CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH-COURT NO. I

Service Tax Appeal No. 21325 of 2016

(Arising out of Order-in-Original No. BLR-EXCUS-004-COM-005 & 006-2016-17 dated 1.6.2016 passed by the Commissioner of Central Excise & Service Tax, Bangalore-IV)

M/s GMR Infrastructure Limited **Appellant**

IBC Knowledge Park, Phase 2 'D'
10th Floor, 4/1, Bannerghatta Road,
Bangalore – 560 029.

Versus

Commissioner of Central Excise & Service Tax **Respondent**
Bangalore-IV

Office of the Commissioner of Central Excise
& Service Tax,
Bangalore-IV Commissionerate, 59 HMT Bhavan,
Bellary Road, Bangalore, Karnataka-560032.

And
Service Tax Appeal No. 21326 of 2016

(Arising out of Order-in-Original No. BLR-EXCUS-004-COM-005 & 006-2016-17 dated 1.6.2016 passed by the Commissioner of Central Excise & Service Tax, Bangalore-IV)

M/s GMR Infrastructure Limited **Appellant**

IBC Knowledge Park, Phase 2 'D'
10th Floor, 4/1, Bannerghatta Road,
Bangalore – 560 029.

Versus

Commissioner of Central Excise & Service Tax **Respondent**
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Office of the Commissioner of Central Excise
& Service Tax,
Bangalore-IV Commissionerate, 59 HMT Bhavan,
Bellary Road, Bangalore, Karnataka-560032.

Appearance

Shri Anil Kumar Kathuria, Advocate - for the appellant

Shri Rama Holla, Superintendent (AR) - for the respondent

CORAM: HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

Date of Hearing: 18/02/2020
Date of Decision: 17/06/2020

Final Order Nos. 20364-20365/2020

Anil Choudhary:

The appellant is engaged in the activity of construction services of roads, power plant, airport, etc. being commercial or industrial buildings or civil works, BAS, consulting engineering services, management or business consulting services, commercial training or coaching Centre services, etc and is registered with the department since 30.11.2004, in due compliance.

2. The internal audit of the Department noticed some discrepancy for the period October 2007 to March 2012 and they issued a show cause notice dated 23.4.2013.

- It appeared to Revenue that the appellant was engaged in providing both exempt services and taxable services under the category of 'works contract service' rendered in domestic area; appellant was availing Cenvat credit on various input services which are consumed in rendering taxable output services, as well as exempted output services; as per Rule 6 of CCR, the appellant have not opted for maintaining separate account for receipt, consumption and inventory of input services for provision of taxable output services and for provision of exempt services, as well as for utilization; thus, the appellant/assessee appeared liable to pay an amount attributable to the Cenvat credit on inputs services used in the exempt output services, at the specified rate in Rule 6(3) of CCR, for the period 1.4.2008 to 31.3.2012; the Revenue calculated the amount payable as below:

Sl. No.	Period	Value of exempted services provided	Rate of Cenvat credit to be reversed	Amount to be reversed
	A	**B**	**C**	**D**
1.	2010-11	Rs.3,84,30,39,918	6	Rs.23,05,82,395
2.	2011-12	Rs.8,80,58,22,801	5	Rs.44,02,91,140
			Total	Rs.67,08,73,535/

Year	Total value of exempted service	Total of taxable + exempted services	Credit availed	Credit attributable to exempted services
	E	**F**	**G**	**H=E/F*G**
2010-11	3843039918	532,21,47,891	13,99,06,759	10,10,24,487
2011-12	8805822801	13324055000	14,48,86,575	9,57,41,168
Total	12648862719	186462028912	284772334	19,67,65,654

- In reply to the audit objection, the appellant had stated that they have already reversed proportionate Cenvat credit amounting to Rs. 1,94,46,310/- in their books on 21.9.2012, as required under Rule 6(3A) of CCR (Option 2) and have further paid interest Rs. 24,69,859/- vide challan.

