(2021) 03 CESTAT CK 0005

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 41144 Of 2016

M/s. Rayala Corporation Private Limited @Hash Commissioner Of G.S.T. And Central Excise

Date of Decision : 04-03-2021

Acts Referred:

Cenvat Credit Rules, 2004 — Rule 2(1), 14, 15(1), 15(3)
Finance Act, 1994 — Section 65(105)(zn), 65(105)(zzl), 65(105)(zzm), 65(105)(zzq), 65(105)(zzzh), 65(105)(zzzza), 73(1)

Citation : (2021) 03 CESTAT CK 0005

Hon'ble Judges : P. Dinesha, J

Bench : Single Bench

Advocate : S. Vishnupriya, S. Balakumar

Final Decision : Partly Allowed

Judgement

1. This appeal is filed by the assessee against Order-in-Appeal No. 159/2016 (STA-I) dated 18.03.2016 passed by the Commissioner of Service Tax

(Appeals-I), Chennai.

1.2 A Show Cause Notice dated 09.04.2012 was issued, citing the scrutiny of ST-3 return and CENVAT invoices for the period from April 2009 to

September 2009, alleging that the appellant had taken CENVAT Credit of Rs. 6,55,099/- in respect of the Service Tax paid for the construction of an

immovable property as input M/s. Rayala Corporation Private Limited, No. 144/7, Old Mahabalipuram Road, Kottivakkam, Chennai â?" 600 041 :

Appellant VERSUS The Commissioner of G.S.T. and Central Excise, Chennai South Commissionerate, M.H.U. Complex, 692, Anna Salai,

Nandanam, Chennai â?" 600 035 : Respondent service credit which, according to the Revenue, was not used for providing any output service i.e.,

renting of immovable property. It has also been observed in the Show Cause Notice that the immovable property was let out only after completion of the construction activity; that the services related to construction activities such as Commercial or Industrial Construction Service or Works Contract

Service, was an input service for the output namely, immovable property, which was neither subjected to Central Excise Duty nor Service Tax; that

the input credit of Service Tax could be availed only if the output is a service liable to Service tax or goods liable to Excise Duty and that the above

appeared to be inadmissible under Rule 2 (l) of the CENVAT Credit Rules, 2004. Interestingly, the said Show Cause Notice also refers to the earlier

Show Cause Notices, viz.:

(i) Show Cause Notice No. 617/2010 dated 30.09.2010 issued in file C.No.IV/09/673/2010- STC/Adj covering the period from April 2009 to

September 2009; and

(ii) Show Cause Notice No. 42/2011 dated 18.03.2011 issued in file C.No.IV/09/166/2009-STC/Adj. covering the period from October 2009 to

September 2010

and at paragraph 5, refers to the period from October 2010 to September 2011, which reads as under:

â??5. Presently, on scrutiny of ST-3 Return and Cenvat Invoices for the period from October 2010 to September 2011, it is found that the

assessee has again taken inadmissible Cenvat Credit on input service to the tune of Rs. 6,52,266/- (Annexure enclosed) and appears to have

contravened the provisions of Rule 2 (l) of Cenvat Credit Rules, 2004 and the same is recoverable under the provisions of Rule 14 of

Cenvat Credit Rules, 2004.â??

1.3 The Show Cause Notice has, vide paragraph 7, proposed the demand of Service Tax of Rs.6,52,266/-, being the wrongly availed CENVAT Credit

under Rule 14 of the CENVAT Credit Rules, 2004 read with Section 73 (1) of the Finance Act, 1994 along with interest at applicable rates and

penalty under Rule 15 (3) of the CENVAT Credit Rules, 2004.

2.1 The appellant filed a detailed reply inter alia requesting for dropping further proceedings for the reasons shown in its reply to Show Cause Notice

dated 20th June, 2012. In a nutshell, the appellant had pleaded, inter alia, that they had taken construction for setting up an additional warehouse to

their factory situated at 100/2 Vandalur Kelambakkam Road, Melakottaiyur, Chennai â?" 600 048, which they had proposed would be used only for renting purposes; the construction activity was undertaken only for setting up an additional warehouse to the factory and that the said construction was

directly used for providing output service namely, renting of immovable property service.

