CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70526 of 2019

(Arising out of Order-In-Original No.LKO/EXCUS/000/COM/ST/11/2018-19 dated 10.01.2019 passed by Commissioner, CGST & Central Excise, Lucknow)

M/s Upal Developers (P) Ltd, **.....Appellant**
(15, Mahmoodabad Estate Building,
Hazratganj, Lucknow)

VERSUS

Commissioner of Central Excise, Lucknow **....Respondent**
(7A, Ashok Marg, Lucknow)

APPEARANCE:

Shri Kapil Vaish, Chartered Accountant for the Appellant
Shri Santosh Kumar, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70009/2024

DATE OF HEARING : 16.10.2023
DATE OF DECISION : 16.10.2023

SANJIV SRIVASTAVA:

This appeal is directed against order in original No LKO/EXCUS/000/COM/ ST/11/2018-19 dated 10.01.2019. By the impugned order following has been held:

"ORDER

17.1 I confirm the demand of inadmissible credit of Cenvat of Rs.2,26,60,877/- (Rupees Two Crore Twenty Six Lakh Sixty Thousand Eight Hundred and Seventy Seven Only) of Central Excise duty/service tax along with all applicable Cess on M/s UPAL Developers Pvt. Ltd. 15. Mahmoodabad Estate Building. Hazratganj, District Lucknow (UP) under provisions of Rule 14 of the Cenvat Credit Rules

2004 read with Section 73 of the Finance Act, 1994 and Section 142 and 174 of the CGST Act, 2017.

17.2 Interest at appropriate rate under Section 75 of the Finance Act, 1994 read with Section 142 and 174 of the CGST Act, 2017 on the amount of Service Tax mentioned at Para 17.1 above shall be recovered from them.

17.3 I confirm the demand of service Tax of Rs 6489/- (Rupees Six Thousand Four Hundred and Eighty Nine Only) short paid by M/s UPAL Developers Pvt. Ltd. 15. Mahmoodabad Estate Building, Hazratganj, District Lucknow (UP) under Section 73 of the Finance Act, 1994 and Section 142 and 174 of the CGST Act, 2017.

17.4 Interest at appropriate rate under Section 75 of the Finance Act, 1994 read with Section 142 and 174 of the CGST Act, 2017 on the amount of Service Tax mentioned at Para 17.3 above shall be recovered from them.

17.5 I also impose Penalty of Rs.22,66,000/- (Rupees Twenty Two Lakh Sixty Six Thousand Only) upon them under Rule 15 of the Cenvat Credit Rules 2004 read with Section 76 of the Finance Act, 1994 and Section 142 and 174 of the CGST Act, 2017 for contravention of the provisions of rule 2,3 & 9 of the CENVAT Credit Rules, 2004.

17.5 I also impose Penalty of Rs.648/- (Rupees Six Hundred and Forty Eight Only) upon them under Section 76 of the Finance Act, 1994 read with Section 142 and 174 of the CGST Act, 2017 for contravention of the provisions of Section 67 & 68 (2) of the Finance Act, 1994."

2.1 Facts leading to the impugned order as recorded in the impugned order are reproduced below:

(i) In terms of Section - 73 (l) read with 73(1A) of the Finance Act. 1994. Statement of Demand cum Show Cause Notice was issued to M/s UPAL Developers Pvt. Limited. for the period 2015-16 to 2017-18 (Upto June) in continuation to earlier Demand-cum-notice to show cause No. ***03/Commr./ST/LKO/2015 dated 16.04.2015*** *for the period 2009-10 to 2013-14 issued by the Commissioner, Central Excise & Service Tax Commissionerate, Lucknow and Statement of Demand No. 29/ADC/LKO/ST/2016-17 dated 29.06.2016 covering the period upto 2014-15,* ***as the grounds, relied upon in the instant statement of demand are the same as mentioned in the Show***

Cause Notice dated 16.04.2015 & Statement of Demand dated 29.06.2016.

