CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/2573/2010-DB

[Arising out of Order-in-Original No. 53/2010 dated 31/08/2010 passed by Commissioner of Service Tax, Bangalore]

GOLFLINKS SOFTWARE PARK PVT LTD
EMBASSY POINT NO.150, INFANTRY ROAD,
BANGLAORE 560001

Appellant(s)

Versus

C.C.E & C.S.T.-BANGALORE SERVICE TAX- I
1ST TO 5TH FLOOR,
TTMC BUILDING,above BMTC BUS STAND,DOMLUR
BANGALORE,
KARNATAKA
560071

Respondent(s)

Appearance:

K.S. RAVI SHANKAR, Advocate
152, RACE COURSE ROAD,BANGALORE
BANGALORE
KARNATAKA
560001

For the Appellant

Mrs. Kavita Podwal, AR

For the Respondent

Date of Hearing: 24/07/2018
Date of Decision:02/08/2018

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 21081/2018

Per : S.S GARG

The present appeal is directed against the impugned order dated 31.08.2010 passed by the Commissioner of Service Tax whereby the Commissioner has confirmed the demand of Rs.9,04,89,039/- under proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14 of CENVAT Credit Rules, 2004 along with interest and imposed equal penalty under Rule 15(4) of the CENVAT Credit Rules, 2004 read with Section 78 of the Finance Act.

2. Briefly the facts of the present case are that the appellant is engaged in rendering various taxable services under Finance Act, 1994 and duly registered with the Service Tax Department under the categories of renting of immovable properties, commercial and industrial construction services, maintenance and repair service, management consultancy service, event management service and works contract service. During the period in dispute, the appellant has utilized CENVAT Credit on input services, namely, architects service, construction service, management consultancy service, real estate agent service and erection & commissioning service to the extent of Rs.9,04,89,039/- and the said Credit was used to discharge the Service Tax and various output services, including renting of

immovable property service. The Service Tax Department conducted an audit and issued an audit note expressing the view that the appellant had wrongly availed CENVAT Credit which was not available to them as per Board Circular No. 98/1/2008-ST dated 04.01.2008. On these allegations, a SCN was issued on 28.10.2009 alleging that as per the Board Circular dated 04.01.2008, no CENVAT Credit could be taken on input services used to bring an immovable property in existence as the immovable property was neither service nor goods. The appellant filed reply to the SCN and after following the due process, the Commissioner vide the impugned order confirmed the proposal in the SCN by holding that the CENVAT Credit was wrongly been utilized by the appellant and demanded tax with interest and imposed statutory penalties under various provisions. Aggrieved by the said order, the appellant filed the present appeal.

3. Heard both sides and perused the records of the case.

4. Learned counsel for the appellants submitted that the impugned order is not sustainable in law as the same has been passed without appreciating the facts and the law. He further submitted that the impugned order is untenable in law being

contrary to the statutory provisions prevalent during the relevant period which permitted CENVAT Credit on various input services used by a service provider for rendering taxable services, including renting of immovable property. He also submitted that the impugned order is contrary to Rule 2(l) of the CENVAT Credit Rules, 2004 which during the relevant period defined the expression 'input service' both inclusively and exhaustively so as to encompass "any service used by a provider of taxable service for providing an output service, and includes services used in relation to setting up….. the premises of provider of output service or an office relating to such…. premises". He also submitted that the impugned order has not at all appreciated that the input services were eligible input services given the text of the statutory rules and credit related thereto ought not to have been denied by the respondent. It is his further submission that renting of immovable property was an activity apart from other activities conducted by the appellant which fell within the scope of the expression 'output service' in Rule 2(p) of the CENVAT Credit Rule, 2004. He further submitted that the issue involved in the present case is no longer ras integra and has been settled in favour of the ass essee vide various decisions of the Tribunal and the High

Court. In support of his submission, he relied upon the following decisions:

