

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA**

Excise Appeal No.76215 of 2016

(Arising out of Order-in-Original No.101-103/Commr/DGP/2015-16 dated 10.03.2016 passed by Commissioner (Appeals) of Central Excise, Customs & Service Tax, Durgapur)

M/s Jai Balaji Industries Ltd.

EPIP Plot, Banskopa, Rajbandh, Durgapur-713212

Appellant

VERSUS

**Commissioner of Central Excise, Customs & Service Tax,
Durgapur**

Satyajit Roy Sarani, City Centre, Durgapur-713216, Dist.-Burdwan, West Bengal

Respondent

Appearance:

Shri A.K.Prasad, Advocate & Shri S.Mohapatra, General Manager (Taxation)
for the Appellant

Shri J.Chattopadhyay, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER

HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

FINAL ORDER NO.75435/2022

DATE OF E-HEARING : 14.06.2022

DATE OF PRONOUNCEMENT : 04 AUGUST 2022

Per P.K.Choudhary :

1. This is an appeal against Order-in Original No 101-103/COMMR/DGP/2015-16 dated 10-03-2016, passed by the Commissioner of Central Excise, Service Tax and Customs, Durgapur.

2. The brief facts of the case are that **M/s. Jai Balaji Industries Limited (Unit-IV)** located in Durgapur, West Bengal (hereinafter referred to as the Appellants) were, during the relevant period, duly registered with Central Excise and engaged in the manufacture of Iron and Steel products as well as articles of Iron and Steel classifiable under chapters 72 and 73, respectively, of the Central Excise Tariff. As part of their **modernization/renovation project** the Appellants

Excise Appeal No.76215 of 2016

decided to set up a Coke Oven Plant in their factory premises for which the Appellants gave contracts to a number of service providers.

3. The contractors paid service tax on the services provided by them. The Appellants took credit of the service tax so paid, as tax paid on 'input service'.

4. The department took the view that the services provided by the contractors were in the nature of 'works contract services' which, was excluded from the definition of 'input service' under the Cenvat Credit Rules, 2004. Accordingly, the following three show cause notices were issued demanding total ineligible Cenvat credit of Rs. 1,93,93,204/-, along with interest and equal amount of penalty :

Sl. No.	Show Cause Notice number and date	Period involved	Cenvat Credit involved (Rs.)
1.	15/Commr/Bol/14 dated 4-3-2014	01-04-2011 to 31-10-2013	1,84,94,031
2.	06/2014-15 dated 12-11-2014.	01-11-2013 to 30-08-2014.	2,62,037
3.	69/ADC/CE/DGP/15 dated 05-10-2015.	01-09-2014 to 31-07-2015.	6,37,136
	TOTAL		1,93,93,204

5. In their replies, all dated 17-02-2016, to the three show cause notices, the Appellants contended that the services received were for **modernization, renovation and repair of the factory** which was included in the definition of 'input service'.

6. However, the submissions made by the Appellants were not accepted by the Id. Commissioner and, vide common Order-in-Original dated 10-03-2016(the impugned Order) he confirmed the full demand along with interest and also imposed equivalent penalty. Hence, the present appeal before the Tribunal.

7. We have heard both the sides and also perused the appeal records.

8. Shri A.K.Prasad, the learned Advocate for the appellants assailed the impugned order on the following points.

Excise Appeal No.76215 of 2016

8.1 The dispute in the present case relates to the period from 01-04-2011 to July, 2015. The provisions relating to Service Tax law underwent substantial changes w.e.f. 01-07-2012 with the introduction of the 'Negative list'. The definition of 'input service' as well as 'works contract service' also underwent changes. However, the instant show cause notices have been issued relying only on the definition of 'input service' as well as 'works contract service' w.e.f. 01-07-2012. Therefore, since the Appellants were never put to notice with reference to the definition of 'input service' and 'works contract service' as applicable prior to 01-07-2012, the demand for the period prior to 01-07-2012 is clearly not sustainable.

