IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No. 78281 of 2018

Arising out of Order-in-Appeal No. 290/S.Tax-I/Kol/2018 Dated 16.04.2018 passed by Commissioner of CGST & CX (Appeal-I), Kolkata

M/s. Bengal Ambuja Housing Development Ltd.
(Vishwakarma, 86C, Topsia Road (S),
Kolkata-700046) **Appellant**

VERSUS

Commr. of CGST & Central Excise, Kolkata North Commissionerate
(180, Shantipally, Rajdanga Main Road
Kolkata-700107)

Respondent

APPERANCE :
Shri Pulak Saha, Chartered Accountant for the Appellant
Shri K. Chowdhury, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

FINAL ORDER NO.75053/2023

Date of Hearing : 06 February 2023
Date of Decision : 06 February 2023

PER R. MURALIDHAR

The appellant is engaged in construction of commercial properties. After completing the construction, some portion of commercial property is sold and the balance portion is retained by them for leasing out to various lessees. For the rent received by them, they are paying the Service Tax. The Ld. Chartered Accountant appearing on behalf of the appellant submits that when their construction activity is taken up initially, it will not be known as to what percentage of constructed area would be sold and what percentage of area could be retained for leasing out the same. Therefore, they have been taking the Cenvat Credit on various inputs and services as to when they are received by the appellant. However, when a portion of the constructed area is sold, the proportionate Cenvat Credit is reversed by them. He draws attention to the Table at Para 6 of the Grounds of Appeal which is reproduced below:-

Particulars	October 2007 to March 2008	April 2008 to September 2010	Total
Total Credit availed in respect of input services (A)	94,09,985/-	1,28,89,247/-	2,29,99,232/-
Less proportionate credit			
Transferred to BAHDL Hospitality Limited	21,58,313/-	29,56,330/-	51,14,643/-
Reversed for sold units	64,77,988/-	88,73,169/-	1,53,51,157/-
Total Reversed (B)	86,36,301/-	1,18,29,499/-	2,04,65,800/-
Balance Credit availed (A-B)	7,73,684/-	10,59,748/-	18,33,432/-

2. The Ld. Chartered Accountant explains that as per the above table, they have initially taken a total Cenvat Credit of Rs.2,29,99,232/-. Over the period, when it is find that the constructed part is sold and not used for the purpose of renting of immovable property, they have reversed the proportionate Cenvat Credit to the extent of Rs.2,04,65,800/-. After this, the balance Cenvat Credit of Rs.18,33,432/- have been utilized by them while discharging the Service Tax liability on the leasing of the property. The Department has issued Show Cause Notice to them vide C. No. V(15)264/ST-Adjn/JC/13/26942 dated 23/10/2013 by invoking the extended period provisions demanding reversal of Cenvat Credit of Rs.18,33,432/-. Since the demand has been made for this amount, there is no dispute with regard to the balance Cenvat Credit already reversed by them. After due process, the demand came to be confirmed at the Adjudication and Lower Appellate Levels. Hence, they are before the Hon'ble Tribunal.

3. The Ld. Chartered Accountant states that since the inputs in question have been used for provision of Service they are eligible for the Cenvat Credit in terms of Rule 2 (l) of the Cenvat Credit Rules, 2004. He relies on the following case laws:-

(i) Sai Samhita Storages Private Ltd. Vs. CCE, Vishakhapatnam-II [2010 (255) E. L. T. 91 (Tri-Bang.)

The same has been affirmed by the Hon'ble Andhra Pradesh High Court [2011 (2) TMI 400-AP High Court]

(ii) Navraratna S G Highway Properties Pvt. Ltd. Vs. CST, Ahemedabad [2012-TIOL-1245-CESTAT-AHM]

(iii) Nirlon Ltd. Vs. Commissioner of Central Excise, Mumbai [2016 (2) TMI 417 CESTAT-Mumbai]

(IV) Lemon Tree Hotel (Cyber Hills Developers (P) Ltd.) Vs. CC & CE, Hyderabad-IV, [2017] (84) taxmann.com 157 (Hyderabad-CESTAT)

(V) CGST & CE, Chennai Vs Dymos India Automotive Pvt. Ltd. [2018 (9) TMI 1135-Madras High Court]

3.1 He submits that the issue involved in the present case is squarely covered by the decisions of various Tribunals and High Court Orders cited above.

3.2 On limitation, he also submits that the appellant has been regularly filing the ST-3 Returns clearly showing the details of Cenvat Credit taken by them during the period. He also draws attention to page number 90 of the Appeal Paper Book wherein the letter submitted to Superintendent of Service Tax, Kolkata is enclosed. This letter shows the details of Cenvat Credit taken and adjustments/reversal made on account of sale of constructed area and the net credit availed. Such letters were regularly filed along with the half yearly ST-3 Returns. Therefore, since all the required details have been fully disclosed to the Department, the question of any suppression does not arise. He also relies on the decision of this Hon'ble Tribunal in the case of M/s. Ambuja Realty Development Ltd.. Vide Final Order No. 75903/2021 dated 08/09/2021 it has been held that when all facts are properly disclosed by way of ST-3 Returns, the confirmed demand is not legally sustainable and accordingly, the appeal was allowed on limitation. Therefore, he submits that the demand for the extended period is not legally sustainable.

4. The Ld. DR reiterates the detailed findings given by the Commissioner (Appeals) and submits that since the input in question have been used in the construction of immovable property, the appellant is not eligible for the Cenvat Credit on such items. Therefore, he submits that the lower Authorities have correctly confirmed demands.