2.2 They also submitted inter alia, with regard to Sl. No. 11 to 20 of Annexure to the Show Cause Notice which was pertaining to Diamond Building

Concept Pvt. Ltd., that the same was attributable to the credit availed towards renovation activity carried out on the third floor of their IT Park at

144/7 Old Mahabalipuram Road, Kottivakkam, Chennai â?" 041 for the new tenant which, according to them, pertained to the availment of credit on

renovation services which activity was directly used for providing output services i.e., renting of immovable property service.

2.3 With regard to insurance, they had maintained that their activities were relating to business, which are treated as input service under the CENVAT

Credit Rules.

2.4 With regard to Sl. No. 8 of Annexure to the Show Cause Notice, they had submitted that the same arose out of a development agreement for

construction of commercial complex entered into by them with M/s. Vira Properties (Madras) Pvt. Ltd. According to the terms of the said agreement,

the land was leased to the developer for construction and the developer could in turn lease back a portion of the constructed premises to the

owner/lessor i.e., the appellant herein. In respect of the aforesaid lease, the developer had charged rent along with applicable Service Tax thereon,

which was taken as credit by the appellant who is a lessor in discharge of Service Tax liability on the main lease. The assessee thus pleaded that the

lease agreement with the developer was an input service to the noticee/lessor which, according to them, was eligible for credit, etc.

3. The Adjudicating Authority, after considering the reply of the assessee, vide Order-in-Original No. 69/2014 dated 26.08.2014, took up the matter for

adjudication and proceeded to confirm the demand proposed in the Show Cause Notice mainly on the ground that the CENVAT Credit availed by the

assessee, which was proposed to be denied by the Revenue, was used only for the construction of immovable property or in relation to immovable

property, which were in the nature of input service for the output viz. immovable property. The Adjudicating Authority refers to Rule 2 (l) of the

CENVAT Credit Rules, 2004 and also to Board Circular No. 98/1/2008-Service Tax dated 04.01.2008. Aggrieved by the said demand, the appellant

filed its first appeal before the Commissioner of Service Tax (Appeals-I), Chennai, who vide impugned order upheld the demand confirmed in the

Order-in-Original, however, also giving partial relief to the assessee. Against the above Order-in-Appeal dated 18.03.2016, the appellant has preferred

this appeal, to the extent they are aggrieved by the partial sustenance of the demand against them.

4. I have heard Ms. S. Vishnupriya, Learned Advocate appearing for the assessee and Shri S. Balakumar, Learned Assistant Commissioner

(Authorized Representative) appearing for the Revenue and have gone through the documents, in the form of bills, placed on record as also various

case-laws referred to and relied upon during the course of hearing.

5.1 With regard to the denial of CENVAT Credit on the ground of the same being availed towards construction service, it is submitted by the Learned

Advocate for the appellant that the above issue is no more res integra as the same is covered in favour of the assessee by the following orders of the

Tribunal for both pre and post April, 2011 :

(i) M/s. Upal Developers Pvt. Ltd. v. Commr. of Central Excise (Lucknow) [2019 (5) T.M.I. 1532 â?" CESTAT ALLAHABAD];

(ii) M/s. Ambattur Developers (P) Ltd. v. Commr. of Service Tax, Chennai [2019 (1) T.M.I. 432 â?" CESTAT CHENNAI];

(iii) M/s. Vital Constructions Pvt. Ltd. v. Pr. Commr. of Service Tax, Delhi-I [2019 (7) T.M.I. 213 â?" CESTAT New Delhi];

(iv) Commr. of Central Excise, Cus. & Service Tax, Trivandrum v. M/s. Kinfra International Apparel Ltd. [2017 (10) T.M.I. 805 â?" CESTAT

BANGALORE];

(v) M/s. DB Malls Pvt. Ltd. v. C.G.S.T., C.E. & C., Bhopal [2018 (5) T.M.I. 1302 â?" CESTAT, New Delhi];

(vi) M/s. Oberoi Mall Ltd. v. Commr. of Service Tax, Mumbai-II [2016 (3) T.M.I. 854 â?" CESTAT MUMBAI];

(vii) M/s. Atlas Offshore Pvt. Ltd. v. Commr. of Central Excise, Service Tax and Cus. [2017 (10) T.M.I. 27 â?" CESTAT HYDERABAD].

5.2.1 The common takeaway from the above orders is that most of these orders have placed reliance on the judgement of the Honâ??ble High Court of Andhra Pradesh in the case of Commissioner of Central Excise, Visakhapatnam-II v. M/s. Sai Sahmita Storages (P) Ltd. reported in 2011 (270)

E.L.T 33 (AP) wherein it has been held that the services used for constructing mall which were meant for renting, which were discharging Service

Tax liability, the duty paid on the inputs or capital goods or services used for construction of the mall was available as credit.

