IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL No. ST/85074/15-Mum

(Arising out of Order-in-Original No. 98/ST-II/RS/2014 dated 30.9.2014 passed by Commissioner of Service Tax-II, Mumbai)

Multimodal Storage Solutions Pvt. Ltd. **Appellant**

Vs.

Commissioner of Service Tax, Mumbai-II **Respondent**

Appearance:

Shri Mehul Jiwani, C.A., for appellant
Shri Suresh Murugu, Deputy Commissioner (AR), for respondent

CORAM:

Hon'ble Mr. S.S. Garg, Member (Judicial)
Hon'ble Mr. C.J. Mathew, Member (Technical)

Date of Hearing: 24.1.2018
Date of Decision: 27.2.2018

ORDER NO. A/85435/2018

Per: S.S. Garg

The present appeal is directed against the impugned order dated 30.9.2014 passed by the Commissioner whereby the Commissioner disallowed the wrongly availed cenvat credit amounting to Rs.77,03,338/- and also confirmed the service tax liability of Rs.11,26,086/- on notional interest on security deposit towards renting of immovable property service along with interest and penalty under various provisions of the Finance Act, 1994.

2. Briefly the facts of the present case are that the appellant is engaged in the business of providing services under storage and warehousing services and renting of immovable property services and they are rendering output services of storage and warehousing till the period of August 2010. The appellant had modernized its premises at Kanjur Marg (E), Mumbai for the year 2008 with a view to let out the same property for commercial use to firms/companies on licence along with various equipments and furnitures. The completion of the modernization/renovation work at the said factory was completed in July 2919 and thereafter the appellant entered into a lease and licence agreement with M/s. Toyo Engineering (I) Pvt. Ltd. on 7.7.2010 whereby the appellant agreed to permit the licensee i.e. M/s. Toyo Engineering (I) Pvt. Ltd. to use the said commercial building along with equipment and fixtures as per the terms and conditions of the agreement. The appellant also availed cenvat credit of various input services used during the period of modernization of premises. Appellant is collecting service tax on the said activity and paying the same under the category of renting of immovable property service. Further, the

appellant under the lease and licence agreement has also received an interest-free security deposit of Rs.3,29,80,000/-. The appellant’s head office is not registered under the Service Tax, but the payments towards all invoices are done from the head office. However, the services were received at the premises from where output services were being provided. After the scrutiny of ST-3 returns filed by the appellant from time to time, the department entertained the view that the appellant has availed irregular cenvat credit on construction of immovable property. Thereafter the department issued a show cause notice dated 20.6.2013 and after following due process of law, the said show cause notice was adjudicated by the Commissioner and he confirmed the demand of Rs.88,29,424/- on the following grounds:-

(a) Cenvat credit has been availed in respect of various input services which had been used in relation to construction of immovable property and, therefore, the same is not admissible;

(b) The construction of immovable property and its subsequent renting are independent transactions and, therefore, the credit for construction cannot be allowed;

(c) The adjudication authority has placed reliance on the judgment in the case of *Bharti Airtel Ltd. vs. CCE Pune – 2014-TIOL-1452-HC-MUM-ST*;

(d) Taking of security deposit is a pre condition for providing service and thus has nexus with the output service.

The adjudicating authority while passing the order-in-original has dropped part of the demand to the extent of Rs.1,31,02,383/- on cenvat credit availed pertaining to (a) input services of brokerage, service management, insurance etc., (b) cenvat credit availed on invoices which are addressed to other than registered premises of the appellant and (c) the adjudicating authority has reduced the rate of notional interest from 36% to 13%% and 18%. The adjudicating authority confirmed the following demand vide the impugned order:

Sr. No.	Nature	Period	Amount (Rs.)
1.	Denial of cenvat credit	October 2007 to April 2012	77,03,338/-
2.	Service tax on notional interest	July 2010 to July 2012	11,26,086/-
	Total		88,29,424/-

3. Heard both the parties and perused the records.

4. Learned consultant for the appellant submitted that the impugned order is not sustainable in law as the same is contrary to the provisions of the statute as well as contrary to the binding judicial precedent. He further submitted that the cenvat credit pertaining to input service of construction service and works contract service has been wrongly denied. He further submitted that in the present case the appellant has availed the credit of input services which were used for the modernization of the existing premises and it is not in dispute that the credit has been availed in respect of modernization/renovation. He also submitted that the definition of input service as prevailing during the relevant period specifically includes the services of modernization, the credit has been rightly availed by the appellant. He also referred to the circular No. 943/4/2011-CX dated 29.4.2011 wherein it is clarified that the credit is eligible for input services for renovation/modernization of the premises. He further submitted that all these services which are in dispute in the present appeal have been considered by this Bench of the Tribunal in the case of *City Centre Mall Nashik Pvt. Ltd. – 2017-TIOL-4322-CESTAT-MUM* wherein credit was allowed on various input services used for construction of immovable property which were subsequently rented out. He further submitted that the

