CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

SERVICE TAX APPEAL No. 87531 of 2023

(Arising out of Order-in-Appeal No. SK/214/APPEALS-II/MC/2023-24 dated 31.08.2023 passed by the Commissioner of CGST & Central Excise (Appeals-II), Mumbai.)

Kaybee Developers Private Limited **.... Appellant**
16/76, Hotel Red Rose, Gokuldas Pasta Road,
Behind Chitra Cinema
Dadar (East), Mumbai – 400 014.

VERSUS

Commissioner of CGST and Central Excise, **.... Respondent**
Mumbai Central Commissionerate
7th Foor, Piramal Chamber, Jijibhoy Lane
Lalbaugh, Parel
Mumbai – 400 012.

APPEARANCE:

Shri Roshan More, Chartered Accountant representing for the Appellants

Shri Dhananjay Dahiwale, Authorized Representatives for the Respondent

CORAM: HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86370/2025

Date of Hearing: 01.07.2025
Date of Decision: 30.09.2025

PER: M.M. PARTHIBAN

This appeal has been filed by M/s Kaybee Developers, Dadar (East), Mumbai (herein after, for short, referred to as 'the appellants') against the Order-in-Appeal No. SK/214/Appeals-II/ME/2022-23 dated 31.08.2023 (herein after, referred to, as 'the impugned order') passed by the Commissioner of CGST & Central Excise (Appeals-II), Mumbai.

2.1 Brief facts of the case, leading to this appeal, are summarized herein below:

2.2 The appellants are a private limited company engaged in providing taxable services of Construction of Residential Complex and for this purpose are registered with the jurisdictional Service Tax authorities holding Service Tax Registration No. AACCK3286HSD001.

2.3 During the course of an audit conducted by the department in 2019 and upon scrutiny of documents, Annual Financial reports for the years 2015-16 to 2017-18 submitted by the appellants on 27.01.2021 and 15.03.2021, it was found by the department that the appellants had paid service tax of Rs.41,57,265/- i.e., Rs.7,40,160/- for the period April, 2017 to June, 2017; Rs.34,17,105/- for the period July, 2017 to March, 2018 in respect of the advances received from their customers for the year 2015-2016 and 2016-2017 (up to June, 2017). However, the department had interpreted that the service tax liability towards advances received against booking of the flats by the customers have not been correctly reflected in the ST-3 returns filed by the appellants and correct amount of service tax in respect of taxable services have not been paid by the appellants. Further, it was also found that the appellants had filed the ST-3 returns belatedly. Therefore, the department on the basis of above detailed scrutiny had issued show cause notice dated 19.04.2021, demanding service tax on various amounts of advances received by the appellants under Section 73(1) of the Finance Act, 1994 along with applicable interest, in respect of taxable services provided by them, on which appropriate amount of service tax was not paid. Further, the said SCN dated 19.04.2021 also proposed for collection of late fees, imposition of penalties under Section 70, 77 and 78 of the Act of 1994.

2.4 In adjudication of the case, the original authority i.e., Assistant Commissioner of CGST & Central Excise, Division-VI, Mumbai Central Commissionerate vide Order-in-Original dated 12.10.2022 had confirmed the proposals made in the SCN for demand of service tax and for imposition of penalties, late fees on the appellants under the Finance Act, 1994. The appellants being aggrieved by the above order, had filed an appeal before the Commissioner (Appeals-II), Mumbai who in deciding the matter had upheld the original order and disposed of the appeal filed by the appellants vide impugned order dated 31.08.2023.

2.5 Feeling aggrieved with the above impugned order-in-appeal dated 31.08.2023, the appellants have filed this appeal before the Tribunal.

3. Learned Chartered Accountant appearing for the appellants submitted that the alleged service tax demand was already discharged by the appellants through eligible CENVAT credit, as reflected in their internal CENVAT register. In their reply to the authorities below, while submitting the detailed breakup of service payment of ₹33,07,182/- through service tax credit utilized during the relevant period was submitted to the department

and is available for verification. By relying upon the case law in *Antares Services Pvt. Ltd. vs. CCE Chandigarh*, wherein the Tribunal have held that procedural lapses in ST-3 filings should not invalidate otherwise admissible Cenvat Credit, they submitted that having discharged the service tax liability they should not be saddled with the demand of ₹2,27,305/- and associated penalties. They also submitted that on account of revenue neutrality there is no loss caused to the exchequer and therefore they should be granted relief from payment of interest and late fees. They also prayed that they may be allowed to revise ST-3 returns retrospectively, if deemed necessary, to reflect the correct credit utilization. In view of the above, the appellants have pleaded that their appeal against the impugned order be entertained.

