

(2021) 09 CESTAT CK 0008

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 50248 Of 2021

M/s Indore Treasure Market City Pvt. Ltd. Vs Commissioner, CGST And Central Excise?

Date of Decision : 01-09-2021

Acts Referred:

Cenvat Credit Rules, 2004 — Rule 4, 6, 9, 14
Finance Act, 1994 — Section 78

Citation : (2021) 09 CESTAT CK 0008

Hon'ble Judges : Delip Gupta, J;P. Anjani kumar, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

1. Heard both sides and perused the records of the case.
2. The issue involved in the appeal is as to whether the credit of Excise Duty/ Additional Customs Duty (CVD) on inputs and capital goods and credit of Service Tax paid on input services which have been used for the construction of Mall, further used/usable for providing taxable output service is admissible to the appellants.
3. Briefly stated, the facts of the case are that M/s Indore Treasure City Market (Private) Limited, the appellant was engaged in the business of setting up and managing shopping centres, family entertainment centres, multiplexes, etc. popularly known as "Malls". The appellant registered itself with the Service Tax Department for Renting of Immovable Property Service, Maintenance and Repair Services, Advertising Services, GTA Services, Management Consultancy Services, etc., intended to be provided by them. The appellant availed the credit on inputs like cement, steel, angles, channels etc., and input services like construction services, consultancy, architect and allied services etc., used by them in the construction of "Malls".
4. An Audit of the records of the appellant was conducted and the Department opined that the appellant is not eligible to avail such credit. Accordingly, a Show Cause Notice was issued and was confirmed by order dated 10.02.2014 wherein

recovery of CENVAT credit availed of Rs.10,21,04,601/- and CENVAT credit utilized of Rs.6,45,131/- was confirmed under Rule 14 of CENVAT Credit Rules 2004 (herein after referred to the Credit Rules) along with applicable interest and equal penalty was imposed under Section 78 of the Finance Act, 1994.

5. Shri Sumit Nema, learned Senior Counsel assisted by Shri Navin Khandelwal and Shir Piyush Parashar appearing on behalf of the appellant submitted that the appellant availed CENVAT credit to the tune of Rs.10.21 Crores and utilized CENVAT credit of Rs.6,45,131/- in respect of agreements for sale of some shops under construction. Learned Senior Counsel pointed out that the definition of "Input" and "Input Service" had undergone a change with effect from 01.04.2011 by Notification dated 01.03.2011. The definition of "Input" till 31.03.2011 was as follows:

"2(k) "input" means-

(i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production;

(ii) 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;

Explanation 1.- The light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

Explanation 2.- Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer;"

6. After the amendment, with effect from 01.04.2011, the definition of "Input" is as follows:

"2(k) "input" means-

.....

but excludes-

.....

(B) any goods used for-

(a) construction of a building or a civil structure or a part thereof; or

(l) excludes services

(A).... in so far as they are used for

(a) construction of a building or a civil structure or a part thereof; or"

7. Learned Counsel submits that it is evident from the definition of "Input" that goods used in the construction of a building or a civil structure are excluded from 01.04.2011 but were included to be eligible for CENVAT credit prior to 01.04.2011; therefore, the credit availed by the appellant prior to 01.04.2011 has rightfully been availed. He submits that the appellant reversed credit of Rs.15,87,634/- and declared it in the ST-3 Returns filed up to March 2013 and intimated the Department by letter dated 16.02.2016 well before the issuance of the Show-Cause-Notice. In addition to the same, the appellant also reversed Rs.51,500/-, Rs.9,99,77,995/- and intimated in the return for the period October 2014 to March 2015 and April 2015 to September 2015, respectively. The final balance of Rs.51,717/- was also reversed by intimating the Department.

8. Learned Counsel for the appellant submits that the issue is no longer res integra and is squarely covered by the order dated 26.06.2019 passed by this Bench in M/s Raipur Treasure Island Private Limited vs. Commissioner of Customs, Service Tax Appeal No. 50615 of 2015 decided on 26.06.2019. He also relies upon the following cases:

I. Commissioner of Central Excise vs. Sai Samhita [2012] 17 Taxman.com 107 (AP) and other cases.

II. Mundra Ports and Special Economic Zone Limited vs. Commissioner of Central Excise and Customs, 2015-TIOL-1288-HC-AHM-ST.

III. Galaxy Mercantiles Limited vs. Commissioner of Central Excise and Service Tax Commissionerate, 2018-TIOL-3789-CESTAT-ALL.

IV. M/s DLF Promenande Limited vs. Commissioner, Service Tax, Delhi, Service Tax Appeal No. 54213 of 2014 decided on 29.01.2020

9. He further submits that the appellant has been regularly filing ST-3 Returns and at the time of audit of their records, it had submitted details of the credit availed. Therefore, the Commissioner erred in holding that the opening balance of the credit available has been suddenly reflected in the Returns and no documents for co-relation of the same were submitted. He also submits that for this reason, the extended period could not be invoked and the demand is liable to be set aside.

10. Learned Authorized Representative appearing for the Department submits that in terms of Rule 2 (1) of the Credit Rules, CENVAT credit is restricted to such services which are used by the provider of taxable services; the appellant was initially registered for payment of service tax on account of services rendered by the foreign architect; thereafter services like Business Auxiliary Service, Goods Transport Agency Service, Renting of Immovable Property Services and Sponsorship Services etc. were added; it was not registered for providing the

services of Construction of a Commercial Building or Complex, or Works Contract Services; therefore there is no question of availing CENVAT credit in respect of input and input services; the appellant did not mention any CENVAT credit balance in the Returns filed for the period 04/2010 to 09/2010; opening balance was shown in the Returns filed for the period 10/2010 to 03/2011. He submits that the appellant has not submitted documents/information regarding the CENVAT credit availed by them even after being requested. Learned Authorized Representative submits that the case laws relied upon by the appellant are not relevant as the facts of the case are different.

