CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. II

Service Tax Appeal No. 53176 of 2016 (DB)

(Arising out of Order-in-Appeal No. DLI-SVTAX-001-COM-019-16-17 dated 28.07.2016 passed by the Principal Commissioner of Service Tax, Delhi-I, New Delhi.)

Delhi Metro Rail Corporation Ltd. **Appellant**
Metro Bhawan, Fire Brigade Lane
Barakhamba Road, New Delhi
Delhi-110001

VERSUS

Principal Commissioner, Service Tax, Delhi-I **Respondent**
17-B, I.A.E.A. House,
M.G. Road, I.P. Estate,
New Delhi-110002

APPEARANCE:

Shri P.K. Sahu, Advocate for the Appellant

Shri Mihir Ranjan, Special Counsel for the Respondent

CORAM:
HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 50128 / 2023

Date of Hearing: 17.08.2022
Date of Decision: 15.02.2023

ANIL CHOUDHARY:

The appellant-Delhi Metro Rail Corporation (DMRC), is having centralised registration with the service tax department for the services-consulting engineering service, management maintenance & repair service, sale of space on time slot for advertisement service, renting of immovable property service, business auxiliary service and

works contract service. The appellant is engaged in providing service of transport to commuters/passengers in Delhi since 24.12.2002 which service is not liable to service tax. The appellant is providing among others service of consulting engineers service to other metro railway bodies in cities like Bangalore, Hyderabad, Chennai, Mumbai, Pune etc. due to their experience and knowledge.

2. The auditors of the office of Director General of audit, Central Taxes, conducted audit for the period 2006-2009 during 08.03.2010 to 15.03.2010, the audit revealed the following errors;

i) The appellant have wrongly availed Cenvat credit of service tax of Rs. 6,17,84,781/- paid on input service-consulting engineering service during April, 2004 to August, 2007, as the appellant was providing exempt service of Transport of passengers.

ii) The appellant have wrongly availed Cenvat credit of Rs. 66,17,317/- based on the invoices which are addressed to other offices of the appellant and not their registered office.

3. It further appeared to revenue that as per Rule 6(1) of CCR, 2004 assessee is not entitled to take Cenvat credit of input service used for rendering exempted output service. Further Rule 6(2) provides for maintaining of separate accounts for input services to be used for rendering taxable output service and tax free services, further Rule 6(5) provides that notwithstanding anything contained in sub-Rule 1, 2 & 3. Thus, credit of the whole of service tax paid on the input consultancy service, which is one of the specified taxable services shall be allowed unless such service is used exclusively in or in relation to the rendering of exempted output service. Thus, credit

of the whole of service tax paid on the input consultancy service, which is one of the specified service under Rule 6(5) of CCR, will only be allowed if the assessee uses this service for rendering both taxable and exempted service. It further appeared to revenue that the input consultancy service was received towards construction of Delhi Metro phase-1 and phase-2 and, thus credit during this construction period is not available on the pretext that appellant was enriching their knowledge and experience for rendering output consultancy service. Further, as per Rule 2 (l) of CCR, 'input service' means any service used by provider of taxable service for providing an output service. Hence, the availment of input consultancy service amounting to Rs. 6,17,84,781/- appeared to be irregular, and also the amount of Rs. 66,17,317/-for the reason that invoices were addressed to offices other than the registered offices of the appellant. It further appeared to revenue that appellant have wilfully suppressd the facts leading to wrong availment of credit and accordingly, invoking the extended period of limitation under proviso to Section 73 of the Act, SCN dated 18.10.2010 was issued proposing to disallow wrongly availed service tax totalling Rs. 6,84,02,098/- alongwith interest. Further, penalty was proposed under Section 76 and 78 of the Act and Rule 15(3) of CCR.

4. It is submission of the appellant that the aforementioned show cause notice was never served upon them. Pursuant to notice of personal hearing, the appellant enquired and requested for a copy of the show cause notice, which was served upon them for the first time alongwith forwarding letter dated 22.09.2015 of the Deputy Commissioner-Adjudication. The appellant on 06.01.2016 submitted

written defence reply inter alia stating that out of the alleged irregular input credit for consultancy service Rs. 6,17,84,781/-, during the disputed period in the SCN, only for Rs. 13, 23,207/- falls in this period. The balance amount of Rs. 6,04,61,574/- was not availed or credit taken during the period under dispute April, 2006 to March, 2009. This amount is covered in the subsequent show cause notice dated 23.04.2014. Secondly, as regard the credit of Rs. 66,17,317/-, it was clarified that the said amount is the aggregate bill amount from the service providers, and the actual amount of service tax involved was Rs. 5,23,936/- only. Thus, the correct amount of service tax under dispute in the SCN dated 19.10.2010 under reply is Rs. 18,47,143/-, that is (Rs. 13,23,207+Rs. 5,23,936). It was further urged that the SCN is time barred as the same have been served only on 22.09.2015 and thus it is beyond the extended period of limitation also. It was further contended that the SCN is bad as the same is based on a local audit report does not contain the details or gist of facts thus, rendering the SCN as vague.

