CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD

REGIONAL BENCH - COURT NO. – I

Service Tax Appeal No. 27459 of 2013

(Arising out of **Order-in-Original** No.47/2013-Adjn (Commr) S.T. dated 28.06.2013 passed by Commissioner of Customs & Central Excise, Hyderabad)

Intime Properties Ltd., .. **APPELLANT**
Mindspace, Cyberabad,
Survey No. 64(part),
APIIC Software Layout,
1st Floor, Building No. 10,
Madhapur, Hyderabad,
Telangana – 500 081.

VERSUS

Commissioner of Central Excise & Service Tax Hyderabad – IV .. **RESPONDENT**
Posnett Bhavan,
Tilak Road,
Ramkoti, Hyderabad,
Telangana – 500 001.

APPEARANCE:
Shri S S Gupta, CA for the Appellant.
Shri AV L N Chary, Authorised Representative for the Respondent.

CORAM: **HON'BLE Mr. ANIL CHOUDHARY, MEMBER (JUDICIAL)**
HON'BLE Mr. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30383/2023

Date of Hearing:17.07.2023
Date of Decision:10.11.2023

[ORDER PER: ANIL CHOUDHARY]

The issues in this appeal is whether input service credit on construction service ₹ 8,95,58,018/- have been rightly allowed on the construction services availed for construction of commercial complex, for earning rent which is taxable as output service. Further issue is whether service tax have been rightly demanded on the electricity and water charges recovered from the tenants by way of reimbursement on actual basis.

2. The brief facts are that the Appellant is engaged in the business of renting of commercial space and is registered under the category of renting of immovable property service and maintenance or repair service. The Appellant have constructed a commercial building during the period October 2007 to March 2010 and they have availed Cenvat Credit of construction services received. The Appellant have let out various units in the said multi-storey buildings/office complex to various tenants. The Appellant is paying service tax under the category of renting of immovable property service. The Appellant is also paying service tax under the maintenance or repair service on the amount of maintenance recovered from the tenants. The Appellant also recovers reimbursement of electricity and water charges from the tenants on actual basis. On this amount of reimbursement the Appellant was not paying service tax.

3. On objection by Revenue with regard to Cenvat Credit taken on the construction services, the Appellant reversed an amount of ₹ 8,95,58,018/- and informed the Department vide letter dated 03.01.2012. Subsequently show cause notice dated 31.10.2012 was issued, proposing to deny Cenvat Credit as aforementioned in view of Board Circular No. 96/7/2007–ST dated 23.08.2007 as amended by Circular No. 98/1/2008–ST, which provided that right to use immovable property is levied to service tax under renting of immovable property. Whereas commercial or industrial construction service or works contract service is an input service for the output - namely immovable property. Immovable property is neither subjected to Central Excise duty not to service tax. Input credit of service tax can be taken only if the output is a service liable to service tax or goods liable to excise duty. Since immovable property is neither service nor goods, input credit cannot be taken.

4. It is further alleged that the Appellant have collected water and electricity charges from the tenants during the period April 2008 to March 2012 and have collected a total amount of ₹ 19,86,07,512/-, on which they are liable to pay tax under the head 'management & repair service'. Further penalty was also proposed under Rule 15 of Cenvat Credit Rules, Section 76 and 78 of the Finance act.

5. The show cause notice was adjudicated on contest vide impugned Order-in-Original dated 28.06.2013 confirming the proposed amount of Cenvat Credit and also appropriating the same with the matching amount

already reversed by the Appellant. Further, proposed demand of service tax on electricity & water charges totalling ₹ 2,06,58,119/- was also confirmed. Further equal amount of penalty was imposed under Section 78 read with Rule 15 of CCR for both the demands. Penalty was also imposed under Section 76 of the Act that the rate of 200 per day or 2% of tax per month, which is higher subject to the maximum amount of tax.

6. Being aggrieved, the Appellant is in appeal before this Tribunal. Assailing the impugned order the Learned Counsel for the Appellant Mr S S Gupta, inter alia urges that following the Board Circular No. 98/1/12008-ST, the Commissioner have disallowed the amount of Cenvat Credit with respect to construction services for the period August 2007 to March 2010.

7. The Learned Commissioner have relied upon the aforementioned Board Circular and also on the Single Member Bench ruling of this Tribunal in M/s Venus Investments reported at [2012 (28) STR 174 (Tribunal - Ahmd)]. The said Judgement - Venus Investments is no more a good law, as the same was passed without referring to the Judgement of Hon'ble High Court in M/s Sai Samhita Storages (P) Ltd., reported at [2011 (270) ELT 33 (AP)] and also the judgements of Division Bench of this Tribunal in Navaratna S.G. Highway Prop (P) Ltd., reported at [2012 (28) STR 166 (tri-Ahmd)]. The Learned Counsel for the Appellant further urges that the aforementioned circulars have been read down and have been held to be against the provisions of Cenvat Credit Rules and under similar facts and circumstances Cenvat Credit have been allowed on the construction services namely –

(i) City Centre Mall Nashik Pvt Ltd,. [2017–TIOL–4322–CESTAT–MUM]

(ii) Maharashtra Cricket Association [2016 (41) STR 833 (Tri-Mumbai)]

(iii) United States Pharmacopeia India Private Ltd.,
[2017 (3) GSTL 301 Tri-Hyd]

(iv) Oberoi Mall Ltd., [2017 (47) STR 292 (Tri – Mumbai)].

