CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH-COURT NO. 4

Service Tax Appeal No. 52325 of 2016-DB

[Arising out of Order-in-Original No. DLISVTAX001COM0331516 dated 29/03/2016 passed by the Pr. Commissioner of Service Tax, New Delhi]

M/s Vital Constructions Private Limited ....**Appellant**
M-11, Middle Circle
Connaught Circus, New Delhi

Versus

Pr. Commissioner of Service Tax, Delhi-I ....**Respondent**
17-B, IAEA House, IP Estate, MG Marg
New Delhi

<u>Appearance</u>
Shri B.L. Narsihman, Advocate, for the appellant
Shri Vivek Pandey, DR for the respondent

CORAM: **Hon'ble Mr. Bijay Kumar, Member (Technical)**
Hon'ble Ms. Rachna Gupta, Member (Judicial)

Date of Hearing/Decision: 19.06.2019

<u>FINAL ORDER NO. 50843 /2019</u>

<u>Per Rachna Gupta:</u>

1. The present appeal is preferred against the Order-in-Original No. 001 dated 29/03/2016.
2. The facts in brief relevant for the adjudication are that the appellant is providing the services under the category of 'Real Estate Agent Service' 'Maintenance or Repair Service' and 'Renting of Immovable Property Service'. They developed commercial properties in gurgaon

and those properties were thereafter rented by the appellants. The appellants availed the Cenvat Credit of input services received by it during the course of construction of immovable property and utilised the same for the payment of service tax on renting of 'Immovable Properties Service' and 'Maintenance or Repair Services'. However, the Department vide a Show Cause Notice No. 72 dated 4/10/2018 objected the availment of Cenvat Credit and proposed the non-utilisation thereof for the discharge of subsequent liability during the period 2008-09 to 2011-12. The said proposal was confirmed by Order-in-Original. Being aggrieved the appellant is before this Tribunal.

3. We have heard Mr. B L Narisihman, Ld. Advocate for the appellant and Shri Vivek Pandey Ld. AR for Revenue.

4. It is submitted by ld. Advocate on behalf of the appellant that the issue has been settled by almost all the benches of this Tribunal in favour of the assessee. The recent Judgment of this Tribunal vide **Final Order No. 50536-50538/2016 dated 16.04.2019** in the case of **Entertainment World Developers Private Limited vs. CCE** has been impressed upon. The appeal is, accordingly, prayed to be allowed.

5. Ld. DR for Revenue, however, reiterated the findings contained in the impugned order.

6. After hearing both the parties and perusing the records as well as the case laws relied upon by the appellant we are of the opinion that the issue to be decided in these cases is as to:

Whether the appellants are eligible to utilize the Cenvat credit on the services supplied to them during construction of mall for discharging their service tax liability after the constructed mall was rented out, on the maintenance & repair services.

7. 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 as [2011 (2) TMI-400 (AP) CCE, Vishakhapatnam-II]** which was subsequently followed by the various other decisions. 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 for post amendment period also, 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:-

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:

> "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:

Input service means any service, -

(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.

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"

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. In view thereof and the Final Order dated 07/04/2009 (as relied upon), we have no reason to differ with the findings allowing the availment of the Cenvat Credit for being utilised for the payment of service tax on provision of output services of 'Renting of Immovable Property. Order under challenge is, therefore, set aside. Appeal stands allowed with consequential benefit, if any, to also be given to the appellant.

(Dictated and pronounced in open court)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

(BIJAY KUMAR)
MEMBER (TECHNICAL)

Tejo