8.2 In para 4.4.1 of the impugned Order the Adjudicating Authority has also relied on the definition of 'input service' as well as 'works contract services' as was prevailing during the period prior to 01-07-2012 **which was not part of the show cause notice dated 04.03.2014**. Since the show cause notices were issued in the context of the definition as prevailing w.e.f. 01-07-2012, clearly the impugned Order has gone beyond the show cause notice, which is not permissible.

8.3 From 01-07-2012 the definition of 'input service' excludes only that portion of the 'works contract service' which relates specifically to construction of building and civil structures. The exclusion clause does not exclude works contract service *per se*, but only certain types of works contract service. Since the definition of 'works contract service' also covers erection, commissioning and installation services, these services have not been excluded from the definition of 'input service'. The services procured by the Appellants from various service providers were for the purposes of fabrication, erection, installation and commissioning of the Coke Oven Project which was not covered by the exclusion clause of the definition of 'input service'.

8.4 The services received by the Appellants from some service providers for the purpose of fabrication, erection and commissioning of different parts of the Coke Oven Project in the factory premises of the

Excise Appeal No.76215 of 2016

Appellants, as part of their **modernization project**, also involved some civil work. However, these minor civil works were not for construction or execution of works contract for a building or civil structures or for laying of foundation or support for capital goods. Hence, the services received by the Appellants were not covered by the exclusion clause in the definition of 'input service'.

8.5 The work of the Coke Oven Project was for the modernization of the appellants' factory. Modernization of the factory was specifically covered in the inclusive definition of 'input service' during both the periods. In their replies, all dated 17.02.2016 the Appellants had specifically pointed out as under:-

" The Noticee further submits that all the above services including 'construction service', and in some cases 'works contract service' were used in relation to modernization, renovation or repairs of their factory. The fact of which may kindly be verified by the Id. Adjudicating authority by causing verification in this regard".

Though these submissions were recorded by the Id. Adjudicating authority in the impugned order, it was neither verified, nor rejected nor rebutted by him.

8.6 In the following cases it has been held that all services received, whether works contract, construction, or otherwise, would be covered by the definition of 'input service' so long as they are covered by the inclusive part of the definition:-

(i) Kakinada Seaports Ltd vs CCE, ST and Cus, Visakhapatnam-II [2015 (40) STR 509 (Tri-Bang)]

(ii) Carrier Airconditioning & Refrigeration Ltd vs CCE, Delhi-IV [2016 (41) STR 824 (Tri-Chan)]

(iii) M/s Bombay Market Art Silk Cooperative (Shop & Warehouse) Society Ltd vs CCE & ST Surat-I [2022-TIOL-444-CESTAT-AHM]

(iv) M/s Reliance Industries vs CCE &ST, Rajkot [2022-TIOL-359-CESTAT-AHM]

(v) M/s Outsource Partners International Pvt Ltd vs CCT &CE, Tiruvananthapuram [2022 (58) GSTL 354 (Tri-Bang)]

8.7 In Board's **Circular No 943/4/2011-CX dated 09.04.2011**, it was clarified that all services received for renovation and repair of factory or office would be eligible for credit by the recipient.

8.8 Even the sample invoices of the contractors relied upon by the Id. Adjudicating authority, in para 4.4.4 of the impugned order, clearly mentions that the services were provided for the Coke Oven Project, which was part of the renovation/modernization plan for the plant/factory.

8.9 As per the definition of 'works contract' both before 01-07-2012 and from 01-07-2012, the service should also involve sale of goods on which VAT/Sale tax has been paid. It is on record that in respect of all the contracts given by the Appellants in connection with erection, installation and commissioning of the Coke Oven Plant, the raw materials like cement, reinforcement steel, structural steel etc, for carrying out the work, were supplied free of cost by the Appellants. Thus, since the services received were not covered by the definition of 'works contract service', the basic premise of the department's contention does not stand.

