Appellant also fall within the inclusive part of the definition of 'input services' (i.e setting up the premises. He argued that the inclusive part of the definition of the term 'input services' also specifically includes **services for setting up the 'premises'** of the service provider. In the present case, the input services of the EPC contractors are used in relation to setting up of premises of GSPL (since the entire route of the pipeline constitute the 'premises' of the GSPL) and hence specifically covered under the inclusive part of the definition as well. The entire route of pipeline would qualify as a premise of GSPL even if it is laid beneath the earth- for support of this argument reliance is placed on the Supreme Court decision of Anant Mills Co Ltd. vs State of Gujarat, AI 1975 SC 1234. He argued that the track of land on which the pipeline is constructed and placed, a statutory **right to use** has been vested free from all encumbrance to the Appellant under the **Gujarat Water and Gas Pipelines (Acquisition of Right of user in Land) Act, 2000** which therefore makes it a premises, for it is this entire route from where/through where, the pipeline services are being rendered.

2.10 Learned counsel argued that the fact that pipeline is an immovable property holds no relevance for CENVAT Credit. He argued that Rule 3(1) of the CCR only states that the credit would be available on the input services received by the output service provider and prescribes no other condition. Therefore, inserting a condition that no credit ought to be available in respect of constructing of immovable property goes against the statutory definition itself. The Tribunal in the case of Navratna SG Highway (pertaining to construction of Mall) as also Maharashtra Cricket Association (ie pertaining to construction of Stadium) has in any case negative such a contention of the Revenue.

3. On behalf of revenue, Special Counsel Shri P.R.V. Ramanan appeared. He submitted that the department was of the view that such availment was not permissible under the CENVAT credit provisions and notification No. 12/2003 dated 20/6/2003 as the EPC contractors had opted to avail of the benefits of the said Notification.

3.1 Cenvat credit taken by GSPL in respect of services rendered by EPC contractors to construct the pipeline system which remains permanently embedded under the earth over a long distance constitutes 'immovable property' and is neither 'goods' nor 'service'. Aforesaid services being towards construction of immovable property, Service tax paid thereon loses its eligibility for Cenvat credit as no CEx. Duty or Service Tax is paid at this stage, thus ceasing to be in input service for 'Transportation of gas through pipeline' which is the service rendered by GSPL.

3.2 Learned Special Counsel argued that what is used by GSPL to provide the output service, namely, 'Transport of goods through pipelines or other conduit' service is the pipeline system, which being embedded underground, is undoubtedly an immovable property. It is neither the 'premises' nor the 'office' of the GSPL. Neither it is 'goods' nor a 'service'. No Service Tax is leviable thereon. Thus, credit of Service Tax paid on CICS cannot be availed of by GSPL. Learned Special Counsel argued that it cannot be said that the input services were used for setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises' or for advertisement or sales promotion, market research, storage up to the place of removal, procurement of input'. The output service rendered by GSPL does not fall under 'activities relating to business' since applying the rule of ejusdem generis it can be said that the enumerated activities are not at all of the nature of GSPL's services.Learned Special Counsel argued that the judgment relied upon by the Hon'ble High Courts and the Hon'ble Tribunal is the one rendered by the Hon'ble AP High Court in the case of Sai Samhita Storages (P) Ltd. The period involved in this judgment was 4/2005 to 9/2005 and the case related to cement and steel items, such as TMT bars, which were used for construction of storage tanks, reinforcement of storage tanks and construction of pipelines for transfer of liquid cargo from the tanks to trucks. These goods were used for setting up the premises of provider of output service, in this case, a storage facility to provide 'Storage and warehouse service' as defined in Section 65 (102) of FA, 1974.He argued that it is settled law that the ratio of judgment is the authority in relation to the facts of the case and the issues considered. The issue in 'Sai Samhita' case concerned 'input services'. He argued that as per the definitions, the 'means' clause pertaining to 'inputs' and 'inputs services' are different. In other words, as far as cement and steel items were concerned their use in any service entitled them to avail the duty credit in respect of the said items. The dispute therein did not concern input services. Hence, applying the ratio of that judgment to the present case of GSPL would not be appropriate. He further argued that the aforesaid judgment has been appealed against to the Hon'ble Supreme Court and the CA has been admitted as reported in 2015(40) STR J23(SC). The judgment is therefore, in jeopardy.