5. Heard both sides.

6. It is seen that the appellant has taken Cenvat Credit of Rs.2,29,99,232/- during the period under consideration. When they are not eligible for Cenvat Credit on account of constructed property which is sold, they have been regularly reversing the Cenvat Credit. These facts are being regularly disclosed in the ST-3 Returns as well as in the accompanying letter submitted to the Range/Division officials.

7. In respect of the constructed portion which is leased out by them, there is no dispute that the Service Tax is being paid on the lease amount received by them.

8. From the case law cited by the appellant it is seen that on similar/identical issues the Tribunals and High Courts have been consistently holding that the inputs used for construction of immovable property is eligible for Cenvat Credit when the Service Tax is paid on the service provided.

9. The Hon'ble Ahemdabad Tribunal in the case of Navratna S G Highway Prop. Pvt. Ltd. Vs. CST, Ahmedabad [2012-TIOL-1245-CESTAT-AHM] has held as under:-

> 3.2 *The definition of 'inputs' is limited to the definition of 'input services' as can be seen from the definition given above. Credit of duty paid on inputs is available when the inputs are used for providing an 'output service'. Therefore, there is a need to say that the inputs have been used for providing an 'output service'. In the case of 'input service', the definition includes input services used by a provider of taxable service for providing an output service. Therefore the definition of input and input service are pari materia as far as the service providers are concerned. That being the position, the decision of the Hon'ble High court of Andhra Pradesh would be applicable to the present case. In that case also, the Hon'ble High Court took the view that without use of cement and TMT bars for construction of warehouse assessee could not have provided 'storage and warehousing service'. In this case also, without utilizing the service, mall could not have been constructed and therefore the renting of immovable property would not have been*

possible. The issue involved is squarely covered by the decision of the Ho'ble High Court of Andhra Pradesh. Since the service tax demand itself is not sustainable, the question of imposition of penalty does not arise. The appeal is allowed with consequential relief to the appellants.

1o. In case of CCE Vishakhapatnam II vs. Sai Sahmita Storages (P) Ltd, this decision of the Bangalore Tribunal has availed by the Hon'ble Andhra Pradesh High Court [2011 (2) TMI 400-AP High Court], has held as under:-

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 docs not arise. In that view of the matter, the order levying penalty was rightly set aside by the CESTAT.

11. The Hon'ble CESTAT, Mumbai in the case of Nirlon Ltd. Vs. Commissioner of Central Excise, Mumbai is held as under:-

6. Undisputed facts are appellant herein has entered into contract for construction of premises which he intended to put to use as commercial complex and rented out the premises to various entities and collected rent from them; appellant had discharged appropriate service tax liability on such activity of renting of immovable property; is eligible to avail CENVAT credit of the service tax paid on various input services. The issue that falls for consideration is whether during the period in question i.e. April 2007 to March 09, the appellant had correctly availed the CENVAT credit of the service tax paid by the service providers under various categories related to construction of commercial complex or otherwise. The Adjudicating Authority has relied upon the Board's Circular No. 98/1/2008-ST to confirm the demands raised by the show-cause notice.

After relying upon the Navratna SG Highway Prop. (P) Ltd. case law, the Tribunal has held as under:-

6.2 In view of the ratio of the higher judicial forum and the facts of the case in hand are the same, we hold that the impugned order is unsustainable and liable to be set aside and we do so.

11. The Hon'ble Madras High Court in the case of GST & CE, Chennai vs. Dymos India Automotive Pvt. Ltd. [2018 (9) TMI 1135 Madras HC] has held as under:-

9. The Tribunal took note of the allegations in the said show notice i.e. the assessee was not eligible for input service credit availed under the head 'commercial or industrial construction activities' during the period 2008-09. The Tribunal, after referring to the definition 'input service' as it stood at the material time under Rule 2(3) of the said Rules, pointed out that the first limb of the definition made it clear that in the case of service provider, the service tax paid would be eligible input service, if the service is used for providing output service. The assessee contended that they were both manufacturer and provider of output service, that for the portion of the building used for manufacturing activity, the appellant was eligible for credit of service tax paid on construction services, that there was no dispute on this credit and that the dispute was confined to the quantum of credit availed on construction services on that portion of the building leased out to the HLIPL.

10. The Tribunal also referred to the decision in the case of ***CCE, Coimbatore Vs. Lakshmi Technology & Engineering Indus Ltd. [reported in (2011) 23 STR 265 (Tri.-Chennai)] and also the decision in the case of Navaratna S. G. Highway Property Private Limited Vs. CST [reported in (2012) 28 STR 166 (Tri.-Ahmd.)]*** *and held that without construction of the building, the renting of immovable property services cannot be provided and that therefore, construction service is an eligible service for credit for providing output service of renting of immovable property.*

11. In our considered view, the conclusion of the Tribunal is well founded, as construction service is an eligible service for credit for providing output service of renting of immovable property and without construction of the building, the renting of immovable *property cannot be provided. We are also of the opinion that there is no error in the decision taken by the Tribunal.*

12. As the issue in the present appeal is squarely covered by the above decisions, the appeal is required to be allowed on merits and I do so.

13. As per the factual evidence reproduced by the appellant in the form of ST-Returns and letters filed with the Department from time to time with regard to the Cenvat Credit taken and reversed by them in the course of their business, the Department has not made out any case against the appellant towards suppression. This Hon'ble Tribunal vide the Final Order No. 75903/2021 dated 08.09.2021 held that extended period is not invokable in such cases. Therefore, the demand for the extended period is required to be set aside in the present case also on account of time bar and I do so.

14. The appeal is allowed in the above terms, granting consequential relief to the Appellant.

(Operative part of the order was pronounced in the open Court.)

Sd/-

(R. Muralidhar)

Member (Judicial)

Pooja