11. We find that the main objections of the Revenue in the instant case is that the appellant registered itself for services provided by an Architect, Business Auxiliary Services, Goods Transport Agency Services, Renting of Immovable Property Services etc. and did not register for the services of Construction of a Commercial Building or Complex or for the Works Contract Services and therefore, there is no nexus between the input services availed and the services provided. Department also contends that the appellant has not submitted evidence to establish the availability of credit. It is also the contention that the appellant has not submitted the requisite documents/ information and suppressed facts.

12. In so far as the argument of Revenue regarding absence of nexus between input services and output services, we find that the Tribunal has gone into this issue in several cases. It is seen that the Tribunal has decided the issue in favour of the appellant.

13. In DLF Promenade Limited, the Tribunal observed:

"20. In view of the aforesaid decisions of the High Courts, there is no manner of doubt that CENVAT Credit availed by the appellant on inputs, inputs services and capital goods service used for construction of the Mall, which was ultimately let out could not have been denied to the appellant. The findings to the contrary recorded by the Commissioner cannot be sustained and are, accordingly, set aside.

21. The only issue that now remains to be decided is whether the amendment made with effect from 1 April, 2011 in the definition of "input service" will be applicable to the facts of the present case since the period of dispute in the second show cause notice is from 1 April, 2011 to 31 March, 2012. The second show cause notice dated 16 April, 2013 makes no mention of the amendment made in the definition of 'input service', much less mentioning that the 'input services' have been received by the appellant after 1 April, 2011. In reply to the show cause notice, the appellant stated that in view of the clarification dated 29 April, 2011 issued by CBEC, 'input services' received prior to 1 April, 2011 were admissible for CENVAT credit. It has also been stated that the 'input services' in question were received by the appellant before 1 April, 2011 in the grounds of appeal also. The appellant has specifically come out with a case that the CENVAT

Credit availed by the appellant for the period 2011-12 pertains to input services received by the appellant prior to 1 April, 2011. In this connection, the relevant pages of the CENVAT Register for the period 2011-12 have also been enclosed.

22. The Commissioner has not examined this aspect and has merely observed that in view of the amendment made in the definition of 'input service' with effect from 1 April, 2011, the appellant would not be entitled to avail CENVAT Credit.

23. It clearly transpires from the reply filed by the appellant as also from the documents enclosed in the appeal that even though the period in dispute may be from 1 April, 2011 to 31 March, 2012 but the 'input services' were received by the appellant prior to 1 April, 2011. The clarification contained in the Circular dated 29 April, 2011, on which reliance has been placed by the learned Counsel for the appellant, is reproduced below:"

S.No.

Issue

Clarification

12

Is the credit available on services received before 01.04.2011 on which credit is not allowed now? e.g. rent-a-cab service

The credit on such service shall be available if its provision had been completed before 01.04.2011.

14. In view of the aforesaid decision of the Tribunal, we are of the considered view that the issue of nexus between input material/services and the output services has been settled by the Tribunal in favour of the appellant.

15. The facts of the instant case are slightly different as in the present case the appellant could not complete the construction of the mall. However, this fact should not in any way affect the admissibility of credit to the appellant as the admissibility of the credit availed prior to 01.04.2011, has been settled in principle. It is also on record that the appellant reversed the credit availed by it after 01.04.2011 and intimated the Department. The demand in instant case pertains to the credit availed by the appellant before 01.04.2011. Therefore, in view of the above discussion, it is held that the appellant has correctly availed the credit on inputs and input services, the duty and tax on which has been paid by the appellant. To that extent, the impugned order is not sustainable.

16. Having decided the issue on merits, we turn our attention to the other issues like time bar and availability of credit to the appellant. The appellant submits that it had been regularly filing the ST-3 Returns and as such nothing was suppressed by it so as to invoke of the extended period.

17. On the other hand, learned Authorized Representative submits that there

was no mention of CENVAT credit in the Returns filed till September 2009 and an opening balance has been shown in the Returns filed for the period October 2009 to March 2010.

18. This contention of Revenue appears to be factually incorrect. The learned Counsel for the appellant has demonstrated that during the Audit conducted during 2007-08, well before the issuance of Show Cause Notice, the credit of around Rs.4.5 crores was noticed by the Audit and explanation of the appellant was called for. The appellant explained the same to the Authorities. The contention of the Department is that the CENVAT credit has been shown for the first time in 2010. On the one hand, Revenue accuses that the appellant availed ineligible credit of Rs.10.15 crores and proceeds to demand the same whereas on the other hand, it avers that no documents like invoices etc. were produced to establish the amount of credit admissible. We find that Credit Rules imposed certain conditions for allowing credit in terms of Rules 4 & 9 and cast certain obligations upon the assessee in terms of Rule 6. The quantum of admissibility of credit depends on satisfying the conditions imposed therein and the discharge of obligations. In such circumstances it is not possible to quantify the admissible credit at this juncture. For this limited purpose, the issue needs to be remanded to the Adjudicating Authority.

19. In view of the above, we set aside the impugned order and remand the issue to the adjudicating authority for quantifying the credit admissible. The appellant shall submit all the evidence it would like to rely upon for the purpose of availing credit claimed by it within two weeks of receipt of this order. We also order that the Adjudicating Authority shall examine all the evidence in form of records/ documents/ certificates as may be submitted by the appellant and allow the credit, as found admissible, to the appellant and pass an order preferably within six weeks of the submission of such evidence.

20. The appeal is allowed to the extent indicated above.

(Order pronounced on 01/09/2021).