(i) Musadilal Projects Ltd. Vs. CCE, C & ST, 2017 (4) GSTL 401 (Tri. Hyd).
(ii) Vamona Developers Pvt. Ltd. Vs. CC, CE & ST, 2016 (42) STR 277 (Tri. Mumbai).
(iii) Mysore Holdings Pvt. Ltd. Vs. CST, 2017 (52) STR 70 (Tri. Bang.).
(iv) CCE Vs. Sai Sahmita Storages Pvt. Ltd., 2011 (23) STR 341 (A.P).
(v) Varun Industries Vs. CCE & ST, 2017 (49) STR 613 (Tri. Ahmd).
(vi) Maharashtra Cricket Association Vs. CCE, 2016 (41) STR 833 (Tri. Mumbai).
(vii) Oberoi Mall Ltd. Vs. CST, 2017 (47) STR 558 (Tri. Ahmd.)
(viii) CCE Vs. Ashok Agencies, 2016 (41) STR 647 (Tri. Chennai).
(ix) Agriculture Products Market Committee Vs. CCE, 2013 (30) STR 558 (Tri. Ahmd.).
(x) Navaratna S.G.Higway Prop. Pvt. Ltd. Vs. CST, 2012 (28) STR 166 (Tri. Adhmd.).
(xi) Commissioner of Wealth-Tax Vs. Ramaraju Surgical Cotton Mills Ltd., 2002-TIOL-1628-SC-WT-LB.
(xii) Orient Paper Mills Ltd. Vs. UOI, 1978 (2) ELT J345 (SC).

5. On the hand, learned AR defended the impugned order. He further submitted that the Board Circular No. 98/01/2008 ST dated 04.01.2008, it is very clear that commercial or industrial construction service or works contract service is an input service for the output, namely, immovable property. Immovable property is neither subject to central excise duty nor Service Tax. Input

credit of Service Tax can be taken only if the output service is liable to Service Tax or goods liable to excise duty. Since immovable property is neither service nor goods, input credit cannot be taken. He further submitted that the learned Commissioner has rightly followed Board Circular in view of the settled legal position by the Hon'ble Apex Court that the Board Circular is binding on the departmental officers.

6. We have carefully considered the submissions made by both the parties and perused the records as well as have gone through the various decisions relied upon by the appellant. The issue involved in the present appeal is whether the services such as architects service, construction service, management consultancy service, real estate agent service, erection and commissioning service etc. used for construction of the premises are admissible input services for taking CENVAT Credit as against the output service of the appellant i.e. renting of immovable property and other related services on which Service Tax has been discharged. In order to appreciate the controversy, it is necessary to examine the definition of 'input service' as provided under Rule 2 (l) of CENVAT Credit Rule, 2004 during the relevant time which

is re-produced below:

"Input Services- As per Rule 2 (l) of CENVAT Credit Rules, 2004, (prior to 01.04.2011) 'input service' means any service.

(i) Used by a provider of taxable service for providing an output service, or

(ii) Used by the manufacture, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal,

and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider or output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or Capital goods and outward transportation upto the place of removal."

6.1 From the above definition, it is clear that any service used by the service provider for providing an output service is admissible 'input service'. Input service specifically includes amongst other services used in relation to setting up of premises of the provider of output service or an office relating to such provider. From the definition, it is clear that the input service is not limited to the services for providing output service but it also includes the services for setting up the premises of provider of output service. In the present case, all the input services involved are used for setting up the premises. The Board Circular relied upon by the Revenue are contrary to the various decisions relied upon by the appellant.

7. Further, we find that in the case of ***Musaddilal Projects Ltd. Vs. Comm of C.Ex., Cus and ST, 2017 (004) GSTL 0401 (T)*** it was held that various inputs and input services used for construction of a building were eligible for CENVAT Credit prior to the amendment of law from 01.04.2011. The Tribunal held that when the appellant was engaged in providing taxable services under the category of renting of immovable property, they could not be denied CENVAT Credit thereon. The present case also relates to the pre-amendment period (i.e., June 2007 - March 2009). The CENVAT Credit is therefore admissible as per the above decision. Further we find that in the case of ***Vamona Developers Pvt. Ltd. Vs. Commr. of Cus., C.Ex. & ST, 2016 (42) STR 277 (T)***, the Tribunal has ruled that credit on input services used for construction of Mall to provide renting of immovable property services (output service) was available to

