CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
REGIONAL BENCH, ALLAHBAD
COURT NO.I

Service Tax Appeal No.70431 of 2020

[Arising out of Order-in-Appeal No.NOI-EXCUS-001-APP-1314-19-20 dated 13.01.2020 passed by the Commissioner (Appeals), Central Goods & Service Tax, Noida]

M/s. MMR Infrastructure Developers(P)Ltd. **Appellant**
B-11, Sector-57,
Noida.

VERSUS

Commissioner of Central Goods & Service Tax, **Respondent**
Noida.

APPEARANCE:

Shri Kapil Vaish, Chartered Accountant for the appellant.
Shri B.K. Jain, Authorised Representative for the respondent.

CORAM:

HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 70249 / 2021

DATE OF HEARING:06.08.2021
DATE OF DECISION:02.11.2021

ANIL CHOUDHARY:

The issue involved in this appeal is whether the appellant have rightly utilised the cenvat credit for payment of service tax, and whether the same tax can again be demanded.

2. The brief facts are that the appellants are engaged in providing construction/works contract services and renting of immovable property services. During 2011 to 2015, appellants "constructed mall (self owned) at Bulandshahar for the purpose of renting of shops". The construction was completed on 25.03.2015. The appellant took cenvat credit of Rs.19,76,562/- during construction and Rs.45,45,465/- after completion,

totalling Rs.65,22,027/-. Appellant also constructed one building in Noida for M/s.Fiza Services (P) Ltd. on contract value of Rs.91.68 lacs. Appellants disclosed and paid service tax liability of Rs.4,40,105/- under Works Contract Service for the period January, 2015 to September, 2015.

3. Appellants availed cenvat credit of service tax paid on various services such as civil work, plumbing work, architecture fees, etc. used in construction of mall. The total credit availed on such services was Rs.65,22,027/-.

4. Appellants also availed credit of Rs.41,955/- on input services used for rendering works contract services to M/s.Fiza Services (P) Ltd. This credit is not the matter of dispute.

5. Service tax of Rs.4,40,105/- on works contract service was discharged out of cenvat credit accumulated with the appellants. It included Rs.41,955/- pertaining to input service of works contract and balance Rs.3,98,150/- from input service of mall (self owned).

6. Consequent to audit, show cause notice dated 25.04.2018 proposed to deny cenvat credit Rs.65,22,027/- relating to input services of mall, and also demanded Rs.3,98,150/- (Rs.4,40,105 – Rs.41,955), as credit wrongly utilised for payment of service tax. It also proposed to impose penalties and demand interest. It appeared to Revenue that credits of service tax paid on the input services used in the construction of mall is not admissible as mall is an immovable property, which is not dutiable under Central Excise Act nor chargeable to Service Tax Act. Input credit of service tax can be taken only if the output service is taxable or if the output goods manufactured are liable to excise duty. It was further observed that construction of complex/building or civil structure or parts thereof is a declared service under Section 66 E of the Finance Act. As

the appellant constructed mall and there was no buyer or service recipient, thus in absence of relationship between the service provider and the service recipient, no output service has been provided. Further, observed that only rent is received from shops.

7. During adjudication, appellants reversed credit of Rs.19,76,562/- taken on civil work etc., and contended that the balance credit pertains to input services availed after completion of the construction of mall.

8. The Additional Commissioner vide order-in-original dated 30.11.2018 disallowed the credit of Rs.65.22 lakhs and demanded service tax of Rs.3.98 lakhs, as short paid. He also imposed penalty of Rs.69.20 lakhs and demanded interest. The amount already paid was appropriated.

9. On appeal, the Commissioner (Appeals) held that service portion of work contract (for construction work) is specifically excluded from the ambit of input service, but there is no restriction with regard to other input services availed for construction of mall. On this issue, he remanded the matter to the adjudicating authority for re-examination.

10. On the issue of double demand of Rs.3,98,150/-, he held that the liability is on account of building and the credit that was utilised for payment of service tax was not admissible. Therefore, the demand has rightly been made and there is no duplication of demand.

11. Being aggrieved, the appellant is before this Tribunal.

12. Ld. Counsel for the appellant urges that the present appeal is only on the issue of confirmation of demand of Rs.3,98,150/- and imposition of penalty. Appellants are not aggrieved by that portion of the order, which remanded the matter for verification purposes. There is no dispute on the liability for payment of service tax of Rs.3,98,150/-, in as much as

appellants had disclosed the same in ST-3 returns and had discharged it out of accumulated cenvat credit. As per Rule 3(4)(e) of Cenvat Credit Rules, 2004, the cenvat credit may be used for payment of service tax on any output service. If there is any doubt on eligibility of the credit, it is the particular credit, which can be disallowed and on restoration of said credit in favour of the appellants, the discharge of service tax by the appellants would automatically get regularised. Therefore, on account of proposed disallowance of credit, service tax can not be demanded again. It is the duplication of demand and is not maintainable under the law. He, therefore, urges that the findings in the impugned orders are liable to be set aside. He prays for allowing their appeal with consequential benefit in accordance with law.

13. Ld. Authorised Representative for the respondent/Department relies upon the impugned orders.

14. Having considered the rival contentions, I find that the Department never issued any show cause notice for disallowance of cenvat credit taken, which has been disclosed in the Returns filed before the Department and further, proper records were maintained. Further, I find that once the credit has been taken in terms of Rule 3 of Cenvat Credit Rules. The same has been objected to by the Department under Rule 14 of Cenvat Credit Rules only on the utilisation of such credit for payment of output service tax, in accordance with Rule 3(4) (e) of Cenvat Credit Rules. I further take notice that Rule 14 has been invoked only on the event of utilisation of accumulated cenvat credit.

15. I further find that the appellant has rightly utilised this accumulated cenvat credit for payment of output service tax of Rs.3,98,150/-, which has been objected to by the Revenue and further demand on this score is set aside. I further hold that extended period of limitation is not attracted in the facts and circumstances as the issue being wholly of interpretation. Accordingly, penalties imposed under Rule 15 of CCR as well as under Section 78 of the Finance Act are set aside.

16. The other findings of the Commissioner (Appeals) are:-

(i) Cenvat Credit of service portion of works contract and construction service are specifically excluded w.e.f. 01.03.2011. I note that disallowance of Rs.19,76,562/- have been *suo moto* reserved on this account on 30.06.2017 during adjudication, and not contested.

(ii) As far as other input services are concerned, there is no restriction. Credit taken by appellant-assessee on account of other sevices is not deniable.

Accordingly, I hold that the amount of Rs.43,46,066/- is admissible to the appellant, as the same have been received for providing taxable service-renting of immovable property service.

(iii) Only the balance amount of credit of Rs.1,99,399/- or (Rs.45,45,465 – Rs.43,46,066/-) is remanded to the adjudicating authority for verification and to allow, if found eligible.

17. Accordingly, the appeal is allowed with consequential benefits in accordance with law. The impugned order stands modified, as indicated.

[Order pronounced on 02.11.2021.]

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Ckp.