IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 41891 of 2014

(Arising out of Order-in-Appeal No. 145/2014 (MST) dated 14.03.2014 passed by the Commissioner of Customs, Central Excise and Service Tax (Appeals), 26/1, Mahatma Gandhi Marg, Nungambakkam, Chennai – 600 034)

Commissioner of Service Tax : Appellant
4th Floor, Newry Towers, Plot No. 2053,
II Avenue, 12th Main Road, Anna Nagar,
Chennai – 600 040

VERSUS

M/s. Dong-A India Automotive Private Limited : Respondent
Old No. 101, New No. 55,
Tahndalam Village, Sri Perambudur Taluk,
Kancheepuram District – 602 105

APPEARANCE:

Shri N. Satyanarayanan, Assistant Commissioner for the Appellant

Shri G. Natarajan, Advocate for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 40923 / 2023

DATE OF HEARING: 22.09.2023

DATE OF DECISION: 13.10.2023

Order : [Per Hon'ble Mr. P. Dinesha]

The period of dispute in the present appeal is from April 2009 to November 2010 and from December 2010 to September 2011.

2. This appeal is filed by the Revenue against the impugned Order-in-Appeal No. 145/2014 (MST) dated 14.03.2014 passed by the Commissioner of Customs, Central Excise and Service Tax (Appeals), Chennai.

3.1 Brief facts that emerge from the reading of Show Cause Notices, common Order-in-Original and the impugned Order-in-Appeal are that the assessee-respondent is engaged in the manufacture of automobile parts, namely, Hose Air In-Take, W/strip, Plug, etc., and is registered with the Central Excise department as a manufacturer of excisable goods. The assessee is also registered with the Service Tax Commissionerate for providing services relating to transportation of goods by road, renting of immovable property and intellectual property rights service.

3.2 It appears that there was an investigation conducted by the Headquarters Preventive Unit of Chennai-IV Commissionerate and during the scrutiny of records, they appear to have noticed that the assessee had rented out the premises constructed by them to M/s. Myung Sung India Precision Pvt. Ltd. and also to M/s. Motonic India Automotive Pvt. Ltd. in terms of the rental/lease agreements entered into between these tenants and the assessee. The Revenue also appears to have noticed that while paying the Service Tax under 'renting of immovable property' on the rent received as stated above, the assessee had availed and utilised the CENVAT Credit

on the invoices issued by the builder, namely, M/s. Samhan Electric Co. India Pvt. Ltd., Chennai.

3.3 The above appeared to the Revenue to be in violation of clarifications issued by the Board vide Circular No. 98/1/2008-S.T. dated 04.01.2008 and also vide Entry 096.01 inserted with effect from 04.01.2008 in the Master Circular No. 96/7/2007-S.T. dated 23.08.2007 and that input credit of Service Tax could only be taken if the output is a 'service' liable to Service Tax or 'goods' liable to Excise Duty, and immovable property being neither service nor goods, the input credit could not have been taken by the assessee and hence, the action of the assessee in availing the CENVAT Credit appeared to be improper and incorrect as per Rule 2(l) of the CENVAT Credit Rules, 2004.

4. In the result, two Show Cause Notices dated 23.03.2011 and 07.05.2012 came to be issued to the assessee, pointing out the contraventions of the provisions by the assessee as above and consequently proposing to disallow and recover the CENVAT Credit wrongly availed and utilised by the assessee for the two periods, namely, April 2009 to November 2010 and December 2010 to September 2011, apart from proposing to demand applicable interest under Section 75 and penalty under Rule 15(1)/15(3) of the

CENVAT Credit Rules, 2004 read with Sections 76 and 77 of the Finance Act, 1994.

5. It appears that the assessee had filed a detailed common reply dated 31.05.2012 to both the Show Cause Notices, thereby seriously rebutting the allegations as to wrong availment and utilisation of CENVAT Credit, as extracted at paragraph 5 of the Order-in-Original. The original authority having considered the explanations filed by the assessee in common adjudication and also the applicable provisions of the Rules and Acts, passed the Order-in-Original No. 01/2013 (RST) dated 13.03.2013, thereby confirming the disallowance, as proposed in the Show Cause Notices, apart from confirming the proposed interest and penalties as well.