5. It was further contended that the appellant have correctly availed the Cenvat credit on consultancy engineering service as the assessee have provided taxable output service of consultancy engineering to other metro projects in other cities. Thus, the input credit taken satisfies the conditions precedent under the Cenvat Credit Rules. It was further contended that credit taken was on the strength of invoices addressed to the other office(s) of the appellant is correct, as the appellant have got centralised registration for service tax purposes. Further urged that being registered is not a condition precedent for taking credit.

6. The SCN was adjudicated by the principal Commr. of service tax vide Order-in-Original dated 28.07.2016 confirming the demand of Rs. 6,17,84,781/- holding the Cenvat credit of consultancy engineering service as the inadmissible, availed during April, 2004 to August 2007. Out of the proposed demand, for irregular invoices of Rs. 66,17,317/-, the truncated amount of Rs. 5,22,936/- was confirmed as inadmissible, received during the period 2006-2009. Further, equal amount of penalty Rs. 6,23,07,717/- was imposed under Section 78. Penalty under Section 76 was dropped and demand of Rs. 60,94,381/- was also dropped.

7. Being aggrieved, the appellant is before this Tribunal.

8. Learned Counsel for the appellant, Mr. P.K. Sahu, Advocate *inter alia* urges the following submissions/grounds:-

Show Cause Notice received beyond limitation period

8.1 The appellant came to know about this proceeding when it received a notice for personal hearing of the Show Cause Notice dated 19.10.2010 on 11.12.2014. The appellant had informed the Pr. Commissioner that it has not received the Show Cause Notice. A copy of the Show Cause Notice dated 19.10.2010 was delivered to the appellant for the first time along with letter dated 22.09.2015 of the Deputy Commissioner (Adjudication). The notice pertains to period April 2004 to March 2009. The appellant had argued before the Pr. Commissioner that the Show Cause Notice was received beyond the limitation period of five years prescribed in the law.

8.2 The Pr. Commissioner, in her Order-in-Original, has claimed that the Show Cause Notice was forwarded to the appellant vide dispatch no. 11839 dated 19.10.2010 under Speed Post, which is a valid means of delivering Show Cause Notice as per section 37C(1) of the Central Excise Act, 1994, as made applicable to service tax matters by virtue of section 83 of the Finance Act, 1994. Therefore, the Show Cause Notice was within the stipulated period of limitation of five years. The appellant submits that there is no proof of service of the SCN sent on 19.10.2010. Further, the Principal Commissioner has not given any evidence of the notice being sent by Speed Post. She has only quoted some dispatch number. (must be of the office register). In ***Regent Overseas Pvt. Ltd. Vs. Union of India, 2017 (6) G.S.T.L. 15 (Guj.)***, Hon'ble High Court has held that, in absence of any proof of delivery, it cannot be said that there is effective service of notice as contemplated u/s 37C of the Central Excise Act. Since the SCN was served on the appellant beyond the limitation period, the SCN was time barred.

8.3 Even otherwise, the adjudicating authority has not applied its mind to the issues and has mechanically gone by the report received from CERA audit, which had advised the Department to examine the issue flagged by them. The audit was conducted from 8th - 15th March 2010. The SCN has been issued seven months later on 19.10.2010, though received by the appellant after five years. Even on the date of SCN, five years limitation period had expired for the period April 2004 to March 2005. For the rest of the disputed period, the normal period of one year had expired on the date of the SCN.

There is no justification for invoking the extended period even on the date of the SCN.

Disallowance of cenvat credit on consulting engineer's services

8.4 The appellant, while implementing, Delhi Metro project, had obtained consulting engineer's service. While utilising such consultancy for Delhi metro rail project, it had acquired knowledge to give consultancy service for similar projects. It had utilised the input tax credit for paying service tax on the output consulting engineering service. The Pr. Commissioner has held that the appellant had availed cenvat credit of Rs.6,17,84,781 on ineligible input services. This is on the ground that the appellant had received consulting engineering services, which were specific to Delhi projects and had been used for exempted service (passenger transport) exclusively. Therefore, the appellant cannot claim that the appellant has used such input service for providing consulting engineering services to other metro projects.