4. On the other hand, learned Authorized Representative (AR) appearing for Revenue reiterated the findings in the impugned order. He further submitted that since the appellants did not indicate the details of tax payment correctly in ST-3 return, they did not properly discharge the service tax dues. Therefore, learned AR claimed that the impugned order is sustainable and prayed that the appeal filed by the appellants be set aside.

5. Heard both sides and perused the records of the case.

6. The issue for consideration before the Tribunal in the present case is to determine whether service tax which is liable to be paid on taxable service of construction of flats/residential complex have been paid in discharge of the service tax liability in terms of the provisions of the Finance Act, 1994.

7. In order to appreciate the issues under dispute, the specific legal provisions of the Finance Act, 1994 relevant to the dispute are extracted and herein given below for ease of reference:

Chapter V of the Finance Act, 1994

"Section 65. Definitions

In this Chapter, unless the context otherwise requires, —
(30a) *"construction of complex" means—*
(a) construction of a new residential complex or a part thereof; or
(b) completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or
(c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex;

(91a) *"residential complex" means any complex comprising of—*
(a) a building or buildings, having more than twelve residential units;

(b) a common area; and
(c) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system,

located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this clause, —
"personal use" includes permitting the complex for use as residence by another person on rent or without consideration;
"residential unit" means a single house or a single apartment intended for use as a place of residence;

(105) *"taxable service" means any service provided or to be provided,*
...
(zzzh) *to any person, by any other person, in relation to construction of complex.*
[1]*Explanation.—For the purposes of this sub-clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorised by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer;"*

CENVAT Credit Rules, 2004

"3 . *(1) A manufacturer or producer of final products or a provider of output service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of—*
(i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act:…
……
(ix) the service tax leviable under section 66 of the Finance Act;
(ixa) the service tax leviable under section 66A of the Finance Act;
(ixb) the service tax leviable under section 66B of the Finance Act;……
paid on—
(i) any input or capital goods received in the factory of manufacture of final product or by the provider of output service on or after the 10th day of September, 2004; and
(ii) any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004,…..

Recovery of CENVAT credit wrongly taken or erroneously refunded.
14. *(1) (i) Where the CENVAT credit has been taken wrongly but not utilised, the same shall be recovered from the manufacturer or the provider of output service, as the case may be, and the provisions of section 11A of the Excise Act or section 73 of the Finance Act, 1994 (32 of 1994), as the case may be, shall apply mutatis mutandis for effecting such recoveries;*
(ii) Where the CENVAT credit has been taken and utilised wrongly or has been erroneously refunded, the same shall be recovered along with

[1] Inserted by the Finance Act, 2010, w.e.f. 1-7-2010.

interest from the manufacturer or the provider of output service, as the case may be, and the provisions of sections 11A and 11AA of the Excise Act or sections 73 and 75 of the Finance Act, 1994, as the case may be, shall apply mutatis mutandis for effecting such recoveries."

8. From the facts on record it is evident that the learned Commissioner (Appeals) had given an opportunity for personal hearing to the appellants, and the representative of the appellants firm Shri Roshan More, Chartered Accountant had attended the said hearing on 20.06.2023 and made their submissions before the said authority. After going through the facts of the case, records placed before him and submissions made by the appellants during the personal hearing, learned Commissioner (Appeals) had given the following findings. The following are some of these findings relevant to the issues in dispute.

