CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

Regional Bench – Court No. III

Service Tax Appeal No.795 of 2010

(Arising out of Order-in-Original No.23/2010 dated 30.11.2010 passed by the Commissioner of Central Excise, Chennai-I)

M/s.A.R. Foundations Private Ltd. : **Appellant**
'Acropolis Building', Ground Floor,
148, Dr.Radhakrishnan Salai,
Chennai 600 004.

VERSUS

The Commissioner of GST & CE, **: Respondent**
Chennai North Commissionerate
26/1, Mahatma Gandhi Road,
Nungambakkam
Chennai 600 034.

<u>APPEARANCE</u>:

Shri M.N. Bharathi, Advocate
For the Appellant

Shri M. Jagan Babu, AC (AR)
For the Respondent

CORAM : HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

<u>FINAL ORDER NO. 40680 / 2020</u>

DATE OF HEARING: 03.03.2020

DATE OF DECISION: 03.03.2020

PER : SULEKHA BEEVI C.S

Brief facts of the case are that the appellant constructed multi storied commercial complex which was leased out to various companies. They started construction of the project during July 2004 and it was completed in the last quarter of 2006-07. Department was of the view that renting of immovable property is leviable to service tax only w.e.f. 1.6.2007. The credit availed by the appellant on inputs and input services prior to this date is not eligible. It was also noticed that though they are engaged in providing output service, they had availed credit on Basic Customs Duty (BCD) as well as Special Additional Duty (SAD). Further, credit was availed on ineligible documents. Show cause notice was issued for the period 2004-05 to 2008-09 (upto 31.03.2009) alleging wrong availment of credit on above grounds as well as proposing to recover the same along with interest and for imposing penalties. After due process of law, the original authority confirmed demand, interest and imposed penalties. Aggrieved by such order, appellants are now before the Tribunal.

2.1 On behalf of the appellant, Ld. Advocate Shri M.N. Bharathi submitted that appellant had obtained service tax registration for providing renting of immovable property service on 27.06.2007. The multi-storied commercial complex is rented out to tenants and was constructed during the period from July 2004 to 2006-07 and the appellant had availed credit on inputs and various input services used for construction of this commercial complex. Even though appellant had not provided any output service during the period when the credit was availed, since the credit has been availed for providing the output service which is taxable, w.e.f. 1.6.2007, the credit is eligible. He submitted that the issue stands settled by the

Tribunal in the case of *Entertainment World Developers Pvt. Ltd. and Others Vs CCE & ST* – 2019-TIOL-3057-CESTAT-DEL.

2.2 With regard to the second issue as to the availment of credit on BCD and SAD, Ld. counsel submitted that they had availed credit under bonafide belief that it is eligible. That there is no suppression of facts with intention to evade payment of duty; that therefore demand raised invoking the extended period may be set aside.

2.3 The third issue is with regard to the demand in respect of credit availed on ineligible documents. He prayed that the appellant would be able to establish their claim, for which the matter may be remanded.

3.1 Ld. A.R Shri M. Jagan Babu appeared and argued on behalf of the department. With regard to the first issue, he submitted that prior to 1.6.2007, the activity of renting of immovable property was not taxable service and therefore credit availed on the inputs and input services for the disputed period used for construction of commercial complex has been rightly disallowed by the authorities below. It is also submitted by him that the appellants have used MS angles and such other steel items for construction of the complex which is not eligible for credit as per the definition of 'inputs'. For this, he relied upon the decision of Larger Bench in the case of *Vandana Global Ltd. Vs CCE & Cus., Raipur* - 2010 (253) ELT440 (Tri.-LB).

3.2 With regard to credit availed on BCD as well as SAD, Ld.A.R submitted that sub-clause (vii) and (viia) of Rule 3 (1) of the Cenvat Credit Rules expressly states that credit is not eligible on BCD as well as SAD.

3.3 Ld. A.R adverted to the discussions made by the authority in para 7.5 to contend that the authorities below have rightly disallowed the credit availed on ineligible documents. Appellant has availed credit on letterheads of service provider, statement of accounts prepared by the assessee as well as service provider and such other documents. These documents do not contain any details of payment of service tax, registration of the service provider etc. These are not documents prescribed under rule 9 (2) of the CCR; that the appellants are not eligible for this credit. He submitted that the impugned order requires no interference.

