FAX : 0532-2400149 REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 08/03/2018

To

Appellant as per address in table below
Respondent as per address in table below

Final Order No. ST/A/70537/2018-CU[DB] dated 07/03/2018

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section **01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.**

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	ST/57199/2013	**Z Square Shopping Mall Pvt Ltd** 16/113, M.g.marg KANPUR UP 208005
		Name and Address of Respondent
2		C.C.E. & S.T.-Kanpur 117/7,,SARVODYA NAGAR, KANPUR, UTTAR PRADESH-208005

Copy To
3Advocate(s) / Consultant(s):

J. K. Mittal , (Adv.) & Hiren Sheth, (C.A.)
A-15, THIRD FLOOR,
PRIYADARSHINI VIHAR,
DELHI
110092

4 Bar Association, CESTAT, Allahabad

5 Director Publications, Customs, Excise, I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp ICICI Bank of Defence Colony New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

12 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

13 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

14 C.D.R. 15 Office Copy 16 Second Folder Copy 17 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No. ST/57199/2013-CU[DB]

(Arising out of Order-in-Original No. 01-ST/Commr./2013 dated 29/01/2013 passed by Commissioner of Central Excise & Service Tax, Kanpur)

M/s Z Square Shopping Mall Pvt. Ltd. **Appellant**

Vs.

Commissioner of Central Excise & Service Tax, Kanpur **Respondent**

Appearance:

Shri J. K. Mittal, Advocate &
Shri Hiren Sheth, Chartered Accountant, for Appellant
Shri Pawan Kumar Singh, Superintendent (AR), for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing & Date of Decision: 24/07/2017

FINAL ORDER NO. 70537/2018......

Per: Anil Choudhary

The appellant-assessee is in appeal against the Order-in-Original No. 01-ST/Commr./2013 dated 29/01/2013 passed by Commissioner of Central Excise & Service Tax, Kanpur, whereby Service Tax have been demanded as short paid amounting to Rs.38,45,212/- for the period 1st April, 2010 to 30th September, 2010 and further input service credit has been held to be inadmissible amounting to Rs.69,95,300/- taken during the period from 2006 to September, 2010 under Rule 14 of Cenvat Credit

Rules, 2004 and further the amount of Cenvat credit utilized out of the above amounting to Rs.8,36,524/- was held to be recoverable along with interest. Further, penalty is imposed under Rule 15(1) of Cenvat Credit Rules, 2004 and further penalty under Sections 76 of the Finance Act, 1994.

2. Being aggrieved by the said order the appellants are before this Tribunal. So far the first issue is concerned, regarding short payment of Service Tax. The learned Counsel have taken us through the various stay orders granted by Hon'ble Delhi High Court & Hon'ble Supreme Court, wherein one of the tenants of the appellant, namely M/s Lifestyle International Pvt. Ltd., who had earlier moved before Delhi High Court and on being unsuccessful before the High Court in their challenge to liability of Service Tax on the activity of "renting of immovable property", they had appealed before Hon'ble Supreme Court. The said M/s Lifestyle International Pvt. Ltd., was enjoying complete stay, before the Hon'ble High Court and subsequently the Hon'ble Supreme Court by its order dated 14/10/2011 modified stay to the effect that M/s Lifestyle International Pvt. Ltd., shall deposit 50% of the Service Tax in dispute and for the balance 50% they shall file 'Corporate Solvency Certificate'. There is no dispute, regarding the compliance made by the said M/s Lifestyle International Pvt. Ltd., in terms of the order of Hon'ble Supreme Court. The learned Counsel has further taken us to the correspondence before the issue of Show Cause Notice

with the Department wherein they had explained the situation that save and except, Lifestyle International Pvt. Ltd., have deposited the Service tax wherever applicable on receipt basis, being prior to the period 2011, when the basis of charge shifted from cash basis to accrual/invoice basis. The Point of Taxation Rules came into effect from 01/04/2011. The ld. Counsel further points out that one of its tenant M/s Trent Limited (A Tata Enterprise) who run the westsite store have subsequently paid the Service Tax to the appellant and the appellant have also in turn deposited the same with applicable interest. This fact is also taken notice by this Tribunal in the Stay Order dated 01/04/2014 being Stay Order No. SO/ST/51280/2014-CU[DB]. This Tribunal have recorded as follows:-

> "As regards duty demand of Rs.38,45,212/- ld. Advocate is not disputing the fact that they are liable to pay Service Tax on the activity of "renting of immovable property". However, he submits that the Adjudicating Authority has confirmed the demand based upon the bills raised by them instead of quantifying the same on the amount received by them. If the rent amount received is taken into consideration, the total duty liability would come to Rs.24,94,797/-. Out of the said demand, they have deposited Rs.8,36,521/- from their Cenvat credit account and Rs.4,94,245/- by cash. The same stands informed to the jurisdictional Superintendent under the

cover of letter dated 18/10/2013. As regards the balance amount, he submits that their tenant had approached the Hon'ble Delhi High Court and subsequently Hon'ble Supreme Court and in terms of the interim order passed by the Hon'ble Supreme Court 50% of the Service Tax, was required to be deposited. The same stands deposited by their tenant. As such, he submits that no more dues are required to be deposited in respect of the said demand."

