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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL REGIONAL BENCH AT HYDERABAD

Court – I

Service Tax Appeal No. 30531/2018

(Arising out of Order-in-Appeal No. HYD-SVTAX-HYD-AD1-007-17-18 dt.01.02.2018 passed Commissioner of Audit-I, Hyderabad)

Dharti Dredging and Infrastructure Ltd

DDIL Bhawan, 6-3-1113/2, BS Maktha,
Begumpet, Hyderabad, Telangana – 500 016 **.....Appellant**

VERSUS

**Commissioner of Central Tax,
Secunderabad – GST**

Kendriya Shulk Bhavan, L.B. Stadium Road,
Basheerbagh, Hyderabad, Telangana – 500 004 **.....Respondent**

Appearance

Shri Ms Rinky Jassuja, Advocate for the Appellant.
Shri Pavan Kumar, AR for the Respondent.

Coram:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

INTERIM ORDER No. I/03/2021

Date of Hearing: 17.03.2021
Date of Decision: 01.04.2021

[Order per: P. VENKATA SUBBA RAO]

1. This matter was referred to a Larger Bench by the Hon'ble Single Member (Judicial) vide his Interim Order dated 06.09.2018 in view of the conflicting decisions in the cases of **Hydus Technologies India Pvt Ltd** vs. **C.C.E., CUS. & S.T., Hyderabad-II**[1] and **Ganesan Builders Ltd** vs **CST, Chennai-II**[2]. The reference is as follows:

> "5. Since both the benches are of the same strength and there being diagonally opposite views expressed, I refer the matter to

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1 . [2017 (52) STR 186 (Tri-Hyd)]
2 . [2017-TIOL-3152-CESTAT-Madras]

> the President CESTAT for constituting Larger Bench to arrive at a conclusion as to whether the view expressed by (the bench in the case of) Hydus Technologies India Pvt Ltd is correct or the view expressed by the Bench in the case of Ganesan Builders Ltd. is to be followed."

2. We heard both sides and perused the records.

3. The appellant herein has availed Cenvat credit on service tax paid on insurance premium paid in respect of "workmen compensation insurance policy", which was denied by the lower authorities and hence, this appeal. When this matter was heard by the learned Single Member (Judicial), he found that contrary views had been expressed on the same issue by two benches of the same strength (both single member benches). Hence, the matter has been referred to a larger Bench for a decision.

4. The appellant is a service tax provider and avails Cenvat credit on the inputs and input services under Cenvat Credit Rules (CCR), 2004. Rule 2(l) of the CCR defines the 'input service' as follows:

> "(l) "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;
>
> **but excludes**
>
> (A) service portion in the execution of a works contract and construction services including service listed under clause (b) of section 66E of the Finance Act (hereinafter referred to as specified services) in so far they are used for –

a. construction of execution of works contract 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; or

(B) services provided by way of renting of a motor vehicle, in so far as they relate to a motor vehicle which is not a capital goods; or

(BA) service of general insurance business, servicing, repair and maintenance, in so far as they relate to a motor vehicle which is not a capital goods, except when used by –

(a) a manufacturer of a motor vehicle in respect of a motor vehicle manufactured by such person; or
(b) an insurance company in respect of a motor vehicle insured or reinsured by such person; or

(C) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for person use or consumption of any employee."

5. It is to be noted that up to 1st April 2011, the above definition of 'input service' did not have the exclusion clause. From 1st April 2011, certain types of services have been excluded from the scope of 'input service' and therefore, no CENVAT credit is admissible on them. The relevant clause is clause (C) above.

6. It is the case of the revenue that insurance being specifically excluded from the definition of "input service" under CCR, 2004, no Cenvat credit of service tax paid on 'Workmen Compensation Insurance Policy' is admissible to the appellant. It is the case of the appellant, that they are entitled for such Cenvat credit.