3. It further appeared to the Revenue that

- the appellant had constructed various projects of road, which is fully exempt from service tax, whereas other allied construction work like toll plaza, administration building, rest rooms and rest areas and miscellaneous works, appeared to be not part of the road, and hence taxable; accordingly, service tax was proposed to be demanded on these activities vide show cause notice dated 23.4.2013 for the period September, 2010 to March, 2012, being tax of Rs. 3,77,03,996; further, there was proposal to disallow Cenvat credit of Rs. 7,58,737being credit appeared to have been taken twice on six invoices;
- it also appeared that appellant have taken Cenvat credit without being in possession of valid documents as required under Rule 4A

of Service Tax Rules, read with Rule 9 of CCR for the period 2007-08 to 2011-12 amounting to Rs. 2,34,16,772;

- Further, it appeared that Cenvat credit have been taken on certain ineligible input services like annual subscription charges, cable charges, car rental, catering services etc., in violation of Rule 2(l) of CCR amounting to Rs. 3,47,14,951; On this issue, in reply to the audit objection, the appellants have reversed Rs. 59,49,283/- in their books on 23.9.2012 but have not paid the interest on such reversal.

4. Accordingly, Show Cause Notice, alleging suppression of facts and contravention of Act read with rules, invoking extended period of limitation, was issued; further another show cause notice, dated 21.5.2014 for the period April, 2012 to June, 2013 was also issued, The adjudicating authority passed common order in original including the subsequent, being impugned order in original dated 1.6.2016. The details of the show cause notice, period in dispute and the demands confirmed vide the impugned order are as follows, which are appealed against by the appellants.

Sl. No.	**Demands confirmed**	**Appeal No. 21325/2016** **SCN dated 23.4.2013 Period 10/2007 to 3/12 (Rs.)**	**21326/2016** **dated 21.5.2014 4/12 to 6/13 (Rs.)**
1.	Service tax on construction of toll plaza, administrative Buildings, rest rooms, parking bays etc.	3,77,03,996	7,04,71,970
2.	Under Rule 6(3) of CCR	1,94,46,310 (Appropriated)	
3.	Cenvat Credit disputed 3(a) credit double availed disallowed	5,81,31,723 (rev. 59,43,283) 7,58,737 (Reversed) (Appropriated)	3,39,24,571
4.	Penalty 76 Under Section 77(2) Under Section 78	Not imposed 10,000/- 3,77,03,006	Not imposed 10,000/- 7,04,71,970 (not proposed

			in SCN)
5.	Penalty under Rule 15(3) of CCR	7,58,737 5,81,31,723	Nil

5. The learned Counsel for the appellant Shri Anil Kumar Kathuria assailing the impugned order makes the following submissions and grounds:

5.1. Learned Commissioner has mis-construed in holding that the toll plaza, administrative building, rest room/area are not part of the road; admittedly, construction of road is exempt; the appellants have constructed road under tender awarded by NHAI and Government of Tamil Nadu to 'M/s GMR Chennai Outer Ring Road Pvt. Ltd.'; on Design, Build, Finance, Operate and Transfer Mode (DBFOT), M/s Buoyance Infrastructure limited were appointed as engineering, procurement and construction contractors ("EPC Contractor"); the activity involved design, build, finance, operate thereafter transfer back to the Government, after number of years as stipulated; construction of toll plaza, rest room, administrative building, etc is part of the same contract and are required under the scheme and scope of the contract-DBFOT, and hence are very much part of the road itself; the EPC contractor awarded 'back to back' sub-contract to the appellant; the scope of work included all the work i.e. construction of road, toll plaza, administrative building, rest area/room and such miscellaneous work; toll plaza and the administrative building have no separate existence and were specially constructed only for the use of the concessionaire to manage the highway, maintain it and also collect toll/fee, as per the terms of the contract and directions of the Government authority from time to time.

5.2. Learned Counsel submits that Board's Circular No. 80/10/2004-ST dated 17.9.2004, clarifies (para 13.2)that leviability of service tax, would depend primarily upon whether the building or civil structure is used or to be used for commerce or industry; as the construction of toll plaza, administrative building etc. is for the basic purpose of maintenance and safety of the road as well as collection of toll towards recovery of cost, the same cannot by any stretch of imagination be considered a separate commercial activity; further, these constructions are on turnkey basis along with the road. The learned Counsel relies on the following cases.