"3. The Adjudicating Authority held that the noticee admitted that they had received advances at the time of booking of residential housing which was not reflected in the ST-3 returns for the relevant period. Thus there is no dispute regarding admissibility of tax liability. The only point of dispute is regarding mode of payment of such short pay tax to be paid from Cenvat Credit in balance in their Cenvat Account. The noticee himself has mentioned in the reply that they had filed ST-3 return for the relevant period and the only fact that some figures are not reflected in the ST-3 returns. They submitted reconciliation statement of books of accounts with service tax returns and requested to condone the mistake on their part. The noticee has submitted that they had already discharged the liability of Service Tax payable on the advances received for the aforesaid period from the Cenvat Credit available with them which are never shown in S.T.-3 returns. They further submitted that they were having enough Cenvat Credit as per statement in their Cenvat Credit to discharge the tax liability. Adjudicating Authority finds that the government of Cenvat Credit is subject to terms and conditions mentioned in the Cenvat Credit Rules, 2004. The assessee shall maintain proper records for the receipt and consumption of the input service in which relevant information regarding the value, tax paid, cenvat credit taken and utilized, the person from whom the input service has been procured is recorded on the burden of proof regarding the admissibility of the cenvat credit shall lie upon the provider of output service taking such credit. No such record has been produced by the noticee to establish their claim. Mere possession of input service invoices does not entitle any assessee to claim and adjust the cenvat credit involved in them for their imminent tax liability. The invoices need to be recorded not only in the books of accounts, but also in to records to be maintained as prescribed in Rule 9 of the Cenvat Credit Rules, 2004. The availment and utilization of the same is also required to be reflected into the returns for the relevant period to be filed before the Department. The noticee submitted that they had produced the Cenvat credit statements along with each Cenvat credit bill for which the notice has merely submitted Cenvat credit statement which is neither signed by the noticee nor approved/certified by the Auditor/CA and hence no validity. Except this, they have submitted no evidence to prove their claim of Cenvat credit of element or utilization.

…….

The availment of the Cenvat credit is subject to terms and conditions mentioned in the Cenvat Credit Rules, 2004. In this regard, Rule 9 of the said rules provides for documents and accounts related to Cenvat. The relevant provisions are as under:-

> *"Rule 9 (5): The manufacturer of final products or the provider of output service shall maintain proper records for the receipt, disposal, consumption and inventory of the input and capital goods in which the relevant information regarding the value, duty paid, Cenvat credit taken utilized, the person from whom the input or capital goods have been procured is recorded and the burden of proof regarding the admissibility of Cenvat credit shall lie upon the manufacturer or provider of output service taken such credit.*

The provider of output service of filing Cenvat credit, shall submit a half yearly return in form specified, by notification, by the Board to the Superintendent of Central Excise, by the end of the month following year particular quarter or half yearly year.

Further the availment and utilization of the Cenvat credit is also required to be reflected in the returns for the relevant period to be filed before the Department. The return is the only document through which the department comes to know about various details of any assessee i.e., the activities carried out, nature and value of services provided, tax liability on it Cenvat Credit availed and utilized, payment through cash, discharged of tax liability within stipulated time etc.

8. I find that the Appellant has not filed a revised return to rectify the mistake or omission within a period of sixty days from the date of submission of the return under sub-rule 9 or sub-rule 10 as the case may be.

9. The Appellant has relied upon the case of M/s Broadcan India Research Pvt. Ltd. Vs. Commissioner Service Tax Bangalore (2016(42) STR-79(Tri.-Bang.). In this case the Appellant has filed with frontline which was not tallying with Cenvat credit shown in the ST-3 Returns which are statutory obligation of the manufacturer or provider of output service to be maintained as prescribed in Cenvat Credit Rules, 2004. Hence the reliance placed by on the Judgement in the case of M/s Broadcan India Research Pvt. Ltd. is not relevant in this case.

10. In view of the above discussion and findings, I reject the appeal filed by the Appellant against the impugned order–in–original No.008/AC (SD)/CGST & C. Ex./MC/Dn.VI/R-III/2022-23 dated 12.10.2022."

9. On perusal of the above findings of the learned Commissioner (Appeals) and the order passed by him in the impugned order, it transpires that the disputed service tax liability decided by the original authority was confirmed mainly on the following basis viz., (i) the appellants had accepted the service tax liability in respect of the advances received for providing taxable service of construction of residential units/complex for the purpose of levy to Service Tax under the Finance Act, 1994 and consequently there is no dispute on service tax liability (ii) the appellants paid the service tax

on the said output service through CENVAT Credit available in their books of accounts, but the same was not shown in ST-3 returns; (iii) since the service tax payment was not reflected in ST-3 returns, it is in violative of Rule 9(5) of CCR of 2004 and therefore and hence service tax is liable to be paid to the extent of Rs. ₹2,27,305/-.