8.10 In paras 4.4.8 and 4.4.9 of the impugned Order, the Adjudicating Authority has held that the input services received by the Appellants were not integrally connected and had no nexus with the final product. It was submitted that this was not an issue raised in any of the show cause notices and, hence, the Adjudicating Authority had gone beyond the scope of show cause notice, which was not permissible.

8.11 With effect from 01-04-2011, Rule 14 of the Cenvat Credit Rules, 2004, was amended to provide that interest would be charged only if the Cenvat credit had not only been **wrongly taken but also utilized**. In the instant case, interest, if any, can be charged only for the period when the amount lying in credit fell below the inadmissible

Excise Appeal No.76215 of 2016

credit at that point of time. No verification has been done in this regard.

8.12 This appears to be, at best, a case of interpretation of the definition of 'input service' and 'works contract service' for which neither any penalty is called for nor can the extended time limit be invoked on the grounds of suppression of facts or willful misstatement with intent to evade taxes.

8.13 The reasons for alleging suppression of facts, as per the show cause notices, is that the appellants had not kept the department informed about taking credit in respect of the impugned input services. In this regard it is submitted that there is no requirement under the law to inform the department about the **specific nature** of the service on which credit has been taken.

9. The learned Authorised Representative referred to the definition of 'input service' and submitted that there is no change in the coverage of definition of 'input service' both before and after 01.07.2012, though the text of the definition may have changed. He also submitted that since 'works contract' service was excluded from the definition of 'input service', credit could not be taken in respect of any service tax paid on 'works contract' services. He also referred to the sample invoices relied upon by the adjudicating authority and submitted that since WCT (Works Contract Tax) had been deducted in all the three sample invoices of the contractors, it clearly indicated that the services provided were all 'works contract services'.

10. We have examined the rival submissions. For better appreciation of the issue involved, it would be appropriate to reproduce the definition of 'input service'.

11. **Definition during the period: 01.04.20011 to 30.06.2017**

2(l) "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

Excise Appeal No.76215 of 2016

final products and clearance of final products up to the place of removal,
*and includes services used in relation to **modernization, renovation or repairs of a factory,** premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage up to the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal service, inward transportation of inputs or capital goods and outward transportation up to the place of removal; **but excludes services, -***

(A) specified in sub-clause (p), (zn), (ztl), (zzm), (zzq), (zzzh) and (zzza), of clause (105) of Section 65 of the Finance Act (hereinafter referred as 'specified services'), in so far as they are used for –

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

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

(B).....

12. During the above period the above sub-clauses of clause(105) of section 65 of the Finance Act,1994, read as under:

"(p) to any person, by an architect in his professional capacity, in any manner;

(zn) to any person, by any other person, in relation to port services in a port, in any manner:

Provided that then provisions of Section 65A shall not apply to any service when the same is rendered wholly within the port;

(ztl) to any person, by any other person, in relation to port services in other port, in any manner;

Excise Appeal No.76215 of 2016

Provided that the provisions of section 65A shall not apply to any service when the same is rendered wholly within other port;

(zzm) to any person, by airports authority or by any other person, in any airport for a civil enclave;

Provided that the provisions of section 65A shall not apply to any service when the same is rendered wholly within the airport or civil enclave;

(zzq) to any person, by any other person, in relation to commercial or industrial construction;

Explanation – For the purposes of this sub-clause, the construction of a new building which is intended for sale, wholly or partly, by a builder or any person authorized by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or the person authorized by the builder before grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer;

(zzzh) to any person, by any other person, in relation to construction of complex.

Explanation – *For the purpose of this sub-clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorized by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorized by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer.*

(zzzza) to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminal, bridges tunnels and dams.

Excise Appeal No.76215 of 2016

Explanation – For the purpose of this sub-clause, "works contract" means a contract wherein, -

(i) Transfer of property in goods in the execution of such contract is leviable to tax as sale of goods, and

(ii) Such contract is for the purposes of carrying out –

(a) Erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise installation of electrical and electronic devices, plumbing, drain laying or other installation for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(b) Construction of a new building or a civil structure or a part thereof, or of a pipe line or conduit, primarily for the purposes of commerce or industry; or

(c) Construction of a new residential complex or a part thereof; or

(d) Completion and finishing services, repaid alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) Turnkey projects including engineering, procurement and construction or commissioning (EPC) projects.

