(2023) 08 CESTAT CK 0015

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 85841 Of 2015

?M/S. Crescent Entertainment & Tourism Ltd APPELLANT

Vs

M/S. Crescent Entertainment & Tourism Ltd RESPONDENT

Date of Decision : 03-08-2023

Acts Referred:

Cenvat Credit Rules, 2004 — Rule 2(k)
Finance Act, 1994 — Section 73(2), 75, 77, 78

Citation : (2023) 08 CESTAT CK 0015

Hon'ble Judges : Dr. Suvendu Kumar Pati, Member (J);Anil G. Shakkarwar, Member (T)

Bench : Division Bench

Advocate : Vishal Agarwal, Ramnath Prabhu, Rishabh Chandak, Dr. Badhe Piyush Barasu

Final Decision : Allowed

Judgement

Dr. Suvendu Kumar Pati, Member (J)

1. Order for recovery of certain CENVAT Credits of Rs.2,24,25,358/- in total availed on input and inputs services allegedly held to be inadmissible and also confirmation of Service Tax demand of Rs.53,31,866/- raised towards providing service of renting of immovable property alongwith interest and penalties under various Sections of Finance Act is assailed in this appeal.

2. Fact of the case, in a nutshell, is that Appellant M/s. Crescent Entertainment & Tourism Ltd. developed a shopping complex called Khandesh Central. It had rented out part of its premises having space for shops etc. to business conductors like Big Bazar, Adidas, Liliput, Provogue etc. It has got service tax registration under Nashik Commissionerate for "Business Support Service" and "Transport of Goods by Road Service". On the basis of intelligence gathered, Director General of Central Excise Intelligence (DGCEI) of Nashik Regional Unit conducted investigation and observed that for construction of the said commercial complex over the erstwhile Khandesh Mill, Appellant had purchased

cement, steel, tiles, pipes, water proofing materials etc. and availed CENVAT Credit on those inputs used for construction of building or civil structure which is nothing but immovable property, not subjected to excise duty or Service Tax but it had availed CENVAT Credits on inputs services like Manpower Supply Agency Service, Architect Service, Telephone etc. when a major portion of the invoices/ bills were raised in the name of its head office at Mumbai. Further, it had entered into agreements with different companies to rent out its premises at different rates ranging from Rs.25 to Rs.50/- per sq. ft. for different periods ranging from 1 year to 9 years. Simultaneously, it was observed that such renting of premises were also linked to the sale outturn of the business units with a minimum guarantee of certain amount, whichever is higher but with respect to certain transactions it had raised invoices for the lesser amount towards rent charges of the premises and discharged duty liability at such lesser amount.

2.1 Appellant was accordingly put to show-cause vide notice dated 15.10.2013 with Addendum dated 09.12.2013 for recovery of CENVAT Credit on inputs for the period between July, 2008 and August, 2011 amounting to Rs.1,40,10,910/- and recovery of CENVAT Credit availed on input services during the period April, 2008 to March, 2013 for an amount of Rs.84,14,448/- as per Annexure A1 and A2 of the show-cause notice totalling a demand for recovery of Rs.2,24,25,358/- alongwith a proposal for penalty of Rs.1,92,873/-and Rs.25,69,497/- under Section 78 and Rs.10,000/- under Section 77 plus proportionate interest on recovery amount under Section 75 of the Finance Act, 1994. Simultaneously, Service Tax demand of Rs.53,31,866/- was also raised for providing of renting of immovable property service during the period between October, 2010 and March, 2013 in terms of Section 73(2) alongwith penalty on the entire amount under Section 78 and interest under Section 75 of the Finance Act, 1994. Appellant failed to succeed the adjudication process that confirmed the demand alongwith interest and penalty, for which it has approach this Tribunal for necessary relief.

3. During course of hearing of the appeal, learned Counsel for the Appellant Mr. Vishal Agarwal submitted that credit on inputs services and capital goods including credit on steel, cement, construction services etc. were all availed prior to 01.04.2011 since the construction of Mall had commenced in 2008 and completed by 2010-11 financial year, but applying the definition of input introduced in Rule 2(k) of the CENVAT Credit Rules, 2004 w.e.f. 01.04.2011, duty demands were confirmed by the Adjudicating Authority. On the basis of the ratio of judgment of this Tribunal in Vandana Global case, in which finding was given to the effect that the amendment was clarificatory having retrospective application that was overruled by the Hon'ble High Court of Chhattisgarh as reported in 2018 (16) GSTL 462 (Chhattisgarh), he further submitted that relying on the explanation-II inserted to the definition of input vide Notification No. 16/2009 on dated 07.07.2009, though not specifically invoked in the show-cause notice that excludes goods used in the manufacture of capital goods for further use in the factory like cement, angles, channels etc., demand of Rs.1,12,91,950/- was confirmed but by that time i.e. before 07.07.2009, credit

