CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>New Delhi</u>

PRINCIPAL BENCH – COURT NO. 3

Service Tax Appeal No. 53875 Of 2018

[Arising out of OIA No. 50-ST/APPEAL-1/EAST/2018 dated 10.09.2018 passed by the Commissioner (Appeals) of Central Tax, GST and Central Excise, New Delhi]

M/s Exotica Developers : **Appellant (s)**
228, basement, jagriti enclave,
Anand Vihar, New Delhi

Versus

Commissioner of Central Goods, Service Tax, Central Excise-Delhi East : **Revenue (s)**
C. R. Building, I.P. Estate East Delhi, New Delhi

<u>APPEARANCE:</u>
Shri R. S. Sharma, Advocate for the Appellant
Shri S. K. Ray, Authorized Representative for the Department

CORAM :
HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER No. 58595/2024

Date of Hearing:10.07.2024

Date of Decision:19.09.2024

<u>HEMAMBIKA R. PRIYA</u>

The present appeal has been filed by M/s Exotica Developers (hereinafter referred to as the appellant) to challenge the Order-in-Appeal No. 50-ST/APPEAL-1/EAST/2018 dated 10.09.2018 passed by the Commissioner (Appeals), New Delhi wherein the demand of Rs. 52,19,706/- has been upheld along with penalties.

2. The brief facts of the case are that the appellant is engaged in providing *inter alia* construction of residential complex service, works contract service, preferential location of external/internal development of complex service. During the course of audit for the period 2010-11 to 2012-13 (upto June 2012), the department observed that the appellant had availed/taken Cenvat Credit in respect of input services (i.e. advertisement services, architect services, commission services, landscaping services, housekeeping & maintenance services, postage & courier services, professional services, repair & maintenance services, telephone/mobile services and watch & ward services) while also availing abatement against construction services being provided by them. By virtue of Notification No. 01/2006-ST dated 01.03.2006, no Cenvat Credit was admissible in case abatement was being availed. During the period 2010-11 to 2012-13 (upto June 2012), they had availed CENVAT Credit of Rs.52,19,706/- on various input services. Therefore, a show cause notice (SCN) dated 23.04.2016 for the period 2010-11 to 2012-13 (upto June 2012) was issued to the appellant for demand and recovery of CENVAT Credit wrongly taken and utilized with interest and penalty. The said SCN was adjudicated vide Order in Original No. 15/PA/ADC/GST/DE/2017-18 dated 12.03.2018 wherein the recovery CENVAT Credit of Service tax of Rs. 52,19,706/- under Section 73(1) of the Finance Act, 1994, along with applicable interest was confirmed and penalties of Rs. 10,000/-and Rs. 52,19,706/- was imposed under Sections 77 and 78 respectively of the Finance Act, 1994. Aggrieved by the said order, the appellant preferred an appeal

before Commissioner (Appeals), who rejected their appeal by upholding the order dated 12.03.2018 passed by the adjudicating authority. Hence, the present appeal.

3. The learned counsel for the appellant submitted that the period in dispute is July 2010 to June 2012 whereas the SCN was issued on 23.04.2016. The Ld. Counsel submitted that as the appellant had been filing his returns regularly, the demand was time-barred and the invocation of extended period does not arise. He further submitted that there was no suppression of facts with an intent to evade payment of Service tax. Hence the extended period for demand under proviso to Section 73(1) of the Finance Act, 1994 is not applicable and the demand is not sustainable on this ground alone. In support of his submission, Ld. Counsel relied upon the decision of the CESTAT, Principal Bench, New Delhi in case of M/s GD Goenka Private Limited Versus Commissioner CGST Delhi South vide Final Order No. 51088/2023 dated 21.8.2023.

3.2 Ld. Counsel for the appellant further submitted that the lower authorities had failed to appreciate the undisputed fact that the entire Service tax on construction service was paid in cash as per copies of challans showing tax payment under Accounting Code of Construction of Complex Service and no credit of input construction services was availed/utilized by the Appellant. He further submitted that no credit of input service of construction or any input service attributable to construction activity was availed by the appellant. Learned Counsel submitted that the appellant was engaged in providing two separate categories of services:(i) Construction of Complex Service falling under Section 65(105) (zzzh) of the Finance Act, 1994 on which service tax was paid on abated value of the cost of flat and no credit of input service was availed on this service during the period 2010-11 to 2012-13 (Up to June 2012) (ii) Maintenance & Repair service, administrative charges and other charges charged from customs, special services by Builders and External Internal Development of Complex & Preferential Location Service falling under Section 65(105)(zzzzu) of the Finance Act, 1994 on which service tax was paid on full value charged at full rate for charges such as administrative charges, Development charges, PLC etc. The credit of non-construction input services was availed under this category of services and was utilized for payment of service tax on this output service alone.

3.3 Learned Counsel further submitted that the lower authorities failed to appreciate that when multiple output services were provided by the appellant, the availment of credit was restricted only on Construction of Complex service under Notification No. 01/2006-ST dated 01.03.2006. There was no restriction on availing credit under other category of services and the amount of input service credit availed utilized under Construction Service (zzzh) is NIL during the period 2010-11 to June 2012. Since no credit was availed on input services for payment of service tax on output Construction service, the condition of non- availment of credit as provided under Notification No.1/2006-ST has been fulfilled by the appellant. There is no contravention of the conditions of said Notification. On this ground alone the demand was not justified and is liable to be dropped as the demand is based on assumption and presumption. He further stated that the SCN has no legs as it does not deny the abatement from value for payment of construction of complex service. Had it been a case of violation of the conditions of Notification No. 01/2006-ST by the appellant, the Department could have denied the abatement and demanded tax on full value; which is not the case. Notification No.01/2006-ST cannot be made a tool for denying credit on input services that too when entire service tax under construction of complex service was paid in tax and there is no demand of tax and claim of Abatement by the appellant has not been disputed. All the services on which credit was availed are covered within ambit and scope of definition of "input service" and have been used in providing output non-construction services as already submitted in the grounds of appeal and rulings relied upon in appeal and the credit has been correctly availed being eligible credit.

3.4 Ld. Counsel for the appellant submitted that since the demand of service tax itself is not sustainable so, the demand of interest is also not justified. The imposition of penalty does not arise in the present case as it is not a case of non-payment or evasion of duty by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Finance Act, 1994 with intent to evade or of the rules made thereunder with intent to evade payment of duty. Hence the penal provisions under Rule 15(3) and

Section 78 and Section 77 are not applicable on facts and circumstances of the case.

4. Learned Authorized Representative for the Department reiterated the findings in the impugned order and submitted that abatement in respect of construction services under Notification No. 1/2006 dated 01.03.2006 and simultaneous CENVAT Credit is not permissible. The appellant had paid Service Tax for Construction of Residential Complex Service in cash without availing CENVAT Credit and appellant availed CENVAT Credit for input services like advertisement, architect, commission, landscaping, housekeeping, maintenance and repair service, postal services, professional services, telephone & mobile services, and security services for Preferential Location and Development of Complex Service. The nature of the service claimed by the appellant, described as 'Preferential Location or External/Internal Development of Complexes,' is considered taxable but does not qualify for input service credit because it does not require the use of input services as defined by Rule 2(1) of the Cenvat Credit Rules, 2004. This is because no input service is exclusively required for the provision of output services like preferential location, club membership, or other special services.

4.1 Learned Authorized Representative further submitted that the definition of "input service" includes services used by a provider of taxable service for providing an output service, or by a manufacturer in relation to the manufacture of final products. However, the services in question do not meet this definition as they are not exclusively used in the provision of the specified output services. The term "output service" is defined in Sub-rule 2(p) of the Cenvat Credit Rules, 2004, as any taxable service provided by a service provider to a customer, excluding certain services referred to in the Finance Act. If a person liable for paying service tax does not provide any taxable service or does not manufacture final products, the service for which they are liable to pay service tax is deemed to be the output service. Based on the conditions specified in the notifications and the definitions of Input and output services, the appellant's claim for Cenvat credit on input services used for providing construction of complex services and not for providing 'preferential location service' is found to be invalid. The appellant has not provided details on how these services were used exclusively for providing 'preferential location or external/internal development of complexes service.' The appellant can avail either abatement or CENVAT Credit, not both. Notification conditions must be construed strictly and no CENVAT Credit is admissible if abatement benefit is claimed. The appellant claimed that input services used were for Preferential Location and Development of Complex Service, not for construction services. In support of his submission, Ld. AR relied upon the decision of **M/s Welcome Hotel Vadodara vs. CCE & ST-Vadodara-I reported as 2019 (5) TMI 1410-CESTAT Ahmedabad** wherein it was held by the Tribunal that the appellant's claim is that these services are in the nature of common input services and have a direct or indirect nexus with all the activities undertaken by the hotel, however, the appellant's claim that they have not availed credit for Input services used in the provision of Mandap Keeping Services is not upheld, as there is no merit in this claim.

4.2 Ld. AR further submitted that the demand for wrongly availed CENVAT Credit for 2010-2013 is rightly upheld and interest is recoverable under Section 75 of the Finance Act, 1994, for wrongly utilized CENVAT Credit. Penalty under Section 78 is justified due to suppression of facts with intent to evade Service Tax.