(v) VITP Private Limited. Final Order No. A/30070–30073 dated 08.07.2022.

It is further urged that construction service was specifically included in the definition of input service prior to April 2011. Prior to 01.04.2011 the definition of input services in Rule 2(ℓ) of CCR specifically covers any service which is used in relation to setting up, modernisation, renovation, repair of the premises of the provider of output service. In the facts of the present case, Appellant have received works contract services for setting up the commercial premises, from where the Appellant is providing the taxable service – renting of immovable property service. Therefore construction service is specifically covered in the definition of input service prior to 01.04.2011. The exclusion clause is introduced only with effect from 01.04.2011. Further Rule 6(5) of CCR specifically mentions construction service as defined under Section 65(105)(zzq). Further Circular No. 137/203/2007–CX 4 dated 01.10.2007, specifically provides that the service of construction of office of service provider, are to be treated as input service for the purpose of availment of Cenvat Credit. Further Circular No. 943/4/2011-CX dated 29.04.2011 have clarified that credit with respect to the services received prior to 01/04/2011, on which credit is not probable after 01.04.2011, such credit shall be available if the provision of service had been completed before 01.04.2011.

8. It is further stated that reversal of credit in dispute, in the ST3 returns for the Half year ended March 2011, and also informed to the Department vide letter dated 03.01.2012, it does not amount to acceptance. There is no estoppel in taxation. Further Appellant have admittedly contested the show cause notice.

9. As regards the demand of service tax on the recovery of actual charges from the tenants towards electricity and water charges, it is urged that the same are by way of reimbursement. After making payment to the supplier of electricity and water, the amount was recovered on actual usage from the tenant. The tenants have been provided with individual meters. The Learned Commissioner have relied on Rule 5 of Service Tax (Determination of Value) Rules 2006 to confirm the demand. It is urged that, the said Rule 5 have been held to be ultravires by the Hon'ble Delhi High Court in the case of M/s Intercontinental Consultants & Technocrates Pvt Ltd., which have been further confirmed by Hon'ble Supreme Court, reported at [2018 (10) GSTL 401 (SC). Admittedly electricity and water in the facts of the present case, have not been consumed in rendering of output service, and the same are not consumables, so far the Appellant is concerned. It is further stated that Section 67 of the Finance Act was amended with effect from 14.05.2015 to include reimbursements of expenses as part of the taxable value of service. In the present case the dispute is prior to the said date.

10. It is further urged that under similar facts and circumstances, in the case of M/s Panchasheel Tech Park Private Limited, service tax was not demanded and the proposed demand dropped by the Commissioner in OIO No.22–23-24/PT–III/ST/COMMR/2011–12 dated 28.11.2011. The said Order is accepted by the Department and no appeal filed. The Learned Counsel also demonstrated during the course of hearing that the amount recovered from the tenants towards electricity & water does not exceed the amount paid to the service providers. It is further stated that electricity is 'goods' and chargeable to duty under the Central Excise Tariff, as well as under the Maharashtra Value Added Tax Act. Thus no service tax can be imposed on supply of electricity (goods).

11. Further, admittedly Appellant have maintained proper books of accounts and vouchers, was registered with the department and have filed their periodical returns regularly, thus no case of concealment, fraud or suppression is made out. Thus the extended period of limitation cannot be invoked. As the show cause notice have been issued and served beyond the period of 18 months, from March 2011, the demand is hit by limitation. Further as the issue is wholly interpretational in nature, extended period is not invokable.

12. Learned AR for Revenue relies on the findings in the impugned order.

13. Having considered the rival contentions, we find that the issue is no longer res integra. So far taking of Cenvat Credit under Rule 2(ℓ) of CCR, on construction services or works contract service, the same has been held to be eligible input service for the period prior to 01.04.2011 in the recent judgement of this Tribunal in L & T Infocity and K. Raheja. Similar view was also taken by Hon'ble Andhra Pradesh High court in M/s Sai Samhita Storages (P) Limited, and by Division Bench of this Tribunal in M/s Oberoi Mall Ltd., (supra). Accordingly we hold that the Appellant is entitled to the Cenvat Credit on receipt of input services under dispute.

14. So far the levy of service tax on reimbursement of electricity and water charges is concerned, we find that this very Bench have held that no service tax is chargeable on the amount of recovery of water and electric charges on actual basis, in the appeals of L & T Infocity and K. Raheja. Similar view was also taken by co-ordinate Bench at Allahabad in Logix Soft Tel Private Limited., [2019 (20) GSTL 545 (Tri-All)]. Accordingly, following the precedents, we set aside the demand on this score also.

15. In the facts and circumstances, we also find that no case for invocation of extended period is made out. Accordingly, the show cause notice is held to be bad on this score also.

16. In view of our aforementioned findings and observations, we allow the appeal and set aside the impugned order. The Appellant shall be entitled to consequential benefits in accordance with law.

(Order Pronounced in open court on 10.11.2023)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

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