3.3 Learned Special Counsel argued that in the case of Navratna S.G. Highway Prop. Pvt.Lt.d vs. CST, Ahmedabad-2012 (28) STR 166 (Tri-Ahmd.). the appellant himself constructed the Mall building. Certain input services were received and used by them during the construction of the mall and thereafter. Hence, the facts of that case and that of Sai Samhita and GSPL are clearly distinguishable. Secondly, the said services were again in respect of the premises of provider of output service.

3.4 Learned Special Counsel argued that in the case of Maharashtra Cricket Association vs CCE Pune III- 2016 (41) STR 833 (Tri- Mum), the Tribunal specifically took note of the facts and stated in para 8 of their order as follows:

> *"In the present case the input services are Architect Services, Consulting Engineers Services, Management Consultancy Services, etc, used for setting up the premises i.e. stadium of provider of output service i.e. the appellant. The output service is renting of stadium and other miscellaneous services. In view of this undisputed position of law, the services used by the appellant for setting up the stadium, are input services and squarely covered by the definition of 'Input Service' as reproduced above."*

The facts of GSPL are quite different because the impugned services were not used for any of the services enumerated in the inclusive clause of the decision. Besides, Tribunal has taken the view that the Board's Circular is contrary to the plain language of the definition.

3.5 Learned Counsel argued that GSPL's own case arises from the Final order of the Tribunal dated 15.04.2013. The findings referred to at the hearing are as under:

> *"5.2 The learned Special Counsel also submitted that in respect of services rendered to the contractor by other service providers, Notification No. 12/2003 does not disallow credit of service tax on such input services and therefore only contractors could have availed the credit. Therefore in such cases if the contractors did not avail the credit, appellant cannot avail. We find ourselves in agreement with this submission. It cannot be said that in respect of input services received by the contractors, appellant is eligible since those are not input services used for providing output service by the appellant but they are used for providing output service by the EPC contractors.*
>
> *5.3 As regards the service rendered by the EPC contractors the ground canvassed is that what has emerged is an immovable property which is neither a service nor goods. In this case, it has to be noted that EPC contractors have not paid service tax on 'pipeline system' but on the services provided for constructing the system. Definition of 'input service' clearly covers this and it cannot be said that this service is not provided to*

> *output service. Moreover the decision of Hon'ble Andhra Pradesh High Court in the case of Sai Sahmita Storages P) Ltd. [2011(270) E.L.T. 33 (A.P.) = 2011(23) S.T.R. 341 (A.P.)] also supports the case of appellants. In this case it was held that inputs used for construction of warehouse is admissible as credit."*

The ROM Order amended the paragraph 5.2 above as follows:

> *The learned Special Counsel also submitted that in respect of services, rendered to the contractor by other service providers, Notification No. 12/2003 does not disallow credit of service tax on such input services and therefore only contractors could have availed the credit. Therefore in such cases if the contractors did not avail the credit, appellant cannot avail. We find ourselves in agreement with this submission. It cannot be said that in respect of input services received by the contractors, appellant is eligible since those are not input services used for providing output service by the appellant but they are used for providing output service by the EPC contractors. <u>It is also made clear that these findings would be applicable only in respect of eligibility of Cenvat credit of service tax paid by provider for services provided to EPC contractors and may not be applicable to the services provided by the service providers directly to the assessee, in respect of Engineering Consultancy, Inspection services, ROV/ROW Consultancy services, and paid for by the appellant directly.</u>"*

3.6 Learned Counsel argued that the findings as above in Paras 5.2 and 5.3 of the Final order have been appealed against by Revenue before the Gujarat High Court. As reported in 2014 (34) STR 321 (Gui) the following issues have been admitted as Tax Appeals by an Order dated 9/1/2014.