(ii) whereas, on the basis of earlier Statement of Demand for the period 2014-15 as mentioned above, a follow up letter vide C. No. 16-STR/SCN/ UPAL/R-1I/LKO-1/15-16/230 dated 11.01,2017 was issued to the Noticee by the erstwhile Superintendent Range-II, Service Tax Division, Lucknow to provide the documents i.e. Ledger regarding Cenvat Credit, Copy of Invoices on account of which the Cenvat Credit has been taken for the subsequent period of 2015-16, 2016-17 & 207-18 Upto June-2017 along with relevant ledgers and also details of expenses made in respect of Legal Consultancy charges. Further, reminder letters of even C.No., dated 01.08.2017. 19.07.2017. 05.12.2017 & 23.01.2018 were also issued to them by the jurisdictional Superintendent Range-VI. CGST and Central Excise Division-ll Lucknow, for providing the desired documents but the Noticee did not provide any documents to the department. Therefore, the statement of demand has been prepared on the basis of ST-3 returns filed by the Noticee on the AIO.

(iii) whereas, it was observed on perusal of ST-3 returns for the period 01.04.20 15 to 30.06,2017 that the Noticee had availed Credit of CENVAT totally amounting to Rs.2,26,60,877/- on those inputs which were inadmissible to them for providing the output service.

(iv) whereas, it was also observed that the noticee had short paid service tax on Legal Consultancy Services on reverse charge basis as per provisions of Section 68(2) of the Finance Act. 1994

On the basis of documents (RUD-3) provided by the party through mail regarding Legal Expenses during the period 2015-16, 20 16-17 & 2017-18 (Upto June 2017), amount of Service Tax short paid by the party during the said period is calculated as under :

Financial Year	*Amount of Legal Expenses liable for payment of S.T under reverse Charge (as per data data provided by the party)*	*Value shown in ST-3 returns in respect of Legal Consultancy Service*	*Differential Value*	*Amount of ST payable*
2015-16	*262900*	*218150*	*44750*	*6489*
2016-17	*665750*	*665750*	*0*	*0*
2017-18 (upto June 17)	*7000*	*7000*	*0*	*0*
Total	*935650*	*890900*	*44750*	*6489*

CASE FOR THE DEPARTMENT:

03. Accordingly, in view of the aforementioned facts, the Noticee ie. M/s UPAL Developers Pvt. Ltd. 15, Mahmoodabad Estate Building Hazratganj, Lucknow was called upon to show cause to the Commissioner, CGST and Central Excise Commissionerate, 7-A. Ashok Marg, Lucknow vide Show Cause Notice No. 06/Comm'r/LKO/ST/2018-19 Dated 19/4/2018 as to why

a) *The amount of Cenvat Credit of Rs.2,26,60,877/- of Central Excise duty/service tax along with Cess wrongly availed and utilized by the noticee, should not be demanded and recovered from them under provisions of Rule 14 of the Cenvat Credit Rules 2004 read with Section 73(1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994.*

b) *The amount of Service Tax of Rs.6,489/- short paid by the noticee should not be demanded and recovered from them under Section 73(1) of the Finance Act, 1994 along with interest thereon under Section 75 ibid.*

c) *Penalty should not be imposed upon them under Rule 15 of Cenvat Credit Rules 2004 read with Section 76 of the Finance Act, 1994 for contravention of the provisions of Rule 2,3 & 9 of the Cenvat Credit Rules 2004 .*

d) *Penalty should not be imposed upon them under Section 76 of the Finance Act 1994 for contravention of the provisions of Section 67 & 68(2) of the Finance Act, 1994. leading to nonpayment of Service Tax.*

2.2 Aggrieved by the impugned order appellants have preferred this appeal.

3.1 We have heard Shri Kapil Vaish Chartered Accountant for the appellant and Shri Santosh Kumar, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned Chartered Accountant submits and places on record the Final Order No 70979/2019 dated 16.05.2019 by which tribunal has allowed the appeal of the appellant against the Order in Original No LKO/EXCUS/000/COM/ST/019/2016-17 dated 15.12.2016.