7. In **Hydus Technologies India**, a learned Member (Judicial) held that Cenvat credit is available in respect of service tax with respect to gratuity insurance, employees deposit linked insurance, employees health insurance, etc., on the ground that "the benefit bestowed by one legislation cannot be taken away or made highly difficult and impractical to be adhered to by another field of law" and accordingly, the benefit was allowed despite specific exclusion by Rule 2(l). Paragraph 7 of this order reads as follows:

> "7. Strong objections were put forward by the ld. AR with regard to the refund of Service Tax in respect of Group Gratuity Insurance, Employees Deposit linked Insurance and employee health insurance. He submitted that these services are excluded in the definition of input service and therefore the appellant is not eligible for refund. Though the ld. AR has put forward strong objections there is no document before me to establish that the services are availed for personal use or personal consumption of the employee. The ld. Counsel for the Appellant explained that the group gratuity scheme is a gratuity policy for the employees of the company taken under Section 4A of the Payment of Gratuity Act, 1972. As per this Act, gratuity is payable if an employee has rendered minimum 5 years of service at the time of exit. The principal concern of the company is to safeguard the availability of sufficient funds to meet the company's obligation for statutory payments. The Employees Deposit Linked Insurance is a part of provident fund scheme and provides maximum payment to the insured person's nominated beneficiary in the event of death due to natural cause, accident or illness..... **None of the above insurance services can be said to be used primarily for personal use or consumption of any employee. All the above insurance services are availed under various Labour legislations enacted for the welfare of employees/workers. The benefit bestowed by one legislation cannot be taken away or made highly difficult and impractical to be adhered to by another field of law. The Tribunal in the case of M/s. Fiem Industries Ltd (supra) has discussed the said issue and held that the assessee is eligible for credit/refund. From the following discussions and also relying on the judgments placed by the appellant, I hold that the appellant is eligible for refund. The impugned order is set aside. The appeal is allowed with consequential reliefs, if any.**"

8. On the other hand, in **Ganesan Builders,** CESTAT-Chennai has denied the benefit of Cenvat credit on input services following the definition of input service including the exclusion clause therein under Rule 2(l) of CCR, 2004, as amended w.e.f. 01.04.2011. Relevant paragraphs of this order are as follows:

> "4. Learned advocate appearing for the appellants has pleaded that the insurance cover was taken by the company for the workers at their site as per the mandatory requirements of Section 38 of the Employees State Insurance Act, 1948. As such, it stands submitted that inasmuch as the company is under a legal obligation to take insurance cover for their employees, it

has to be held that the said services are directly having nexus to their output service and hence, is an input service.....

6. After carefully considering the submissions made by both sides and after going through the impugned orders, I find that the dispute relates to availment of CENVAT credit of service tax paid on the Insurance Service taken by the appellant for their workers at site. Admittedly, such insurance services have to be provided by an assessee in terms of the Employees State Insurance Act, 1948 and are for the welfare of the employees. The said services have also been held to be eligible input service for the purpose of availment or credit by various decisions of higher courts.

7. However, the crux of the matter in the present appeal is, as to whether such services continued to be covered by the definition of 'INPUT SERVICES" after 1-4-2011, when a specific exclusion clause was introduced in the definition of 'Input Services. For better appreciation, the same is reproduced below:

But excludes-

(a).....

(b).....

(c) such as those provided to in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance, and travel benefits extended to employees on vacation such as Leave or Home Travel Concessions, when such services are used primarily for personal use or consumption of any employee.

8.1.....

The exclusion clearly mentions various services including the Life Insurance and Health Insurance Services as not covered by the Input Services. Similarly, the travel benefits extended to the employees at the time of Leave or Home Travel Concession also stands excluded. There is no warrant to read excluded Health Insurance Services with the travel benefits for leave, etc. As such, the contention of the learned advocate that it is only those Health Insurance Services which are extended during leave stands excluded cannot be appreciated and accepted.

9. In as much as the period involved in the present appeal is subsequent to 1-4-2011, I am of the view that the availment of credit was not admissible to the assessee.

10. Similarly, the fact that the appellant is obliged to provide such services under the Employees State Insurance Act, 1948 can also not to be held as ground to allow the credit, inasmuch as legislation is within its right to amend the definition of " Input Services' and to include or exclude any of the services from its ambit. In any case, the Tribunal is not within its jurisdiction to

> decide on the vires of the said amendments. Accordingly, the denial of the same along with confirmation of interest is upheld."

