

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH, MUMBAI

Service Tax Appeal No. 87598 of 2018

(Arising out of Order-in-Appeal No. MKK/553/RGDAPP/2017 dated 20-02-2018 passed by the Commissioner of CGST, Central Excise, Raigarh (Appeals).)

.....Appellant

**Aditya Birla Science & Technology Co. Pvt. Ltd.
Plot No. 1 & 1A, MIDC Taloja,
Taluka-Pnvel,
Dist. Raigad-410208**

VERSUS

.....Respondent

**Commissioner of CGST &
Central Excise,
Raigad.**

APPERANCE:

Shri Shri Duregesh Nadkarni, Advocate for the Appellant
Shri Onil M. Shivadikar, Asst. Commissioner, Authorised Representative for
the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85917/2019

Date of Hearing: 21-12-2018

Date of Decision: 17-05-2019

SUVENDU KUMAR PATI:

1. Denial of CENVAT credit to the appellant on the Service Tax paid towards Business Support Service on the ground that cost of rent paid

for residence of employee is not taxable for which credit is not admissible is assailed in this appeal.

2. Factual backdrop of the case is that appellant has been rendering scientific and technical consultancy services. M/s. Aditya Birla Management Corporation Pvt. Ltd. (ABMCPL) is the service provider from whom appellant received services upon entering into Secondment Agreement dated 01-04-2007 on which basis services of Dr. Prashant Puri, having vast experience in the field of science and technology was extended to the appellant on secondment basis for carrying out various scientific and technical research projects in the appellant's company. Service provider ABMCPL recovered the entire cost for the services provided by Dr. Puri from the appellant including house rent for his residential accommodation and salary component, in terms of agreement that provided that the expenses incurred in relation to provision of services provided to be borne by the appellant. CERA audit raised objection to the service tax paid under separate invoice for the cost of the rent of the residence of Dr. Puri, which appellant explained to be accommodation charge of Dr. Puri and is admissible in view of pre 2011 amended definition of input service carrying "activities related to business". Clarification was not acceptable to the respondent department for which it was subjected to show cause notice, matter was adjudicated, OIO confirmed duty liability for the period of dispute between April 2008 to March 2011 along with interest and equivalent amount of penalty, that found

approval of the Commissioner (Appeals) Raigarh. Appellant is before this Tribunal challenging the order of Commissioner (appeals).

3. In the Appeal memo and during course of hearing, Learned Authorised Counsel for appellant Mr. Duregesh Nadkarni submitted that Service Tax paid under the category "business Support services" was availed as CENVAT credit by the appellant (provided by ABMCPL) being recipient of service and since both entities i.e., appellant and ABMCPL are subject to different jurisdictional authorities, as for settled principles of law, assessment cannot be reopened at the recipient's end. He placed his reliance on the decisions of *DIL LIMITED – 2008(9) STR 411(T)*, *TRINETRA TEXTURISERS P. LTD. – 2004(166) ELT 384(T)*, *ULTRATECH CEMENT LTD.-2011(22) STR 289(T)*, *LAXMI METAL PRESSING WORKS P.LTD. – 2010(18) STR 149(T)*, *MULTI ORGANICS P. LTD. – 2011(21) STR 695(T)*, *ELECTRICA ENGINEER INDIA P. LTD.-ORDER NO. A/87585/2018 DATED 10-10-2018* to support his contention and in citing judgement in the case of the *Commissioner v. Macnair Exports (P) Ltd. – 2003 (152) E.L.T.A87 (S.C.)*, he pointed out that jurisdiction being a point of law can be raised at any stage of the proceedings. He further argued that CENVAT credit of Service Tax paid for arranging the residential facility was admissible and as per se they had not filed credit of Service Tax paid on rendering of residential unit and such services upto 31-03-2011 were covered under the expression activities relating to business and hence admissible in view of Hon'ble Apex court decision given in *Maruti Suzuki Ltd. case report in [2009 (240) E.L.T. 641 (S.C.)]* as well as

Hon'ble Bombay High Court decision given in Ultratech Cement Ltd. report in *2010(260) E.L.T. 369 (Bom.)*. Further submission of Learned Counsel for the appellant focuses on the findings of the Commissioner (Appeals) regarding existence of employee-employer relationship which was an altogether different ground not raised in the show cause notice nor agitated during the entire adjudication process for which he pressed to set aside the order passed by the Commissioner (appeals) denying admissibility of such CENVAT credit to the appellant.

