# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
## NEW DELHI

PRINCIPAL BENCH

## SERVICE TAX APPEAL NO. 50915 OF 2019

(Arising out of Order-in-Original No. 35-36/RK/Commr./CGST/Audit-II/2018-19 issued under C. No. IV (16) HQRS/ADJN/AST/61/2016/5735 dated 28.12.2018 passed by the Commissioner, Central Goods & Service Tax (Audit-II), New Delhi)

**Applied Solar Technologies (India) Pvt. Ltd.** ...Appellant
A-5, Saraswati House,
Naraina Industrial Area Phase-II,
New Delhi

VERSUS

**The Commissioner, Central Goods & Service Tax (Audit-II)** ...Respondent
EIL Annexe Building, 5th Floor,
Bhikaji Cama Place, R.K. Puram,
New Delhi-110066

**APPEARANCE:**

Shri Shrinivas Kotni and Ms. Urvashi Kaira, Advocates for the Appellant
Shri Harshvardhan, Authorized Representative for the Department

**CORAM:**

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

**FINAL ORDER NO. 50060/2023**

**Date of Hearing: 27.10.2022**
**Date of Decision: 20.01.2023**

**JUSTICE DILIP GUPTA:**

Applied Solar Technologies (India) Pvt. Ltd[1] has filed this appeal to assail the order dated 28.12.2018 passed by the Commissioner of Central Goods and Service Tax (Audit-II), New Delhi[2], by which the demand proposed in the show cause notice has been confirmed.

2. The appellant is engaged in the business of providing Hybrid Power Solutions to the towers of various telecom service operators.

---

1. **the appellant**
2. **the Commissioner**

The appellant provides uninterrupted power supply through solar/diesel systems for the operation and maintenances of such sites in case power supplied by the Electricity Board is not available for some reason.

3. A show cause notice dated 18.04.2016 was issued to the appellant for the period 2010-11 to 2014-15 regarding non-payment of service tax of Rs. 69,23,985/- on the advances received from clients in relation to the services to be provided and regarding irregular availment of CENVAT credit of Rs.2,28,64,576/- in respect of capital goods and utilization thereof. The relevant portions of the show cause notice is reproduced below:

> "**1. Non payment of service tax on the advances received from clients in relation to the services to the provided.**
>
> 4. Whereas, during the course of audit, it was noticed that the assessee had received advance from M/s Indus Towers Limited during the years 2010-11 & 2011-12 amounting to Rs.6,72,23,160/- for the services to be provided but the Service Tax was not paid on receipt of such advances. **The scrutiny of the agreement namely "Master Hybrid Solar Solution Installation Operation & Maintenance Agreement" (RUD-II) between the assessee and M/s Indus Towers Ltd. (ITL) revealed that the assessee was to be paid advances for the services as per Para 6.7 of the agreement, which were to be adjusted towards the payment for the assessee's services in the last two months of service availment period. The conditions of the agreement reflected that these amounts recorded as "Advance" were not a refundable deposit.** Further as per Clause 3.1 of the said agreement, the contract period was 10 years from the contractual takeover date of each of the Telecom Sites of M/s Indus Tower Ltd. and therefore the advance receipt has not been adjusted so far as the

due date to adjust the advance received towards payment for services is yet to come.

4.1 Whereas, the said Para 6.7 of the assessee's agreement with M/s Indus Towers Ltd. whichrefers to M/s Applied Solar Technology (India) Pvt. Ltd., as "AST" and M/s Indus Towers Ltd., as "Indus" reads as follows:-

xxxxxxxxxx

4.6. Whereas it appears from the above that the assessee was aware about the nature of their aforesaid transactions as evident from the different agreements entered into by the assessee with M/s Indus Towers Limited and other Customers. However the assessee still did not pay the Service Tax amounting to Rs. 69,23,985/- on such advances @ 10.3%, including Cess and the same is liable to be demanded and recovered from them under Section 73(1) of the Act ibid along with applicable Interest under Section 75 of the Act ibid.