9. Learned counsel for the appellant submits that they have obtained an insurance policy to cover their liability for payment of compensation to their workers under Workmen Compensation Act, 1923. Section 3 of this Act mandates the employer to pay compensation to the workers in the event of personal injury to a workman by accident arising out of and in the course of his employment. The compensation that has to be paid is as per the formula prescribed under the Act. They have taken an insurance to cover this potential liability. Insurance services being liable to service tax, the appellant, at the time of making payment for the premium of the said policy, paid the service tax. They, therefore, claimed Cenvat credit of the service tax so paid.*

10. Show cause notices dated 09.03.2015 and 15.04.2016 were issued to them *interalia* alleging Cenvat credit availed on insurance services do not have nexus with the business of the company and were also specifically excluded from the definition of input service. Accordingly, the credit was sought to be recovered under Rule 14 of CCR, 2004 along with interest and penalty. These show cause notice were adjudicated by the lower authority confirming the demand and the appeal was rejected by the Commissioner (Appeals) relying on the order of CESTAT-Chennai in **Ganesan Builders**. Hence, they filed the present appeal which has been referred to a Larger Bench to resolve the conflict between the decisions in **Hydus Technologies India** and **Ganesan Builders**.

11. Learned Counsel would submit that the decision of CESTAT-Chennai in the case of **Ganesan Builders** is no longer good law because it has been overruled by the Hon'ble High Court of Madras, which decision is reported in

2019 (20) GSTL 39 (Madras). This judgment of the Hon'ble High Court of Madras is binding on the Tribunal and hence they should be allowed Cenvat credit on the service tax paid on the premium. Thus, she would submit that both the cases of **Hydus Technologies India** by CESTAT-Hyderabad and **Ganesan Builders** by the Hon'ble High Court of Madras stand in their favour and their appeal must be allowed.

12. Without prejudice to the above, she would submit that the exclusion under clause (C) of Rule 2(l) of CCR, 2004 inserted w.e.f. 01.04.2011 reads as follows:

> "(C) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, **life insurance**, **health insurance** and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, **when such services are used primarily for person use or consumption of any employee**."

13. She would submit that while introducing the aforesaid amendment a TRU vide D.O.F No.334/3/2011-TRU dated 28.02.2011 explained as follows:

> "On the same lines, **a service meant primarily for the personal use or consumption of employees will not constitute an input service**. A list of specific services has also been given by way of example in the definition. **Most of these services constitute a part of the cost-to-company package of the employee and are provided either free of charge or on concessional basis to company employees**."

14. A perusal of the above clarification shows what was sought to be excluded was what is primarily meant for personal use or consumption of employees. In their case, the benefit of insurance is not going to the employees at all. As per the Workmen Compensation Act, 1923, the employees are entitled to compensation whether or not the appellant takes the insurance policy. The amount of compensation is also fixed as per law. This potential liability of the company was sought to be covered by the insurance policy which they have taken. Learned Counsel takes us through the copy of the insurance policy, which shows that the insured is the

appellant and not the individual employees. Therefore, in terms of clause (C) of Rule 2(l) of CCR, 2004 they are not excluded from availing Cenvat credit. Therefore, learned Counsel submits that the question before the Larger Bench may be answered in favour of the assessee.

15. Learned departmental representative reiterates the findings of the lower authority and submit that Rule 2(l) of CCR, 2004 clearly made some exclusions including the insurance policies where the benefit goes to individual employees. He would submit that it is very clear that the legislation intended to exclude those services which have been used primarily for personal use or consumption of any employee. Since, the ultimate beneficiary in the present insurance policy is the employee, no benefit of Cenvat credit should be availed for these policies. The appellant's contention that these policies are taken under the statutory obligation under Workmen Compensation Act, 1923 and hence Cenvat credit should be allowed on the service tax paid on insurance premium has no legal basis. He relies on the following case laws:

a. Microsoft Global Service Centre (India) vs Comm [2020(10) TMI 57 CESTAT Hyderabad
b. Bharat Fritz Werner Ltd vs Comm [2019 (6) TMI 67 – CESTAT Bangalore]
c. Sasken Technologies Ltd. [2019 (1) TMI-219-CESTAT Bangalore]
d. Andritz Technologies Pvt. Td. [2019 (12) TMI 122 –CESTAT Bangalore]
e. Olam Information Services Pvt. Ltd. [2020 (5) TMI 318 –CESTAT Chennai]
f. Wipro Ltd [2018-TIOL-3256-CESTAT-BANG-LB]

16. He asserts that the ratio of the decision of the Tribunal in **Hydus Technologies India** is not correct because the Tribunal cannot modify the Cenvat Credit Rules and they should be applied as such.