> *"(i) Whether Customs, Excise and Service Tax Appellate Tribunal committed an error in holding that MIs. GSPL is entitled to CENVAT credit in respect of the services provided by independent service provider in respect of Engineering Consultancy, Inspection Services, ROUIROW Consultancy, which was paid by M's. GSPL directly?*
>
> *(ii) Whether the Tribunal committed an error in entertaining the ground of the respondent M/s. GSPL on such question of CENVAT credit in a Rectification Application and whether the Tribunal can be stated to have corrected the error apparent on the face of record?"*

Thus, these findings are under challenge and the decision of the High Court is awaited.

3.7 Secondly, the Hon'ble Tribunal has solely relied upon the AP High Court Judgement in the case of Sai Samhita Storages (P) Ltd. In this regard submissions made at Paras 6.1.1 to 6.1.5 above may kindly be perused. In view of the findings recorded in the aforesaid Final order ought not to be applied to the present appeal

4. We have considered the rival submissions, We find that the appellants are engaged in the business of transporting gas through pipe line. For the purpose of transporting gas through pipe line it is essential for them to lay pipe lines between their different station. For the purpose of laying pipeline the appellants engage various contractors to procure pipes and completed the activity of laying the pipeline. In this process these contractors get the price of material used by them and all the services provided by them. These contractors pay service tax on the services provided by them to the appellant. These contractors take services from various sub contractor. The issue before us is if the appellants are entitled to take the credit of service tax paid by these contractors directly supplying services to the appellant for the purpose of laying pipeline. The fundamental objection of the revenue is that pipelines are immovable property and not goods and therefore, any service tax paid on such installation cannot be claimed as input credit by the appellant. All the issues involved in this case have already been decided in the appellant's own case by the Tribunal vide order reported in 2013 (32) STR 510 (Tri. Ahmedabad). The said order was subsequently modified by order No. M/14188 to 14190/WZB/AHD/2013 dated 18.09.2013 in rectification of mistake application. It is seen that aforesaid order of Tribunal has considered all the aspects of the issue raised in this appeal and given its findings. Some of the finding of the order are reproduced:-

> **4.3** We find considerable force in these arguments. It cannot be said that pipeline is a plant or equipment. In the case of plant or equipment, during the construction process, several components/spares/accessories are manufactured and bought out parts are received and all are assembled to bring plant or machinery into existence. In such a situation capital goods used within the factory have been allowed for the purpose of CENVAT credit. No doubt pipes are covered by capital goods. But once again as discussed earlier in respect of inputs, in this case also capital goods are required to be "used for" providing output service according to the definition of 'capital goods' under Rule 2(a) of CENVAT Credit Rules, 2004. In the case of capital goods for a manufacturer, what is required is use of capital goods in the factory of the manufacturer of final products whereas in the case of capital goods for service providers, they are required to be used for providing output service. Pipes are used for construction of pipeline by the service provider and pipeline system is handed over to the appellant. Construction of pipeline is an activity covered for service tax

levy and it can be said that the pipes are used for providing output service by the service provider namely EPC contractor and not the appellant. The definition of 'input' also would not be of any help to the appellant since definition of 'input' also requires the input to be used for providing output service. Appellant is not using pipes for providing any output service but have supplied it for construction of pipeline to the EPC contractor. Being a free supply material, if the value of the same is not included in the pipeline system by the output service provider, question of availment of credit also does not arise. The definition of input service also does not help the appellants to get the credit of duty paid on pipes. The definition requires the input services to be "used for" providing an output service and it cannot be said that the inclusion clause helps them to take credit of service tax paid by the EPC contractor we are not able to find any provision which allows them to take credit of duty paid on pipes and also service tax paid on construction of pipeline system. A conscious decision was made by the appellant and the EPC contractor to avail the benefit of Notification No. 12/2003 especially in the case of appellants, they had also taken a legal opinion. Once a choice is made the consequence of the choice also inevitably follows and has to be suffered.

