CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Service Tax Appeal No. 51011 of 2015

(Arising out of order-in-original No. 01/Commr/ST/IND/2014 dated 05.01.2015 passed by the Commissioner, customs, Central Excise & Service Tax, Indore).

M/s Entertainment world Developers Private Limited — **Appellant**
6th Floor, Treasure Island
11, South Tukoganj,
Indore.

VERSUS

Commissioner, Customs, Central Excise and Service Tax — **Respondent**
P.B. No. 10, Manik Bagh Road,
Manik Bagh Palace, Indore
M.P. -452001

APPEARANCE:

Shri Naveen Khandelwal and Sh. Sumit Nema, Advocates for the appellant
Shri R. K. Manjhi, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. C. L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 50861/2020

DATE OF HEARING: 03.12.2019
DATE OF DECISION: 15.10.2020

ANIL CHOUDHARY:

The appellant – M/s Entertainment world Developers Pvt. Limited have set up a Shopping Mall cum Entertainment World known as 'Treasure Island', which is in operation since December, 2005 after completion of the construction. The appellant is registered with the

Service Tax Department for various services including Renting of Immovable Property, Selling of space or time slots, Maintenance or repairs etc. They also availed input service credit with respect to various input service received for rendering the output services. The appellant have been filling their returns regularly in Form ST-3. As per their returns, they have taken cenvat credit and utilised the same as follows:-

Sl. No.	Period of ST-3 returns filed	Cenvat credit opening balance shown in ST-3 return (in Rs.)	Cenvat credit taken	Cenvat credit utilised	Closing balance
1	10/2011 to 03.2011	1,62,95,699/-	15,33,465/-	37,12,977/-	1,41,36,187/-
2	04/2011 to 09.2011	1,41,36,187/-	11,03,249/-	23,10,012/-	1,29,29,424/-
3	10/2011 to 03.2012	1,29,29,424/-	10,68,185/-	1,48,97,609/-	NIL
4	04/2012 to 06.2012	NIL	3,66,640/-	3,62,361/-	4,079/-
	Total		49,91,539/-		

2. Further, Revenue found that the appellant is discharging service tax liability for GTA as recipient of service, in cash. Further, the whole amount of service tax liability was being discharged through utilisation of cenvat credit. It appeared to Revenue that appellant have been discharging service tax on receipt basis, whereas w.e.f. 01.04.2011, service tax is liable on the billed amount, thus, there appears to be some short payment of service tax. It appeared to Revenue that the said amount of cenvat credit amounting to Rs.49,91,539/- is not admissible to appellant, as cenvat credit is admissible only when such input service/ inputs are used in providing any output service. It appeared that there is non-payment of service tax for renting of immovable property service for the period April,

2011 to September, 2011 amounting to Rs. 66,48,166/-. It has been observed in the show cause notice in para 9 that vide OIO No. 15/COMM/INDST/2012 dated 28.09.2012, cenvat credit of Rs. 4,46,92,767/- was disallowed for the period May, 2006 to September, 2010. It was also alleged that inspite of repeated requisition, appellant have failed to submit details of the credit taken, gross amount received towards taxable services etc. Accordingly, show cause notice dated 17.05.2013 proposed to disallow cenvat credit taken amounting to Rs. 49,91,539/-. Further, demand of tax of Rs.66,48,166/- for the period April, 2010 to September, 2010 alongwith interest and penalty was proposed under Section 76, 77 and 78.

3. The show cause notice was adjudicated on contest whereby the proposed disallowance of cenvat credit was confirmed alongwith equal amount of penalty. Further, service tax was demanded for Rs. 66,48,166/- alongwith equal amount of penalty under Section 78 alongwith interest under Section 75. Being aggrieved, the appellant is before this Tribunal.

4. Learned Counsel for the appellant urges that the order-in-original is factually wrong, for denying the receipt of cenvat credit for want of details from the appellant, despite evidence on record for submission of such details all throughout. The appellant have been regularly filing their returns disclosing the cenvat credit availed as follows:-

Period	Amount of cenvat credit availed as per the return (Rs.)	Date of filing of return
October 2010- March 2011	15,53,465/-	25.04.2011
April 2011 - September, 2011	11,03,249/-	20.12.2011
October, 2011 – March, 2012	19,68,185/-	22.06.2012
April, 2012 – June, 2012	3,66,640/-	30.11.2012

5. Appellant have been maintaining proper cenvat credit register, books of accounts alongwith supporting evidences and vouchers. The appellant renders output services being advertising agency services, maintenance and repair services, renting of immovable property services, etc. The major input services among others being received are Advertisement and Business Promotion, Bank charges, Repair and Maintenance services, Security Services, Legal & Professional Services, Telephone & Internet Services etc.

6. It is further urged that the definition of input service as amended, provides that the manufacturer or an output service provider is entitled to take cenvat credit of input services used directly or indirectly in relation to providing of output services and also includes various services specified therein. Learned Counsel further points out that reference to Circular No. 98/1/2008-ST is frivolous as the said circular is in respect to allowability of 'construction services' or 'works contract service' used for construction of immovable property, whereas the admitted fact is that the appellant has completed the construction and the Mall and is in operation since December, 2005.

7. Learned Counsel further points out that so far the disputed amount of cenvat credit of Rs.4,46,92,767/- in respect of construction stage is concerned, was disallowed vide order-in-original dated 28.09.2012, the same was challenged before this Tribunal in Service Tax Appeal No. 55113 of 2013 and vide Final Order No. ST/A/50536-50538/2019-CU(DB) dated 16.04.2019, the cenvat credit was held allowable with consequential benefits. Learned Counsel further refers to para 32 of their reply to show cause notice, wherein they have given input service-wise details for the period under dispute amounting to Rs. 49,91,539/- and also had furnished the break-up voucher-wise attached to the reply as Annexure-'D'. All the input service are received namely; Advertisement and Business Promotion, Bank Charges, Brokerage, Housekeeping Services, Insurance Service, Legal and Professional Service, Manpower Consultancy Service, Rent for hiring of immovable property, Security services, Telephone & Internet Services and miscellaneous services.