discharge Service Tax liability on renting of immovable property. The Tribunal also held that even if such input services are procured before obtaining Service Tax registration, such credit could not be denied as there is no restriction for availment of such credit. This decision squarely applies in this case and the impugned order is untenable in law. Further, the appellant relied on the decision in ***Mysore Holding Pvt. Ltd. Vs. CST, 2017 (52) STR 0070 (T)*** in which it has been held that CENVAT Credit on input services relating to construction activity, is allowable to real estate developers holding the Service Tax registration. The Tribunal followed the precedent in ***Infosys Ltd. Vs. Commissioner 2015 (37) STR 862 (T)*** in which it was held that the construction services used as input services for setting up a global training centre for rendering taxable services for commercial training and coaching, was admissible in law. The Tribunal also followed the Gujarat High Court decision in ***Mundra Ports & Special Economic Zone Ltd. Vs. CCE, 2015 939) STR 0726 (Guj.)*** holding that input services used apart from inputs for providing taxable services from the jetty constructed (Port Services) would be allowable in law.

7.1 Further, we find that the Andhra Pradesh High Court in the case of ***CCE Vs. Sai Sahita Storages (P) Ltd., 2011 (23) STR 341 (AP)*** has held that the inputs used for construction of a warehouse to provide storage and warehousing services would be available as CENVAT Credit. The appellant submits that input services would also qualify as eligible services for the purpose of discharging the output tax liability on renting of immovable property. Further we find in the case of ***Varun Industries Vs. CCE, 2017 (49) STR 613 (T)*** it was held that input services used for construction of godown which was let out on rentals, were eligible for CENVAT Credit as the output service (renting of immovable property) was taxable. Further, we find in the case of ***Maharashtra Cricket Association Vs. CCE, 2016 (41) STR 833 (T)***, it has been held that architect and designed services used as input services to provide the output service of renting of immovable property were eligible services and CENVAT could not be disallowed applying the Board Circular dated 04.01.2008, which was contrary to statute law. This decision is squarely applicable to the appellant, more so as the very same circular was applied against the appellant by the respondent to deny CENVAT Credit.

7.2 Further, we find in the case of ***Oberoi Mall Ltd. Vs. CST. 2017 (47) STR 292*** in which the Tribunal held that credit relating to input services used to construct mall for renting of immovable property, would be available as CENVAT to the appellant for paying output tax liability on renting of immovable property. Further, we find in the case of ***CCE Vs. Ashok Agencies 2016 941) STR 647 (T)*** in which it was held that various input services such as engineering consultancy, construction services, erection, maintenance and installation and banking services utilized as input services to provide renting of immovable property would be available as input services to provide renting of immovable property would be available as input services as they were required to bring out the edifice which was immovable property rented out. Further, we find in the case of ***Agricultural Product Market Committee Vs. CCE, 2013 (30) STR 558,*** in which the Tribunal held that credit on input services such as management, maintenance repair, advertising, telecommunications and insurance services used by the appellant for renting of godown (immovable property) was available to discharge the output tax liability. The impugned order of the Commissioner is wrong in law. Further, we find in the case of ***Navratna SG Highway Prop. Pvt. Ltd. Vs. CST, 2012 (28) STR 166 (T)*** it was held that various input services used to construct and rent immovable property would be available since without utilization of such services, construction of mall and renting thereof was not possible. This decision applies with full force and vigour to the appellant and the impugned order is manifestly illegal as it falls foul of the above ruling.

8. Further, we find that the respondent has heavily relied upon the Circular dated 04.01.2008 which is contrary to the law cited supra. The Tribunal's decision eclipse this Circular which has been held to be contrary to statute law. The proceedings before the Commissioner are vitiated and have been hit by administrative consideration. The Apex Court in the case of ***Orient Paper Mills Ltd. Vs. UOI, 1978 (2) ELT J 345 (SC)*** held that Appellate Authority which exercised quasi-judicial power

should not be influenced by departmental clarifications and Board Tariff Ruling while adjudicating the cases.

9. In view of the discussion above, we are of the considered opinion that the issue is squarely covered in favour of the appellant by various decisions relied upon cited supra and by following ratios of the said decisions, we set aside the impugned order by allowing the appeal of the appellant with consequential relief, if any.

(Order was pronounced
in Open Court on **02/08/2018**)

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

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