IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No. ST/267/2010-CU[DB]

(Arising out of Order-in-Original No. 68/Commissioner/LKO./ST/2009 dated 03/11/2009 passed by Commissioner of Central Excise, Lucknow)

M/s Bharti Airtel Ltd. **Appellant**

Vs.

Commissioner of Central Excise, Lucknow **Respondent**

Appearance:

Shri B.L. Narasimhan (Advocate) &
Shri Utkarsh Malviya (Advocate) for Appellant
Shri Pradeep Kumar Dubey (Superintended) AR for Respondent

CORAM:

Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 26/12/2018
Date of Decision : 26/12/2018

FINAL ORDER NO. **70059/2019**

Per: Anil G. Shakkarwar

Present appeal is directed against the impugned Order-in-Original No. 68/Commissioner/LKO/ST/2009 dated 03.11.2009 passed by Commissioner of Central Excise, Lucknow.

2. Brief facts of the case are that the appellant were engaged in providing Telecommunication Services and were availing Cenvat Credit of duties and taxes paid on inputs, capital goods and input services. Provision of said

Telecommunication Services involved carrying out an activity of interconnection between Telegraph Authorities i.e., interconnecting subscribers of other telecom companies with its own subscribers. Circular No.91/2/2007-ST dated 12.03.2007 issued by CBEC clarified that said interconnect usage charges were not taxable under any of duty in existing taxable services and was covered by amended definition of Telecommunication Services introduced in Finance Bill, 2007 and shall come into effect after the enactment of Finance Bill, 2007. In view of Rule 2(e) of Cenvat Credit Rules, 2004 which defines exempted services which included such services on which service tax is not leviable it appeared to Revenue that appellant were providing two stream of services, one taxable and other covered by Rule 2(e) of Cenvat Credit Rules, 2004 related to Interconnect Usage Charges. From the ST-3 returns submitted/filed by appellant for the period from April, 2004 to September, 2007 it appeared to Revenue that appellant did not maintain two separate accounts for receipt, consumption and inventory of input and input services meant for use in provision of taxable and other services which was related to Interconnect Usage Charges which was not taxable to service tax and, therefore, in view of provision of Rule 6(3)(c) of Cenvat Credit Rules, 2004 appellant were eligible to pay service tax payable on output service only to the extent of 20% through Cenvat Credit availed. Therefore, proceedings were initiated for recovery of such Cenvat Credit which in the

opinion of Revenue was not admissible for utilization in excess of said 20% of service tax payable which resulted into passing of impugned order. Through impugned order the Original Authority has confirmed the demand of Service Tax of Rs.7,83,92,438/- and appropriated the amount of Rs.5,91,66,347/- and ordered for recovery of balance amount of Rs.1,92,26,091/-. Further another demand of service tax of Rs.5,71,895/- allegedly short paid by appellant for the period from April, 2007 to September, 2007 was also confirmed. Further the Original Authority has directed the appellant to pay interest on reversed amount of Rs.5,91,66,347/- and imposed penalty of Rs.7,83,92,438/- under Section 78 of Finance Act, 1994. Aggrieved by the said order appellant is before this Tribunal.

3. Heard the learned counsel for the appellant. Learned counsel for the appellant has submitted that during the period from April, 2007 to September, 2007 service tax of Rs.5,71,895/- was already paid by the appellant and the same was entered in different heads of Service Tax and Education Cess due to bona fide error of computation and that upon discovery the same was rectified and there was no mala fide intention of non-payment and the error was only accounting error and, therefore, it is not a case for demand invoking extended period of limitation. He has further argued that the same was ordered to be recovered through the

