

Tel : 022-23754933  
Fax : 022-23754910

OUTWARD NO.: A/502  
REGISTERED / AD / SPEED POST

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
WEST ZONAL BENCH : MUMBAI  
3RD, 4TH, & 5TH FLOOR, JAI CENTRE, 34 P. D'HELLO ROAD,  
POONA STREET, MASJID BUNDER (E), MUMBAI- 400 009.

From : The Assistant Registrar, CESTAT, MUMBAI.

Dated: 11/04/2019

File No.:-ST/85752/2014

In the matter of :-

DEEPAK FERTILISERS &  
PETROCHEMICALS CORPORATION  
LTD  
OPP GOLF COURSE YERWADA PUNE  
Pin Code - 411 006

(Appellant)

Vs

CCE PUNE III  
ICE HOUSE 41-A SASSON ROAD  
OPPOSITE WADIA COLLEGE PUNE Pin  
Code - 411001

(Respondent)

I am directed to transmit herewith a certified copy of Order No. : A/85699/2019 dated : 01/04/2019 passed by the Tribunal under section 01(S) of the Finance Act, 1994 relating to Service Tax Act, 1994.

(Manas Kumar Sinha),  
Assistant Registrar,  
Service Tax Appeal Branch  
CESTAT - MUMBAI

Copy To :-

1. Commissioner Customs & Central Excise (Appeal) :Nil
2. O/o Commissioner (AR) CESTAT, Mumbai
3. CESTAT Bar Association, Mumbai
4. CESTAT Bar Association, New Delhi
5. Master File
6. M/s Centax Publications Pvt. Ltd.
7. Taxmann Allied Services (P) Ltd.
8. M/s Company Law Institute Of India Pvt. Ltd.
9. LawCruz Advisors Pvt. Ltd., Faridabad
10. The ICFAI Society, Hyderabad
11. MS Knowledge Processing Pvt. Ltd.
12. TAXONGO Pvt. Ltd.
13. ~~Advocate~~<sup>(s)</sup> / ~~Consultant~~<sup>(s)</sup> / ~~Representative~~:-

V. Sridharan,  
401-404, Kakad Chambers, 132, Dr. Annie  
Besant Road, Worli, Mumbai - 400 018

DB-D

Prepared By :

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE  
TRIBUNAL  
WEST ZONAL BENCH AT MUMBAI  
COURT NO. I**

**Appeal No. ST/85752/2014**

(Arising out of Order-in-Original No. PUN-EXCUS-003-COM-029-13-14 dated 29.11.2013 passed by the Commissioner of Central Excise & Service Tax, Pune).

M/s Deepak Fertilizers & Petrochemicals Appellant  
Corpn. Ltd.

Vs.

Commissioner of Central Excise & Service Respondent  
Tax, Pune

Appearance:

Shri V. Sridharan, Advocate with for Appellant  
Shri Vinay Jain, C.A.

Shri M.K. Sarangi, Jt. Commissioner (AR) for Respondent

CORAM:

**HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)  
HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)**



Date of Hearing: 16.10.2018

Date of Decision: 01.11.2019

ORDER NO. *A/85699/2019*

*Per: Dr. D.M. Misra*



This is an appeal filed against Order-in-Original No. PUN-

EXCUS-003-COM-029-13-14 dated 29.11.2013 passed by the

Commissioner of Central Excise & Service Tax, Pune.

2. Briefly stated the facts of the case are that the appellants have been providing taxable service under the category of

'Renting of Immovable Property Service' during the relevant period October, 2007 to March, 2012. The appellant had availed inadmissible total CENVAT Credit of Rs.9,40,38,326/- on capital goods and input services during the said period. Consequently, a show-cause notice was issued to them on 16.4.2013 invoking extended period of limitation for recovery of the said credit with interest and penalty. On adjudication, the demand was confirmed with interest and penalty. Hence, the present appeal.