4. Heard both sides.

5. The first issue is with regard to the credit availed on inputs and input services for construction of the commercial complex. The said issue as to whether the credits availed on inputs and input services used for construction of the commercial complex which is used for providing taxable service of renting of immovable property has been decided by the Tribunal in the case of *Entertainment World Developers Pvt. Ltd. and Others Vs CCE & ST* (supra). The relevant paras of the decision read as under :

"7. The issue to be decided in these cases is as to whether the appellants are eligible to avail the Cenvat credit on the services supplied to them by their job workers/contractors for which raw materials have been supplied by the appellant. The demand in question is prior to the amendment of the provisions of input services under the Credit Rules i.e. prior to 2011. The issue is no longer res integra in view of the decision of Hon‟ble Andhra Pradesh High Court in the case of Sai Sahmita Storages (P) Ltd. referred (supra) which was subsequently followed by the various other decisions as enumerated in para 4.1. In all these cases, the issue was identical and it was held by various Tribunals/High Court that in such a situation, the appellant would be entitled for the benefit of Cenvat credit prior to amendment. In case of DB Malls, this Tribunal vide its Final Order No. 51699/2018 dated 20.4.2018 held as under:

> "6. Regarding the capital goods, the matter has come up before the Tribunal in the case of DLF Ltd. V/s CCE & ST, Delhi, Final Order No. 62037-62030/2018 dated 22/03/2018 where the issue pertaining to the capital goods for input service used for providing the output services namely renting of immovable property service, it was observed that the appellant is entitled for availing Cenvat Credit. The said order is reproduced below:-
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> 3. Considering the fact that the said issue has already been examined by this Tribunal in the case of DLF Cyber City Developers Ltd., vide Final Order No.60018/2018 dated 03/01/2018, this Tribunal has observed that the inputs, capital goods and input services used by the appellants for providing output services, in terms of Rule 2 (a) (ii) of the Cenvat Credit Rules, 2004, the appellant is entitled to avail Cenvat Credit. Further, this Tribunal observed as under:
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> "It is undisputed that the services are utilized for bringing to existence building which is used by the appellants for hospitability business and is used for rendering output services like mandap keeper and health club and fitness centre and dry cleaning service and internet café services. It is an unimaginable that a hotel can render these services without a building in its place. In our considered view, the input services are availed by the appellant in respect of works contract services, project management services and architectural professional services used for construction of a building, which subsequently is put into use for rendering taxable output services. We find that the adjudicating authority was in error to rely upon the Board Circular No.98/1/2008-ST dated 04/01/2008 in as much, the definition of input services during the relevant period does not bar availment of Cenvat Credit all input services. In order to appreciate correct position of law, the definition of input services under Rule 2 (1) of the Cenvat Credit Rules, 2004 as was during the relevant period of these cases is reproduced:
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> Input service means any service, -
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> (i) used by a provider of taxable service for providing an output service; or
> (ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal, and includes services used in relation to setting up, modernization, renovation or repairs of a factory premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage up to the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and 3 Appeal No.ST/3089/2012 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.
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> It can be seen from the above reproduced sub-rule, that input services includes the services used in relation to setting up, modernization, renovation of premises of provider of output services. In the case in hand, the definition is reproduced as above categorically will apply and the clarification given by the Board in CBEC Circular dated 04/01/2008 is going beyond the definition as reproduced is herein above. We find that similar issue as to eligibility to avail the CENVAT credit on design and engineering of pipe line services rendered by the pipeline laying of contractors, was denied in the case of Reliance Gs Transportation Infrastructure Ltd. (supra) , holding that these services were utilized for bringing into existence an immovable property. The Bench after considering the definition of input services, held that the provisions of Section 2 (1) of the Cenvat Credit Rules, 2004 very clearly indicate eligibility to avail Cenvat Credit of the service tax paid on these services"
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> 4. As the issue has already been decided by this Tribunal holding that any inputs, capital goods or input service used for providing output services, namely, renting of immovable property service, the assessee is entitled to avail Cenvat Credit."

7.1 Similar view has been taken by this Tribunal in the case of DLF Ltd. Vs. CCE & Service Tax in Final Order No. 62037- 62038/2018 dated 22.3.2018.