4. In response to such submissions, Learned Authorised Representative for the respondent Department argued in favour of the reasoning and rationality found in the order of the Commissioner (Appeals). In citing a case law report in 2010 (20) STR 456 (Bom.), he pointed out the Hon'ble Bombay High Court made a clear distinction that expenditure incurred on such activity cannot be covered under the expression "relating to the business" and drawn attention of the court relying on Maruti Suzuki Ltd. case where it was stated that nexus between input service and business of assessee is required to be established. Further on the definition of support service of business or commerce as contained in section 65 of the Finance Act 1994, he also argued that explanation appended to such definition clearly indicates that such infrastructural support service are permissible for providing office along with office utilities etc. and not for providing residential accommodation for which he sought no interference by the Tribunal in the order passed by Commissioner (Appeals).

5. Heard from both sides and perused the case record.

6. Admittedly Dr. Puri was engaged through secondment agreement By ABMCPL and as per agreement between appellant and ABMCPL, expenditure incurred for service provided by ABMCPL is to be borne by the appellant. Meaning of secondment as given in the Cambridge Dictionary - it is a period of time, an employee is sent to work somewhere else, to increase the number of workers, to replace other worker, or to exchange experience or skills. From the dictionary meaning of secondment, it cannot be said that there exist an employee-employer relationship between appellant and Dr. Puri. On the other hand, as found from the case record, services of Dr. Puri were made available to the appellant through its service provider ABMCPL and it recovered back all costs of Dr. Puri including salary, residential accommodation etc. Making available the services of Dr. Puri to the appellant was done by ABMCPL for which there can not be any doubt that it was not a service rendered by ABMCPL to the Appellant. As found from the order-in-original, denial of CENVAT credit on rent paid for residential accommodation was justified by the adjudicating authority on the ground that Service Tax was not payable to the owner of the property for rending the residential accommodation to Dr. Puri. It was not known if such Service Tax collected on such rent has been paid to the property owner who, in tern, had paid the same to the department. Liability of discharge of tax in the said case does not fall on the house owner as service provider ABMCPL, who collected the Service Tax, is duty bound to pay the same to the

Government. In the instant case, there is no dispute concerning such payment being not paid to the Government by ABMCPL. Even in such a situation the liability is supposed to be fixed on the person who collected the same and it can never be fixed on the person from whom it is collected.

7. Sample invoice copy Annexed to the appeal memo at page no. 56 contains description in the invoice as amount being debited to the appellants "towards rent-residence of Dr. Puri" and service category is referred as business support service. Nowhere, it is mentioned that such invoice was raised exclusively towards payment of rent and going by the invoice description, it can be said that the said expenditure of ₹ 14,08,815/- was made towards expenditure incurred for providing accommodation to Dr. Puri which may also include rent and other ancillary expenditures. It is also clearly indicated that Service Tax @ 10%, Education Cess and S.H. Education Cess @ 2% and 1% respectively were also paid by the appellant. More importantly, at page no. 54 another tax invoice is enclosed which is purely salary component of Dr. Puri paid as seconded employee. It has indicated that the said salary was paid by the service provider who sought its reimbursement from the appellant. In that tax invoice also, Service Tax component was met but it is not understood as to why collection of Service Tax from "payment of salary" not objected by respondent Department when the finding of Commissioner indicated it as an employee-employer relationship. Be that as it may, when service tax was collected by service provider even on providing for residential

accommodation which is admissibly not subjected to service tax, there is no point in denying benefits of availment of CENVAT credit to the appellant when legality of such collection at the receivers end was not questioned. Several decisions referred above by the appellant disapproves such questioning of taxability at the payers end. Hence the order.

8. The appeal is allowed and order passed by the Commissioner (appeals) Raigad in appeal No. MKK/553/RGDAPP/2017 dated 20-02-2018 is hereby set aside.

(Order pronounced in open Court on)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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