3. The learned Advocate for the appellant has submitted that during the period in dispute the appellant had constructed a mall, which was let out subsequently on commercial basis and the appellants were discharging Service Tax under the taxable category of Renting of Immovable Property Service from time to time. The construction of the said mall was completed in phased manner during August, 2007 to January, 2008. The premises were given on rent from January, 2008 and onwards. The show-cause notice was issued to the appellant for recovery of a total CENVAT Credit of Rs.9,40,38,326/- proposing to deny CENVAT Credit of excise duty/CVD paid on various capital goods used in the construction of mall amounting to Rs.1,70,52,345/-, input services used in construction of mall before 1.6.2007 amounting to Rs.1,95,75,038/-, in respect of input services used in construction of Mall after 01.6.2007 amounting to Rs.4,14,11,353/-, input services used in rendering output service of Renting of Immovable Property Service prior to 1.6.2007 amounting to Rs.13,44,039/- and on input services used to provide output service of Renting of Immovable Property Service after 01.6.2007 amounting to Rs.1,46,55,551/-. It is the

DL

contention of the appellant that they availed CENVAT Credit of capital goods such as Air Conditioning system, Escalators, Transformers, DG Sets, electrical and accessories falling under Chapter 82, 84, 85 and 90 of the Central Excise Tariff Act, 1985, hence, it falls within the ambit of definition of capital goods as prescribed under Rule 2(1) of CENVAT Credit Rules, 2004, hence eligible to credit. In support, they referred to the decision in the case of *City Centre Mall Nashik Pvt. Ltd. Vs. CCE&ST - 2017-TIOL-4322-CESTAT-MUM.*

4. Further, he has submitted that Mall is an immovable property and neither subject to excise duty nor Service Tax, is an immaterial factor, because the Mall emerges at an intermediate stage and is finally used in providing output service. The appellant is not in the business of dealing in immovable properties. The mall is used for rendering taxable output service on which Service Tax has been paid by the appellant. Further, referring to the definition of input services, the learned Advocate for the appellant has submitted that the input services in question are covered under the "means" part of the definition of the term 'input service' and hence also covered within the expression 'activities relating to business' in the said definition of input service. Further, he has submitted that the activities relating to setting up of premises of provider of output service also falls within the ambit of input service. It is their contention that definition of input service specifically refers to the activities in relation to 'setting up of premises of provider of output service' within its scope and ambit. In the present case, construction of mall has been completed in January, 2008 and there is no doubt

to the fact that the input service namely, Architect Services, Works Contract Service and other services were used in the construction of the mall, which in turn, has been rented out and Service Tax on such renting activity has been discharged by the appellant. It is their contention that without utilizing such services, mall could not have been constructed and therefore, the renting of immovable property would not have been possible.

5. He has further submitted that the issue is no more *res integra* and covered by the decision of this Tribunal in the case of *Navarathna S.G. Highway Prop. Pvt. Ltd. - 2012 (28) STR 166 (Tri-Nashik)*, *Vamona Developers Pvt. Ltd. - 2016 (42) STR 277 (Tri-Mum)*, *Oberoi Mall Ltd. - 2017 (47) STR 292 (Tri-Mum)*, *City Centre Mall Nashik Pvt. Ltd. - 2017-TOL-4322-CESTAT-MUM.*

6. Assailing the findings of the adjudicating authority, the learned Advocate has further submitted that there has been nexus between the input services received by the appellant for operation of the mall and the output service of rendering of immovable property service provided by them. The learned Advocate has further submitted that even though it has been alleged in the show-cause notice that the appellant has suppressed the facts but there is no evidence placed on record that the appellant has suppressed facts with intent to evade payment of tax. It is their contention all the facts relating to availing of Credit when asked by the department pursuant to the scrutiny of ST-3 Returns filed from time to time, they have intimated the same through their letter dated 01.4.2010 to the department. Besides, the present issue also relates to one of

interpretation of definition of the term 'input services' and 'capital goods', hence extended period cannot be invoked. Also, imposition of penalty on the appellant is bad in law.

7. Per contra, the learned AR for the Revenue has submitted that CENVAT Credit Rules, 2004 has been issued under the rule making power as per Section 37 of Central Excise Act, 1944 read with Section 94 of the Finance Act, 1994. Section 37 provides power to frame rules in relation to CENVAT Credit Rules for inputs/input services used in or in relation to manufacture of the goods by a manufacturer, whereas Section 94(1)(ee) of Finance Act, 1994 provides power to frame rules with respect to services consumed in the provision of output service. Therefore, if the said enabling provisions are read with CENVAT Credit Rules, 2004, the definition of input services prescribed at Rule 2(j) suggests that in respect of a service provider, the input services consumed in providing output services only is entitled to credit. Further, he has submitted that scope of "input services" with respect to a manufacturer is wider as compared to a service provider, which is clear from the judgment of Hon'ble Punjab & Haryana High Court in the case of *Maruti Suzuki Ltd. - 2017 (5) GSTL 18 (P&H)* and judgment of Hon'ble Supreme Court in the case of *Commissioner of Central Excise Vs. Ultratech Cement Ltd. - 2018-TOL-42-SC-CX*, it is his argument that for claiming CENVAT Credit by a service provider, for deciding the eligibility on the inclusive part of the definition under Rule 2(j), the later part also needs to be satisfied. In other words, the service provider claiming credit even though covered under the inclusive part of the definition also has to be established that the service is used