10. On perusal of the legal provisions of sub-sections (30a), (91a) of Section 65 of the Finance Act, 1994 and clause (zzzh) of Section 65(105) ibid, which provide for definition of various terms and itemized the scope of the entry of taxable service, respectively, it seen that any service provided in relation to construction of a complex which is intended for sale, wholly or partly, by a builder was subject to levy of service tax w.e.f. 01.07.2010. Since there is no dispute on the issue of taxability of the service provided by the appellants, the only point of dispute that requires to be addressed is whether, the payment made by utilization of CENVAT Credit can be taken as due discharge of service tax liability under the Finance Act, 1994 or not.

11. In the present factual matrix of the case, the facts of the case indicate that the CENVAT Credit taken on input service has not been disputed by the department and only on account of the details not shown in ST-3 returns for the relevant period, the difference in the amount of advance indicated in their books of accounts and ST-3 returns was taken as taxable services on which service tax has not been discharged, and the demands were confirmed. Further, the details of reconciliation statement furnished by the appellants and the CENVAT credit accounts have not been properly scrutinised by the authorities below. Further, it is also a fact on record that there is no action taken by the department either in the present SCN or in other proceedings for recovery of input credit taken in their CENVAT accounts as being not eligible, in order to derecognise such tax payment on advances received. When the appellants having been allowed to take CENVAT credit of eligible input credit, without any objection by the department and without invoking the relevant provisions of CENVAT Credit Rules, 2004, they cannot be stopped in utilizing the same for the reason of procedural violations. Therefore, I am unable to agree with the findings arrived at by the learned Commissioner (Appeal) for demanding service tax leviable on the advances received by the appellants, when the details of service tax payment through CENVAT credit had been produced before them and such payment having been accepted by the department and not denied as ineligible input credit.

12. In this regard, I find that in the case of *Origin Learning Solutions Pvt. Ltd., Vs. Commissioner of Service Tax, Chennai* vide Final Order No. 41698/ 2021, the Tribunal has held that not mentioning the CENVAT credit availed in ST-3 returns is a procedural lapse that can be condoned. Furthermore, the Tribunal has also held in the case of *Twenty First Century Printers Ltd. Vs. Commissioner of Central Excise, Surat-II* – 2009 (234) E.L.T. 277 (Tri.-Ahmd.) that denial of input credit on technical and procedural grounds is not justifiable on the basis of the judgement delivered by Hon'ble High Court of Gujarat. The relevant paragraph of the said decision is extracted and given below:

> ***"4.*** *It is well settled that in the absence of any doubt about the duty paid character of the inputs that received in the factory and their utilization in the manufacture of final products, cleared on payment of duty, the denial of credit on the technical and procedural grounds is not called for. The Hon'ble High Court of Gujarat in the case of M/s. Vimal Enterprises v. UOI - 2006 (195) E.L.T. 267 (Gujarat) has observed that the entire endeavour of the Revenue should be to make the scheme effective and not to deny the beneficial provisions on the basis of technical breaches. As such, we find no justification for denial of credit or for imposition of penalty. Hence, the impugned order is accordingly set aside and all the appeals are allowed with consequential relief to the appellants."*

13. In view of the foregoing discussions and analysis, I do not find any merits in the impugned order passed by the learned Commissioner (Appeals) to the extent it has upheld the order of the original authority in confirming the adjudged demands, despite the service tax liability having been discharged by the appellants through CENVAT Credit which was not disputed by the department, and thus, it does not stand the scrutiny of law. Therefore, by setting aside the impugned order dated 31.08.2023, the appeal is allowed in favour of the appellants.

14. In the result, the impugned order dated 31.08.2023 is set aside and the appeal filed by the appellants is allowed in their favour.

(Order pronounced in the open court on 30.09.2025)

(M.M. PARTHIBAN)
MEMBER (TECHNICAL)

Sinha