7.2 Similar views were taken in other cases, and for the brevity sake we are not dealing with each one in isolation. However, we would like to reproduce the Hon‟ble Andhra Pradesh High Court in the case of M/s Sai Samita Storage supra. The relevant paragraph of the decision of Hon‟ble High Court is reproduced below :

> "9. There is no dispute in these cases, that the assessee used cement and TMT bar for providing storage facility without which storage and warehousing services could not have been provided. Therefore, the finding of the original authority as well as the appellate authority are clearly erroneous, which was correctly rectified by the CESTAT in so far as the levy of penalty under Rule 15(2) of the Rules is concerned, unless and until there is a finding that there was suppression of fact, and irregular claim of CENVAT credit, the question of levying penalty under Rule 15(2) of the Rules does not arise. In that view of the matter, the order levying penalty was rightly set aside by the CESTAT.
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> 10. These two appeals, for the above reasons are, accordingly, dismissed. No costs."

7.3 We also find that the reliance placed by learned AR in the case of M/s Bharti Airtel, BSNL, Vodaphone Mobile is misplaced as the same is not directly related the issue at hand. In all these the issue was regarding the immovability/movabiltity of transmission towers which was in different context all together. However, we find that the reliance placed on the various decisions by learned Advocate on behalf of the appellant, are directly on the issue regarding the availability of Cenvat credit in construction of Mall on inputs, capital goods and input services and capital goods used for construction of shopping mall and payment of service tax on the various services rendered by the mall after been operationalised, using these credit lying in balance.

8. In view of above we set aside the impugned order and allow the appeals with consequential benefit. We also find that learned AR has placed reliance that the services were not directly provided by the appellant, but was through their contractors. It is argued that these contractors were employed by the appellant who were provided with the raw materials by the appellant. Also the contractors have paid the service tax and billed to the appellant. Hence, we find that the appellants have rightly taken the Cenvat credit as per Credit Rules. It is of no relevance as to whether the construction has been done through the contractors or not as long as service tax is paid, the appellant is entitled for cenvat credit and subsequent utilisation thereof for payment of service tax.

9. We also accept the request of ITPIL regarding the refund, if any, to the Treasure Island Private Lt d. on account of the fact that the pre-deposit has been made on behalf of the appellant (EWDPL) by them (ITPIL) with due intimation to the department and the department has also accepted the same in writing. Therefore, we direct them the pre-deposit should be refunded to the M/s Treasure Island Private Limited in place of the appellant M/s EWDPL."

The judgement in that case had relied upon the decision rendered in *DLF Cyber City Developers Ltd*. - 2018-TIOL-743-CESTAT-CHD. Following the said decision, we are of the considered opinion that the credit disallowed on inputs and inputs services used for construction of commercial complex is unjustified. The appellants are eligible for credit. The demand in respect of this set aside.

6. The demand confirmed in the impugned order also includes the credit availed on BCD and SAD to the extent of Rs.37,77,727/-. As per sub clause (vii) and (viia) of Rule 3 (1) the credit is not eligible on BCD as well as SAD. The authorities have rightly disallowed the credit and the same is upheld.

7. With regard to the credit disallowed to the tune of Rs.2,18,079/- and Rs.9,04,709/- availed on ineligible documents in para 7.5 of the impugned order, the Commissioner has stated that the appellant has availed credit on letterheads issued by the service provider, statement of accounts prepared by the appellant or by the service provider and other documents which do not contain any details which are required to ascertain whether the service tax has been paid or the services have been availed. From the discussion in this paragraph, we are able to conclude that the documents on which the credit has been availed are ineligible and not in accordance with Rule 9(2) of CCR 2004. We therefore hold that the credit in this regard is ineligible and uphold the same.

8. Ld. Counsel for the appellant has also argued on the ground of limitation with regard to the credit availed on BCD and SAD. Since the statutory provisions itself states that the credit is not eligible, the appellants who is a service provider ought not to have availed credit. We find no reasons to hold that the invocation of extended period in this regard is improper. From the discussions made above, the impugned order is modified to the extent of allowing credit availed in respect of inputs and input services used for construction activities. The demand & interest, and penalties in respect of credit availed on Basic Customs Duty and Special Additional Duty as well as credit

availed on ineligible documents are upheld. The impugned order is modified as indicated above.

The appeal is partly allowed on above terms.

(Dictated and pronounced in open court)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

(ANIL G. SHAKKARWAR)
MEMBER (TECHNICAL)

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