01

for providing the output service and the nexus should be direct one.

8. Further, he has submitted that the immovable property is neither subjected to Service Tax nor excise duty. Hence, credit of input services availed for construction of immovable property is inadmissible. In support, he has referred to the Circular dated 4.1.2008. Further, referring to the judgment of this Tribunal in *City Centre Mall Nashik Pvt. Ltd. (supra)*, the learned AR has submitted that in para 4 of the said judgment, it is observed that since the inputs were used for providing construction service, which is not an output service of the appellant, therefore CENVAT Credit was not admissible. Further, referring to the judgment in the case of *Tower Vision India Pvt. Ltd. Vs. Commissioner of Central Excise, Delhi - 2016 (42) STR 249 (LB)* the learned AR has submitted that CENVAT Credit cannot be allowed if MS Angles and Channels have gone into fabrication of such tower, which are in turn used for providing infra support service of telecom services. Further, referring to the judgment of *Sai Sahmita Storages Pvt. Ltd. - 2011 (23) STR 341 (AP)*, *Naurathna SG Highway (supra)*, *Mundra Port SEZ (supra)* relied upon by the appellant, the learned AR for the Revenue submitted that the ratio laid down in the said judgments are inapplicable in the facts of the present case.

9. On the aspect of limitation, the learned AR for the Revenue has submitted that appellant failed to inform about availing of CENVAT Credit, at any stage, during the construction of Mall or thereafter also in the ST-3 returns, they have not disclosed the

01

said transaction and failed to pay Service Tax. Accordingly, the extended period of limitation is applicable.

10. Heard both sides at length and perused the records.

11. The issue involved for determination in the present appeal is: whether the appellants are eligible to avail CENVAT Credit on inputs, capital goods and input services in the construction and later maintenance of the mall during the period October, 2007 to March, 2012. A total demand of CENVAT Credit of Rs.9,40,38,326/- confirmed against the Appellant issue wise tabulated as below-

Sr. No.	Particulars	Amount
1.	CENVAT Credit (Excise Duty/CVD) availed on Capital Goods used for construction of Mall	1,70,52,345/-
2.	CENVAT Credit availed on input services used in construction of Mall before 01.06.2007	1,95,75,038/-
3.	CENVAT Credit availed on input services used in construction of Mall after 01.06.2007	4,14,11,353/-
4.	CENVAT Credit availed on input services to render output service of Renting of Immovable property prior to 01.06.2007	13,44,039/-
5.	CENVAT Credit availed on input services to render output service of Renting of Immovable property after 01.06.2007	1,46,55,551/-
	<b>Total</b>	<b>9,40,38,326/-</b>

12. The contention of the appellant is that the construction of mall they have used capital goods and input services. It is their contention that capital goods that were installed in the said mall are Air Conditioning system, escalators, Transformers, DG sets, electrical and accessories falling under Chapters 82, 84, 85 and 90 of the Central Excise Tariff Act, 1985, accordingly, satisfy the definition of 'capital goods' and eligible to credit. Further, they have argued that the mall is an immovable property which comes at the intermediate stage and ultimately used in providing



taxable output services. Therefore, contention of the Revenue that the said immovable property had not suffered excise duty nor Service Tax, is immaterial and in no manner would affect the admissibility of CENVAT Credit on input services used in construction of mall, which is ultimately given on rent to customers and service tax has been paid on 'Renting of Immovable Property' service. The learned Advocate vehemently argued that the issue relating to admissibility of CENVAT Credit on capital goods and input services used in the construction of the mall and thereafter for its repair and maintenance and management etc. covered by the judgment of this Tribunal in the case of *Navratna SG Highway (supra)*, *Vamona Developers (supra)*, *Oberai Mall (supra)*, *City Centre Mall Nashik Pvt. Ltd. (supra)*. It is their contention that in all the above judgments, it has been held that there is nexus between the input services received by the appellant for setting up and operation of the mall in providing the output service of renting of immovable property.

