

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Excise Appeal No.11560 of 2013-DB

(Arising out of OIO-24-COMMR-SURAT-II-2013 dated 22/02/2013 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-SURAT-II)

Kohler India Corporation Private Limited

.....Appellant

Plot No. 828, Gidc Mega Estate,
Jhagadia Valia Road, Jhagadia, Bharuch Gujarat

VERSUS

C.C.E. & S.T.-Surat-ii

.....Respondent

New C.Ex Building...Opp. Gandhi Baug,
Chowk Bazar, Surat,
Gujarat- 395001

APPEARANCE:

Shri. Jigar Shah, Advocate for the Appellant

Shri. G Kirupanandan, Superintendent (Authorized Representative) for the
Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No. A/ 11734 /2022

DATE OF HEARING:12.08.2022
DATE OF DECISION:23.11.2022

RAMESH NAIR

This appeal has been filed by M/s. Kohler India Corporation Pvt. Ltd. assailing the Order-in-Original [impugned order] dated 22-02-2013 passed by the Commissioner of Customs, Central Excise and Service Tax, Surat.

2. The facts of the case, in brief, are that a team of Central Excise Officers visited the factory premises of appellant and documents related to Cenvat Credit availed on services received from various service providers were called. Upon the examination of the appellant's records/ documents it was noticed by the revenue authorities that the Appellant has received the services from various service provider for setting-up of factory. It appears that the Cenvat Credit on inputs used in the manufacture of prefabricated structure and Cenvat credit of input services on the taxable services such as

Construction of Building, Erection Commissioning & Installation (Erection of Electric Tower From GEB to their factory premises) Architect Services, Real Estate Agent availed by the Appellant was inadmissible to them as they have no relation either directly or indirectly in the manufacture of finished goods. It also appears that Cenvat Credit of input services not available for construction of building whether pre-fabricated of steel structure or civil structure, immovable property, erection of electric tower and other services received by other service providers in respect of such services because the building, immovable neither subjected to the Central Excise Duty nor to the Service tax.

3. The revenue also observed that the credit taken by the appellant appears to be inadmissible in terms of Rule 3(1) and Rule 2 (I) of the Cenvat Credit Rules, 2004 according to which the input services should be used either for providing output service or should be used directly or indirectly by the manufacturer in relation to manufacture of excisable goods. However, in the instant case, the impugned services are used in construction of a civil structure and prefabricated steel structure which is attached to earth. The building of a Factory is neither an output service nor it is subjected to central excise duty nor to the service tax. These services are not used by the appellant as a manufacturer, whether directly or indirectly, in or in relation to manufacture of final products in as much as these services are used only for the construction of civil structure and pre-fabricated steel structure for their manufacturing plant, which is not subjected to excise duty nor to the service tax. Thus the Cenvat Credit does not appear to be admissible. A detail show cause notice dated 07.02.2012 was issued proposing denial of Cenvat Credit of Rs. 4,62,52,447/- on inputs services and to recover the ineligible Cenvat credit of Service Tax paid on the disputed input services along with applicable interest and penalty. The said show cause notice was adjudicated *vide* impugned order wherein the Learned Adjudicating Authority confirmed the entire demand of ineligible Cenvat credit along with interest under Rule 14 of the Cenvat Credit Rules read with Section 11A(1) of the Central Excise Act, 1944 and imposed equivalent penalty under Rule 15(2) of the Cenvat Credit Rules read with Section 11AC of the Central Excise Act, 1944. Therefore, the present appeal filed by the appellant.

4. Shri. Jigar Shah, Learned Counsel appeared on behalf of the Appellant submits that demand of Cenvat credit of service tax paid on various input services is not sustainable. The definition of input services as existed at relevant point of time includes the Services for setting up and modernization

of factory and therefore, the appellant are eligible to claim Cenvat Credit of such services. It can be seen from the definition of input services under Rule 2(l) of Cenvat Credit Rules, 2004 that any service used for setting up of the factory or modernization of the factory is specifically covered in the definition of input services. He placed reliance on the following decisions.

- Cadila Healthcare Ltd. – 2013(30)STR 3 (Guj)
- Bellsonica Auto Components – 2015(40)STR 41 (P&H)
- Mundra Port & SEZ Ltd. – 2015 (39)STR 726 (Guj)

4.1 He further submits that the circular dated 04.01.2008 relied upon in the show cause notice and adjudication order to deny the Cenvat credit of input services on the ground that the use of services created an immovable property which is not liable to excise duty or service tax and denial of Cenvat credit legally not correct. He placed reliance on the following decisions.