to the extent of Rs.1,07,33,533/- was already availed and utilised which was clearly admissible in view of the prevailing Rule then and in view of the judgment of the Hon'ble High Court of Gujarat that overruled judgment of Mundra Port and SEZ Ltd. of the Tribunal reported in 2015 (39) STR 726 (Guj.). Further, placing reliance on the various judgments in the case of CGST Vs. Dymos India Automotive Pvt. Ltd. reported in 2019 (365) ELT 26 (Mad.), Navratan S.G. Highway Properties P. Ltd. Vs. CST reported in 2012 (28) STR 166 (T), Reliance Gas Transportation Infrastructure Ltd. Vs. CST, reported in 2016 (45) STR 286 (T), Reliance Corporate IT Park Ltd. Vs. CCE reported in 2023 (2) TMI 826 – CESTAT Mumbai, Upal Developers Pvt. Ltd. Vs. CCE in Appeal No. 70278 of 2017, Oberoi Mall Ltd. Vs. CST reported in 2016 (3) TMI 854– CESTAT Mumbai, Regal Buildtech Pvt. Ltd. Vs. CCE reported in 2019 (12) TMI 331 – CESTAT Mumbai, he argued that CENVAT Credit availed on various construction related services were admissible credits prior to 01.04.2011 and in view of the fact that admissibility of inputs in respect of goods used in construction of immovable property had remained always a bone of contention for the period prior to 01.04.2011 for which in view of the judgment in the case of CCE Vs. Ultra Tech Cement Ltd. reported in 2017 (347) ELT 3 (Chhattisgarh) and CCE Vs. Bhoramdeo Sahakari Shakkar reported in 2017 (345) ELT 476 (Chhattisgarh), invocation of larger period would not be applicable to the case of Appellant.

4. On the issue of demand of Service Tax that was based on the value mentioned in the lease rental agreements, leaned Counsel Mr. Agarwal further submitted that admittedly provisions were made for collection of lease towards renting of immovable property on the basis of minimum guaranteed amount and alternatively on the basis of business turnover, whichever were to be in the higher side but because of the inadequate footfall in the Mall complex that could not generate adequate business for the tenants namely the business conductors, Appellant orally agreed to accept less amount of lease rental than the amount reflected in the agreement. In asserting that despite such lesser collection of rents, Appellant continued to discharge service tax liabilities for the period from 2010 to 2013 on the basis of agreed amount and thereafter, its started billing the business conductors on the basis of agreed percentage on net sales that remained lesser than the agreed upon rental amount, but on that score, duty demand, based on the reason that no addendum/revised rental agreement was entered between the parties, was unsustainable. On rejection of credits for the period post October, 2010 on the ground that most of the invoices were addressed to the registered office of Appellant at Mumbai and not to the Mall at Jalgaon Unit, placing reliance on the judgment of Hon'ble High Court of Gujarat passed in the case of CCE Vs. Dashion Ltd. reported in 2016 (41) STR 884 (Guj.) that has been accepted by the CBEC vide its Circular No. 1063/2/2018-CX, he argued that its a procedural infraction and curable irregularity for which CENVAT Credit cannot be denied only on the ground that invoices issued in the address of registered office had not registered it as IST and, therefore, the order passed by the Commissioner is liable to be set aside.

5. In response to such submissions, learned Authorised Representative for the Respondent-Department Mr. Badhe Piyush Barasu arguing in support of the reasoning and rationality of the order passed by the Commissioner and drawn our attention to the fact that by the time order was passed by the Commissioner in January, 2015 Tribunal's judgment on Vandana Global was holding the field and even the judgment of Adani Port and SEZ Ltd., cited supra, had not been pronounced and, therefore, the order passed by the Commissioner in placing reliance on Mundra Port and SEZ Ltd. cited supra holding that credit of excise duty paid on construction material was not admissible and retrospective effect of the amended definition of input having attained judicial approval by the Tribunal in Vandana Global case, no irregularity could be noticeable in the order passed by the Commissioner that would require intervention of this Tribunal.