3. The ld. A. R. is not disputing the contentions on this point. Accordingly, we find that there are merits in the argument of the appellant and there is no actual Service Tax, which was short paid. The learned Counsel have also taken us through the returns for the relevant period and have reconciled the figures with reference to the Show Cause Notice, and we find that there is no Service Tax short paid.

4. The next issue is regarding allowable of Cenvat credit on certain inputs. In the Show Cause Notice, it has been alleged that appellant have taken Cenvat credit since 2006 (prior to start of business of renting of immovable property from May, 2010). The various services on which input credit was taken, are Construction, Architect, Erection & Installation, Insurance, Advertisement, Chartered Accountant, Travel Agent, Air Conditioning service, Security Services and Repair & Maintenance, House Keeping & Telephone, etc. The learned Commissioner have disallowed the Cenvat credit on the said

services aggregating to Rs. Rs.69,95,300/-on the finding that a Single Member Bench of this Tribunal in the case of Venus Investments *Versus* Commissioner of Central Excise, Vadodara reported at 2013 (29) S.T.R. 72 (Tri. – Ahmedabad) have held that the order of the Adjudicating Authority disallowing Cenvat credit under similar facts and circumstances was upheld following the CBEC Circular No. 98/1/2008–ST dated 04/01/2008. In view of the circular, the ld. Commissioner observed that the said circular clarifies that input credit of Service Tax can be taken only if the output is a 'service' liable to service tax or are 'goods' liable to excise duty; since immovable property is neither 'service' nor 'goods', input credit cannot be taken.

5. The learned Counsel for the appellant states that this issue is no longer *res-integra* and Co-ordinate Bench of this Tribunal in the case of Oberoi Mall Ltd. *Versus* Commissioner of Service Tax, Mumbai-II reported at 2017 (47) S.T.R. 292 Tri. - Mumbai), being Final Order dated 17/02/2016, following the ruling of Hon'ble High Court in the case of Commissioner *Versus* Sai Sahmita Storages Pvt. Ltd. reported at 2011 (270) E.L.T. 33 (A.P.), mPortal India Wireless Solutions (P) Ltd. *Versus* Commissioner reported at 2012 (27) S.T.R. 134 (Karnataka) & Vamona Developers Pvt. Ltd. *Versus* Commissioner reported at 2016 (42) S.T.R. 277 (Tribunal) have held that for taking Cenvat credit, registration is not a condition precedent. Credit of duty paid on inputs is available

Av

when the inputs are used for providing an 'output service'. Therefore, there is a need to satisfy that the inputs have been used for providing an 'output service'. In the case of 'input service' the definition includes input services used by a provider of taxable service for providing an output service. Therefore, the definitions of input and input service are *pari materia* as far as the service providers are concerned. That being the position, the decision of Hon'ble High Court of Andhra Pradesh in the case of Commissioner *Versus* Sai Sahmita Storages Pvt. Ltd. (supra) would be applicable to the facts and circumstances of this case also, the Hon'ble High Court had taken the view that without use of Cement & TMT Bars for construction of warehouses, assessee could not have provided 'storage' and 'warehousing service'. In this case also, without utilizing the service, mall could not have been constructed and therefore the 'renting of immovable property service' would not have been possible. The issue involved is squarely covered by the decision of Hon'ble High Court of Andhra Pradesh in the case of Commissioner *Versus* Sai Sahmita Storages Pvt. Ltd. (supra).

6. The ld. A. R. for the Revenue have relied on the findings of the ld. Commissioner on this issue.

7. Having considered the rival contentions and on perusal of the facts on record, we find that the issue of input credit, in the facts and circumstances are squarely covered by the ruling of this Tribunal in the case of Oberoi Mall Ltd. *Versus*

Commissioner of Service Tax, Mumbai-II (supra). So far the ruling of Venus Investments *Versus* Commissioner of Central Excise, Vadodara reported at 2013 (29) S.T.R. 72 (Tri. - Ahmedabad) relied by the ld. Commissioner pointed out that the said order also was subsequently modified in favour of the assessee vide Miscellaneous Order No. M/1292/2012-WZB/AHD, dated 27/07/2012, wherein it was held that there is error apparent on the face of record. The issue involved was wrongly considered. Reliance is placed also in Mundra Port & SEZ Ltd. & Vandana Global relating to availment of Cenvat credit on input and capital goods whereas issue in the instant case is availment of input service so involved.

8. Accordingly, we allow this appeal on both the issues and set aside the impugned order. The appellant shall be entitled for consequential benefits in accordance with law.

(Dictated and pronounced in Court)

-Sd/-
(ANIL G. SHAKKARWAR)
Member (TECHNICAL)

-Sd/-
(ANIL CHOUDHARY)
Member(JUDICIAL)

Ansari

प्रमाणित प्रतिलिपि 14/03/18

सहायक पंजीकार/Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण/C.E.S.T.A.T.)
38, एम.जी.मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001