proceedings initiated through show cause notice dated 20.10.2008 where normal period of limitation was only one year. He has further argued that Interconnect Usage Charges were collected by the appellant was within the knowledge of Revenue and reliance for issue of show cause notice was place on ST-3 returns filed by the appellant. Therefore, all the information was available with the Revenue and, therefore, Revenue did not have authority to extend normal period of limitation beyond one year for issue of impugned show cause notice which was issued on 20.10.2008 for the period upto May, 2007. He has further relied on the decision of this Tribunal in the case of Idea Cellular Ltd. vs. Commissioner of Central Excise, Rohtak reported at 2009 (16) S.T.R. 712 (Tri.-Del.). He further submitted that this Tribunal has held in the said case that extended period of limitation in respect of services provided and collection of Interconnect Usage Charges were within the knowledge of Department in view of Letter No.199/2/2004-CX-4 dated 15.06.2004 issued by CBEC to BSNL wherein it was clarified that Interconnect Usage Charges were not chargeable to service tax. Therefore, he has argued that it was held by this Tribunal in the said case that extend period of limitation was not invokable in the circumstances. He has further argued that the entire show cause notice was beyond the period of limitation and there were no ingredients for invocation of extend period of limitation and, therefore, the demand was barred by

limitation. He has further argued that since the demand was barred by limitation the impugned order is not sustainable.

4. Heard the learned AR Shri Pradeep Kumar Dubey, Superintendent on behalf of the Revenue who has supported the impugned order.

5. Having considered the submissions from both the sides and on perusal of record we find that the demand confirmed is in respect of recovery of Cenvat Credit which is used for discharge of Service Tax in excess of 20% of the service tax payable through Cenvat Credit in view of provision of Rule 6(3)(c) of Cenvat Credit Rules, 2004 and fact that Interconnected Usage Charges were not chargeable to service tax and such charges were collected by the appellant. However, we find that the issue is squarely covered by this Tribunal's decision in the case of Idea Cellular Ltd. (supra), we note that the period covered in the show cause notice in respect of Interconnected Usages Charges is upto May, 2007 and in respect of demand of service tax on account of error of accounting the period involved is April, 2007 to September, 2007 and the show cause notice was issued on 20.10.2008 by extending the larger period. We also note that this Tribunal in the said case of Idea Cellular Ltd. (supra) has held in Para 5 and 5.1 as follows:-

"5. Another plea of the Appellant is that longer limitation period of five years under proviso to Section 73(1) for recovery of excess utilized credit and penal provision of Rule 15(4) of Cnevat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994 have been wrongly invoked as there is absolutely no willful misstatement, fraud or suppression of facts etc. with intention to evade the service tax. We agree with this plea of the Appellant, in view of the following-

(a) In each ST-3 return filed during period of dispute, the details of the service tax payable and the service tax paid through credit and through cash under TR-6 Challans have been given and therefore the Appellant cannot be accused of concealing the fact that during certain months, their utilization of credit for payment of service tax had exceeded the limit of 20% of the service tax payable.

(b) The dispute in this case is linked with the question as to whether or not the 'interconnect usage charges' being charged by one telephone service provider from another for network access attract service tax and the Board vide letter No.199/2/2004-CX-4 dated 15.06.2004 intimated BSNL that Interconnect usage charges would not attract service tax. In view of this background, it would be totally unfair for the Department to claim that it was not aware that the Appellant were providing non-taxable service like inter-connectivity, roaming service etc.

5.1 Hon'ble Supreme Court in case of CCE vs. Chemphar Drugs & Liniments reported in 1989 (40) E.L.T. 276 (S.C.) and Pushpam Pharmaceuticals Company v. CCE, Mumbai reported at 1995 (78) E.L.T. 401 (S.C.) has held that something positive, rather than mere inaction or under proviso to Section 11a(1) of the Central Excise Act, 1944 and that since the expression – 'Suppression of facts' has been used in the company of strong

words such s fraud, collusion in willful default, it cannot be interpreted or mere omission – the act constituting 'suppression' must be deliberate. In this case neither the circumstances indicate 'suppression of facts', misstatement, fraud etc. nor any evidence in this regard has been produced. Therefore neither the demand beyond the normal limitation period of one year is sustainable nor penalty under Rule 15(4) of Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994 is attracted."

In view of precedent decision of this Tribunal under similar circumstances extended period of limitation is not invokable. We, therefore, hold that since the show cause notice is issued by invoking extended period of limitation the impugned order is not sustainable.

6. We, therefore, set aside the impugned order and allow the appeal.

(Pronounced in Court)

Sd/-
(Anil G. Shakkarwar)
Member (Technical)

Sd/-
(Ashok Jindal)
Member (Judicial)

Ankit