13. With effect from 1.7.2012 the definition of 'input service' reads as under:-

2(l) "input service" means any service, -

(i) used by a provider of output 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 upto the place of removal,

Excise Appeal No.76215 of 2016

and includes services used in relation **to 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, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, 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 as specified services) in so far as they are used for -

(a) construction or 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 personal use or consumption of any employee;

Excise Appeal No.76215 of 2016

14. Clause (b) of Section 66E (also introduced w.e.f. 1.7.2012) of the Finance Act,1994 reads as under:-

SECTION 66E. Declared services. — The following shall constitute declared services, namely :—

(a) renting of immovable property

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-certificate by the competent authority.

Explanation. — For the purposes of this clause,—

(I) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely :—

(A) architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or

(B) chartered engineer registered with the Institution of Engineers (India); or

(C) licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(II) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure;

(c) temporary transfer or permitting the use or enjoyment of any intellectual property right;

(d) development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software;

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;

(f) transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods;

(g) activities in relation to delivery of goods on hire purchase or any system of payment by instalments;

(h) service portion in the execution of a works contract;

(i) service portion in an activity wherein goods, being food or any other article of human consumption or any

Excise Appeal No.76215 of 2016

drink (whether or not intoxicating) is supplied in any manner as a part of the activity.

15. The expression 'works contract' was defined in the Finance Act,1994, wef 1.7.2012, in Section 65B(54), as under:

(54) "works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property;

16. We find that the definition of 'input service' has an **inclusion** clause and an **exclusion** clause. The intention of the government could never have been to cover certain services in the inclusion part and at the same time cover them also in the exclusion clause. The cases cited by the learned advocate for the appellants support this view. The expression "*modernisation, renovation or repairs of a factory*" was appearing in the definition of 'input service' both before and after 01.07.2012. It has not been denied by the department that the Coke Oven Project of the appellants was towards *modernization and renovation* of their existing plant/factory.

17. In the case of **M/s Reliance Industries vs CCE &ST, Rajkot [2022-TIOL-359-CESTAT-AHM]** decided on 13.04.2022, the facts were similar to that of the present case where the party had undertaken modernization and expansion of their facility. It was held as under:-

" 1. In the year 2015 the appellant undertook modernization/ expansion of its manufacturing facilities in their Jamnagar refinery by setting of facilities such as Coke Gasification Island, Air Separation Unit (ASU), CoRecovery Unit , Sulphur Recovery Unit (SRU),Refinery Off-Gas Cracker Plant (ROGC),Low Density Polyethylene Plant (LDPE), Linear Low Density Polyethylene Plant (LLDPE), the Captive Power Plant etc. This project was nomenclated by the appellant as the J3 project. The erection, commission, installation service

Excise Appeal No.76215 of 2016

and works contract service in dispute were rendered under 81 contracts by 41 contractors/ service providers.

.....

4.10 Without prejudice to our above findings, we further find that the appellant's factory is admittedly huge existing petroleum industry and working for decades. The ECIS service was used for expansion, renovation and modernization of overall existing petroleum plant. As per inclusion clause of the definition the services relating to modernization, renovation is an admissible input service. In our view, even though service of construction of building or civil structure are falling under the exclusion clause but even if similar service is used for renovation and modernization of existing factory, the credit is admissible. The exclusion applies only in respect of such service as specified therein which are used for initial setting of the factory. It is pertinent to note that when the exclusion was brought in the rules, services relating to setting up of the factory was removed from the inclusion clause of the definition of input service in rule 2(l) of Cenvat Credit Rules, 2004 therefore, there is a direct nexus of the service mentioned in the exclusion clause and setting up of the factory. It is important to note that the legislature consciously continued the services of renovation, modernization, repairs appearing in the inclusion clause of definition of input service. **This clearly shows that any service relating to modernization, renovation of the existing factory is admissible as input service which is the direct case of the appellant(emphasis supplied)...**"