**II. IRREGULAR AVAILMENT OF CENVAT CREDIT IN RESPECT OF CAPITAL GOODS AND UTILISATION THEREOF:**

5. **Whereas, during the scrutiny of CENVAT Credit record of the assessee pertaining to capital goods, it was found that the assessee had been availing CENVAT credit on goods such as MS angles, GI Sheets, Bolts, Shelter Cabins, Structures of iron & steel, MS huts, fabricated and galvanized structures by treating such goods as capital goods.** From the scrutiny of purchase invoices and the Cenvat records presented by the assessee during the audit, it was observed that during 2010-11 to 2014-15, the assessee had availed CENVAT Credit to the tune of Rs. 2,28,64,576/- on such goods **which appeared to be not covered under the definition of Capital Goods as provided in CENVAT Credit Rules, 2004, as amended.** Item-wise bifurcation of availment of such Cenvat Credit as Capital Goods has been provided by the assessee for the said period (RUD-V).

xxxxxxxxxxx

5.2 xxxxxxxxxxx Thus, the credit amounting to Rs. 2,28,64,576/- availed by the assessee on such goods appears to be inadmissible, and is thus, liable to be reversed under Rule 14 of the Cenvat Credit Rules, 2004 read with section 73 & 75 of the Finance Act, 1994.

5.3 **Whereas, on being pointed out regarding such wrong availment of CENVAT Credit, the assessee reversed an amount of Rs. 1,41,00,814/- on 31.03.2015, 05.04.2015, 31.10.2015 and 30.11.2015 through CENVAT Credit out of total inadmissible Cenvat Credit of Rs.2,28,64,576/-, albeit**

Under Protest on all items other than Shelter Cabin. **However the assessee neither reversed the remaining Cenvat Credit availed on Shelter Cabin amounting to Rs.87,63,762/- nor paid any interest.** In terms of Section 75 readwith Rule 14 of Cenvat Credit Rule, 2004.

5.4 Whereas from the above it appears that the Cenvat Credit amounting to Rs. 2,28,64,576/- claimed as Cenvat Credit as Capital Goods is not admissible to the assessee. Therefore, the assessee is required to reverse the same alongwith interest in terms of Rule 14 readwith Section 73 & 75 of Finance Act, 1994.

6. **Thus, in the light of the discussions in the paras above, the total Service Tax liability of the assessee for the period 2010-11 to 2014-15 is tabulated as under:-**

Table 1 (Service Tax)

| S.No. | Para No. of this notice | Service Tax payable/ Cenvat Credit to be recovered (including Cess) (in Rs.) | Amount already deposited (in Rs.) |
|---|---|---|---|
| 1. | 4.6 | 69,23,985/- | Nil |
| 2. | 5.4 | 2,28,64,576/- | 1,41,00,814/- (under protest) |

4. The extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act 1994[3] was also invoked in the show cause notice.

5. The aforesaid show cause notice refers to paragraph 6.7 of the Agreement entered into between the appellant and M/s. Indus Towers Limited. The said paragraph 6.7 is reproduced below:

> "6.7 AST at its own cost agrees to install, operate and maintain the AST Hybrid Solar Solution for the contracted period of 10 years from the individual Site Agreement Date of each of the Telecom Site and Idea agrees to make available all such facilities and infrastructure as specified in this Agreement for providing continuous Services by AST at each of the Telecom Sites during the Terms of the Agreement.
>
> Indus shall pay to AST an Advance in respect of each of the sites which amount shall be calculated as the equivalent of two months' estimated fee (as determined on the basis of number of BTS on each site) in accordance with clause 3.3.3 of Schedule-1, such advance shall be liable for adjustment with the Fees payable for the last two months of the term of the respective sites".

6. The show cause notice was followed by a Statement of Demand dated 10.04.2018 that was issued under 73(1A) of the Finance Act for the period 2015-2016. The demand proposed in this Statement of Demand was restricted to irregular of availment of CENVAT credit in respect of capital goods and utilization thereof to the extent of Rs. 3,33,113/-.

7. What follows from the aforesaid show cause notice dated 18.04.2016 and the Statement of Demand dated 10.04.2018 is:

---

**3. the Finance Act**

| Allegation/Issue | Period of Dispute | Demand proposed (in INR) | Demand Confirmed (in INR) |
|---|---|---|---|
| **SCN I:** Non-payment of Service Tax advances received from the client in relation to the services to be provided | 2010-2011 | 69,23,985/- | 69,23,985/- |
| **SCN I:** Wrongful availment of CENVAT Credit on goods which were not covered under the definition of Capital Goods | 2014-2015 | 2,28,64,576/- | 2,28,64,576/- |
| **SCN II:** Irregular availment and utilization of CENVAT Credit in respect of capital goods | 2015-2016 | 3,33,113/- | 3,33,113/- |
| **Total** | | | **3,01,21,674/-** |

8. The first dispute relates to the amount of advance of Rs. 6,72,23,160/- received by the appellant from M/s Indus Tower Ltd, on which the department sought to levy service tax on the premise that such amount pertains to advance received towards the 'services to be provided', i.e., it is a consideration towards the service and not security deposit.