5.2.2 The Co-ordinate Allahabad Bench of the CESTAT in the case of M/s. Upal Developers Pvt. Ltd. (supra) has also observed as under:

â??2. The revenue's objection is to availment of Cenvat credit of duty paid on various inputs, capital goods and input services consumed

for the construction of the mall on the ground that the construction activity has not discharged any service tax liability and as such the

credit cannot be held to be available to the assessee. Accordingly, by way of issuance of a show cause notice dated 17.04.2015 for the

period October, 2009 to March, 2014, the demand of duty of Rs.3.64 crores approximately was proposed to be confirmed against them by

denying the said credit.

3. The appellant during the course of adjudication took a categorical stand that the mall was specifically constructed by them for renting

purposes and as such all the inputs can be said to be having a nexus with the ultimate output services i.e. 'renting of immovable property',

on which they are paying service tax. They also contested that a part of the credit to the extent of around Rs.1.14 crores was availed by

them subsequent to the construction of a mall and was in respect of the services utilized for renting of immovable property. They also relied

upon various decisions of the Tribunal laying down that such availment of credit is appropriate. Specifically, reliance was placed to the

Tribunals decision in the case of M/s Oberoi Mall Ltd. Vs Commissioner of Central Excise, Mumbai-ii reported as 2017 (47) STR 292 (Tri.-

Mumbai) & M/s Laxmi Enterprises Vs Commissioner of Central Excise & Service Tax, Vadodara 3 Service Tax Appeal No. 70278 of 2017

reported as 2014-TIOL-2042-CESTAT-AHM and to the decision of Hon'ble Andhra Pradesh High Court in the case of M/s Sai Sahmita

Storages Pvt. Ltd. Vs Commissioner of Central Excise, Visakhapatnam-II reported as 2011 (270) ELT 33 (AP).

4. It is seen that while dealing with the applicability of the said decisions to the facts of the present case the Original Adjudicating Authority

has observed that there are divergent views of the Tribunal and has referred to the CESTAT- Ahmadabad decision in the case of Mundra

Port & Special Economic Zone Ltd. Vs Commissioner of Central Excise, Rajkot reported as 2009 (13) STR 178 (Tri.-Ahmd.). He has

observed that in the said decision, the Tribunal observed that it is not permissible for an assessee to avail Cenvat credit of duty paid on

cement and steel, used for construction of Jetty and Storage tanks. As such, by following the said favarable decision and by relying upon

the said Ahmadabad Tribunal Decision, he confirmed the demand of duty along with confirmation of interest and imposition of penalty.

5. At this stage, we note that the Tribunal decision in the case of M/s Mundra Port & Special Economic Zone Ltd. (supra) laying down that

the assessee was not entitled to avail the credit of duty paid on inputs used for construction stands reversed by the Hon'ble Gujarat High

Court reported as Mundra Ports & Special Economic Zone Ltd. 2015 (39) STR 726 (Gujarat). As such, any reference to the said decision by

the adjudicating authority was not called for.

6. We also find that the said issue stands covered by various decisions of the Tribunal wherein the Judgment of Hon'ble Andhra Pradesh

High Court in the case of Commissioner of Central Excise, Visakhapatanam-ii Vs Sai Sahmita Storages (Plausible) Ltd. (supra) stands

followed. Reference to the Tribunal's order can be made as Oberoi Mall Ltd. (supra) & M/s Laxmi Enterprises (supra). It stands held in the

said decisions that services used for constructing mall which were meant for renting which were discharging service tax liability, the duty

paid on the inputs or capital goods or services used for construction of the mall is available as credit. As such, we held that the credit stand

rightly availed by the appellant and utilized for discharge of their service tax liability under the category of 'Renting of Immovable

Property'. We accordingly, set aside the impugned order and allow the appeal with consequential relief.â??

5.3 In view of the above, I do not see any merit in the Revenueâ??s denial of CENVAT Credit and the same is liable to be set aside. Accordingly, the impugned order to this extent is set aside.

