CUSTOMS, EXCISE AND SERVICE TAX APPELLAT TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench – Court No. - I

Service Tax Appeal No.3377 of 2012

(Arising out of Order-in-Original No.8/2012-(Service Tax)-Commr. dated 17.09.2012 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-I.)

M/s. Gayatri Hi-Tech Hotels Limited
(6-3-1090, TSR Towers, Raj Bhawan Road, Somajiguda, Hyderabad, A.P.-500082.)
...Appellant

VERSUS

Commissioner of Customs, Central Excise & Service Tax, Hyderabad-I Commissionerate,
.....Respondent
(Kendriya Shulk Bhavan, L.B. Stadium Road, Basheerbagh, Hyderabad, A.P.-500004.)

APPEARANCE

Shri G.Natrajan, Advocate for the Appellant (s)
Shri V.R. Pavan Kumar, Authorized Representative

CORAM:

HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI P. VENKATA SUBBA RAO, MEMBER(TECHNICAL)

FINAL ORDER NO: A/30054/2022

DATE OF HEARING : 28 February 2022
DATE OF DECISION : 22 April 2022 .

P.K.CHOUDHARY :

This is an appeal filed against the Order-in-Original No. 8/2012 dated 17.09.2012 passed by the Commissioner of Customs and Central Excise and Service Tax, Hyderabad I Commissionerate. The Appellant was constructing a seven star hotel in the city of Hyderabad and in this connection, they availed various services from Foreign Service providers as well as domestic service providers. Vide the said

order, Service Tax of Rs.10,24,257 has been confirmed on the Appellant, on the ground that while paying Service Tax under reverse charge, for the import of services, the amount of "withhold tax" paid by the Appellant, over and above the consideration paid to the foreign service providers, shall also be included in the value of taxable service. This demand pertain to the period from May 2006 to March 2010. Appropriate interest on the above demand, under Section 75 of the Finance Act, 1994 and a penalty equal to the tax amount under Section 78 of the Act have also been confirmed in the impugned order. Further, CENVAT credit of Rs.5,27,64,905 availed by the Appellant during the period from 2006-07 to 2009-10 on various input services such as, architect services, consulting engineering services, management consultant services, commercial or industrial construction services, etc. has also been disallowed on the ground that as a result of these services, what emerges is the immovable property in the form of Hotel and hence such CENVAT credit is not admissible. In this connection, the Commissioner has also relied on CBEC's Circular No. 98/1/2008 dated 04.01.2008, wherein it has been clarified that such services relating to construction of immovable property are not entitled for credit, as neither any excise duty nor any service tax was paid on such immovable property. The Assessee contented that upon construction of the Hotel, the same would be used to provide various taxable services, such as Mandap Keeper Services, etc. While confirming the demand, interest under Rule 14 of the CENVAT Credit

Rules, 2004 and equal penalty under Rule 15 (3) of the said rules have also been confirmed.

2. Appearing on behalf of the Appellant, learned Counsel, Shri. G. Natrajan, has made the following submissions.

2.1 On the issue of demand of Service Tax on "withhold tax" it was argued by the learned counsel that as per Rule 7 of the Service Tax (Determination of Value) Rules, 2006, the value of taxable services provided from outside India, shall be equal to the actual consideration charged for the said services. By drawing reference to the agreements entered into by the Appellant, with Foreign Service providers, the learned counsel submitted that, any tax, including, withholding taxes, shall be borne by the Appellant. Accordingly, the Appellant had paid actual consideration to the Foreign Service providers and calculated the withholding tax by grossing up the same, as per Section 195A of Income Tax Act, 1961. For example, if the amount payable to the foreign service provider is Rs. 1,00,000/- and the rate of withholding tax is 10%, by grossing up (1,00,000/100*110), the total amount would be arrived at Rs. 1,10,000 and the withholding tax of Rs. 10,000 would be paid to the Income Tax Department and Rs. 1,00,000 would be paid to the service provider. As the consideration paid to the foreign service provider is Rs.1,00,000 only, the Appellant paid Service Tax on the said amount.

2.2 Learned Counsel has also relied upon Section 198 of Income Tax Act and contended that, as per the said Section, any tax deducted

under the provisions of this chapter, shall be deemed to be income received and the said deeming fiction is only for the purposes of Income Tax Act and the same cannot be applied to Service tax in view of Rule 7 of the Service Tax (Determination of Value) Rules, 2006. The Learned Counsel has also relied upon the following decisions wherein, similar demands have been set aside:

1. *Garware Polyester Ltd. v. CCE– 2017 (5) GSTL 274 Tri-Mum*
2. *MagarpattaTowship Dev. & Cons. Co. Ltd. v. CCE – 2016 (43) STR 132 Tri-Mum*
3. *Hindustan Oil Exploration Co. Ltd. v. CCE – 2019 (25) GSTL 252 Tri-Chennai*

2.3 Learned Counsel has also relied upon the decision of the Division Bench of this Tribunal in the case of *TVS Motor Company Ltd v. CCE – 2021-VIL-412-CESTAT,Chennai*, wherein also similar demands have been set aside after considering relevant provisions of Income Tax Act and precedent judgments. In this case, the demand was also set aside on the ground of limitation, as the issue is wholly interpretational and litigative; appropriate Service Tax has already been paid and the demand is only on the TDS portion.