13. Revenue, on the other hand, tried to distinguish the aforesaid judgments submitting that the ratio laid down in *Bharati Airtel's* case would be squarely applicable, hence, CENVAT Credit on the input services used in the construction of the mall and thereafter management, maintenance and repair of the same would not be applicable.

14. We find that this Tribunal in more or less identical circumstances, in the case of *City Centre Mall Nashik Pvt. Ltd's* case confronted with denial of CENVAT Credit involving the period October, 2007 to March, 2012, and the disputed credit



amount has been categorized in para 2 of the said judgment as follows: -

"(A) Demand of Cenvat Credit of Rs.5,46,82,044/- (March 2007 to March 2011.

A.1. Credit on Cement, Steel, TMT Bars, Doors, Windows etc. used for construction of mall under the category of input amounting to Rs.1,63,67,075/-

A.2. Capital goods used in the mall such as Lift, Escalator, Chillers, D.G. Sets, Heat Exchangers, Wires, Cables, Fire Fighting Equipments, Water Pumps, Transformers, Control Panels Distribution Boards, Cables, Trays, CRP Tubes etc. etc. for operation of mall Rs.2,26,36,646/-

A.3. Cenvat credit on various services such as Architect Service, Business Auxiliary Service, C & F Agency service, Consulting Engineer Service, Cargo Handling Service, etc. used for construction and operation of Mall Rs.1,01,76,663/-

A.4. Cenvat Credit on various services such as Advertisement Agency Service, Broadcasting Service, Chartered Accountant Service, Cleaning Service, Insurance Service etc. used before completion of construction of shopping mall during April 2007 to March 2011 and after construction of shopping mall i.e. from April 2009 to March 2011 Rs.55,01,660/-."

15. Analyzing the judgments cited by both sides including *Nauratna SG Highway Prop. Ltd. (supra)*, *Sai Samhita Storage Pvt. Ltd. (supra)*, *Mundra Port and SEZ Ltd. (supra)* and other cases it is observed at para 5 & 7 as follows: -

5. We have carefully considered the submissions made by both the sides. The issue involved in the present case to be decided is the admissibility of the cenvat credit on various input, input services and capital goods. As regard cenvat credit of Rs. 1,63,67,075/- on the goods namely steel cement, doors, windows etc. used for construction of shopping mall, these goods were inputs for the service namely construction of shopping mall, however the same goods is not the input for providing output service i.e. renting of immovable property. Therefore in view of Honble High Court of Bombay judgement in the case of *BhartiAirtel Ltd. (Supra)*, the cenvat credit is not admissible on the goods used in the construction of mall. As per the definition of input for the purpose of providing service, it is clear that only on those inputs Cenvat is allowed which are used for providing the output service. In the present case, cement, steel, for steel, angles, channels etc. were not used for providing output service i.e. renting of immovable property. The same was used for providing construction service which is not the output service of the appellant, therefore the cenvat credit is not admissible. Moreover, w.e.f. 7.7.2009 the said goods were excluded from the

21

definition of input service. The larger bench of this Tribunal in the case of Vandana Global Ltd.(Supra) also held that credit of goods used for construction of building/structure is not admissible. We therefore uphold the demand of service tax amounting to Rs. 1,63,67,075/-. As regard the cenvatcredit availed amounting to Rs. 2,26,36,646/- on the capital goods, we find that all the capital goods fall under the definition of capital goods provided under cenvat credit rules 2004. The adjudicating authority denied the credit only on the ground that these capital goods after installation become immovable goods, therefore the credit is not admissible. We find that all the capital goods were cleared by the supplier on payment of duty therefore the capital goods as such can not be said that it is immovable goods. Merely by installing the capital goods it does not become an immovable goods. If this contention of the adjudicating authority is accepted then all the capital goods such as machinery, equipments, appliances installed in the factory for production will not be eligible for cenvat credit. Therefore merely by installation of duty paid capital goods, it can not be said that it is immovable goods all the capital goods were used in the shopping mall to facilitate the shop owners for operation of the mall, who have been given the shops on rent by the appellant. Therefore all these capital goods were directly used by the appellant for providing output service i.e. renting of immovable property service. Accordingly the cenvat credit on the capital goods is admissible, the demand of Rs. 2,26,36,646/- on this count is set aside. As regards the cenvat credit of Rs. 1,01,76,663/- in respect of various services used in relation to construction of mall are input service as defined under Rule 2(i) of Cenvat Credit Rule 2002 which reads as under:-

