IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: ST/87254, 87258/2018

Arising out of: Order-in-Original No. GOA/EXCUS/000/APP/ 147 to 148/2017-18 dated 27.03.2018

Passed by: Commissioner of Custom & Central Excise (Appeals), Goa.

Milroc Good Earth Property & Developers Ltd

Appellants – Represented by:
Shri C.S.Biradar, Advocate

versus

C.C.E &S.T, Goa

Respondent – Represented by:
Shri Dilip Shinde, Assistant Commissioner (AR)

Date of hearing: 19.01.2019
Date of pronouncement: 03.04.2019

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Hon'ble Shri Ajay Sharma, Member (Judicial)

ORDER NO: A/85659-85660/2019

These two appeals have been filed by the Appellant from the common Orders-in-Appeal GOA/EXCUS/000/APP/ 147 to 148/2017-18 dated 27.03.2018 passed by the Commissioner of Custom & Central Excise (Appeals), Goa.

2. The appellants are engaged in construction of residential complexes. According to the Revenue, the Appellants constructed a Hotel and availed Cenvat credit in respect of inputs and input services

exclusively used in the construction of said Hotel & Spa Project at Milroc Kadamba, which is illegal since the Appellant has not provided any output service in relation to construction of the hotel building to another person as defined under Section 65B(44) of the Finance Act, 1994. Therefore, the Cenvat Credit on inputs and input services used in such activity are not admissible to the appellant in terms of Rules 2(l)(i), 2(1)(A)(a) and Explanation III to Rule 6(3) of the Cenvat Credit Rules, 2004 r/w Section 66E(b) of the Finance Act, 1994. Accordingly two show cause notices were issued to the Appellant; (i) for the period from July, 2012 to February, 2014 for recovery of availment of inadmissible Credit of Rs.6,23,747/- and (ii) for the period from July, 2014 to February, 2016 for recovery of availment of inadmissible Credit of Rs.4,38,199/-; total amounting to Rs.10,61,956/- alongwith interest and also penalty u/s.78 of the Finance Act, 1994. Both the show cause notices were adjudicated separately, by which the adjudicating authority through separate orders-in-original upheld both the show cause notices. On Appeal, the ld. Commissioner vide impugned order dated 27.3.2018 rejected both the Appeals filed by the Appellant.

3. I have heard ld. counsel for the Appellant and ld. Authorised Representative for the revenue and perused the records. According to the ld. counsel, the Appellant has availed credit in respect of services other than construction service and for this purpose he produced the

certificate issued by various State Government agency as well as the ST-3 returns filed by the hotel division of the Appellant. He stated that the Appellant had availed credit in respect of input services primarily of advisory nature and of consultancy service other than the construction service and discharged the service tax on the services provided in the hotel like (i) accommodation in hotels (ii) restaurant service, (iii) health club and fitness centre service and (iv) other taxable service services, other than the 119 listed services. He also filed the list of services alongwith the Appeal memo, on which the Appellant has availed the Cenvat credit.

4. The ld. AR Appearing for the Revenue reiterated the findings recorded in the impugned order and submitted that the Appellant is not entitle to the cenvat credit since it relates to construction which is a declared service as defined under section 65B(22) of the Act and as the Appellant is not providing any output service in relation to construction of hotel building to another person therefore they cannot claim availment of any credit.

5. In order to appreciate the submission, Section 65B(22) and (44) are extracted as follows:-

> *"65B. In this Chapter, unless the context otherwise requires, -*
>
> *…..*
>
> *(22) 'declared service" means any activity carried out by a person for another person for consideration and declared as such under Section 66E;*

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(44) 'service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include –
(a) an activity which constitutes merely, -
…..
(ii) such transfer, delivery or supply of any goods which is deemed to be sale within the meaning of clause (29A) of article 366 of the Constitution; or
….."

'Input' and 'Input services' have been defined in Rules 2(k) and 2(l) of the Cenvat Credit Rules, 2004 and the same are extracted as under:-

"2(k) "input" means-
(i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production;
(ii) all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service;
Explanation 1. - The light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.
Explanation 2. - Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer;"
"2(l) "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 upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and 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.

but excludes

(A) service portion in the execution of a works contract and construction services including service listed under clause

(b) of section 66E of the Finance Act (hereinafter referred as specified services) in so far as they are used for –

(a) construction or execution of works contract of a building or a civil structure or a part thereof; or

(b) laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified services; or;

(B) services provided by way of renting of a motor vehicle, in so far as they relate to a motor vehicle which is not a capital goods; or