3.3 Learned authorized representative re-iterates the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of argument.

4.2 Undisputedly the impugned order is in respect of the Statement of Demand issued as per Section 73 (1A) as a sequel to the show cause notice dated 03/Commr./ST/LKO/2015 dated 17.04.2015 *for the period* 2009-10 to 2013-14 issued by the Commissioner, Central Excise & Service Tax Commissionerate, Lucknow. The demand of Rs 3.64 Crores approximately was confirmed by the Commissioner vide order in original No. LKO/EXCUS/000/COM/ST/019/2016-17 dated 15.12.2016 by adjudicating the said show cause notice. On appeal tribunal has vide Final Order No 70979/2019 dated 16.05.2019 allowed the appeal filed by the appellant against the said order. Relevant paragraphs from the said order are reproduced below:

> *"2. The revenue's objection is to availment of Cenvat credit of duty paid on various inputs, capital goods and input services consumed for the construction of the mall on the ground that the construction activity has not discharged any service tax liability and as such the credit cannot be held to be available to the assessee. Accordingly, by way of issuance of a show cause notice dated 17.04.2015 for the period October, 2009 to March, 2014, the demand of duty of Rs.3.64 crores approximately was proposed to be confirmed against them by denying the said credit.*

3. The appellant during the course of adjudication took a categorical stand that the mall was specifically constructed by them for renting purposes and as such all the inputs can be said to be having a nexus with the ultimate output services i.e. 'renting of immovable property', on which they are paying service tax. They also contested that a part of the credit to the extent of around Rs.1.14 crores was availed by them subsequent to the construction of a mall and was in respect of the services utilized for renting of immovable property. They also relied upon various decisions of the Tribunal laying down that such availment of credit is appropriate. Specifically, reliance was placed to the Tribunals decision in the case of M/s Oberoi Mall Ltd. Vs Commissioner of Central Excise, Mumbai-ii reported as 2017 (47) STR 292 (Tri.-Mumbai) & M/s Laxmi Enterprises Vs Commissioner of Central Excise & Service Tax, Vadodara reported as 2014-TIOL-2042-CESTAT-AHM and to the decision of Hon'ble Andhra Pradesh High Court in the case of M/s Sai Sahmita Storages Pvt. Ltd. Vs Commissioner of Central Excise, Visakhapatnam-II reported as 2011 (270) ELT 33 (AP).

4. It is seen that while dealing with the applicability of the said decisions to the facts of the present case the Original Adjudicating Authority has observed that there are divergent views of the Tribunal and has referred to the CESTAT Ahmadabad decision in the case of Mundra Port & Special Economic Zone Ltd. Vs Commissioner of Central Excise, Rajkot reported as 2009 (13) STR 178 (Tri.-Ahmd.). He has observed that in the said decision, the Tribunal observed that it is not permissible for an assessee to avail Cenvat credit of duty paid on cement and steel, used for construction of Jetty and Storage tanks. As such, by following the said favarable decision and by relying upon the said Ahmadabad Tribunal Decision, he confirmed the demand of duty along with confirmation of interest and imposition of penalty.

5. At this stage, we note that the Tribunal decision in the case of M/s Mundra Port & Special Economic Zone Ltd. (supra) laying down that the assessee was not entitled to avail the credit of duty paid on inputs used for construction stands reversed by the Hon'ble Gujarat High Court reported as Mundra Ports & Special Economic Zone Ltd. 2015 (39) STR 726 (Gujarat). As such, any reference to the said decision by the adjudicating authority was not called for.

6. We also find that the said issue stands covered by various decisions of the Tribunal wherein the Judgment of Hon'ble Andhra Pradesh High Court in the case of Commissioner of Central Excise, Visakhapatanam-ii Vs Sai Sahmita Storages (Plausible) Ltd. (supra) stands followed. Reference to the Tribunal's order can be made as Oberoi Mall Ltd. (supra) & M/s Laxmi Enterprises (supra). It stands held in the said

> *decisions that services used for constructing mall which were meant for renting which were discharging service tax liability, the duty paid on the inputs or capital goods or services used for construction of the mall is available as credit. As such, we held that the credit stand rightly availed by the appellant and utilized for discharge of their service tax liability under the category of 'Renting of Immovable Property'. We accordingly, set aside the impugned order and allow the appeal with consequential relief.*
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> *7.* ***Inasmuch as, the appeal has been allowed on merits****, we are not going to the alternative plea of demand being barred by limitation."*

4.3 As the demand made as per the show cause notice dated 17.04.2015 on the basis of which Statement of Demand dated 19.04.2018 has been issued, has been set aside by the tribunal vide the above referred order, we do not find any merits in the impugned order.

5.1 Appeal is allowed.

(Operative part of the order is pronounced in open court)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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