17. Learned Authorized Representative would submit that in view of the above, the appeal filed by the appellant in the present case deserves to be rejected and the question may be decided against the appellant.

18. We have considered the submissions and have perused the records.

19. The question which has been referred is whether the view expressed by CESTAT Hyderabad in **Hydus Technologies India** or the view expressed by CESTAT-Chennai in the case of **Ganesan Builders** is correct.

20. On perusal of the records, it is seen that the two cases are somewhat different on facts. In the case of **Hydus Technologies India**, Cenvat credit was allowed on group gratuity insurance, employee deposit linked insurance, employee health insurance, etc., holding that these were legal responsibilities of the employer and hence Cenvat credit should be allowed, "**because the benefit bestowed by one legislation cannot be taken away or made highly difficult or impractical to be adhered to by another field of law.**" By contrast, the case of **Ganesan Builders** holds that any obligation under any other law cannot be a ground to allow credit inasmuch as legislation is within its right to amend the definition of input services and to include or exclude any of the services from its ambit.

21. This decision of the CESTAT-Madras in **Ganesan Builders** has been overruled by the Hon'ble High Court of Madras specifically dealing with "workmen compensation insurance policy". The Hon'ble High Court of Madras has held that the Workmen Compensation Act, 1923 is a beneficial legislation and the policy taken by the assessee in that case does not name the employees but categorised the employees based on their vocation/skill.

The insured in that case is the assessee and the intention of the policy is to protect the employees who work at the site and not to drive them to various forums for availing compensation in the event of an injury or death. The service in that case was not primarily for personal use or consumption of employee and the insured is the assessee and not the employees. The relevant portion of judgment in paragraphs 9, 10 and 11 are reproduced below:

> "9. **In our considered view, the Tribunal missed a very significant point, while taking a decision as to whether the credit availed by the assessee is eligible or not? The first and foremost factor, which should have weighed the mind of the Tribunal is the nature of the policy availed by the assessee; the beneficiary of the policy; and the Statute, under which, the policy is required to be availed. These three are very important factors in the instant case**.
>
> 10. As noticed above, the assessee is rendering commercial or industrial construction service, construction of residential complex, works contract services and GTA Service (as a recipient) and the assessee is registered with the Service Tax Commissionerate. The copies of a few policies, which have been availed by the assessee, have been produced before us, which show that they are Workmen Compensation Policies. The name of the insured is the assessee, namely, M/s. Ganesan Builders Limited. The policies specify the area, where the construction works are being carried on and in the copies given to us the addresses are : No. 144, Rajiv Gandhi Salai, Chennai-41 and (ii) SIPCOT Industrial Park, Irungulam, Podur Village, Sriperumbudur. The description of the employees for whom premium has been paid are not described by their names, but by their vocation/skill, namely, Mason, Helper, Stone Cutter, Barbender and his Helper, Carpenter and his Helper, Painter and his Helper, Store Keeper, Electrician, Supervisor, Plumper, Welder, Tiles Mason, etc. Therefore, we are required to consider as to why the assessee is required to avail such a policy. This is so because of a statutory requirement under the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (in short, "the 1996 Act"). Under the said Act, the Workmen's Compensation Act, 1923 has been included in the Second Schedule of the 1996 Act and the provisions of Workmen's Compensation Act, 1923 has been made applicable to the building workers.
>
> **11. Thus, the inclusion of the Workmen's Compensation Act in the 1996 Act, a beneficial legislation, is for the purpose of protecting workmen, who generally belong to unorganized sector. The policy does not name the employees, but categorized the employees based on their vocation/skill. The insured is the assessee and the intention of the policy is to protect the employees, who work in the site and not to drive them to various forums for availing compensation in the event of an injury or death. Therefore, even viewed from this angle, the availment of the policy appears to be a statutory requirement and as rightly**

> **contended by the assessee, this service is not used primarily for personal use or consumption of an employee and this, being the statutory requirement, it is insured (assessee) specific and not employees specific.**"
>
> **(emphasis supplied)**

22. The three factors to be considered as per the judgment of the Hon'ble High Court are:

a) The nature of the policy;
b) The beneficiary of the policy;
c) The statute under which the policy is required to be availed.