2(i) "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;

From the above definition it can be seen that the services used for setting up the premises of output service provider is admissible input service. In the present case the appellant are output service provider and got the shopping mall set up which was rented out, therefore the renting of immovable property is an output service and the various services such as construction work service, architect service consulting engineer, erection, commissioning, installation etc, were used for setting up of shopping mall are input services. Therefore these services are clearly input service as per the definition given above, this issue has been settled in the various judgements which reproduced below:-

AT

(i) Maharashtra Cricket Association (supra) held that-

8. The issue involved is whether the services such as Architect Services, Consulting Engineers Services, Management Consultancy Services etc. used for construction of sports stadium are admissible input services for taking Cenvat Credit as against the output service of the appellant i.e. renting of the said stadium and other services on which services, service tax was discharged. Whether the service is input service or otherwise, it can be ascertained only on the basis of definition of 'input service' as provider under Rule 2(f) of Cenvat Credit Rules, 2004, which is reproduced below:

"Input Services- As per Rule 2(f) of Cenvat Credit Rules, 2004, (prior to 1.4.2011) 'input service' means any service,

i) used by a provider of taxable service for providing an output service ; or

(ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal]In, and includes services used in relation to setting up, modernisation, 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."

From the above definition of input service, any service used by a provider of taxable service for providing an output service is admissible 'input service'. Input service specifically includes amongst others services used in relation to setting up, premises of provider of output service or an office relating to such premises. On the analysis of the definition, it becomes clear that the 'input service' is not limited to the services for providing output service, but it also includes the service for setting up the premises of provider of output service. In the present case the input services are Architect Services, Consulting Engineers Services, Management Consultancy Services etc. used for setting up the premises i.e. stadium of provider of output service i.e. the appellant. The output service is renting of stadium and other miscellaneous services. In view of this undisputed position of law, the services, used by the appellant for setting up the stadium, are input services and squarely covered by definition of 'input service' as reproduced above. The Board Circular appears to have travelled absolutely contrary to the clear and plain language of the definition of the input service. It is very pertinent that legislators knowing fully that there is no tax or excise duty on the constructing premises of the output service provider, included services used for setting up of the premises of provider of output services, for the simple reason that if the premises are used for providing the output service, the credit of input services used for setting up the premises of service provider must be allowed.

21

9. In view of this clear and unambiguous definition of input service, it is apparent that the Circular is contrary to the definition of input service which is not tenable. We found that the judgments, relied upon by the counsel, are directly applicable in the present case. However the Id. Commissioner brushed aside the judgment only giving excuse that he is bound by the Board Circular. In the case of Navaratna S.G. Highway Prop. Pvt. Ltd. (supra), the division bench of Ahmadabad Tribunal in the identical case allowed the Cenvat Credit on the input services used for construction of immovable property which in turn used for renting and other services. The operative para is reproduced below:-

*"3.2 The definition of 'inputs' is limited to the definition of 'input services' as can be seen from the definition given above. Credit of duty paid on inputs is available when the inputs are used for providing an 'output service'. Therefore, there is a need to say that the inputs have been used for providing an 'output service'. In the case of 'input service', the definition includes input services used by a provider of taxable service for providing an output service. Therefore the definition of input and input service are parimateria as far as the service providers are concerned. That being the position, the decision of the Hon'ble High Court of Andhra Pradesh would be applicable to the present case. In that case also, the Hon'ble High Court took the view that without use of cement and TMT bars for construction of warehouse assessee could not have provided 'storage and warehousing service'. In this case also, without utilizing the service, mall could not have been constructed and therefore the renting of immovable property would not have been possible. The issue involved is squarely covered by the decision of the Hon'ble High Court of Andhra Pradesh. Since the service tax demand itself is not sustainable, the question of imposition of penalty does not arise. The appeal is allowed with consequential relief to the appellants."*