9. The second dispute pertains to the CENVAT credit availed by the appellant on goods namely MS angles, GI sheets, Bolts, Shelter Cabins, Structures of iron & steel, MS huts, fabricated and galvanized structures. According to the department, these goods are not covered under the definition of 'capital goods' as defined under rule 2(a) of the CENVAT Credit Rules, 2004[4].

10. The appellant filed a reply to the show cause notice and the Statement of Demand denying the allegations. However, by an order dated 28.12.2018, the Commissioner confirmed the demand proposed in the show cause notice.

---

**4. the 2004 Rules**

11. In regard to the non-payment of service tax amounting to Rs. 69,23,985/-, the Commissioner observed as follows:

> "211. Though, there is force in the contention that to determine the exact nature of the transaction the agreement in whole should be read, however, **even on conjoint reading of all the provisions of the impugned agreement between the Noticee and Indus Tower Ltd. there is nothing which suggests that the said amount was in the nature of security deposit. The said amount has been treated as advance in the agreement.** This is also categorically mentioned that the said amount was equivalent to two months rental of each of the sites. Further, the said amount was to be adjusted towards payment of last two months of service.
>
> 212. Regarding the contention that the said amount has been booked as liability in the financials, I find that every payment received in advance for which the billing is yet to be done has to be treated as liability in the financials but that would not decide the leviability of service tax or otherwise. For determination of taxability, the legal provisions of Finance Act, 1994 would be relevant. I find that services provided or to be provided was taxable. Obviously, the impugned amount was towards the service provided, albeit, in future. Also, in terms of Explanation 3 to Section 67 of the Finance Act, 1994 any amount received either before, during or after provision of service shall be the gross amount charged for the service. Accordingly, the said amount is leviable to service tax.
>
> xxxxxxxxxxx
>
> 217. In view of my findings above, I find that the impugned amount was advance received towards taxable service and was leviable to service tax. The Noticee failed to pay service tax on such amount which is recoverable from them along with applicable interest."
>
> **(emphasis supplied)**

12. In regard to the irregular availment and utilization of CENVAT credit amounting to Rs. 2,28,64,576/-, the Commissioner observed as follows:

> "227. From the above definition, it is clear that 'capital goods' are those items which fall in any of the above-mentioned seven categories as provided under clause (A) of Rule 2(a) of the CENVAT Credit Rules, 2004. **However, in the instant case the impugned gods viz. MS angles, GI sheets, Bolts, Shelter cabins, Structures of iron & steel, MS huts, Fabricated and galvanized structures all do not fall under any of the chapter headings of the First Schedule to the Excise Tariff Act specified in the Rules, ibid. Hence, the aforesaid goods do not qualify to be treated as capital goods.**
>
> 228. Since the impugned goods are not capital goods within the meaning of the above definition, the credit thereof taken by the assessee is in violation of the Rule 3 & Rule 4 of the CENVAT Credit Rules, 2004 and thus not admissible.
>
> 229. I find that the Noticee has taken a plea that the impugned goods, if not capital goods, would be inputs as defined under Rule 2(k) of the CENVAT Credit Rules, 2004. I am not inclined to accept this plea. Since the period involved in this case is from 2010-11 to 2014-15 and the definition of input suffered changes in the year 2011, I am discussing the issue for the period prior to 2011 and thereafter."
>
> **(emphasis supplied)**

13. The contention advanced by the appellant that the extended period of the limitation could not have been invoked was also rejected and the relevant paragraph is reproduced below:

> "241. The very fact that the Noticee themselves termed the amount received as advances and distinguished the transactions of advance from security deposit in different agreements, the mens rea or suppression of facts is quite clear. Further, despite the Board clarification that credit of goods used for creation

> of immovable structures should not be taken, the Noticee deliberately and knowingly took the credit in order to avail and utilize the credit which was not admissible to them. It was only during the audit that the documents relating to such credit were examined and it come to fore that the credit was wrongly taken."

