CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
AHMEDABAD
REGIONAL BENCH, COURT NO. 2

SERVICE TAX APPEAL NO. 11495 OF 2016-DB

(Arising out of OIA-AHM-SVTAX-000-APP-008-16-17 dated 27/04/2016 passed by Commissioner of Central Excise and Service Tax-SERVICE TAX - AHMEDABAD)

GULMOHAR PARK MALL PVT LTD

1 Basement, Gulmohar Park Mall, Satellite Road,
Opp. Satellite Police Station, Satellite Road,
Ahmedabad, Gujarat. **Appellant**

Vs.

COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX-SERVICE TAX - AHMEDABAD **Respondent**

7 Th Floor, Central Excise Bhawan, Nr. Polytechnic
Central Excise Bhavan, Ambawadi,
Ahmedabad, Gujarat-380015

Appearance:
Present for the Appellant : Shri Vaibhav K Jajoo, Advocate
Present for the Respondent: Shri Ajay Kumar Samota, Superintendent (AR)

CORAM:
HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C. L. MAHAR, MEMBER (TECHNICAL)

Final Order No. 11471/2024

DATE OF HEARING: **04.03.2024**
DATE OF DECISION: **01.07.2024**

RAMESH NAIR

The facts of the present case are that the appellant are engaged in providing the taxable service of renting of immovable property service and registered with the Service Tax at commissionerate Ahmedabad. The appellant vide letter dated 16.05.2012 informed the department that they have paid 100% service Tax on the rent. However, the service recipient i.e. tenant of the appellant's property also paid 50% of the Service Tax liability as per the Hon'ble Supreme Court interim order in the case of RAI (Retailer Association of India) thus there is excess payment of Service Tax for which the appellant

filed refund claim. Since there was delay in processing by the department, the appellant then requested the department for adjustment of excess paid Service Tax against the subsequent liability of Service Tax instead of claiming the refund, the refund claim was returned by department on 29.06.2012, citing reason that since the 50% Service Tax was paid by the RAI (Retailer Association of India) is as per the interim order dated 14.10.2011 by the Hon'ble Supreme Court, the said amount cannot be allowed to be adjusted or refunded. The appellant have adjusted the excess paid Service Tax for amount of Rs. 32,67,727/- against the periodical Service Tax liability. The show cause notice was issued demanding the Service Tax of Rs. 32,67,727/- against the short paid Service Tax as the same amount adjusted by the appellant was not allowed. The Adjudicating Authority except demand of Rs. 21,839/- remaining amount has been dropped by allowing the adjustment made by the appellant against the excess paid Service Tax. The revenue being aggrieved by the Order-In-Original filed an appeal before the Commissioner appeal, on the ground that the appellant have wrongly taken the credit and utilized against the Service Tax paid by their service recipient which is not permissible. The learned Commissioner appeal agreeing with the grounds of appeal confirmed the demand of Rs. 32,67,727/-. Therefore, present appeal field by the appellant.

2. Shri Vaibahv K Jajoo learned Advocate appearing on behalf of the appellant submits that there is no dispute that the excess amount of Service Tax was paid therefore either the same needs to be refunded or adjustment made by the appellant in terms of Rule 6(4)(A) of Service Tax Rules, 1994 should be allowed. The Adjudicating Authority has rightly considering the Supreme Court Judgment allowed the adjustment consequently dropped the demand therefore, the impugned order is not sustainable. He further submits that neither in the show cause notice nor in the adjudication order, there was any issue of wrong availment of CENVAT Credit whereas the appellant have

proposed the adjustment of excess paid Service Tax in the future tax liability therefore, the case is not of CENVAT Credit. He submits that since in the revenue's appeal ground is not arising from the Order-In-Original the appeal of revenue was not maintainable before the Commissioner appeal. He placed reliance on this Tribunal decision in the case of Commissioner of Customs, Central Excise and Service Tax vs. Ms. EWDPL – 2020(10) TMI 291- CESTAT New Delhi.

3. Shri Ajay Kumar Samota, learned Superintendent (AR) appearing on behalf of the revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both sides and perused the records. We find that there is no dispute that there is excess payment of Service Tax including 50% payment made by the service recipient 100% Service Tax was paid by the appellant therefor, almost 1/3rd of the payment of Service Tax made is in excess. In the revenue's appeal entire ground was made assuming that appellant have wrongly availed CENVAT Credit and utilized the same. We find from the show cause notice and original order that there was case of wrong availment of CENVAT Credit. Even the show cause notice proposed Service Tax short paid, there was no proposal in the show cause notice of wrongly availed cenvat demand. In normal course demand of cenvat is raised under Rule 14 of CENVAT Credit Rules which is not the case here. The adjudicating authority has also decided the matter considering the adjustment of excess paid Service Tax. Therefore, it is apparent from the grounds of appeal that the appeal filed by the revenue is absolutely on wrong footing. Therefore, in our view the order of the commissioner appeal also passed assuming the issue is of wrong availment of CENVAT Credit is completely vitiated and not maintainable on this ground alone. Moreover, on the facts of the case there is excess payment of Service Tax on the same service therefore the excess amount of Service Tax paid either by service recipient or by the appellant either needs to be refunded or

the same may be allowed as adjustment in the future tax liability. Since the appellant have opted for adjustment of excess paid service tax it is in terms of Rule 6 (2) of Service Tax Rules. We do not find any illegality or error on such adjustment made by the appellant. It is also fact on record that service recipient paid 50% in terms of the Hon'ble Supreme Court interim order has been debited the said amount to the appellant. Therefore, the said amount was also born by the appellant only. Thus against the 100% tax liability the appellant has born 150% of Tax liability. Accordingly, the appellant is entitled either for refund of 50% for excess paid Service Tax or for adjustment against the excess paid towards the future tax liability. As result we hold that the adjustment made by the appellant of excess paid service tax towards the subsequent tax liability is absolutely in order and correct.

Therefore we do not find any error in the order passed by the Adjudicating Authority. However, the impugned order passed by the learned Commissioner (Appeals) suffers from apparent error and illegality. Hence, the same is not sustainable.

5. Accordingly, we set aside the impugned order and allow the appeal with consequential relief.

(Pronounced in the open court on **01.07.2024** *)*

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

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