Commissioner has denied the cenvat credit on the ground that the same is used for construction of immovable property by relying upon the circular dated 4.1.2008 and upon the judgment in the case of *Galaxy Mercantiles Ltd. 2013-TIOL-751-HC-ALL-ST* and *Bharti Airtel Ltd. – 2014-TIOL-1452-HC-MUM-ST*. It was his further submission that the Tribunal in the case of *City Centre Mall Nashik Pvt. Ltd.* has allowed the cenvat credit of input service used for construction of immovable property that is used for renting after considering both the aforesaid judgment cited by the adjudicating authority as well as the circular. He also submitted that it has been consistently held by various courts that cenvat credit of input service used for construction of immovable property which is ultimately used for renting or for providing storage and warehousing services etc. will be eligible. For this submission, he relied upon the following decisions:-

i) *Oberoi Mall Ltd. – 2017 (47) STR 292 (Tri.-Mumbai)*;

ii) *Navaratna SG Highway Prop (P) Ltd. – 2012 (28) STR 166 (Tri.-Ahmd.)*;

iii) *Sai Sahmita Storages Pvt. Ltd. – 2011 (270) ELT 33 (HC-Ahmd.)*;

iv) *City Centre Mall Nashik Pvt. Ltd. 2017-TIOL-4322-CESTAT-MUM*;

v) *Bellsonica Auto Components India P. Ltd. – 2015 (40) STR 41 (P&H)*.

He further submitted that it has been consistently held by various courts that even if the intermediate goods are not excisable but the final output is taxable, then the inputs used in the manufacture of intermediate product will be eligible for credit. For this, he relied upon the decision of Hon'ble Supreme Court in the case of *Solaris Chemtech Ltd. – 2007 (214) ELT 481 (SC)* wherein the Hon'ble Supreme Court has held that credit of inputs or input services used in manufacture of non-excisable intermediate product will be eligible if the intermediate product is used for manufacture of dutiable final product. He also submitted that for cenvat credit availed after 1.4.2011, there are certain services which have been received prior to 1.4.2011 but the credit has been taken post 1.4.2011 and balance services have been received and credit has been taken post 1.4.2011 and he has given the list of services on which credit has been taken after 1.4.2011. He also submitted that demand of service tax on notional interest is not sustainable in law. This issue, according to the learned counsel, has been settled in the case of *Magarpatta*

Township Developers & Construction Co. Ltd. – 2015 (37) STR 618 (Tri.-Mumbai) and *K. Reheja Corp. Pvt. Ltd. – CESTAT order No. A/1644/14/CSTB/C-I dated 14.10.2014* wherein the Tribunal has held that notional interest cannot be included in the value and will not be taxable under the category of renting of immovable property service. He also submitted that the department has accepted this judgment on merits and decided not to pursue the manner in the higher court.

5. On the other hand, learned AR reiterated the findings of the impugned order.

6. After considering the submissions of both the parties and perusal of the material on record and the various judgments relied upon by the appellant, we find that the Revenue has wrongly denied the cenvat credit on various input services which have been used for construction of immovable property which is ultimately rented out. Further we find that this issue has been considered in detail in the case of *City Central Mall Nashik Pvt. Ltd.* cited supra, wherein the Tribunal has considered all the judgments relied upon by the Commissioner while denying the cenvat credit and has also considered the circular relied upon by the adjudicating authority and has held that the appellant is entitled to cenvat credit on input services used for

construction of immovable property. Therefore, we hold that denial of cenvat credit on the input services is not sustainable in law.

7. As far as the demand of service tax on notional interest is concerned, we find that the issue is squarely covered by the judgment of the Tribunal in the case of *Magarpatta Township Developers & Construction Co. Ltd.* and *K. Raheja Corp. Pvt. Ltd.* cited supra, wherein the Tribunal has held that notional interest cannot be included in the value and will not be taxable under the category of renting of immovable property services. We also find that the department has accepted the judgment on merits and has not filed appeal against the said judgment. Therefore, we hold that no service tax is chargeable on notional interest and the finding of the learned Commissioner on this is set aside.

8. Therefore, keeping in view our discussion above, we find that the impugned order is not sustainable in law and, therefore, the same is set aside by allowing the appeal of the appellant.

(Pronounced in court on 27.2.2018)

(C.J. Mathew)
Member (Technical)

(S.S. Garg)
Member (Judicial)

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