14. Shri Shrinivas Kotni, learned counsel for the appellant made the following submissions:

**(i)** Advance is nothing but a security deposit which is not susceptible to levy of service tax. This amount of advance has same size undisputedly been received by the appellant in pursuant to the service contract/agreement dated 29.09.2010 namely 'Master Hybrid Solar Solutions Installation Operation & Maintenance Agreement';

**(ii)** The impugned order does not refer to specific clauses nor does it analyse them so as to conclude that such amount was an amount towards taxable service and not towards security deposit;

**(iii)** The amount paid as deposit is not an advance which is adjusted in the subsequent/running bills. The said amount is a deposit for the complete contracted period of 10 years which is quantified as 2 months estimated fee. The adjustment is nothing, but a manner agreed upon between the parties to settle the final claims, on completion of the contractual period, which is agreed as an adjustment as bill value, if the project successfully gets completed;

**(iv)** The very fact that the said amount was kept with the appellant unadjusted for 9 years and 10 months, itself supports the contention of the appellant that the said amount is in the nature of security deposit;

**(v)** The appellant correctly availed the CENVAT credit on capital goods and in this connection reliance has been placed upon the decision of the Tribunal in

**Principal Commissioner** vs. M/s. **AST Telecom Solar (P) Ltd**[5]; and

**(vi)** The extended period of limitation could not have been invoked in the facts and circumstances of the present case.

15. Shri Harshvardhan, learned authorised representative appearing for the department, however, supported the impugned order and made the following submissions:

**(i)** In regard to the first issue the amount received by the appellant was towards advances and in support of this contention reliance has been place upon the decision of the Tribunal in **Central Power Research Institute** vs. **Commissioner of C. Ex., Bhopal**[6]; and

**(ii)** The extended period of limitation was correctly invoked in the facts and circumstances of the case.

16. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

17. The first issue that arises for consideration is whether the amount of Rs. 6,72,23,160/- received by the appellant from M/s. Indus Towers Ltd. should be treated as an advance, on which service tax is to be levied as contented by the department, or it should be treated as a security deposit which is not susceptible to levy of service tax, as contented by the appellant.

18. Paragraph 6.7 of the Agreement provides that the appellant shall, at its own cost, install, operate and maintain the Hybrid Solar Solution for a period of 10 years for which M/s Indus Tower Ltd. shall

---

**5. Service Tax Appeal No. 52426 of 2019 decided on 22.10.2021**
**6. 2017 (6) G.S.T.L. 42 (Tri.-Del.)**

pay an advance in respect of each of the sites which amount shall be calculated as equivalent of two months estimated fee and such advance shall be liable for adjustment with the fees payable for the last two months of the term. The Agreement, therefore, specifically refers to the amount as an advance which would be adjusted with the fees payable for the last two months. There is nothing in the Agreement which may even remotely suggest that the said amount can be treated as a security deposit. This is what has also been held by the Commissioner.

19. In this connection reliance can be placed on the decision of the Tribunal in **Central Power Research Institute**. The Tribunal held:

> "4. The appellant did not contest that they were rendering taxable service and liable to pay service tax on such service. **The dispute in the present case is the liability of the appellant to pay service tax on the considerations received from the recipient of service, in advance.** The appellants contested the demand on the ground that the business model adopted by the appellant, for more than three decades, is that they take security deposits from clients towards consideration, for providing service, which will enable them for easy settlement of payments. The business compulsion and the need for taking preparatory steps in terms of manpower and overhead costs are met by the appellant. Security deposit was intended to safeguard the interest of the appellant. Such advance are returned or transferred to other units of the appellant, who render service. The ld. Counsel also submitted that the Original Authority did not consider the business practice in correct perspective. Refunding of security deposit and then receiving the invoice value separately from customers is cumbersome process. It was argued that setting off dues against the deposit is a well established accounting procedure. From the facts recorded by the Original Authority and the submissions made by the appellants, it is very clear that the

> appellants are receiving consideration in advance, in whatever name it is called and such considerations are squarely covered by the provisions of Section 67(3) of the Finance Act, 1994, which states that, "the gross amount charged for taxable service, which include any amount received towards the taxable service before, during or after provisions of such service"."