6. We have perused the case record, relied upon case laws and other materials produced by adversaries. As could be noticed, there were two types of demand namely demand for recovery of inadmissible credits which is further bifurcated into two subcategories. They are CENVAT Credit availed on various inputs like steel, cement, other materials used in construction services and the other one was invoices raised in the Appellant's Head office address which was different from the place of use of inputs. The second demand is in respect of Service Tax i.e. computed on the differential calculation made, basing on the price agreed in the bilateral agreement and the actual amount collected against invoices raised for renting of immovable property by the Appellant from its tenants. On the point of admissibility of credits on steel, cement etc., Appellant's stand is consistently in favour of its complete availability up to 07.07.2009 till Notification No. 16/2009-CE introduced an explanation-II into the definition of "inputs". Undisputedly credits were admissible on purchase and use of those items up to the amendment was brought on record on 07.07.2009. Learned Counsel for the Appellant took the stand that if period beyond 07.07.2009 till the subsequent amendment made on 01.04.2011 is to be taken as the period on which credit is also inadmissible, then only about Rs.7 lakhs some odd amount of credits were availed by the Appellant after 07.07.2009. Department placed its reliance solely on the judgment of Larger Bench of this Tribunal passed in the case of Vandana Global wherein it was held that Explanation-II to Rule 2(k) of CENVAT Credit Rules, 2004 inserted vide Notification No. 16/2009-CE was clarificatory in nature and hence it has retrospective application w.e.f. 2004 but the same judgment has been overruled by the Hon'ble High Court of Chhattisgarh in 2018. Needless to mention here that having regard to the precedent value of both the decisions, coupled with direction content in the judgment of the Larger Bench of the Tribunal in the case of Mira Silk Mills Vs. Commissioner of Central Excise, Mumbai reported in 2003 (153) ELT 686 (Tri. - LB) wherein it had been held that in such a scenario the judgment of the Hon'ble High Court is to be followed, we are of the considered opinion that CENVAT Credits on those inputs like cement, steel etc. were admissible to the Appellant since no Rule was in existence then to deny its admissibility. This being the position of law, going by the submissions of

learned Counsel on the facts of the case, out of total credit of Rs.1,12,91,950/- availed on cement and steel, credit to the extent of Rs.1,07,33,533/- being availed prior to 07.07.2009 were clearly admissible credits. Now coming to the disputed credit that was taken after 07.07.2009, apart from the submissions of Appellant that neither the Notification No. 16/2009-CE was pressed into service not any reference to the subsequent amendment made on 01.04.2011 was referred in the show-cause notice and that such restriction in 2009 on taking credits against goods used in manufacture of capital goods was meant for manufacturer of finished goods and not for service provider, we would like to place on record findings of this Tribunal made at its Bench at Ahmedabad in the case of Bridge & Roof Co. (India) Ltd. Vs. CCE & ST, Vadodara-I on dated 15.06.2023 in Service Tax Appeal No. 13327 of 2013-DB, the relevant portion of which reads:-

“From the plain reading of the explanation-2 it can be seen that explanation-2 is exclusively applicable to manufacturer and not to service provider. Therefore, the entire case based on the amendment in explanation-2 cannot sustain. Further, as regards the admissible inputs for the purpose of Cenvat credit, it falls under clause-(ii) of the definition of inputs according to which the Input includes all goods except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles used for providing any output service. A plain reading of clause-(ii) of definition read with explanation-2, it is absolutely clear that the exclusion provided in explanation-2 is applicable to manufacturer and as regard the service provider in terms of clause-(ii) of definition Input the service provider is entitled for Cenvat credit of inputs which are used for providing output service.”

7. It is required to be mentioned here that in placing reliance on the judgment on the issue raised by the adversaries including that of M/s Mundra Port & SEZ Ltd. and M/s. Vandana Global and after going through the amended definition of input service brought w.e.f. 07.07.2009, the above referred order was handed out. In carrying forward the judicial precedent set by our own Tribunal, we are inclined to conclude our findings that the entire credit availed by the Appellant-service provider in respect of goods purchased for construction of premises are admissible credits. Further, in view of the decision of the Hon'ble High Court of Gujarat passed in the case of CCE Vs. Dashion Ltd. and the settled position of law that ISD registration cannot be a pre-condition precedent for availment of CENVAT Credit on inputs services post October, 2010. The reason cited in the Order-in-Original that addresses mentioned in the invoices were different is unsustainable in law unless it is established that the services were not actually availed by the assessee on which credits were taken by it.

8. Now coming to the demand of Service Tax on the basis of the value shown in the lease rental agreement documents, there is no denying of the fact that no subsequent change of the terms and conditions of the agreement were made in respect of those documents by way of addendum or amendment of those

agreement and admittedly lesser amount on the basis of sale turnover was taken to be the rent of the property in respect of most of the tenants, though agreements indicate that higher amount was to be billed and collected by the Appellant but this cannot form the basis to make a duty demand since invoice value, which is consistent with the collection of rent value, would determine the taxability irrespective of the fact that it is inconsistent with the agreed upon terms. To put it differently, any agreement can be breached by either of the parties against which civil remedy by way of liquidated or unliquidated damaged can be claimed in a civil court and parties can be at variance to the terms of agreement on mutual consent through an oral agreement but it would be out of purview of any 3rd party including the tax authorities to compel observation of the conditions of the contracts/agreements, other than the parties who are signatories to it. Hence the order.

THE ORDER

9. The appeal is allowed and the order passed by the Commissioner of Central Excise, Customs & Service Tax, Nashik–I vide Order-in-Original No. 02/ST/2015 dated 21.01.2015 is hereby set aside with consequential relief, if any.