3. Per Contra Shri V.R. Pawan Kumar, the learned Authorized Representative for the Department, has referred to Section 67 of the Finance Act, 1994 and Rule 7 of the Service Tax (Determination of Value) Rules, 2006 and contended that the withholding tax paid by the Appellant shall also form part of the consideration. He argued that the

tax deductor is bound to furnish Form 16A to the service provider and file quarterly return. He also referred to Section 90 and 91 of the Income Tax Act and submitted that the income earned by the foreign service provider is prima facie liable to Income Tax in India and subject to the Double Taxation Avoidance agreements, if any; if tax is paid in one country the income would be exempted in another country. He also relied on the decision of the Tribunal in the case of *Sheladia Rites v. CCE – 2019 (27) GSTL 707 Tri-Hyd*, wherein, TDS was paid by grossing up the net consideration payable to the local service provider, it was held that Service Tax is payable including the TDS.

4. In rejoinder, the learned Counsel for the Appellant submitted that any TDS deducted in favour of a local person would be set off against his Income Tax liabilities and hence this decision cannot be applied in respect of withholding tax arising out of a foreign transaction.

5. With regard to the demand for recovery of CENVAT Credit on various input services availed in connection with the construction of the hotel, the learned counsel for the Appellant submitted that, during the relevant period, the definition of the term 'input service' under Rule 2(l) of the CENVAT Credit Rules 2004, specifically covered services used in relation to "setting up of the premises of the provider of output service and activities relating to business", and these phrases were omitted only w.e.f 01-04-2011. He also submitted that,

after completion of construction of hotel, various taxable services, such as mandap keeper service, convention service, restaurant service, room accommodation, etc., would be provided by the Appellant and hence the credit is entitled. He also relied on the following decisions:

1. *Sai Samhita Storages Pvt. Ltd v. CCE – 2011 (270) ELT 33 (AP)*
2. *Mundra Port & Sez Ltd v. CCE – 2015 (39) STR 726 Guj*
3. *Bellasonica Auto Components India Pvt Ltd v. CCE – 2015 (40) STR 41 (P&H)*
4. *Lemon Tree Hotels Pvt Ltd v. CCE – 2018 (13) GSTL 305 (Tri-Chennai)*

5.1 With regard to the reliance placed by the Commissioner on CBEC Circular No. 98/1/2008 dated 04-01-2008, it was submitted that, the said circular has ignored the fact that the hotel premises would be used for providing various taxable services. Reliance was also placed on the decision of this bench of the Tribunal in *Lemon Tree Hotel v. CCE-2018-(10)-GSTL-241-Try-Hyd.*

6. Per Contra Shri V.R. Pawan Kumar, the learned Authorized Representative, has referred to the following decisions:

1. *Bharati Airtel Ltd v. CCE [2014 (35) STR 865 (Bom.)]*
2. *Vodafone India Ltd., v. CCE, Mumbai [2015 (324) ELT 434 (Bom.)]*
3. *Galaxy Mercantiles v. CCE [2014 (33) STR (3) (All.)]*

6.1 By referring to clauses (xvia), (xviaa) and (xvib) of Section 37(2) of the Central Excise Act, it was argued that the Appellant is not eligible to the subject CENVAT Credit.

7. In his rejoinder, the Counsel of the Appellant submitted that, the decisions relied on by the opponent counsel are in the context of 'input' whereas the present dispute is on 'input services' which is covered in favour of the Appellant in various decisions cited supra. He also submitted that, in so far as the service providers are concerned, the CENVAT Credit rules have been framed under Section 94 of the Finance Act, 1994 and the reference to Section 37 is unwarranted.

8. We have carefully considered the arguments advanced before us by both sides and also perused the case records.

9. With regard to the issue of Service Tax liability on the withholding tax component, it is true that, the issue is covered in favour of the Appellant in various decisions relied upon by the learned counsel for the Appellant. However, it is observed that, the issue as to how the withholding tax paid in India would be treated by the Foreign Service provider, while determining his tax liabilities, has not clearly come out in those decisions. In TVS Motor Company *supra*, after referring to the provisions of the Income Tax Act and various precedent decisions, it has been held as below.

> *14.5 The above decisions have categorically held that when the TDS amount has been borne by the assessee and only the consideration for the services as agreed upon by the parties has*

> *been paid to the service provider, the same cannot be included in the taxable value for determining the Service Tax liability.*

9.1 However, we do not consider it necessary to embark upon any further discussion on the issue, as the finding of the tribunal, with regard to limitation in TVS Motor Company *supra,* is squarely applicable to this case. To quote from the judgment,

> *16.1 Learned counsel for the appellant has argued on the ground of limitation also. As discussed above, the issue is wholly an interpretational one and there were several litigations pending before different fora. So also, it has to be noted that the appellant has dutifully discharged the Service Tax liability on the entire consideration paid by them. The demand is only on the TDS portion remitted under the Income Tax Act. There is no positive act of wilful suppression with intention to evade payment of Service Tax brought out by the department for invoking extended period.*

9.2 In this case also, the facts are similar. Accordingly, we hold that the demand of Service Tax of Rs.10,24,257/- for the period May 2006 to March 2010, by way of issue of SCN on 08.06.2011, by invoking the extended period of demand, is not sustainable, in the absence of any justification for invoking the extended period. Accordingly, the above demand of Service Tax, along with demand interest and penalties is set aside as time barred.

10. With regard to the denial of CENVAT Credit of Rs.5,27,64,905, we observe that during the relevant period, the definition of the term “input service” specifically covered services used in relation to “setting up of the premises of the provider of output services”. The reliance

placed by the Commissioner on CBEC Circular No.98/1/2008 dated 04-01-2008, is not sustainable in as much as the said circular has been held to be contrary to the provisions of law, in several judgments. It is a fact on record that these services were used for construction of hotel premises, from which various taxable services would be provided by the Appellant, after completion of construction. In this connection the various judgments relied upon by the learned counsel for the Appellant, are apposite and the judgments relied upon by the Learned Departmental Representative, are distinguishable. The definition of the term "input" has been amended from 07.07.2009 so as to specifically exclude the goods used for construction of immovable property from the scope of "inputs", whereas there is no such restriction in the definition of "input service".

10.1 In *Lemon Tree Hotel v. CCE-2018-(10)-GSTL-241-Try-Hyd.,* this Tribunal has held as below.

> ***"7.*** *It is undisputed that the services are utilized for brining to existence building which is used by the appellants for hospitability business and is used for rendering output services like mandap keeper and health club and fitness centre and dry cleaning service and internet cafe services. It is an unimaginable that a hotel can render these services without a building in its place. In our considered view, the input services are availed by the appellant in respect of Works Contract Services, Project Management Services and Architectural Professional Services used for construction of a building, which subsequently is put into use for rendering taxable output services. We find that the adjudicating authority was in error to rely upon the Board*

Circular No. 98/1/2008-S.T., dated 4-1-2008 in as much, the definition of input services during the relevant period does not bar availment of Cenvat credit on all input services. In order to appreciate correct position of law, the definition of input services under Rule 2(l) of the Cenvat Credit Rules, 2004 as was during the relevant period of these cases is reproduced :

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.

It can be seen from the above reproduced sub-rule, that input services includes the services used in relation to setting up, modernization, renovation of premises of provider of output services. In the case in hand, the definition is reproduced as above categorically will apply and the clarification given by the Board in C.B.E. & C. Circular dated 4-1-2008 is going beyond the definition as reproduced is herein above. We find that similar issue as to eligibility to avail the Cenvat credit on design and

engineering of pipe line, services rendered by the pipeline laying of contractors, was denied in the case of Reliance Gas Transportation Infrastructure Ltd., (supra), holding that these services were utilized for brining into existence an immovable property. The Bench after considering the definition of input services, held that the provisions of Section 2(l) of the Cenvat Credit Rules, 2004 very clearly indicate eligibility to avail Cenvat credit of the service tax paid on these services.

8. *Views of the Tribunal have been fortified by decision of the Hon'ble High Court of Gujarat in the case of Mundra Ports and Special Economic Zone Ltd., (supra) the ratio is in paragraph No. 7, 8 & 9 which we with respect reproduce :*

> *7. It is not disputed that jetty was constructed and input credit was claimed on cement and steel. The aforesaid definition of Rule 2(k) was applicable and Explanation 2 did not provide that cement and steel would not be eligible for input credit. According to learned Counsel for the appellant, the appellant is not manufacturer and, therefore, the provisions of Explanation 2 of Rule 2(k) would be applicable only to the factory and manufacturer. The appellant is neither having any factory nor he is manufacturer. The appellant is a service provider of port. We need not go into this question as to whether the appellant is a factory or manufacturer or service provider in view of the fact that it is not disputed by Mr. Y.N. Ravani, learned counsel appearing for the Revenue in this Tax Appeal that the appellant provides service on port for which he is getting jetty constructed through the contractor and the appellant has claimed input credit on cement and steel. The cement and steel were not included in Explanation 2 from 2004 up to March, 2006. The Cenvat Credit Rules, 2004 were amended in exercise of the*

powers conferred by Section 37 of the Central Excise Act, 1944 with effect from 7-7-2009, the date on which it was notified by the Central Government from the date of the notification. According to learned Counsel for the appellant, this amended definition would apply only to the factory or manufacturer and would not apply to the service provider. According to him, either before the amendment made in the year 2009 or thereafter, the appellant was neither factory nor manufacturer and he has only constructed jetty by use of cement and steel for which he was entitled for input credit as jetty was constructed by the contractor, but the jetty is situated within the port area and the appellant is a service provider. According to the appellant, his case is squarely covered by the judgment of the Division Bench of the Andhra Pradesh High Court in Commissioner of Central Excise, Visakhapatnam-II v. Sai Sahmita Storages (P) Limited, 2011 (270) E.L.T. 33 (A.P.) = 2011 (23) S.T.R. 341 (A.P.) wherein in Paragraph 7, it has been clearly held that a plain reading of the definition of Rule 2(k) would demonstrate that all the 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. It is not in dispute that the appellant is a taxable service provider on port under the category of port services. Therefore, the appellant was entitled for input credit and the decision of the Division Bench of the Andhra Pradesh High Court squarely applies to the facts of the case and answered the question on which the appeal has been admitted.

8. Mr. Y.N. Ravani, learned counsel for the Revenue has placed reliance on the decision of the Larger Bench of the Tribunal in Vandana Global Limited v. Commissioner of Central Excise, Raipur, 2010 (253) E.L.T. 440. We have

carefully gone through the decision of the Larger Bench of the Tribunal. We do not find that amendment made in Cenvat Credit Rules, 2004 which come into force on 7-7-2009 was clarificatory amendment as there is nothing to suggest in the Amending Act that amendment made in Explanation 2 was clarificatory in nature. Wherever the Legislature wants to clarify the provision, it clearly mentions intention in the notification itself and seeks to clarify existing provision. Even, if the new provision is added then it will be new amendment and cannot be treated to be clarification of particular thing or goods and/or input and as such, the amendment could operate only prospectively. In our opinion, the view taken by the Tribunal is based on conjectures and surmises as the Larger Bench of the Tribunal used the expression that intention behind amendment was to clarify. The coverage under the input from where this intention has been gathered by the Tribunal has not been mentioned in the judgment. There is no material to support that there was any legislative intent to clarify any existing provision. For the same reason, as mentioned above, the decision of the Apex Court in Sangam Spinners Limited v. Union of India and Others, reported in (2011) 11 SCC 408 = 2011 (266) E.L.T. 145 (S.C.) would not be applicable to the facts of the instant case.

9. Mr. Ravani has also vehemently urged that since jetty was constructed by the appellant through the contractor and construction of jetty is exempted and, therefore, input credit would not be available to the appellant as construction of jetty is exempted service. The argument though attractive cannot be accepted. The jetty is constructed by the appellant by purchasing iron, cement, grid, etc., which are used in construction of jetty. The

> *contractor has constructed jetty. There are two methods, one is that the appellant would have given entire contract to the contractor for making jetty by giving material on his end and then make the payment, the other method was that the appellant would have provided material to the contractor and labour contract would have been given. The appellant claims that he has provided cement, steel, etc., for which he was entitled for input credit and, therefore, in our opinion, the appellant was entitled for input credit and it cannot be treated that since construction of jetty was exempted, the appellant would not be entitled for input credit. The view taken contrary by the Tribunal deserves to be set aside.*

It can be seen from the above reproduced paragraphs of the judgment of the Hon'ble High Court of Gujarat the issue availment of Cenvat credit on the input services which are used for bringing into existence of immovable property are also eligible for availment of Cenvat credit."

10.2 Even though there was an observation in the impugned order that the disputed credit has been reversed voluntarily by the Appellant, admitting their ineligibility to credit, the said observation is effectively countered by the learned counsel for the Appellant, by drawing reference to the reply to the SCN and written submissions.

10.3 Accordingly, We hold that the demand for denial of CENVAT Credit is not sustainable in law. Since the demand itself is not sustainable, the demand of interest and imposition of penalty are also liable to be set aside. Since the credit has already been reversed, the

Appellant is entitled for consequential relief as per Section 142 (6)(a) of CGST Act, in view of the introduction of GST. Ordered accordingly.

11. The appeal is allowed in the above terms.

(Order pronounced in the open court on 22.04.2022.)

(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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