8.5 The appellant submits that consulting engineering services received by the appellant has a nexus with the consultancy engineering services rendered by it to other metro projects in other cities which are being executed in similar manner. Knowledge and experiences gathered from consultancy service received for Delhi Metro Rail Project is valuable for giving consultancy for other metro rail projects. After examining the definition of "input service" in rule 2(l) of Cenvat Credit Rules, 2004, Hon'ble Bombay High Court in ***Coca Cola India pvt. Ltd. vs. CCE, Pune-II, 2009 (15) STR 657 (Bom.)***, has held that "activities relating to business" appearing in

the definition is of wide import and all activities connected with the business fall within the definition of input service. Therefore, the appellant has correctly taken cenvat credit of service tax paid on consulting engineering services received by it when such services were used for rendering taxable consultancy services.

8.6 The Parliament had enacted Delhi Metro (Operation & Maintenance) Act, 2002. Subsequently, this was amended to cover metro in other cities. Physically, construction for Delhi metro started on 01.10.1998. The first line of Delhi metro was inaugurated on 24.12.2002. Even wile construction was going on, the appellant had decided to provide consultancy to other metro rail projects. The Annual Director's report for 2001-02 states that the appellant had acquired considerable expertise, technical know-how in planning and execution of metro rail projects through its association and interaction with General Consultants (consortium of international consultants) and global contractors. To generate revenue, the appellant had decided to provide technical consultancy service on commercial basis in 2001-02.

8.7 The Pr. Commissioner has ignored the Directors' reports (*pages 42-45 of appeal memo*) and main objectives of the appellant corporation, while holding that there is no evidence that such consulting engineer's service received for Delhi metro rail project was used for rendering consultancy service for the other projects. As the Directors' report states, the consultancy service was used by the appellant for the Delhi project and also used for giving Engineering Consultancy to other metro projects. Therefore, the input credit on

consulting engineer's service was 100% allowable under Rule 6(5) r.w. Rule 2(l) of the Cenvat Credit Rules.

8.8 Even if the input tax credit was not eligible, there is no application of mind by the Pr. Commissioner. She has mis-conceived what the CERA has reported. It is wrong to allege that the appellant has utilised cenvat credit of Rs.6,17,84,781 during 2006-09. The Pr. Commissioner has ignored the documents supplied by the Superintendent (Adj.) to the appellant along with his letter dated 03.12.2015, wherein it is clearly stated that out of the alleged irregularly availed cenvat credit of Rs.6,17,84,781, only Rs.13,23,207 falls in this notice period (*page 129 of appeal memo*). The balance amount was yet to be availed. It seems the same has been included in the subsequent SCN. Therefore, the demand cannot exceed Rs.13,23,207.

Ineligible cenvat credit on invoices issued to non-registered offices.

8.9 The Pr. Commissioner has given divergent findings while disallowing the cenvat credit of Rs.5,22,936. Firstly, she has denied the credit on the ground that cenvat credit cannot be taken on the strength of invoices issued to non-registered premises of the appellant. But in the subsequent paragraph, she has denied the credit by holding that cenvat credit cannot be availed by registered premises when cenvat credit is actually availed and utilised by unregistered office. There is nothing in the law that disentitles the appellant from taking cenvat credit on the strength of invoice issued to non-registered premises of the appellant for input service, the

utilisation of which is not in doubt. In ***Rajender Kumar & Associates vs. CST, Delhi, 2021 (45) GSTL 184 (Tri. – Del.)***, the CESTAT has held that registration of the premises is not a condition precedent for availing cenvat credit.

9. The learned Counsel also relies on the ruling of Hon'ble Supreme Court in Delhi Airport Metro Express Pvt Ltd(DAMEPL) Vs. Delhi Metro Rail Corporation Ltd (Appellant) reported at [2022-1-S.C.C-131(S.C.)] wherein in the matter of Arbitration (contractual disputes) between the appellant and DAMEPL, the Apex Court observed that the appellant is a joint venture of the Government of India and the Government of NCT Delhi, proposed implementation of Airport Express Metro Line, project in New Delhi, from New Delhi Railway Station to Dwarka, Sector-21 via IGI Airport, New Delhi. Further, DMRC decided to develop the project by engaging a Concessionaire for financing, design, procurement, installation of all systems (including but not limited to rolling stock, overhead electrification, track, signaling, tele-communication, ventilation and air conditioning, automatic fair collection, baggage check in and handling, depo and other facilities). DMRC had to undertake design and construction of basic civil structure for the project which was in the nature of public private partnership, the bid for construction etc. was accepted in favour of Reliance Energy Ltd. (renamed as Reliance Infrastructure Ltd.) by issue of letter of acceptance on 21.01.2008.

