CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH, MUMBAI

Service Tax Appeal No. 86853 of 2021

[Arising out of Order-in-Appeal No. DL/66/APPEALS THANE/TH/2021-22 dated 26.08.2021 passed by the Commissioner of GST & Central Excise (Appeals Thane), Mumbai.]

M/s Chheda Developments ....Appellant
119-111, Goyal Shopping Arcade,
S.V. Road, Borivali (West),
Mumbai – 400 092

VERSUS

Commissioner of CGST & Central Excise, Thane ....Respondent
3rd & 5th Floor, ACCFL House,
Road No. 22, Wagale Industrial
Estate, Thane, Mumbai – 400 604

APPERANCE:

Ms. Padmavati Patil, Advocate with
Mr. Kiran Chavan, Advocate for the Appellant

Shri Ajay Kumar Shrivastava, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

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

FINAL ORDER NO. 85877/2024

Date of Hearing: 22.07.2024
Date of Decision: 11.09.2024

Order for proportionate reversal of CENVAT Credit to the tune of ₹16,39,155/- calculated on the basis of unsold flats available on the day of issue of completion/occupancy certificate to the builder, Appellant herein, that received affirmation of the Commissioner of

GST & Central Excise (Appeals Thane), Mumbai *vide* his above referred order is assailed in this appeal.

2. Fact of the case, in a nut shell, is that Appellant is engaged in development of real estate project and it had undertaken redevelopment of project of an existing Co-operative Housing Society called Jai Devki 'A', located at Borivali (West), Mumbai. It had constructed 134 flats, during the financial year 2014-15 to 2016-17 and availed CENVAT Credit of Service Tax paid on various inputs services, used in the said construction activity. Completion certificate was received by it on 31.03.2017 after which the remaining 19 flats acquired the status of immovable property namely building and sale of such completed flats would not attract Service Tax as per law and the definition contained in Section 65B(44) of the Finance Act, 1994. Basing on the same observation made by the Audit, show-cause notice dated 09.12.2019 was issued by the then Dy. Commissioner proposing proportional recovery of CENVAT Credit of ₹16,39,155/- in respect of said unsold flats on the date of issue of completion certificate. Show-cause notice also proposed for recovery of interest and penalties, Appellant contested the same unsuccessfully during adjudication process and before the Commissioner (Appeals) and now before this forum seeking necessary relief.

3. During course of hearing of the appeal learned Counsel for the Appellant Ms. Padmavati Patil submitted that confirmation of demand

was made by the Dy. Commissioner and the Commissioner (Appeals) also concurred to his finding despite the fact that issue has been squarely settled by this Tribunal and even upheld by the Hon'ble High Court of Gujarat in the case of *Alembic Ltd.* as reported in *2019-TIOL-1495-HC-AHMD-ST* and in several other appeals including that of *Shreno Ltd. [2019-TIOL-1546-HC-AHM-ST], TPL Developers – Final Order No. 20197/2019 dated 15.02.2019, Kabra Associates - Final Order No. A/86698-86700/2019 dated 24.09.2019, Prajapati Developers – 2019-TIOL-806-CESTAT-HYD.* This Tribunal also has taken a consistent view that entitlement to CENVAT Credit has to be examined at the time of receipt of input service and legitimate availment of such credit at the time when output service is wholly taxable, subsequent denial is impermissible in law for the reason that some portion of property was subsequently converted into immoveable property and therefore, the order passed by the learned Commissioner (Appeals) is unsustainable both in law and facts. She also argued against invocation of extended period in confirming demand when the issue was purely interpretative in nature as covered by the decision of this Tribunal made in the case of *Lanxess ABS Ltd. – [2010 (259) ELT 551 (T)], Neptune Equipments – [2010 (259) ELT 588 (T)],* etc.

4. Per contra, learned Authorised Representative for the Respondent-Department Mr. Ajay Kumar Shrivastava argued in support of the reasoning and rationality of the order passed by the Commissioner (Appeals) and pointed out that Section 65B(44) of the

Finance Act, 1994 excludes transfer of Title in goods or immovable property by sale etc. from the purview of service and Explanation-3 to Rule, 6 of CENVAT Credit Rules, 2004 puts the said activity mentioned under Section 65B under exempted service as defined in Rule, 2 Sub Rule (e) of the CENVAT Credit Rules, 2004, so as to cover it under Rule, 6(1) for proportionate credit availment and therefore, the order passed by the Commissioner (Appeals) need not be interfered with.

5. I have perused the appeal paper book, relevant provisions of law, relied upon judicial decisions on the issue and other material available on record. Going by the judicial precedent that emerged through interpretation of the provision of law, there can be no second opinion that credit eligibility is to be examined as on the date receipt of input services and it is not governed by latter development such as portion of property getting converted into immovable property after receipt of completion certificate as could be noticed from para 12 and 14 of the relied upon judgment passed in the case of *M/s. Alembic Ltd. Vs. Commissioner of Central Excise and Service Tax, Vadodara–I reported in 2019-TIOL-358-CESTAT-AHM.* Otherwise also going by the provision of law such sale of immovable property having been excluded by statute namely by the Finance Act, 1994, under Section 65B(44) from the definition of service that is apparently done taking the constitutional mandate available under Section 366(29) of the Constitution of India, including the same as a component of exempted service through Explanation-3 added to

Rule, 6 of the CENVAT Credit Rules, 2004 can't be said to be a validly legislated rule in view of operation of Section 38A of the Central Excise Act, equally applicable to Service Tax matters as covered under Section 83 of the Finance Act, 1994. Hence the order.

<u>THE ORDER</u>

6. The appeal is allowed and the order passed by the Commissioner of GST & Central Excise (Appeals Thane), Mumbai *vide* Order-in-Appeal No. DL/66/APPEALS THANE/TH/2021-22 dated 26.08.2021 is hereby set aside with consequential relief, if any.

(Order pronounced in the open court on 11.09.2024)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad