(2021) 05 CESTAT CK 0028

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 11011 Of 2013

Creative Infocity Ltd — APPELLANT

Vs

C.C.E. And S.T.-Ahmedabad-iii — RESPONDENT

Date of Decision : 24-05-2021

Acts Referred:

Cenvat Credit Rules, 2004 — Rule 2(3)

Citation : (2021) 05 CESTAT CK 0028

Hon'ble Judges : Ramesh Nair, J;Raju, Technical Member

Bench : Division Bench

Advocate : Vipul Khandhar, H.K Jain

Final Decision : Allowed

Judgement

1. This appeal has been filed by M/s Creative Infocity against denial of Cenvat Credit.

2. The appellant providing taxable service namely Banking and Financial Services, Goods Transport Agency Service, Renting of Immovable Property

Service, Management and Maintenance and Repair Service and Sponsorship Service. The appellant availed Cenvat credit of these services of

commercial and industrial construction availed by them for construction of their premises. It was alleged that the appellant did not use the said services

for provision of output services mentioned above. It was specifically pointed out that the renting of Immovable Property Service became chargeable to

service tax effect from 01.06.2007. It was alleged that the Banking and Financial Services, Management and Maintenance Repair Services and

Renting of Immovable Property do not entail the use of Commercial and Industrial Construction Services. The demand was confirmed by the

adjudicating authority. Interest and penalty were also imposed. Aggrieved by the said order the appellant before the tribunal.

3. Learned counsel for the appellant argued that it has been held in numerous decision of tribunal that credit of Commercial and Industrial Construction

Service can be availed for provision of output service. He relied on the decision of tribunal in the case of DYMOS INDIA AUTOMOTIVE PVT

LTD 2019 (365) ELT 26 (Mad). In said decision it has been held that for the output service classifiable as Renting of Immovable Property Service

Cenvat credit of Commercial and Industrial Construction service is eligible. In the said decision reliance has been place on the decision of tribunal in

case of NAVARATNA S.G HIGHWAY PROPERTY PVT. LTD. 2012 (28) STR 166 and in case of LAXMI TECHNOLOGY INDIA LTD 2011

(23) STR 265. He also relied on the decision of the tribunal in the case GUJARAT ECO TEXTILE PARK 2020 (33) GSTL 408 (Tri.-Ahmd.)

3.1 The learned counsel also argued that the definition of input service. Input service used in relation to setting up, modernization, renovation or repair

of factory, premises of provider of output services or an office relating to such factory or premises. In this case the construction of complex amounts

to setting up of appellantâ??s premises.

4. Learned Authorized Representative relied on the decision in these cases.

â?¢ 2017 (52) STR 434 (Tri- Ahmd) â?" Fascel Ltd Vs. CST, Ahmedabad

â?¢ 2014 (35) STR 865 (Bom) â?" Bharti Airtel Ltd Vs. CCE, Pune â?" III

â?¢ 2018 (8) GSTL 105 (Guj) â?" CGST- VIII, Vejalpur Vs. Vodafone Essar Gujarat Ltd.

â?¢ 2006 (199) ELT 15 (Tri.- Mum) â?" Indorama Synthetics Ltd Vs. CCE, Nagpur

â?¢ 2018 (360) ELT 86 (Bom)- Manikgarh Cemnet Vs. CCE, Nagpur

4.1 He argued that the only goods can qualify under the definition of capital goods. He argued that the buildings are not goods and therefore they did

not qualify as capital goods.

5 We have considered the rival submissions. we find that the issue regarding admissibility of Cenvat credit on Commercial and Industrial Construction

Service used for construction of building which in turn are used for renting purpose has been settled by Honâ??ble High Court of Madras in case of

DYMOS INDIA AUTOMOTIVE PVT LTD 2019 (365) ELT 26 (Mad). In the said decision following has been observed.

â??9. The Tribunal took note of the allegations in the said show cause notice i.e. the assessee was not eligible for input service credit availed under

the head â??commercial or industrial construction activitiesâ?? during the period 2008-09. The Tribunal, after referring to the definition â??input

serviceâ?? as it stood at the material time under Rule 2(3) of the said Rules, pointed out that the first limb of the definition made it clear that in the

case of service provider, the Service Tax paid would be eligible input service, if the service is used for providing output service. The assessee

contended that they were both manufacturer and provider of output service, that for the portion of the building used for manufacturing activity, the

appellant was eligible for credit of Service Tax paid on construction services, that there was no dispute on this credit and that the dispute was confined

to the quantum of credit availed on construction services on that portion of the building leased out to the HLIPL.

10. The Tribunal also referred to the decision in the case of CCE, Coimbatore v. Lakshmi Technology & Engineering Indus Ltd. [reported in

2011 (23) S.T.R. 265 (Tri.-Chennai)] and also the decision in the case of Navaratna S.G. Highway Property Private Limited v. CST

[reported in 2012 (28) S.T.R. 166 (Tri.-Ahmd.)] and held that without construction of the building, the renting of immovable property

services cannot be provided and that therefore, construction service is an eligible service for credit for providing output service of renting of

immovable property.

11. In our considered view, the conclusion of the Tribunal is well founded, as construction service is an eligible service for credit for

providing output service of renting of immovable property and without construction of the building, the renting of immovable property cannot

be provided. We are also of the opinion that there is no error in the decision taken by the Tribunal.â??

5.1 As far as the reliance of Authorized Representative on the following decision:

â?¢ 2017 (52) STR 434 (Tri- Ahmd) â?" Fascel Ltd Vs. CST, Ahmedabad

â?¢ 2014 (35) STR 865 (Bom) â?" Bharti Airtel Ltd Vs. CCE, Pune â?" III

â?¢ 2018 (8) GSTL 105 (Guj) â?" CGST- VIII, Vejalpur Vs. Vodafone Essar Gujarat Ltd.

is concerned the Honâ??ble High Court of Delhi in case of Vodafone Mobile

Services Limited has taken contrary view. Moreover, the facts and

circumstances in case of Telecom Towers are different from the facts in the instant case.

5.2 It is noticed that the renting of Immovable Property Service came into existence with effect from 01.06.2007 and therefore credit of Commercial

and Industrial Construction Service for the period prior to levy of service tax on Renting of Immovable Property Service cannot be allowed. The credit

of services availed after 01.06.2007 is however admissible. The appellant have also claimed benefit of Cenvat credit for prior period with respect to

the other output services namely Banking and Financial Services, Goods Transport Agency Service, Management and Maintenance and Repair

Service and Sponsorship Service. It is seen that while the Commercial and Industrial Construction Service has been used for construction of entire

building. The services specified above have no relation to the building. If at all these services are only be provided from very small part of the building

the rest of the building has been rented by the appellant which at the material time was not taxable service. Thus, the admissibility of credit needs to

be examined from that aspect. It is seen that the aspect of admissibility of credit with respect to output services other than Renting of Immovable

Property Service was not raised before the lower authorities and therefore, there are no findings in this aspects in the impugned order. Moreover it is

also not clear if the said services Banking and Financial Services, Goods Transport Agency Service, Management and Maintenance and Repair

Service and Sponsorship Service were provided from same premises or from elsewhere. Admissibility of the credit is the question of law and

therefore the appellantâ??s can raised at the stage of first appellate level also. Since this aspect has not been examined by the lower authorities the

impugned order is set aside and the matter is remanded to the original adjudicating authority for fresh consideration after taking note of above

observations.

6. The impugned order is set aside and matter is remanded to the adjudication authority.

(Pronounced in open court on 24.05.2021)