20. There is, therefore, no error in the finding recorded by the Commissioner on this issue.

21. The second issue that arises for consideration is as to whether the appellant had correctly availed the CENVAT credit on goods which according to the appellant are capital goods. This issue has been decided in favour of the appellant by the Tribunal in **AST Telecom Solar** and the relevant portion of the decision is reproduced below:

> "1. **The issue in this appeal is whether the Adjudicating Authority and the Commissioner (Appeals) have rightly allowed the cenvat credit with respect to the items like M.S. Angles, G.I. sheet, Bolts, Shelter Cabins, Structures Cabins, Structure of Iron and Steels, M.S. Huts, fabricated and galvanized structures, etc., finding that the same may be utilised by the respondent/assessee in providing taxable output service and also observing that these items were used by the assessee in fabrication or for support of capital goods.**
>
> 2. The brief facts are that the respondent is registered with the Service Tax Department providing taxable service under the category of "Business Support Service and "Business Auxiliary Service". The assessee was mainly providing „Hybrid Power Solutions" for maintaining the telecom towers of telecom service providers by way of ensuring uninterrupted supply of power through integrated solar/diesel systems, in case of power failure, as well as operations and maintenance of such towers.

xxxxxxxxxx

9. Having considered the rival contentions, I find that the cases relied upon by the Revenue are mainly related to the tower owned by telecom service providers, wherein the dispute was cenvat credit on input/capital goods used for erection of tower, which are essential for providing the output service/telecom service. Such facts are not emanating in the present case. It is an admitted fact that the respondent/assessee does not own the telecom towers. **The respondent are only providing services of providing uninterrupted power for ensuring maximum uptime of the telecom towers, to ensure un-interrupted mobile services. For rendering such output services, the respondent has acquired the items under dispute for providing the output service.** I find that an output service provider under Rule 3 of CCR is entitled to take cenvat credit on all such goods without any distinction as to inputs or capital goods for rendering taxable output service. I further find that the show cause notice is mis-conceived for raising the dispute on the inputs being not capital goods. Rule 3 of Cenvat Credit Rules provides - "provider of output service shall be allowed to take credit of the duty paid of excise specified in the first Schedule to the Excise Tariff Act, leviable under the Excise Act, and also the credit of duty of excise specified in the second schedule of the Excise Tariff Act as well as education cess and higher education cess, on inputs or capital goods, used by the provider of output service, on or after 10th day of September, 2004."

**(emphasis supplied)**

22. In the present case, items like MS angles, GI sheets, Bolts, Shelter Cabins, Structures of iron & steel, MS nuts, fabricated and galvanized structures, have gone into the making of solar system, through which the appellant rendered taxable output service. The appellant, therefore, has rightly availed CENVAT credit on MS angles,

GI sheets, Bolts, Shelter Cabins, Structures of iron & steel, MS nuts, fabricated and galvanized structures.

23. The appellant was, therefore, in view of the aforesaid decision of the Tribunal in **AST Telecom Solar** entitled to avail CENVAT credit and the Commissioner was not justified in disallowing the credit.

24. The third issue that arises for consideration is regarding the invocation of the extended period of limitation in the show cause notice. The relevant portion of the show cause notice invoking the extended period of limitation is reproduced below:

> "8. Whereas, from the facts discussed above, it further appears that the assessee, by doing so, had intentionally and willfully suppressed the details of providing/receiving that impugned taxable services and did not file prescribed ST-3 Returns containing the details correctly therein with the intention to short payment/non-payment of the applicable Service Tax on such services. Agreements were never shared by the assessee with the Department so that the nature of these advances could be ascertained from the agreements. Thus there is a clear case of suppression on the part of the assesssee. The assessee was aware about the nature of such advances as he had entered into different types of agreements for different kinds of advances/ security deposits but he has shown under a single heading in his Balance Sheet which reflects his intention to evade the Service Tax. These acts of omission and commission on the part of the assessee resulted in short payment/ non-payment of Service Tax as discussed under aforesaid paras."

25. The Commissioner has recorded a finding that though the Agreement referred to the amount as advance but still the appellant made an attempt to treat it as a security deposit, which clearly shows that there was suppression of facts with an intent to evade payment of tax.

26. There is no error in the finding recorded by the Commissioner in this regard, as indeed the appellant did try to evade payment of service tax by treating the amount as a security deposit when in fact it was clearly an advance, which fact was very specifically mentioned in the Agreement. The intention to evade payment of service tax by suppression of material facts is writ large.

27. In view of the aforesaid discussion, the denial of CENVAT credit by the impugned order is set aside but the rest of the order of the Commissioner is maintained. The appeal is allowed only to the extent indicated above.

(Order pronounced on **20.01.2023**)

**JUSTICE DILIP GUPTA)**
**PRESIDENT**

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

Shreya/JB