IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI

COURT No. I

Application No. ST/S/699/12
Appeal No. ST/199/12

(Arising out of Order-in-Original No. 30/ST-II/WLH/2012 dated 06.03.2012 passed by Commissioner of Service Tax, Mumbai)

For approval and signature:

Honble Mr. M.V. Ravindran, Member (Judicial)
Honble Mr. C.J. Mathew, Member (Technical)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : No

2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : No

3. Whether Their Lordships wish to see the fair copy of the Order? : Seen

4. Whether Order is to be circulated to the Departmental authorities? : Yes

Nirlon Ltd.

Appellant

Vs.

Commissioner of Central Excise
Mumbai
Respondent

Appearance:
Ms. Aparna H, Advocate
for appellant
Shri B. Kumar Iyer, Supdt. (AR)
for respondent

CORAM:
Honble Mr. M.V. Ravindran, Member (Judicial)
Honble Mr. C.J. Mathew, Member (Technical)

Date of Hearing: 06.01.2016
Date of Decision: 06.01.2016

ORDER NO

Per: M.V. Ravindran

This appeal is directed against Order-in-Original No. 30/ST-II/WLH/2012 dated 06.03.2012.

2. The relevant facts that arise for consideration are appellant herein had availed CENVAT credit of the service tax paid on the input services, goods and used the same for discharging service tax liability under the category of Renting of Immovable Property Services for the period April 2007 to March 2009. Revenue authorities were of the view that the appellant could not avail CENVAT credit on such input services and the goods as has been clarified by CBEC by Circular No. 96/7/2007-ST dated 23.08.2007 and further amended by Circular No. 98/1/2008 ST holding that credit of service tax paid on input construction services is not eligible for availing CENVAT credit. Coming to such conclusion a show-cause notice dated 05.06.2009 was issued by invoking extended period for the demand of ineligible CENVAT credit along with interest and for imposition of penalties. Appellant contested the matter on merits as well as on limitation. The adjudicating authority after following due process of law rejected the contentions raised and confirmed

the demands along with interest and also imposed penalties by relying the CBEC Circular.

3. Learned Counsel would draw our attention to the facts of the case and submit that the adjudicating authority has erred in confirming the demands raised. It is her submission that the provision of Rule 2(l) Cenvat Credit Rules, 2004, during the relevant period, had envisaged eligibility of CENVAT credit in respect of setting up of premises for providing taxable of goods services. It is her submission that appellant had rendered the services of Renting of Immovable Property during the period in question. It is her submission that the service providers who had provided the services of Electrical Work, Plumbing & Fire Fighting Work, Road Work, Gardening, Sewerage Treatment Plant, Drainage Work, Air Conditioning Work, Supply of Diesel Generator Set, Erection & Installation of Elevators and Civil Work by Contractors had discharged the service tax under Works Contract Service and various other services. It is her submission that Commercial Complex so constructed was intended for renting out during the period in question hence the appellant had under bonafide belief availed CENVAT credit and utilized the same for discharge of service tax liability under the category of Renting of Immovable Properties. It is her submission that the reliance by the adjudicating authority on Circular No. 98/1/2008-ST dated 04.01.2008 is incorrect as the said Circular is contrary to the provisions of Cenvat Credit Rules, 2004. It is her further submission that the issue is well settled by the Tribunal in the case of Navaratna S.G. Highway 2012 (28) STR 166 (T) and Sai Samhita Storages 2010 (255) ELT 91 (T); latter judgement was upheld by the Hon'ble High Court of Andhra Pradesh as reported at 2011 (270) ELT 33 (AP). It is also her submission that the Hon'ble High Court of Gujarat in the case of Mundra Ports & Special Economic Zone Ltd. - 2015 (39) STR 726 (Guj) has reversed the judgement and order of this Tribunal and held that CENVAT credit of duty paid on cement and steel used in construction of new jetties and other commercial buildings are entitled for input credit.

4. Learned D.R. on the other hand, reiterates the findings of the adjudicating authority.

5. We have considered the submissions made at length by both sides and perused the records.

6. Undisputed facts are appellant herein has entered into contract for construction of premises which he intended to put to use as commercial complex and rented out the premises to various entities and collected rent from them; appellant had discharged appropriate service tax liability on such activity of renting of immovable property; is eligible to avail CENVAT credit of the service tax paid on various input services. The issue that falls for consideration is whether during the period in question i.e. April 2007 to March 09, the appellant had correctly availed the CENVAT credit of the service tax paid by the service providers under various categories related to construction of commercial complex or otherwise. The adjudicating authority has relied upon the Boards Circular No. 98/1/2008-ST to confirm the demands raised by the show-cause notice.