- Honda Motorcycle & Scooters – 2016(45)STR 397 (Tribunal)
- Ballsonica Auto Components India Pvt. Ltd. – 2015(40)STR 41 (P&H)
- Lemon Tree Hotel 2018(10)GSTL 241 (Tribunal)
- Carrier Air Conditioning & Refrigeration 2016(41)STR 824(Tribunal)

4.2 Without prejudice he also submits that the period of dispute in the present case is 2008-2009. The definition of input services contained a phrase “ activities related to business” as eligible activities to avail Cenvat Credit of input services. He placed reliance on judgments of Coca Cola India Pvt. Ltd. – 2009 (15)STR 657 (Bom)

4.3 He also submits that the service providers have classified their activity under the taxable category of construction services, erection, commissioning and installation services and architect services etc. The service tax was also paid by the service providers in the respective taxable categories. The show cause notice alleged that since the service provider M/s Kirby Building Technologies have used materials (pre fabricated building blocks) to provide the services in the nature of erection, commissioning and installation services and therefore, the appellant are not eligible to claim Cenvat credit. The Central Excise Commissionerate, Hyderabad has confirmed that M/s Kriby Building Technologies manufactured the said pre-

fabricated building block in their factory at Hyderabad and cleared the same in their own name after paying central excise duty on 110% of the Costs. The said material was used by them in their services in the nature of erection, commissioning and installation services provided to the appellant. It is also undisputed that the appellant have not received any material or Cenvat Credit is not availed of any material in the present dispute. The Appellant availed the Cenvat Credit of Service tax paid to the service providers. Therefore the classification of services/ activity cannot be changed at the end of the recipients i.e. the appellant. They have received the services from the service provider and Cenvat Credit cannot be denied on the ground that the service provider used materials in provision of their services. He placed reliance on the decisions of Reliance Industries Ltd. – 2022(4)TMI 729 –CESATAT –Ahmedabad.

5. Shri. G Kirupanandan, learned Superintendent (Authorized Representative) appearing for the Revenue have reiterated the reasoning given by the adjudicating authority for denial of credit. He placed reliance on the following decisions.

- Commissioner of C. Ex. Nagpur Vs. Manikgarh Cement - 2010(20)STR 456 (Bom)
- Maruti Suzuki Ltd. Vs. CCE , Delhi –II – 2009(240) ELT 641(Tri. LB))
- Vandana Global Ltd. Vs. Commr. Cx. Raipur – 2010 (253)ELT 440 (Tri. LB)
- Commissioner of Chennai Vs. Sundaram Brake Linings 2010(19) STR 172 (Tri. Chennai)
- Tower Vision India Pvt. Ltd. Vs. Commr. Ex. 2016(42)STR 249
- Fascel Ltd. Vs. CCE, Ahmedabad – 2017(52)STR 434 (Tri. Ahem.)
- Inox Air Products Ltd. Vs. CCE, Raigad 2014(34)STR 29 (Bom)
- Gujarat State Petronet Ltd. Vs. CCE, Ahmedabad 2013(32)STR 510 (Tri. Ahmd.)
- Stanadyne Amalgamations Pvt. Ltd. Vs. CCE, Chennai 2011(268)ELT 86 (Tri. Chennai)

6. We have carefully considered the submissions made by both the sides and perused the records. We find that this appeal pertains to the period February 2008 to June 2009, the adjudicating authority decided the matter

on the basis of old theory of law that services are related to the immovable properties hence Cenvat credit is not admissible. We find that subsequently, the various high courts and tribunals have given decisions in various judgments cited by the learned counsel for the appellant on this issue. The entire finding of the adjudicating authority is based on old theory of law and subsequently, much water was flown on the issue. We are of the view that the adjudicating authority needs to give a fresh look in the entire case in the light of the various judgements given subsequent to the passing of the impugned order.

6.1 We also find that the adjudication authority in respect of most of the services denied the credit on the ground that there is no nexus between the services with the manufacturing activity of appellant and clearance of the goods or for their business activity. We find that all the services *per se* are *prima facie* input services held in various judgments, however, the admissibility of Cenvat credit on these services can be decided on the basis that whether the services were used for the purpose specified in the definition of input service. Therefore, we are of the view that the entire matter needs to be re-considered

7. Accordingly, we set aside the impugned order and allow the appeals by way of remand to the adjudicating authority for passing a fresh order.

(Pronounced in the Court on 23.11.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)