10. The aforementioned observations of the Supreme Court also fortifies that the appellant was engaged in providing consulting engineering service. Further, admittedly appellant have disclosed

receipts and tax liability for consulting engineering service provided to other Metro rail projects, during the period under dispute.

11. Opposing the appeal, learned AR for revenue, inter alia urges that Rules 6(1) of CCR disallow Cenvat credit on such input or input service which is used in manufacture of exempted goods or for provision of exempted services. Further, Rules 6(2) of CCR provides maintenance of separate account and records for receipt, consumption and inventory of input/input services, meant for use of manufacture of dutiable output and tax free output, goods or services and shall thus take credit of input credit attributable to taxable output of goods or service. Further Rule 6(3) provides that if an assessee does not maintain separate accounts but is taking credit of common input or service utilised both for taxable and tax free output services, then the assessee is required to pay specified amount (6% or as applicable) on the exempt turnover. Further, Rule 6(5) of CCR provides that notwithstanding anything contained in sub-Rule (1) (2) & (3) of Rule 6, credit of the whole of service tax paid on 17 taxable input services, (as specified), shall be allowed unless such services are used exclusively in or in relation to manufacture of exempted goods or providing exempted services. Thus, appellant is entitled to Cenvat credit of the whole of 'engineering consultancy service' (which is one of the 17 specified services), if this service is used both for taxable and exempted services.

12. Learned AR further, on the ground of limitation, urges that Section 37 (C) of Central Excise Act deals with the issue of-service of

notice/orders etc. The section provides various methods of service. As per the department, the SCN dated 19.10.2010 was dispatched under office dispatch no. 11839 dated 19.10.2010 by speed post. Although, speed post was not specifically mentioned in the Section during the relevant time, in Milan Poddar Vs. CIT 2013-357-ITR-619 (JHAR. ISC), Hon'ble Jharkhand High Court examined the issue-whether a dispatch of notice by speed post was in accordance with Section 282 of the Income Tax Act. Hon'ble High Court accepted speed post to be sufficient and equivalent to Registered post for the purposes of Section 282 of the Income Tax Act, 1961. Thus, a parallel can be drawn in the subject case, relying on the ruling of Jharkhand High Court. The notice dispatched by speed post in the facts of the present case is sufficient compliance with Section 37(C) of the Central Excise Act. It is further urged that the notice which was dispatched through speed post was not returned by the postal department, and hence, there is presumption of service. Further urges that all correspondences have been made with the appellant at the same postal address, and therefore, there is no question of the appellant having not received the SCN dated 19.10.2010. Learned AR further relies on the ruling of Hon'ble Bombay High Court in Colour Craft vs. ITO (IT80), wherein relying on the ruling in Milan Poddar, the Hon'ble High Court held that the registered post would take within its scope, not only speed post but also all other mails forming part of the established system of mails in which, the receipt and movement is recorded to ensure safe delivery. Further urges that speed post is equivalent to registered post as per statutory presumption under Section 27 of General Clauses Act.

13. Learned AR further urges that the appellant-assessee was operating under self-assessment scheme which was introduced vide Finance Act, 2001. Under the self-assessment regime, the superintendent of Central Excise/Service Tax is empowered only to verify the correctness of the returns. The assessee is required to assess, the tax due on the services provided by them and furnished the details in the Return Form (ST-3). It is the onus of the assesse to file correct return. In the instant case, the appellant-assessee did not seek any clarification from the department, but have *suo moto* utilised inadmissible Cenvat credit of consulting engineering services, for payment of service tax liability. Thus, the appellant have wilfully and deliberately suppressed the facts by way of availing inadmissible Cenvat credit resulting in evasion of payment of service tax. Further, under the facts and circumstances, there was suppression as well as contravention by the assessee. Had the audit not detected the error, the applicable tax liability would have escaped. Thus, appellant have not disclosed true facts to the department, as regards, taking and utilisation of inadmissible Cenvat credit. Accordingly, extended period of limitation have been rightly invoked under the proviso to Section 73(1) of the Finance Act.