6.1 In the said order, the original authority by referring to Rule 2(l) of the CENVAT Credit Rules, 2004, records that as per the definition, the cardinal principal to decide an "input service" is that which is used for providing an output service that should be primarily a 'service'; that in the instant case, the assessee is providing the output service of 'renting of immovable property' and what is used by them for providing such service is only the immovable property, which by itself is not a service taxable under the Service Tax law.

6.2 He further refers to the Board Circular No. 96/7/2007-S.T. dated 23.08.2007 to hold that the immovable property constructed cannot be held to be a taxable service of its own and therefore the credit availed on the construction services for such immovable property could not be sanctified by the relevant provisions of the CENVAT Credit Rules, 2004.

6.3 With regard to the invoking of the larger period of limitation, the original authority holds that the output services being in the nature of renting of immovable property services, the CENVAT Credit was wrongly availed on the services used for the construction of the property which was in clear violation of the provisions of the CENVAT Credit Rules, 2004 as also instructions contained in the above Circular, which fact was not intimated to the Department, nor was there any clarification sought in this regard by the assessee, if there was any doubt.

7. Aggrieved by the said order of disallowance, the assessee appears to have approached the first appellate authority by filing appeal against the above Order-in-Original. The first authority vide impugned Order-in-Appeal No. 145/2014 (MST) dated 14.03.2014 having allowed the claim of the assessee, the present appeal has been filed by the Revenue before this forum.

8. Heard Shri N. Satyanarayanan, Ld. Assistant Commissioner for the Revenue and Shri G. Natarajan, Ld. Advocate for the respondent-assessee.

9. The submissions of the Ld. Assistant Commissioner are summarized, as below: -

- The order of the first appellate authority is not in accordance with law, nor is it in accordance with the interpretation drawn by the Mumbai Bench of the CESTAT in the case of *Commissioner of Central Excise, Nagpur v. M/s. Manikgarh Cement Works [2010 (18) S.T.R. 275 (Tri. – Mumbai)]* and the Hon'ble Apex Court in the case of *Collector of Central Excise v. M/s. Solaris Chemtech Ltd. [2007 (214) E.L.T. 481 (S.C.)]*

- The construction service is an input service for output namely, immovable property, which is neither excisable nor amenable to Service Tax and that the same is also not an input service to the output service namely, renting of immovable property.

- The definition under Rule 2(l) *ibid.* had a very vast scope covering almost every service which were needed to be used by the manufacturer, whether directly or indirectly, in or in relation to

the manufacture of final products, and included services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service. According to him, the output service of 'renting of immovable property' did not involve the input service as specified/defined under the above Rule.

10.1 *Per contra*, the Ld. Advocate relied on the findings in the impugned order. He would also contend that the respondent is a manufacturer of automobile parts registered with both Central Excise and Service Tax Commissionerates; the respondent had constructed a separate building in their factory premises and availed Service Tax credit; the said building was rented out to two companies for a monthly rent and discharged Service Tax on such rental services utilising the Service Tax credit so availed on the construction of new building.

10.2 Further, it is contended that provision of renting of immovable property, which is a taxable service under the Finance Act, is not possible without a property/building constructed; the building was hence constructed for providing output service of renting of immovable property and therefore, there was direct nexus with the provision of output services; hence,

the input service credit was availed on the construction, which cannot be denied. Moreover, according to the Ld. Advocate, the definition of input service as prevalent at the relevant point of time was quite exhaustive and there was no restriction to avail input service credit on the construction services; it was only with effect from 01.04.2011 that the definition came to be amended by excluding construction services from the purview of input services.

