

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
MUMBAI**

**WEST ZONAL BENCH**

**SERVICE TAX APPEAL NO: 87207 OF 2019  
WITH  
CROSS-OBJECTION NO: 86190 OF 2019**

[Arising out of Order-in-Appeal No. PUN-EXCUS-001-APP-0344/18-19 dated 11<sup>th</sup> October 2018 passed by Commissioner of Central Tax (Appeals-I), Pune.]

**Commissioner of CGST**

**Pune-I**

GST Bhavan, 41/A, Sasson Road, Pune-411001.

**...Appellant**

*versus*

**Avaya India Pvt Ltd**

Level-3, Tower 11, Cyber City, Magarpatta, Hadapsar  
Pune-411013.

**...Respondent**

**APPEARANCE:**

Shri Badhe Piyush Barasu, Deputy Commissioner (AR) for the appellant

Shri Harish Bindumadhavan and Shri Mayur Jain, Advocates for the respondent

**CORAM:**

**HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)  
HON'BLE MR ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)**

**FINAL ORDER NO: A / 86213/2023**

DATE OF HEARING:

17/07/2023

DATE OF DECISION:

22/08/2023

**PER: DR. SUVENDU KUMAR PATI**

This appeal has been preferred by the Revenue Department challenging the legality of the order-in-appeal

passed by the Commissioner (Appeals) whereby the order-in-original passed by the Additional Commissioner on 21/03/2018 confirming denial of CENVAT credit along with interest and equal penalty against respondent M/s Avaya India Pvt. Ltd. was set aside.

2. Facts of the case, in brief, is that the Respondent was a tenant of property owners M/s MTDCCL and WARPL. Property owners were receiving lease rental of the premises rented out to the respondent and also the proportionate amount of the electricity consumption by the occupants against raising of two distinct invoices every month. The service tax paid against proportionate electricity consumption amount was charged under 'Business Auxiliary Service' but electricity being in the nature of sale being exempted from the purview of service tax, credit availed by the respondent in respect of service tax paid towards payment of electricity was denied to the respondent for the period 2013-14 and 2014-15. Show cause-cum-demand notice was raised against the respondent, adjudicated and confirmed against it, who preferred an appeal before the Commissioner (Appeals). Commissioner (Appeals), vide his detailed order dated 11/10/2008, allowed the appeal by holding that such credit availed even against incorrectly paid service tax was admissible credit in view of the judgment passed in the case of *Bajaj Allianz General Insurance Co Ltd vs. Commissioner of Central Excise* reported in 2014 (8) TMI 787-CESTAT MUMBAI.

Department is before us challenging the legality of the said order.

3. During the course of hearing of the appeal Learned Authorised Representative Shri Badhe Piyush Barasu submitted that going by the definition of CENVAT Credit Rules, only admissible credits were allowed to be refunded to reduce the cascading effect but respondent, having no licence or authority to supply electricity, had raised invoices against supply of electricity and charged service tax which is not admissible for the reason that electricity is not covered under the definition of service and the Respondent is not entitled for any refund and, therefore, the order passed by the Commissioner is not sustainable in law and the same is required to set aside.

4. Respondent has filed the Cross-objection stating that credit was validly taken and in view of the decision of the Hon'ble High Court of Calcutta passed in the case of *Srijan Realty (P) Ltd vs. Commissioner of Service Tax-II, Kolkata* reported in 2019 (3) TMI CALCUTTA HIGH COURT. Credit taken in raising bills on the occupant towards the realization of electricity consumption charges are admissible for which the cross-objection is filed with a limited purpose of noting the *ratio* of this decision in the order.

5. In response to such submission of the Learned Authorised Representative, Learned Counsel for the respondent submitted

that apart from a departure from the judicially settled principle that credit cannot be denied at the receiver's end, in view of several decisions of this Tribunal including those reported in *Commissioner of Central Excise, Pune vs. Ajinkya Enterprises* reported in 2012 (7) TMI 141 BOMBAY HIGH COURT, *Commissioner of Central Excise, Chandigarh vs. Ranbaxy Labs Ltd* reported in 2006 (7) TMI 216 – PUNJAB AND HARYANA HIGH COURT, *Indorama Synthetics (I) Ltd vs. Commissioner of Central Excise & Service Tax, Nagpur* reported in 2018 (7) TMI 22 – CESTAT MUMBAI, *Jayaswal Neco Industries Ltd vs. Commissioner of CGST, Palghar* reported in 2022 (9) TMI 1283 – CESTAT MUMBAI and *Bajaj Allianz General Insurance Co Ltd vs. Commissioner of Central Excise*, reported 2014 (8) TMI 787 – CESTAT MUMBAI, he submitted that otherwise also in view of the decision of the *Srijan Realty (P) Ltd supra*), noted above, realizing electricity consumption charges from the occupant is a service that has been rendered to the respondent and the same is covered under the Finance Act, 1994 as a 'service'.

6. We have perused the case records, relied upon decisions and the findings of the Commissioner (Appeals). Primarily placing reliance on the *Bajaj Allianz General Insurance Co Ltd*, cited *supra*, where CENVAT credit taken on incorrectly paid service tax were held to be admissible for the reason that it was otherwise refundable that would attract revenue neutral situation. But he had not gone into the present proposition of

law that CENVAT credit cannot be denied at receiver's end when the legality of the same is not questioned at the service provider's end in view of the consistent decisions emerged during the relevant time, as has been referred in the preceding paragraph. This being the position of the law, we have got no hesitation to confirm the order passed by the Commissioner (Appeals). But we are unable to go with the submission of Learned Counsel for the respondent that raising bills on the occupant with service tax component against realization of electricity charges are valid under the Service Tax Laws for the reason that in the said judgment it was categorically held that electricity was defined as 'goods' and thus capable of being traded for which it cannot be covered under the category of service tax nor appellant had any licence to supply electricity under the Electricity Act, 2003, but while such an order was passed treating the activity as the appellant therein had converted high tension electricity supply to low tension electricity supply for the purpose of supplying domestically consumable electric power to the occupant against which it had raised the bill, that was being treated as service and accordingly appellant's plea therein was allowed. This case stands completely on a different footing and this can only be treated as an erroneous payment of service tax since no extra amount was collected towards its service component other than the electricity consumption dues. However, the classification or legality of such payment of tax could have been done at the owner's end but it

can never be a ground for denial for CENVAT credit at receiver's end, since payment of service tax was accepted by the Appellant. Hence the order.

**ORDER**

7. The appeal is dismissed and the order passed by the Commissioner of Central Tax (Appeals-I), Pune is hereby confirmed. Cross-objection is also disposed of as not maintainable.

*(Order Pronounced in Open Court on 22/08/2023)*

**(DR. SUVENDU KUMAR PATI)**  
***Member (Judicial)***

**(ANIL G. SHAKKARWAR)**  
***Member (Technical)***

*\*/as*