5. We have heard the Ld Counsel for the appellant and the LD AR for the department.

5.1 Before considering the merits of the case, we take up the submissions of the Ld. Counsel that the said show cause notice is time barred. We note that the period of dispute in the instant SCN is June 2010-July, 2012, whereas the said notice is dated 23.04.2016. We also note that the SCN has relied on the ST-3 returns for demanding duty which had been filed by the appellant. It has been submitted before us that the appellant was regularly filing his returns, wherein the availment of credit was duly shown, as indicated in the table as under:

Period	Date of Filing of ST-3 Return	Last Date for SCN
04/2010 to 09/2010	03.08.2011	03.08.2012
10/2010 to 03/2011	03.08.2011	03.08.2012
04/2011 to 09/2011	17.10.2011	17.10.2012
10/2011 to 0382012	23.04.2012 `	23.04.2013
04/2012 to 06/2012	20.11.2012	20.11.2013

Once when the ST-3 returns were filed regularly, the Department cannot allege fraud, collusion, wilful mis statement or suppression of facts, and invoke the extended period of time. In the instant case, we observe that the Appellant has regularly filed ST-3 returns consequent upon obtaining Service tax registration. the original authority has failed to give a finding to the effect that considering the facts and circumstances of this case, how extended period is invocable. The impugned order notes that the extended period is invokable as the availment of Cenvat Credit came to the knowledge of the officers during the audit of the records of the appellant. There has been no evidence led by the Department of any positive act of suppression or fraud by the appellant. In this case the Appellant has filed returns regularly and disclosed all information to the department. Thus, we hold that extended period of limitation is not invocable in this case.

5.2 This issue was considered by a Division Bench of the Tribunal in **GD Goenka Private Limited Versus Commissioner CGST Delhi South vide Final Order No. 51088/2023 dated 21.8.2023** wherein the Tribunal held as follows**: -**

> "24. Thus, the CBEC took a conscious decision that detailed scrutiny of the Returns should be done only in some cases selected based on some criteria. In those Returns, where detailed scrutiny is not done by the officers some tax may escape assessment which may not be discovered within the normal period of limitation. As a matter of policy, the CBEC, took such risk and the loss of Revenue is a result of the policy.
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> 25. To sum up:

a) The appellant assessee was required to file the ST 3 Returns which it did. Unless the Central Excise officer calls for documents, etc., it is not required to provide them or disclose anything else.

b) It is the responsibility of the Central Excise Officer with whom the Returns are filed to scrutinise them and if necessary, make the best judgment assessment under section 72 and issue SCN under Section 73 within the time limit. If the officer does not do so, and any tax escapes assessment, the responsibility for it rests on the officer.

c) Although the Central Excise Officer is empowered to scrutinise all the Returns call for records and if necessary, make the best judgment assessment, if, ST/51787/2022 as per the instructions of CBIC, the officer does not conduct a detailed scrutiny of same Returns and as a result is unable to discover any short payment of tax within the period of limitation, neither the assessee nor the officer is responsible for such loss of revenue. Such a loss of Revenue is the risk taken by the Board as a matter of policy.

d) Extended period of limitation cannot be invoked unless there is evidence of fraud or collusion or wilful misstatement or suppression of facts or violation of the provisions of Act or Rules with an intent.

e) Intentional and wilful suppression of facts cannot be presumed because (a) the appellant was operating under selfassessment or (b) because the appellant did not agree with the audit and claimed that CENVAT credit was admissible; or (c) because the appellant did not seek any clarification from the Revenue; or (d) because the officer did not conduct a detailed scrutiny of the Returns and the availment of CENVAT credit which is alleged to be inadmissible and was discovered only during audit.

26. We, therefore, find in favour of the appellant on the question of limitation. As the entire demand except what has been conceded by the appellant falls beyond the value period ST/51787/2022 of limitation it is not necessary to examine the merits of the case."

5.3 Similarly, the CESTAT Delhi vide its order dated 13.12.2023 in the matter of **M/s International Air Charter Vs. Commissioner of Central Tax (Appeals -II), Delhi in Service Tax Appeal No. 52064 of 2018**, allowed the appeal of the assessee on limitation, finding that mere suppression of facts, as alleged by the department, is not enough and there must be a deliberate and wilful attempt on the part of the assessee to evade payment of duty. In the absence of any intention to evade payment of service tax, which intention should be evident from the materials on record or from the conduct of the assessee, the extended period of limitation cannot be invoked.

6. We note that as the entire demand in the instant case is for the extended period. In view of the above discussions, we hold that the

show cause notice dated 23.04.2016 is barred by time, as extended period is not invokable in the facts and circumstances of the present appeal. Consequently, we are not going into the merits of the case.

7. In view of the above discussions, the impugned order is set aside and the appeal is allowed

(Order pronounced in the open Court on 19.09.2024)

(BINU TAMTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

G.Y.