Relying on the aforesaid judgment, this Tribunal in the case of Laxmi Enterprise and Varun Industries taken the consistent view and allowed the Cenvat Credit in respect of input services used for construction of godown/other immovable properties which were used for renting services. In another case of Sai Samhita Storages Pvt. Ltd., passed by Tribunal's Bangalore bench which was upheld by the Hon'ble High Court of Andhra Pradesh, the fact was that cement and TMT bars were claimed as inputs for construction of warehouse which was used for providing 'storage and warehouse services'. The Hon'ble High Court held that without use of cement & TMT bars 'storage and warehouse services' could not have been provided, accordingly Cenvat Credit was allowed on cement and TMT bars. In view of the above findings, not only by this Tribunal but also endorsed by the Hon'ble High Court of Andhra Pradesh that the Cenvat Credit on inputs and input services are admissible for construction, which is used for providing output services. We are also of the considered view that in the present case the appellant has clearly entitled for Cenvat Credit in respect of all the services used for construction/setting up the stadium

D1

which is admittedly used for providing the output services.

10. In view of above discussion, we set aside the impugned order and allow the appeal, with consequential relief, if any, in accordance with law.

(ii) Oberoi Mall Ltd. (supra) held that-

7. The submission made by the Ld. C.A. has strong force in as much, there is no dispute, that the appellant has constructed various malls and rented the same to various parties and discharge of service tax on rent received is also not disputed. The availment of Cenvat Credit on various input services for the construction of the malls and subsequent utilization, we find that in the case of Navratna S.G. Highway Properties (P) Ltd (supra) (wherein one of the member of this bench Shri M.V. Ravindran was presiding) this Tribunal held in favour of the assessee by recording as under:

*"3.2 The definition of inputs' is limited to the definition of input services' as can be seen from the definition given above. Credit of duty paid on inputs is available when the inputs are used for providing an output service'. Therefore, there is a need to say that the inputs have been used for providing an output service'. In the case of input service' the definition includes input services used by a provider of taxable service for providing an output service. Therefore the definitions of input and input service are pari-materia as far as the service providers are concerned. That being the position, the decision of the Hon'ble High Court of Andhra Pradesh would be applicable to the present case. In that case also, the Hon'ble High Court took the view that without use of cement and TMT bars for construction of warehouse assessee could not have provided storage and warehousing service'. In this case also, without utilizing the service, mall could not have been constructed and therefore the renting of immovable property would not have been possible. The issue involved is squarely covered by the decision of the Hon'ble High Court of Andhra Pradesh. Since the service tax demand itself is not sustainable, the question of imposition of penalty does not arise. The appeal is allowed with consequential relief to the appellants."*

The above reproduced view was followed by this bench of the Tribunal in the case of Vamona Developers Pvt Ltd. by referring to the judgment of Hon'ble High Court of Karnataka in the case of *M. Portal India Wireless Solutions Pvt. Ltd. -2012 (27) STR 134 (Kar) - 2011-TIOL-928-HC-KAR-ST* and the judgment of Hon'ble High Court of Andhra Pradesh in the case of *SaiSamhita Storages Pvt. Ltd. -2011 (270) ELT 33 (A.P.) - 2010-TIOL-1751-CESTAT-BANG* and held in the favour of the appellant. We do not find any reason to deviate from such a view already taken on this issue.

8. As regard the judgment relied upon by the departmental representative in the case of Galaxy Mercantile Ltd. (supra), we find that Hon'ble High Court of Allahabad has only affirmed a prima-facie view on pre-deposit of amount. The view expressed by the Hon'ble High Court is only prima-facie view. In the case of

DI

Navratna S.G. Highway Properties (P) Ltd (supra) and various judgments, the Tribunal has taken the final view while disposing the appeals.

9. In view of the foregoing, we find that the impugned orders are liable to set aside and the appeals are allowed with consequential relief, if any.  
(iii) Vamona Developers Pvt. Ltd. (supra)

5. We have carefully gone through the facts as well as submissions made by both sides.

The factual position is that in 2011 the appellant declared their intention of availing Cenvat Credit on input services for discharging the service tax liability on the output service namely Renting of Immovable Property Service. There is no hiding the fact that these services were received over a period of 5 years from 2007 to 2011. And it was only when the construction was ready for renting out they took centralized registration in 2011. In the centralized registration the input services as well as the services to be provided were declared. We find that as held by the Honble High Court of Karnataka in the case of mPortal India Wireless Solutions Pvt. Ltd., there is no provision in the Cenvat Credit Rules which imposes a restriction on availment of credit on input services procured before registration is taken. Even though department has filed an appeal against this judgement, we are bound by judicial discipline to honor the judgment of the High Court.