6.1 The second issue relates to the denial of CENVAT Credit in respect of renovation services. On this also, I agree with the contentions of the

appellant that this issue also stands covered in their favour in the following caselaws:

(i) M/s. Gujarat Eco Textile Park Ltd. v. C.C.E. & S.T., Surat-I [2019 (9) T.M.I. 581 â?" CESTAT AHMEDABAD];

(ii) M/s. The India Cements Ltd. v. C.C.E., Chennai [2018 (6) T.M.I. 581 â?" CESTAT CHENNAI]

6.2.1 In M/s. Gujarat Eco Textile Park Ltd. (supra), the Co-ordinate Ahmedabad Bench of the Tribunal, while dealing with an identical issue, has held

as under:

â??5. The next issue relates to demand of reversal of cenvat credit on service tax paid for construction of compound wall and laying of new

pipelines. It is seen that the appellant are paying service tax on the rent received as well as on usage charges recovered from their members.

The appellant are providing various infrastructure services to member units and for providing the said services the compound wall and

pipelines are necessary ingredients. In these circumstances the credit on the said services cannot be denied. The impugned order relies on

various CBEC Circulars to deny the credit. It is seen that the service for construction of compound wall was availed during July 2006 to

May 2011 and the credit was taken during the months of April 2009 to May 2011. The services in respect of laying of pipelines were

availed during the year 2011-2012 the Commissioner observes that the service of construction of new compound wall and laying of pipeline

of taxable park received by the appellant were not used by the appellant for providing output service nor were used in relation to setting

up, modernization, renovation or repairs or premises of provider of output service. We find this argument totally misplaced. During the

period 2006-2011, the unit was being set up and laying of pipeline and building wall is certainly part of renovation of premises and thus

covered under the definition of input services.â??

6.2.2 The Chennai Bench of the Tribunal also in M/s. The India Cements Ltd. (supra), while dealing with an identical issue, has observed as under:

â??5. For better understanding, the definition of input services for the relevant period is reproduced as under: -

â??â??input serviceâ?? 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 up to the place of

removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer

networking, credit rating, share registry, security, business exhibition, legal service, inward transportation of inputs or capital goods and

outward transportation up to the place of removal;

(prior to 1.7.2012) but excludes services: -

(A) Specified in sub-clause (p), (zn), (zzl), (zzm), (zzq), (zzzh) and (zzzza) of clause (105) of Section 65 of the Finance Act

(hereinafter referred as specified services), in so far as they are used for-

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

(b) laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified

services)â??

6. From the above, it can be seen that the definition does not include the works contract services. In fact, the definition of works contract

services contains subcategories like completion of finishing services, etc.,. When works contract services are availed for painting, laying of

floor tiles, etc., in the nature of completion of finishing services, these would generally be in the nature of modernisation or

repair/renovation of existing structures. Such services would be eligible for credit. Only when works contract services are used for

construction of a building or civil structure or a part thereof or laying of foundation or making of structures for support of capital goods, they are not eligible for credit. The laying of railway tracks does not fit into subclause (a) or (b) of exclusion Part (A) in the definition of

input service. Thus the disallowance of credit, alleging that these services are excluded from the definition, is without any legal basis. I am

of the view that the appellants are eligible for credit.â??

6.3 The Learned Departmental Representative for the Revenue was, however, unable to distinguish the above orders nor was he able to file any

contrary decisions/orders. In view of this and following the above orders, the disallowance of CENVAT Credit on this issue also is held to be improper

and hence, the impugned order to this extent is set aside. The appellant succeeds even on this ground.

7.1 The next ground relates to insurance service. The Revenue has denied the credit holding that insurance service does not qualify as input service

since it was not used and it did not alter the provision of the output service. On this issue, as pleaded by the Learned Advocate for the appellant, the

Bangalore Bench of the CESTAT in the case of M/s. Meyer Organics Pvt. Ltd. v. The Commissioner of Central Excise, Bengaluru-II reported in

2017 (10) T.M.I. 962 â?" CESTAT BANGALORE, has observed as under:

â??6. After considering the submissions of both the parties and perusal of the material, I find that the appellants have taken the godown on rent

outside the factory premises for storage of raw material as they could not get the permission from the Assistant Commissioner under Rule 8 of

CENVAT Credit Rules which permits an assessee to keep the goods outside the factory with the permission of the Assistant Commissioner. Since the

appellants were not having sufficient space in the factory to store the inputs and the packing material, therefore, they had taken the premises outside

the factory and also took the dealers registration only exclusively to the appellants factory and the goods have not been sold or removed to any other

person, which fact has not been denied by the Revenue. Further, I also find that though the rent agreement for the godown was in the name of M/s.