10.3 He would thus pray for dismissal of the appeal filed by the Revenue.

10.4 He has relied on the following decisions/orders:-

i. *Commissioner of C.Ex., Visakhapatnam-I v. Sai Sahmita Storages (P) Ltd. [2011 (23) S.T.R. 341 (A.P.)]*

ii. *Commissioner of G.S.T. & C.Ex., Chennai v. Dymos India Automotive Pvt. Ltd. [2019 (365) E.L.T. 26 (Mad.)]*

iii. *Commissioner of C.Ex., Delhi-III v. Bellsonica Auto Components India P. Ltd. [2015 (40) S.T.R. 41 (P&H)]*

iv. *Commissioner of Central G.S.T., Gurgaon v. DLF Ltd. [2023 (70) G.S.T.L. 237 (P&H)]*

v. *Carrier Airconditioning & Refrigeration Ltd. v. Commissioner of Central Excise, Delhi-IV [2016 (41) S.T.R. 824 (Tri. – Chan.)]*

vi. *Maruti Suzuki India Ltd. v. Commissioner of C.Ex., Delhi-III [2017 (47) S.T.R. 273 (Tri. – Chan.)]*

vii. *Oberoi Mall Ltd. v. Commissioner of Service Tax, Mumbai-II [2017 (47) S.T.R. 292 (Tri. – Mum.)]*

viii. Ambattur Developers v. Commissioner of Service Tax [2019-TIOL-1241-CESTAT-MAD]

ix. Rayala Corporation Pvt. Ltd. v. Commissioner of G.S.T. & C.Ex., Chennai [2021 (52) G.S.T.L. 276 (Tri. – Chennai)]

11.1 We have heard the rival contentions and we have perused the documents placed on record including the orders of lower authorities. The scope of the appeal covers two periods, i.e., April 2009 to November 2010 and December 2010 to September 2011, for which Show Cause Notices came to be issued on 23.03.2011 and 07.05.2012. The definition of "input service" came to be amended with effect from 01.04.2011 and hence, the said definition would apply to the dispute on hand, partly for the period from April 2011 onwards. We have also carefully gone through the decisions/orders referred to in the impugned order and also those which were relied upon during the course of arguments. These judicial presidents are clearly rendered before the amendment dated 01.04.2011 and hence, to this extent, the change in law is required to be applied to the case on hand for the part period from 01.04.2011 to September 2011.

11.2 Rule 2(l) of the CENVAT Credit Rules, as amended, reads as below: -

"Rule 2. Definitions. — In these rules, unless the context otherwise requires, -

…

(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,*

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;]

[Explanation. - For the purpose of this clause, sales promotion includes services by way of sale of dutiable goods on commission basis.]"

11.3 To this extent, therefore, it appears that the first appellate authority has clearly erred in not applying the change in law for which reason the impugned order, to this extent, requires to be set aside.

12.1 The Hon'ble Punjab and Haryana High Court in the case of *M/s. Bellsonica Auto Components India P. Ltd. (supra)* has considered the impact of the amendment brought about in 2011 to Rule 2(l) (*supra*) by which construction services were specifically excluded from the definition of "input service". The Hon'ble Court has further observed as under: -

> *"11. If in fact the said services were not covered by Rule 2(l), it would not have been necessary to introduce the amendment. It is clear, therefore, that prior to the amendment the setting up of a factory premises of a provider for output service relating to such a factory fell within the definition of 'input service.' The amendment of 2011 is not retrospective and is not applicable to the respondents' case."*

12.2 From various other decisions / orders relied upon, we find that the definition under Rule 2(l) did not include construction service and as such, the assessee-respondent was justified in claiming the CENVAT Credit and the same has been rightly allowed by the Commissioner (Appeals) up to 01.04.2011.

12.3 The dispute for the rest of the period is hit by the definition under Rule 2(l), as amended with effect from 01.04.2011 and therefore, the lower appellate authority is not justified in not applying the correct law. Hence, to this extent, the impugned order is required to be interfered with.

13. Consequently, we partly allow the appeal filed by the Revenue, that is to say: -

(i) In respect of the period prior to 01.04.2011, the Department's appeal is dismissed.

(ii) In respect of the period after 01.04.2011 i.e., 01.04.2011 to September 2011, the Department's appeal is allowed.

14. Further, we deem it appropriate to remit the issue back to the file of the adjudicating authority to recalculate the disallowance of CENVAT Credit availed for the period from 01.04.2011 to September 2011.

15. The appeal is disposed of on the above terms.

(Order pronounced in the open court on **13.10.2023**)

Sd/-
(M. AJIT KUMAR)
MEMBER (TECHNICAL)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sdd