18. In the above decision reliance was placed on the earlier decision in the case of **Ion Exchange (I) Ltd. Vs. Commissioner of C. Ex., Cus. & S.T., Surat-II [2018 (12) G.S.T.L. 302 (Tri. - Ahmd.)]** wherein it was held as under:-

"8. A plain reading of the said provisions makes it clear that service utilized in relation to modernization, renovation and repair of the factory are definitely fall within the meaning of 'input service' even though; construction of a building or civil structure or part thereof has been placed under exclusion clause of the said definition of 'input service'. After amendment to the definition of the 'input service', a clarification issued by the Board vide Circular No. 943/4/2011-CX, dated 29-4-2011 whereunder answering to the questions raised on the eligibility of credit of service tax

Excise Appeal No.76215 of 2016

paid on construction service as an 'input service' used in modernization, renovation or repair, it has been clarified that the said services being provided in the inclusive part of definition of 'input service' are definitely eligible to credit. Thus, harmonious reading of the inclusive part of the definition and the exclusion clause mentioned at clause (a) relating to construction service of the definition of 'input service', it is clear that the construction service relating to modernization, renovation and repair of the factory continued to be within the meaning of 'input service' and accordingly, the Service Tax paid on such service is eligible to credit. Undisputedly, the appellant carried out modernization/renovation work to meet USA, FDA guidelines for manufacture of their products therefore, the service tax paid on such construction service is eligible to credit. In the result, the impugned order is set aside and the appeal is allowed with consequential relief, if any, as per the law."

19. Reliance was also placed on the decision in the case of **Mahle Engines Components India P. Ltd Vs. Commr. Of C. Ex., Indore -2018 (363) E.L.T. 1150 (Tri. - Del.)** wherein it was held as under:-

"6. With regard to the availment of Cenvat credit of the Service tax on painting of the factory building & machinery, I find that the Authorities below have denied Cenvat credit on the ground the construction of building or civil structure is falling under the Exclusion Clause contained in the definition of "input service" under Rule 2(1) of the Rules. However, on perusal of the sample copies of the invoices issued by the service provider, I find that the services were provided in relation to the painting of the factory building and plant & machinery, which are appropriately classifiable under category of "renovation or repair of the factory" contained in the inclusive part of the definition of the "input service". Thus, I am of the considered view that such service falls under the purview of the "input service" for the purpose of availment of Cenvat credit. Therefore, denial of Cenvat credit and imposition of penalty on the appellant will not be sustainable."

20. Further, recently in the case of **M/s Bombay Market Art Silk Cooperative (Shop & Warehouse) Society Ltd vs CCE & ST**

Excise Appeal No.76215 of 2016

Surat-I [2022-TIOL-444-CESTAT-AHM], decision dated 17.05.2022, it was held as under:-

"5. From the above decision of this Tribunal it is clear that any construction and works contract if used for repair and renovation of existing factory, the same falls under inclusion clause of definition of Input Service, accordingly, the Cenvat credit is admissible. The impugned order is set aside and the appeal is allowed."

21. Further, the Board itself in **Circular No. 943/4/2011-CX, dated 29-4-2011** has clarified as under:-

4.	<i>Is the credit of input services used for repair or renovation of factory or office available?</i>	<i>Credit of input services used for repair or renovation of factory or office is allowed. Services used in relation to renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, are specifically provided for in the inclusive part of the definition of input services.</i>
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22. In view of the above the Appellants have correctly taken credit of service tax paid/borne in respect of all services which were used for the Coke Oven Project as part of the modernization/renovation plan of the existing plant/factory.

23. The impugned order is, accordingly set aside and the appeal allowed.

(Pronounced in the open Court on **04.08.2022**)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/

(P. Anjani Kumar)
Member (Technical)

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