6.1 We are not in agreement with the findings recorded by the adjudicating authority for more than one reason.

(a) Firstly, it is not disputed that appellant had discharged appropriate service tax liability under the category of Renting of Immovable Property. In our considered view the service tax liability on renting of immovable property will not arise unless the immovable property comes into an existence, such immovable property will be in the nature of constructed building/warehouse. In the case in hand, appellant had constructed a commercial complex and rented out the premises to various entities.

(b) Secondly, unless the commercial complex is constructed and completed in all respects, the same could not be rented out by the appellant is a common sense. In our considered view the reliance placed by the learned Counsel in the judgement of the Tribunal in the case of Navaratna S.G. Highway (supra) will be applicable as in that case, Revenue sought to deny the CENVAT credit of the service tax paid on various input services used for construction of a mall, the Bench (wherein one of us shri M.V. Ravindran was Presiding

Officer) after considering the definition of input service held as under:-

3.1?The Revenue has relied upon the definition of input services as given in Rule 2(l)(i) of CENVAT Credit Rules, 2004 which reads as under: Input services means any service used by a provider of taxable service for providing an output service. According to the Revenue in this case the services listed above have not been used for providing the service for the construction of the mall. Since mall is not an excisable product or is a service, credit is not admissible. As submitted by the learned counsel, the issue which was before the Hon ble High Court of Andhra Pradesh was similar to the present one. The Honble High Court of Andhra Pradesh considered the definition of the input and input service and took a view that using cement and TMT bars for construction of warehouse, the CENVAT credit on cement and TMT bars would be admissible. The Honble High Court observed as follows :

6.?The only allegation against the assessee is that they claimed CENVAT credit irregularly with reference to cement and TMT bars used in the construction of warehouses through which the storage and warehousing services are provided by the assessee. Section 65(102) of the Finance Act defines storage and warehousing as to include storage and warehousing services for goods including liquids and gases but does not include any service provided for storage of agricultural produce or in service provided by cold storage. As per Section 65(105)(zza), read with Section 66 of the Finance Act, there shall be levied tax on storage and warehousing services at 12% of the value of taxable service. The service tax payable is determined in accordance with Section 67(4) read with the Service Tax Rules, 1994 made in exercise of the powers under Section 94 of the Finance Act. There is no dispute that every provider of taxable service is entitled to claim CENVAT credit in relation to input service. Rule 2(k) and (l) of the Rules are relevant and they read as under.

2.?Definitions. -
(k)? input means -

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;

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;

(l)? input service means any service, -

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

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.

7.?A plain reading of both the above definitions would show that, unless excluded, rail goods used in relation to manufacture of final product or for any other purpose used by a provider of taxable service for providing an output service are eligible for CENVAT. In Maruti Suzuki Ltd. v. Commissioner of Central Excise, Delhi-III, (2009) 9 SCC 193 = 2009 (240) E.L.T. 641 (S.C.) the Supreme Court laid down as follows :

9.?Coming to the statutory definition of the word input in Rule 2(g) in the CENVAT Credit Rules, 2002, it may be noted that the said definition of the word input can be divided into three parts namely :

(i) specific part

(ii) inclusive part

(iii)place of use

Coming to the specific part, one finds that the word input is defined to mean all goods, except light diesel oil, high speed diesel oil and 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. The crucial requirement, therefore, is that all goods used in or in relation to the manufacture of final products qualify as input. This presupposes that the clement of manufacture must be present.

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 pari materia as far as the service

providers are concerned. That being the position, the decision of the Honble 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 Honble 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.

(c) It is also seen that the similar issue came up before the Tribunal in the case of Sai Samhita Storages (supra) wherein CENVAT credit of cement and TMT bars was denied by the Revenue on construction of cold storage. The Tribunal held in favour of the assessee. Aggrieved by such an order, Revenue preferred an appeal before the Hon'ble High Court of Andhra Pradesh and their Lordships by reasoned order upheld the view expressed by the Tribunal. We reproduce the said ratio as is in para No. 9.

9.?There is no dispute, in these cases, that the assessee used cement and TMT bar for providing storage facility without which storage and warehousing services could not have been provided. Therefore the finding of the original authority as well as the appellate authority are clearly erroneous, which was correctly rectified by the CESTAT. In so far as the levy of penalty under Rule 15(2) of the Rules is concerned, unless and until there is a finding that there was suppression of fact, and irregular claim of CENVAT credit, the question of levying penalty under Rule 15(2) of the Rules docs not arise. In that view of the matter, the order levying penalty was rightly set aside by the CESTAT.

6.2 In view of the ratio of the higher judicial forum and the facts of the case in hand are the same, we hold that the impugned order is unsustainable and liable to be set aside and we do so.

6.3 As we are deciding the issue on merits, we are not recording any findings on various other submissions made by both the sides. Accordingly, we set aside the impugned order and allow the appeal with consequential relief, if any.

(Dictated in Court)

(C.J. Mathew)
Member (Technical)
(M.V. Ravindran)
Member (Judicial)

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