5. *Whether GSPL is eligible for the credit in respect of input services provided by other contractors to EPC contractors?*

5.1 The main ground taken by the Revenue to deny this benefit is that what GSPL used to perform its services is an immovable property and hence it is not "goods" as understood under the Central Excise Act. According to Revenue the subject goods is neither an input nor input service nor capital goods. According to the learned Special Counsel the pipeline system used by GSPL does not fall within the definition of any item under Rule 2 of CCR.

5.2 The learned Special Counsel also submitted that in respect of services rendered to the contractor by other service providers, Notification No. 12/2003 does not disallow credit of service tax on such input services and therefore only contractors could have availed the credit. Therefore in such cases if the contractors did not avail the credit, appellant cannot avail. We find ourselves in agreement with this submission. It cannot be said that in respect of input services received by the contractors, appellant is eligible since those are not input services used for providing output service by the appellant but they are used for providing output service by the EPC contractors.

5.3 As regards the service rendered by the EPC contractors the ground canvassed is that what has emerged is an immovable property which is neither a service nor goods. In this case, it has to be noted that EPC contractors have not paid service tax on 'pipeline system' but on the services provided for constructing the system. Definition of 'input service' clearly covers this and it cannot be said that this service is not provided to output service. Moreover the decision of Hon'ble Andhra Pradesh High Court in the case of *Sai Sahmita Storages (P) Ltd.* [2011 (270) E.L.T. 33 (A.P.) = 2011 (23) S.T.R. 341 (A.P.)] also supports the case of appellants. In this case it was held that inputs used for construction of warehouse is admissible as credit.

4.1 The aforesaid order was modified by the order of tribunal in rectification of mistake application in following words.

(iv) We find that the appellant herein has sought for rectification of error in findings at paragraph No. 5.2 on the ground that the said paragraph deals with the issue of pertaining to availment of Cenvat Credit of Service Tax paid by Contractors to EPC contractors. It is his submission that at least in respect of Appeal Nos. 356/2009 and

> 320/2010, the appellant had availed Cenvat credit of the Service Tax paid on the inputs services like Engineering Consultancy, Inspection services, ROU/ROW consultancy services etc. received by them directly, for execution of the said contract laying of pipeline system. It is also the submission that the final order of the bench dated 15-4-2013 in paragraph No. 5.3 has specifically held that any services provided for laying the pipeline system, Cenvat credit shall be available of the service tax paid for the services.

4.2 The appeal filed by the revenue against this order of tribunal were rejected by Hon'ble High Court, Ahmedabad as reported in 2014 (34) STR 321. Against this order of Hon'ble High Court the revenue has approached Hon'ble Apex court. Hon'ble Apex Court has after condoning the delay issue the notice in the petition for special leave to appeal filed by revenue.

5. It is seen that the issue involved in the instant case is squarely covered by the decision of tribunal in the appellant's own case. The said decision was also approved by Hon'ble High Court. The Learned Special Counsel for revenue has argued since the Hon'ble Apex Court has issued notice, the decisions of tribunal and Hon'ble High Court cannot be applied to the instant case. We find no force in this submission as the decision of Hon'ble High Court has not been stayed. The second issue raised by the Learned Special Counsel is that tribunal solely relied on the decision of AP High Court in the case of Sai Samhita Storages Pvt Ltd-2011 (23) STR 341 (AP), and that the decision in the case of Sai Samhita Storages Pvt Ltd relates to 'inputs' and not 'inputs services', We do not find any merit in argument of Learned Special Counsel. The decision of tribunal upheld by Hon'ble High Court in Appellant's own case is comprehensive in all respects. In view of the fact that the decision in the case of Sai Samhita Storages Pvt Ltd was examined by the co-ordinate bench of tribunal and the said decision has been approved by the Hon'ble High Court.

6. In view of above we do not find any merit in the impugned order. Relying on the decision of tribunal in appellant's own which has been approved by Hon'ble High Court we find that the appellant are entitled to

Cenvat credit in respect of service received by them directly from their contractors in respect of laying pipeline.

7. The appeal is allowed in above terms.

(Pronounced in open court on 02.02.2021)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

GEETA