8. As regards the allegation of demand of Rs.66,48,166/- not paid, the appellant have pointed out that some tax was outstanding and was not paid due to litigation. As regards chargeability of service tax for renting of immovable property service, which was finally settled in favour of the Revenue only after re-introduction of the service tax on renting of immovable property under Section 65(105)(zzzz) of the Finance Act, 1994, vide Finance Act, 2010 (with retrospective effect from 01.06.2007). Further, in para 36 of the reply, it was mentioned that appellant have filed declaration under VCES, 2013 for tax dues of Rs.83,09,571/- on 24.12.2013, for the

period April, 2011 to December, 2012 which includes the outstanding amount of Rs. 66,48,166/-. As per the present show cause notice, it was also pointed out that the appellant have deposited the tax dues under the said scheme. Therefore, the show cause notice for the said amount of Rs. 66,48,166/- is not maintainable. It is further pointed out by the learned Counsel, from para 27 of the impugned order that the learned Commissioner have misdirected himself under the impression that the Mall is still under construction and hence various input services are not allowable, thus, committing mistake of fact, vitiating the order.

9. Learned Counsel further points out that even after reintroduction of the levy of service tax on renting of immovable property and if being upheld by the High Court, appeal of service receiver being 'Retailers Association of India' vs. Union of India & Ors have been admitted by Hon'ble Supreme Court vide interim order dated 14.10.2011, reported at 2011-TIOL-104-SC-ST whereby the Apex court have granted interim relief by directing that the appellant (service receivers) shall deposit 50% of the tax liability with respect to the tax dues prior to 30.09.2011, and for the balance 50% they shall submit an solvency certificate to the satisfaction of the jurisdictional Commissioner. Learned Counsel further points out that whatever service tax was unpaid due to litigation, the service receiver and the appellant have made proper disclosure in the return, had also reflected the admitted tax correctly. But the appellant cannot deposit service tax as the tenant of the appellant was party before the High Court and the Supreme Court, were not paying as enjoying stay.

Whatever tax was in arrears as admitted by the appellant, the appellant have deposited all the taxes and have annexed the challans vide miscellaneous application before this Tribunal and have also filed the details chart showing the financial yearwise tax liability for the period June, 2007 to March, 2012. The extract of said details are as follows:-

Particulars		Total (Rs)
Billing of Renting (12.36%)		20,93,33,,463/-
Bill of Renting (10.30%)		38,65,07,230/-
Total Billing		59,58,40,693/-
Less- Property Tax paid		1,27,31,453/-
Taxable value		58,31,09,240/-
Less: Amount not received		23,45,804/-
Amount on which tax is payable		58,07,63,436/-
Service Tax payable		6,40,48,497/-
Less-Paid and shown in ST-3 of Oct. 11 to Mar. 12		
Through cenvat credit (Note 1)	Consolidated payments have been made, so figures not shown separately. However, shown in return of March, 12 as arrears paid.	1,48,97,609/-
Through cash by EWDL (Note 2)		41,74,717/-
Through cash by RAI Members (50% portion) (Note 3)		34,62,038/-
Still payable after filing above ST-3 return		
By RAI Members (50% return		34,62,038/-
By EWDL		3,80,52,095/-
Less: Paid by EWDL through various challans (as per list attached)		3,83,39,850/-
Final payable by EWDL (excess paid)		(2,87,755)

Note 1: Arrears
Note 2: Current Return period, challan 1, 2 & 3
Note 3: Arrears cash by RAI, letter dt. 05.02.13.

Thus, the appellant has paid more, evidently than that was payable by them.

10. Learned Counsel further urges that there is no specific disallowance for any specific head of input service received by them,

and evidently input service credit was disallowed under the wrong impression that the Mall of the appellant is still under construction. Accordingly, he prays for allowing the appeal setting aside the impugned order.

11. Learned Authorised Representative for Revenue relies on the impugned order.

12. Having considered the rival contentions, we find that the appellant is entitled to input service credit of Rs. 49,91,591/- in dispute. All the services in question are eligible input services for rendering of output services. There is no dispute as regards receipt of any of the input services.

13. As regards the demand of service tax for Rs. 66,48,166/-, we find that the said amount is also not tenable as the said demand was prima facie raised under the impression that the appellant is not entitled to cenvat credit of Rs. 49,91,539/-. Further, we find that the appellant have deposited the service tax as per their calculation and is also evident from the calculation chart and the payment challans brought on record vide miscellaneous application, which was earlier allowed vide order dated 03.12.2019. We further find that Revenue have not pleaded that the VCES application filed by the appellant on 24.12.2013 for tax dues upto December, 2012 have been rejected. Even otherwise the appellant have deposited all the taxes, as is evident. Accordingly, we allow this appeal and set aside the impugned order with consequential benefits. The adjudicating authority is directed to verify the challans for payment of service tax

alongwith calculation as furnished by the appellant before this Tribunal. The appellant is directed to file a copy of the calculation chart alongwith evidence of payment of service tax before the adjudicating authority for verification. If any amount is found to be short paid, the same shall be deposited on being so pointed out by the adjudicating authority. The excess amount deposited, if any, shall be adjusted in accordance with law. The appeal is allowed with consequential benefits.

(Pronounced on 15.10.2020).

(**Anil Choudhary**)
Member (Judicial)

(**C. L. Mahar**)
Member (Technical)

Pant