- ***Larsen and Toubro Limited Vs. Union of India – 2009 (248) ELT 170 (Bom),*** *wherein it was held that turnkey agreements are to be seen as one agreement which involves series of other incidental and inseparable activities, which otherwise may be taxable if undertaken separately.*
- ***Archi-structural Constructions India P. Ltd. Vs. CCE, Coimbatore – 2011 (22) STR 663 (Tri-Chennai)****, wherein 'Air catering unit' constructed under the indivisible EPC contract for Airport, was held to be part of Airport and not taxable separately.*
- *Delhi Bench of Tribunal in* ***DIAL Vs. Commissioner of Service Tax, Delhi*** *held that the 'advance development fees' received by DIAL from lessees in the Aero City area, Delhi Airport, for providing and constructing common facilities was held to be non-*

taxable as such activity was held to be within the meaning of airport.

5.3. Learned Counsel also submits that the scope of sub-contract entered with M/s Buoyance Infrastructure Ltd, is as follows;

> **"1. Scope of work:**
>
> a) GIL-EPC scope of work shall include the total works connected with the CONTRACT as per the specifications mentioned in the CONTRACT including Tender Documents/Specification/Drawings etc.
>
> b) GIL-EPG is understood to have satisfied himself by due careful examination before signing this sub contract Agreement as to the contents of the CONTRACT, the nature of the ground and sub-soil, the form and nature of the site, the quantities and nature of the work, the materials and equipments etc., necessary for completion of the work and power required for the execution of the Project, the accommodation he may require for itself and its employees/workmen and all the other matters incidental thereto and ancillary thereof effecting the execution and completion of the Project.
>
> c) Unless otherwise agreed upon, it is the sole responsibility of GIL-EPC to submit to SPV and BIPL any drawings, samples of materials, invoices, vouchers, specifications, working instructions, any specific documents etc. at his cost for the fulfillment of the CONTRACT.
>
> d) GIL-EPC shall be liable to abide by the terms and conditions of the CONTRACT. A copy of the CONTRACT is annexed hereto as Annexure '1'
>
> ………………………..."

Learned Counsel also submits that, from the above, it is evident that the scope of work entrusted to the appellant was the total work connected to the construction agreement, wherein construction of roads included construction to toll plaza, administrative building, rest areas and miscellaneous work such as truck lay beys, bus shelters, avenue plantation, median shrubs and street lighting.

6. Learned Authorised Representative reiterates the findings of in the impugned order.

7. Having gone through the rival submissions, we find that the toll plaza, administrative building etc. are part of the road having no separate existence and are meant only for the purpose of road. Accordingly, we hold that construction of toll plaza, administrative building is exempt from payment Service Tax. To this extent, we hold that the demand on this ground is liable to be set aside.

8. The next ground is in respect of demand raised under Rule 6(3) of Cenvat Credit Rules, whereby amount of Rs.1,94,46,310/- was disallowed holding that the appellant is required to reverse Cenvat credit attributable or used in providing exempt services by way of reversal; Learned Counsel points out that the said amount is not disputed and was already reversed on 21 September, 2012, prior to issue of show cause notice and the same stands appropriated along with interest of Rs. 24,69,859/-.

9. The next ground is in regard to an amount of Rs. 7,58,737/- alleged to be double credit taken by the appellant. We find that the appellants have reversed the amount prior to issue of show cause notice and the same has been appropriated in the adjudication order. The appellants did not dispute.

10. The next ground is regarding disallowance of Cenvat credit of Rs. 5,81,31,723/- in show cause notice dated 23.4.2013 and Rs. 3,39,24,751/- in show cause notice dated 21.4.2014. Learned Counsel urges that the Cenvat credit disallowed comprises as follows:

Nature of Services	**Amount (4/12 to 6/13)**	**07-08 to 11-12**
Advertising and marketing	Rs. 21,477/-	
Air Travel Agents	Rs. 5,675/-	
Banking and Financial Services	Rs. 3,03,08,620/-	
Advisory Services	Rs. 1,35,960/-	
Manpower Recruitment and Supply Services	Rs. 4,81,461/-	
Security Services	Rs. 9,24,904/-	
Works Contract Services	Rs. 20,46,654/-	
Total	Rs. 3,39,24,751/-	5,81,31,723/-

Learned Counsel submits that Rule 2(l) of CCR provides for the scope of credit on input service allowable to a provider of output service which are used by him in providing the output service, whether directly or indirectly, in or in relation to the manufacture of final products and includes services, used in relation to setting up, modernization, used in premises of provider of output service or an office relating to a factory or premises etc. etc. and makes specific exclusion with respect to certain services in the exclusion clause (A) to (C), being input service for construction or execution contract of a building or civil structure etc. There is no specific exclusion for the input services in dispute and the same have been received and used in providing output services. Accordingly, prays for allowing this ground. Learned Authorised Representative for Revenue have relied upon the impugned order and supports the disallowance.