14. As regards the Cenvat credit of Rs. 6,17,84,781/- on Consulting Engineering Service, issue have been concluded in para 5.3 of the impugned OIO, that the assessee have taken credit of this amount till August, 2007 and out of this, Cenvat credit of Rs. 13,23,207/- was availed during the month of August 2007, and balance was available to be availed Rs. 6,04,61,574/-. Further urges that as appellant have utilised the input service of consulting

engineering service, in construction of its metro network in and around Delhi, they were not entitled to take credit of the same for providing the output service of consulting engineering service provided to other metro projects in other cities. Admittedly, the output service provided to passengers/commuters is tax free under the provisions of service tax. Further urges that for availment of credit of input service tax, the assessee should have provided output service which is taxable, and the input service in question must be used for providing the taxable output service having one to one co-relation. Thus, in the facts of present case, Cenvat credit of service tax paid on input consulting service is inadmissible. It is also urged that the contention of the appellant, they are utilising the experience and expertise gained at Delhi Metro project, for giving engineering consultancy to other metro projects, does not appear satisfactory and acceptable as all the projects are different in nature and require case specific skilled consultation. The appellant had received services like study of soil condition, seismic zone category, condition of the water table, surrounding of metro line i.e., whether to design underground metro or overhead metro, other condition, etc. Application of design of one project is practically not feasible, as conditions of soil, air etc., differ from place to place. Further, appellant did not submit any documentary evidence that they utilised the expertise gained through the input services in respect of Delhi Metro, for other metros.

15. Further urges that Rule 9(1) and 9(2) of CCR specifies documents required for availing Cenvat credit. It is the appellant case that the consulting engineering service received by them was

meant for phase-I or phase-II of Delhi Metro. Thus, there is no co-relation of the input consultancy engineering service received by the appellant with the output consultancy service rendered to others.

16. As regards the disallowance of Cenvat credit of Rs. 5,22,936/- is concerned, the same have been taken on the strength of invoices issued to the offices of the appellant situated in other cities, which are unregistered like Hyderabad, Chennai, Pune, Kolkata etc. Input services were received and consumed at those unregistered offices and not utilised for providing final output services. Hence, the amount of Rs. 5,22,936/- have been rightly disallowed under Rule 14 of CCR.

17. Having considered the rival contentions, we find that admittedly, appellant have provided taxable output service of engineering consultancy service to other metro projects located in other cities like Hyderabad, Chennai, Pune, Kolkata etc. For providing this service, appellant have also set up offices in those cities. Rule 2(l) of CCR provides –input service means any service used by provider of output service for providing an output service. This rule further provides that such input service may have been used by the manufacturer/service provider either directly or indirectly. Thus, one to one co-relation is not required for taking Cenvat credit under Rule 3 of CCR. Once credit have been rightly taken, there is no restriction in use of such credit for payment of either central excise duty or service tax or any other specified tax liability. Further, Rule 6(5) of CCR provides that the provisions of Rule 6(1), (2) and (3) are not applicable, where input service

received is used both for providing taxable and tax free output service. Admittedly, in the facts of the present case, appellant have utilised the input consultancy engineering service both for providing tax free output service of passenger transport and taxable output service of consultancy engineering service. Accordingly, we allow this ground in favour of the appellant and set aside the demand of disallowance of Cenvat credit of Rs. 6,17,84,781/-.

18. So far the next issue is concerned, regarding disallowance of Cenvat credit with regard to input service received at the unregistered offices of the appellant located in other cities like Hyderabad, Chennai, Pune etc., it is admitted fact that such offices were opened by the appellant for providing output taxable service of engineering consultancy service. Further, Admittedly, appellant have accounted for the receipt of output taxable service provided from those offices which have been accounted for at the Delhi office and subjected to service tax. Further, condition of being registered is not essential for taking Cenvat credit, as have been held by Hon'ble Karnatka High Court in mPortal India Wireless Solutions Pvt Ltd. vs. Commissioner of Service Tax, Bangalore, [2011 (9) TMI 450- Karnataka High Court]. Accordingly, we allow this ground in favour of the appellant and set aside the disallowance of Cenvat credit of Rs. 5,22,936/-.

19. As we have allowed the appeal on merits, in favour of the appellant-assessee, we set aside the penalty imposed under Section 78 r/w Rule 15 of CCR.

20. As we have allowed the appeal on merits, we leave the ground of limitation open. Thus appeal is allowed with consequential benefits.

(order pronounced in the open Court on 15.02.2023)

Anil Choudhary
Member(Judicial)

P.V. Subba Rao
Member(Technical)

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