23. From the above, we find that the present case is identical to the case of **Ganesan Builders** decided by the Hon'ble High Court of Madras inasmuch the policy in question pertains to workmen compensation scheme. The insured, as can be seen from the insurance policies is the assessee/appellant and not the individual employees. In other words, the benefit of the policy, if any, goes to the assessee and not to the individual employees. It is not like health insurance taken for the benefit of employees. We find from the Workmen Compensation Act, 1923 that Section 3 places the liability for compensation upon the employer. Section 4 determines the amount of compensation to be paid. If the assessee had not taken this insurance policy the employees would still be eligible for full compensation as per sections 3 and 4 of the Workmen Compensation Act, 1923. What is sought to be covered by these insurance policies in the present case is the liability of the assessee against any potential claim under sections 3 and 4 of the Act.

24. This is one of the insurance policies where the potential liability of the insured is indemnified by the insurance company. A few other such policies are:

a) **Reinsurance policies** where the beneficiary is the primary insurer whose risk is partly covered by the reinsurance company.

b) Third party insurance taken in respect of motor vehicles in which the beneficiary is not the third party who may be hit in an accident by the vehicle but the owner of the vehicle who will be liable to pay compensation to such third party with or without insurance.

c) Professional liability insurance taken by a doctor where the beneficiary is not the patient who may at some stage suffer because of faulty performance of services by the doctor but the doctor himself. The patient who suffered will be eligible for compensation from the doctor as decided by the Courts. The doctor either has to pay the compensation out of his own pocket or take insurance policy to cover the risk. In the latter case, the doctor is the beneficiary (insured) and not the patient.

d) Product liability insurance: If the product of a manufacturer was found to be defective causing large consequential damage, he will have to pay enormous compensation. The product liability insurance indemnifies him against such a liability.

25. In all such cases, by paying a small premium the employer, the insurance company, the doctor or the manufacturer cover their potential liability.

26. Similarly, in the present case the workmen are not the beneficiaries of the policy but it is the assessee. Therefore, the benefit of the insurance in the present case flows directly to the assessee themselves and not to individual employees. Therefore, the present policy is not excluded by clause (C) of Rule 2(l) as has been held by the Hon'ble High Court of Madras in the case of **Ganesan Builders**.

27. We have carefully considered the case laws relied upon by the learned Departmental Representative.

28. In the case of **Wipro Ltd.,** the question was one of service tax paid on outdoor catering services provided by the assessee to their employees. The

benefit in that case was flowing to the employees and the same stands covered by the exclusion of the definition of 'input services'. In **Microsoft Global Services,** the question was regarding eligibility of CENVAT credit on the excluded services partly for the period prior to amendment on 1-4-2011, which was allowed and partly for the period post 1-4-2011 which was disallowed. In **Bharat Fritzwerner Ltd.,** the availability of CENVAT credit on Life Insurance and Health Services credit was disallowed post 1-4-2011 where the benefit flowed to the employees. In **Sasken Technologies,** the question was of eligibility of CENVAT credit of service tax paid on Group Medical Insurance Services, Catering Services and Transportation of employees and credit was disallowed on the first two, being services for personal consumption of the employees and was allowed on the third service since it was related to the work and not for personal consumption of the employees. In **Andritz Technologies,** CENVAT credit was not allowed on Group Medical Insurance, Rent a Cab services, Food Coupons meant for personal consumption of the employees. In **Olam Information Services,** CENVAT credit on Group Insurance Services was disallowed as this was meant for personal consumption of the employees.

29. All these orders are consistent with the judgment of the Hon'ble High Court of Madras inasmuch as in all these cases, the benefit CENVAT credit was denied on the input service in dispute which was for personal consumption of the employees and not to cover the potential liability of the assessee. As we have already observed and as is evident from the Insurance policies in question in the present case, the beneficiary is the assessee himself and the service is not meant for personal consumption of the employees.

30. In view of the above, we answer the question referred to us as follows:

> "The view expressed by the Tribunal **Hydus Technologies India** lays down the correct position in law. The view expressed by the Tribunal in **Ganesan Builders** has been over ruled by the Madras High Court in **Ganesan Builders Ltd.** vs. **Commissioner of Service Tax, Chennai.**[3]**"**

31. The matter may be placed before the appropriate bench for deciding the case.

(Order pronounced in the open court on April 01, 2021)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Veda/Shreya

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3. 2019 (20) G.S.T.L. 39 (Mad.)