Meyer Healthcare Pvt. Ltd., which has merged with the appellant and it was their company before amalgamation. Further, I also find that storage is

directly connected to the production. Further I find that the appellant has produced the receipt of insurance premium and which shows that the

insurance is with regard to the finished products and other property of the appellant in the factory. Further, I also find that the inputs were supplied

from the dealers registered premises to the appellant alone as shown by various invoices produced on record. In view of these facts, I am of the

considered opinion that appellants are entitled to the CENVAT Credit on service tax paid on rent of dealers premises which is nothing but an

extension of the factory of the appellant. Similarly, I am of the considered opinion that appellants are entitled to the CENVAT credit on security

services availed for dealers premises as well as insurance paid for the finished goods stored in the factory premises. Consequently, I set aside the

impugned order by allowing the appeal of the appellant with consequential relief.â??

From the above, it is clear that even the CENVAT Credit on insurance service becomes allowable.

7.2 I also find that the above view is supported by an order of the Delhi Bench of the Tribunal in the case of M/s. SRF Ltd. v. C.C.E., Indore in

Excise Appeal No. 2028 of 2012 vide Final Order No. 54645 of 2016 dated 24.10.2016, as under:

â??3. Tribunal vide its decision in the case of Oudh Sugar Mills Ltd. Vs. CCE, Lucknow [2012 (282) ELT 541 (Tri.- Del.)] has held that

insurance paid on plant, machinery and equipment has to be held as input service. The Honble High Court of Bombay in the case of CCE,

Nagpur Vs. Ultratech Cements Ltd. [2010 (20) STR 577 (Bom.)], it was held that catering services having nexus or integral connection with

manufacture of final product would be covered by the cenvatable input service. Honble High Court of Karnataka in the case of CCE&ST,

LTU, Bangalore Vs. Micro Labs Ltd. [2011 (23) STR 444 (Kar.)] has held that service tax paid on all services utilised directly or indirectly

in or in relation to final product is eligible for Cenvat credit.

4. Further, Honble High Court of Punjab & Haryana in the case of Ambuja Cements Vs. Union of India [2009 (236) ELT 431 (P&H)] has

held that insurance is admissible for cenvat credit.

5. In as much as all the issues stand decided, I find no reasons to uphold the impugned order. Accordingly, the same is set aside and the

appeal is allowed with consequential relief to the appellant.â??

7.3 In view of the above, I am of the opinion that the denial of CENVAT Credit on insurance service by the Revenue is not in order and therefore, the

impugned order to the above extent is liable to be set aside. Accordingly, the same is set aside and the appeal is allowed on this ground.

8.1 The next ground relates to ground rent. The development agreement and rental agreement with M/s. Vira Properties (Madras) Pvt. Ltd. is placed

on record. The facts borne out of record indicate that the land in question was leased to developer who in turn leased the same back to the owner for

which leased rental was collected from the owner-appellant. Prima facie, the assessee who is the owner of the land, has claimed itself to be the lessee

of the portion of the same land and paid rent along with applicable Service Tax. Be that as it may, no document evidencing as to how the developer

assumed the role of the lessor is there on record nor has it been placed before me. This fact coupled with the crucial fact as to against which output

activity did the assessee seek to take the input Service Tax credit has also never been explained.

8.2 In view of the above, I do not find any justifiable reasons to interfere with the findings of the lower authorities and hence, the findings on this issue

in the impugned order are sustained. Accordingly, this issue stands decided against the assessee.

9. The last issue relates to the consequential penalty which was reduced to Rs. 50,000/- by the Learned Commissioner (Appeals) in the impugned

order. In the Show Cause Notice, the issuing authority has proposed penalty under Rule 15 (3) of the CENVAT Credit Rules, 2004, however, in the

adjudication order, the Adjudicating Authority has levied penalty under Rule 15 (1) which, on appeal, has been reduced to Rs. 50,000/- only. The

Learned Commissioner (Appeals) has categorically observed that there was no element of fraud, suppression of facts, etc., with an intent to evade

tax. The intention as to fraud, suppression of facts, etc., are relevant for the penalty under Rule 15 (3) and hence, the Revenue has not made out any

case to rope-in Rule 15 (1) which deals with a different situation altogether. Hence, I am of the opinion that there is no scope to sustain even the

reduced penalty and accordingly, the same is directed to be deleted in toto. 10. In the result, the appeal stands partly allowed to the extent indicated

hereinabove.

(Order pronounced in the open court on 04.03.2021)