(BA) service of general insurance business, servicing, repair and maintenance, in so far as they relate to a motor vehicle which is not a capital goods, except when used by –

(a) a manufacturer of a motor vehicle in respect of a motor vehicle manufactured by such person; or

(b) an insurance company in respect of a motor vehicle insured or reinsured by such person; or

(C) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and

> *plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee".*

The term 'works contract' has been defined under Section 65B(54) of the Finance Act, 1994 as under:-

> *"Works contract" means contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any moveable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property".*

A plain reading of the above definitions would show that, unless excluded, all goods used in relation to manufacture of final product or for any other purpose used by a provider of taxable service for providing an output service are eligible for CENVAT credit.

6. In a somewhat similar matter titled as *CCE, Visakhapatnam-II vs. Sai Sahmita Storages (P) Ltd.; 2011 (270) E.L.T. 33 (A.P.)* the issue before the Hon'ble High Court of Judicature for Andhra Pradesh was whether the assessee therein, provider of storage and warehousing service, was entitle for credit of central excise duty under Rule 2 & 3 of the Cenvat Credit Rules, 2004, which was paid by the assessee on cement and TMT bar used for construction of warehouse for providing storage facility and the Hon'ble High Court has upheld the order of the Tribunal holding the assessee eligible to claim credit

under the CENVAT Credit Rules, 2004 and has held that that the assessee is entitle to claim cenvat credit on cement and TMT bar used for providing storage facility without which storage and warehousing services could not have been provided.

7. The aforesaid decision of the Hon'ble High Court was followed by this Tribunal in the matter of *Vamona Developers Pvt. Ltd. vs. CC, CE & ST, Pune-III; reported in 2016(42) STR 277 (Tri.-Mumbai).* In this case the assessee was engaged in the business of construction & sale of commercial properties. They also provided renting of immovable property. They constructed a mall for which they received various input services viz. air conditioning work, AMC, banking & insurance, consultancy charges, exhaust system, false ceiling, flooring, labours suppliers, painting, plumbing, security services etc.etc. and claimed cenvat credit of service tax paid on input services, which was denied by the department on the ground that the appellant therein is not eligible for credit as the input services have resulted in an immovable property which is not excisable nor any service tax is paid on the same and that the services have not been used for providing renting of immovable property service. This Tribunal while relying upon the decision of the Hon'ble High Court in the matter of *Sai Sahmita Storages (P) Ltd. (supra)* has held that almost the entire credit has been availed on input services which have been used for providing the output service i.e. Renting of immovable service for

which there was no restriction under clause (i) of definition of 'input service' and hence the appellant therein are eligible for the credit in terms of the definition of input service.

8. Similarly this Tribunal in the matter of *Oberoi Mall Ltd. vs. CST, Mumbai-II; 2017 (47) STR 292 (Tri.-Mumbai)* while following the decision of the Hon'ble High Court in the matter of *Sai Sahmita Storages (P) Ltd. (supra)* and of this Tribunal in the matter of *Vamona Developers Pvt. Ltd. (supra)* has decided the issue in favour of the Appellant therein and held that the appellant therein is entitle to avail the cenvat credit on various input services used by them for the construction of malls, which were rented out.

9. I have gone through the list of services on which the cenvat credit has been availed by the appellant, the agreement as well as the invoices and I am of the view that none of these services are related to construction. These are the services which normally performed after the construction activity is over and therefore provisions of Section 65B ibid are not attracted in the facts of this case. The hotel construction is not the end activity of the appellants. Rather their end activities are providing various taxable services like accommodation, restaurant services, spa services and other related services in the said Hotel and they have availed credit in respect of these services which are other than construction service. They have, therefore, fulfilled the conditions specified in Rule 2(l) ibid and thus the appellant is entitled

to the credit of the same under the provision of Rule 3(1) ibid. The argument of Revenue that the services in issue have been utilized for construction of the Hotel which is not excisable and therefore credit is not admissible, is unfounded and I do not agree with the same. According to me, the credit in issue has been availed on input services which have been used for providing the output services i.e. the services mentioned above and hence I find that the reasoning by the lower Authorities is devoid of any merit.

10. In view of the discussions made hereinabove and also in view of various decisions as cited above, the credit availed by the appellant is admissible and the revenue cannot recover the same. Since the recovery itself is not sustainable, the question of interest and penalty does not arise. The Appeal is therefore allowed and the impugned order is set aside.

(Pronounced in Court on 03.04.2019)

(Ajay Sharma)
Member (Judicial)

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