10.1. Having considered the rival submissions, we find that all the aforementioned services have been used by the appellant in providing output service and thus eligible under the definition of input service under Rule 2(l) of CCR; from the facts on record, we find that the appellant have already reversed an amount of Rs.59,43,283/- out of disputed credit for the period October 2007 to December, 2012; we find that the learned Commissioner has erred in holding that banking and financial services, credit rating services are not used for providing output services; we find that such services are required to raise funds, which is essential to carry out the business of the appellant and hence the same is held to be eligible service; as regards the allegation that certain processing charges/banking service was related to GMR Infrastructure Limited (subsidiary company) as reflected in additional credit arrangement letter of the bank, whereas the invoice is in the name of the appellant towards loan processing fee; we hold that as the appellant company benefits from profitability and working of subsidiary company, thus the banking and financial charges are eligible input service in respect of the appellant. We find that there is no specific reason assigned for disallowance of Cenvat credit for other input services by the learned Commissioner. Accordingly, we allow this ground in favour of the appellant and against the Revenue.

11. The next ground regarding imposition of penalty under Section 78 of the Finance Act for both the periods in dispute; Learned Commissioner has observed that the appellant failed to disclose the taxable activity of construction of toll plaza, administrative building etc to the department in their ST-3 returns, with an intention to evade payment of service tax and hence extended period of limitation is invocable; it is further held that the appellant have not disclosed availment of Cenvat credit in respect of input services and hence suppressed the facts; Learned Counsel states that such facts are not obtaining in the facts of their case; it is admitted fact that they have filed Returns and maintained proper books of account and registers; the whole demand is only by way of change of opinion in the course of audit; further, appellant have admitted substantial amounts and reversed the same on being objected to by Revenue under Rule 6(3) of Cenvat Credit Rules as well as disallowance in part of the Cenvat Credit; further, under the facts and circumstances extended period of limitation is not attracted, there being no case of fraud, suppression etc; accordingly, penalty under Section 78 is also liable to be set aside; Learned Counsel further points out that Section 78 was not invoked in the show cause notice dated 31.5.2014 for the subsequent period. We are not inclined to accept the argument of Learned Authorised Representative reliance on the impugned order for upholding of the penalty.

12. Considering the rival contentions, we find that no case of suppression, fraud, etc. is made out against the appellant; further, admittedly appellant have maintained proper books of accounts and registers of the transactions and also regularly filed the ST-3 returns and paid the admitted taxes; further, appellant deposited substantial amounts by way of reversal or deposit at the time of audit which have been appropriated in the impugned order; Amount reversed/paid matches the disallowed amount; under such circumstances, we hold that penalty under Section 78 is not attracted. Accordingly, the same is set aside; penalty under Section 77(2) of the Finance Act is also not attracted, hence set aside.

13. Another ground raised is in regard to classification of service for the period from 1.6.2007, it appears that Revenue holds that the services to be classifiable as 'construction service' under Section 65(105)(zzq), where as per the appellant holds the same to be classifiable under the 'works contract service' defined under Section 65 (105)(zza) of the Act; considering the rival contentions, we find that admittedly the appellant have executed works contract along with materials, thus, under the facts and circumstances, the construction services are classifiable under 'works contract service' and not as construction service. We hold that under the facts and circumstances, penalty imposed under Rule 15(3) of CCR is also set aside.

14. In the result, in view of the discussion above, we hold that service tax demand(s) are set aside, save & except the portion not disputed; we hold that extended period of limitation is not invocable and consequently, we set aside all penalties. Accordingly, both appeals are allowed as indicated above with consequential benefits.

(Pronounced in Court on 17/06/2020)

(Anil Choudhary)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

RM