.....

7. It is obvious from the definition of input service as it stood prior to 11.4.2011 and after 1.4.2011 that, in the earlier period there was no restriction on use of the input service for construction of building or civil structure used for providing output service. Reliance on the case of Bharti Airtel Ltd. (supra) is misplaced. First, the Honble High Court clearly held that their conclusion is based on the facts and circumstances which fell for their consideration in those appeals. Secondly, because in that case the input services/inputs were used in construction of towers which were held to be immovable property and hence not excisable. And credit was sought on structural items such as iron and steel. Similarly even the judgement in case of Vodafone does not help the Revenue. In the present case, we find that almost the entire credit has been availed on input services which have been used for providing the output service that is Renting of Immovable Property Service for which there was no restriction under the clause (i) of the definition of input service. The inclusive part of the definition of input service allowed services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service etc. The words setting up were deleted only from 1.4.2011. Therefore the appellant are eligible for the credit in terms of the definition of input service.

In view of the above decisions which were given after detailed interpretation of definition of input service, the services used for construction of shopping mall are admissible for cenvat credit. We therefore set aside the demand of Rs. 1,01,76,663/-. As regard the demand of cenvat credit amounting to Rs. 55,01,660/-, the cenvat credit was availed on the services such as advertisement, broadcasting, C.A., clearing service, insurance

DI

service, management maintenance and repair service etc., the same was denied on the allegation in the show cause notice that these services have no nexus to the output service of renting of immovable property. In this regards we observed that the service used whether prior to construction or after completion of the construction, the cenvat credit is admissible for the reason that the services used prior to the construction is in relation to the construction of service which is admissible input service as discussion in the above paragraphs.

The services which was used after completion of construction of shopping mall were also used ultimately for the renting of shopping mall therefore the same is input service for providing the service of renting of immovable property service. We also observed that the adjudicating authority has not given clear reasoning for denying this particular credit. Accordingly we set aside the demand of cenvat credit of Rs. 55,01,660/-. As regard demand of service tax amounting to Rs. 2,06,07,771/- this demand was confirmed on the ground that the service tax was paid to the extent of this amount by utilising the cenvat credit which was held in admissible. In this regard we are of the view that once demand was of wrongly cenvat credit is proposed, there cannot be an another demand of recovery of service tax which was discharged by utilizing so called wrongly availed credit for the reason that by recovery of the wrongly availed credit whatever service tax paid by utilizing cenvat credit will hold good, no further recovery can be made. Therefore the demand of service tax even though paid by utilising the cenvat credit again confirmed for recovery is not legal and proper. Therefore the demand of service tax amounting to Rs. 2,06,67,771/- is set aside.”

16. We do not see any reason to deviate from the observation recorded in the aforesaid judgment. Hence, applying the said judgment to the facts of the present case, we are of the opinion that the CENVAT Credit is admissible to the appellant on the duty paid on capital goods and service tax paid on input services used in the setting up of the new premises i.e. the Mall which is later provided on rent and service tax has been paid on Renting of Immovable Property Service and the input services used in providing the said output services. Besides, the demand is also not sustainable being barred by limitation as the details of availing of the Cenvat Credit of the duty paid on Capital goods and service tax paid on input services used in setting up of the Mall and used for providing the output service has been intimated to the department in April 2010. Thus, the Appeal

21



succeeds both on merit and limitation. In the result, the impugned order is set aside and the Appeal is allowed, with consequential relief, if any, as per law.

(Pronounced in Court on 01.10.2019)

S D

S D

(C.J. Mathew)  
Member (Technical)

(Dr. D.M. Misra)  
Member (Judicial)

Sinha

आदेश के प्रति निम्न आवदन  
Copy of the Order forwarded and/  
कर वाला/कमिश्नर/विभागीय प्रतिनिधि  
The Assessee/The Commissioner/The  
DR., C.E.S.T.A.T  
सर्यागत प्रतिनिधि  
TRUE COPY

सहायक रजिस्ट्रार  
Assistant Registrar  
सीमाशुल्क उपायुक्त और  
सेवाशुल्क अपील अधिकरण  
Custom Excise & Service Tax  
Appellate Tribunal



11 APR 2019