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REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 05/12/2017

To

Appellant as per address in table below
Respondent as per address in table below

Final Order No. ST/A/71847/2017-CU[DB] dated 13/06/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	ST/1767/2010	**Vodafone Mobile Services Ltd** 5, Shahnajaf Road, LUCKNOW UP
		Name and Address of Respondent
2		C.C.E. & S.T.-Lucknow 7-A...ASHOK MARG, LUCKNOW, UTTAR PRADESH-226001

Copy To
3Advocate(s) / Consultant(s):

Atul Gupta, (Adv,) ALD
3/1A/3 OPP AUTO SALES,Above the Office Of Blue Dart/DHL Courier, COLVIN ROAD, LOHIA MARG ALLAHABAD-211001

4 Bar Association, CESTAT, Allahabad

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp ICICI Bank of Defence Colony New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

12 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

13 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

14 C.D.R. 15 Office Copy 16 Second Folder Copy 17 Guard File

Asstt. Registrar

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, REGIONAL BENCH: ALLAHABAD

DIVISION BENCH

Appeal No. ST/1767/2010-CU(DB),

Dated of Hearing/decision: 13.6.2017

[Arising out of Order-in-Original No. 24/Commr./LKO/ST/2010 dated 27/8/2010 passed by Commissioner, Central Excise, Lucknow]

Vodafone Mobile Services Ltd — Appellant

Vs.

C.C.E. & S.T.-Lucknow — Respondent

Appearance:
Present for the Appellant: Shri Atul Gupta, Advocate
Present for the Respondent: Shri Mohammad Altaf (Asstt. Commissioner), AR

Coram: Hon'ble Shri Anil Choudhary, Member (Judicial)
Hon'ble Shri Anil G. Shakkarwar, Member (Technical)

Final Order No. 71847/2017

Per: Anil Choudhary

The present appeal is filed by the Appellant M/s Vodafone Mobile Services Ltd. against Order-In-Original No. 24/Commissioner/LKO./ST/2010 dated 27.08.2010 passed by Ld. Commissioner of Central Excise, Lucknow.

2. Brief facts of the case are that the appellant, is a 'telegraph operator', engaged in providing telecommunication services to its subscribers and is registered with the Department. The appellant was also engaged in activities, namely interconnection with other networks, wherein certain commercial and technical arrangements

were entered under which the telegraph authorities connected their equipment, networks and services with each other to enable their customers to have access to the customers, services and networks of the other telegraph authority. The service tax was charged and paid by the telegraph authority, from its subscriber, who was getting such service. Each Telegraph authority shared part of amount charges for service as 'Interconnect User Charges' with other telegraph authorities, however, such part which is shared by other telegraph authorities was not taxable, so service tax was not paid on such shared amount (between the service providers). The CBEC also vide its Circular No. 91/2/2007-ST dated 12.03.2007 clarified that such interconnect usage charges (IUC) were not taxable. The activity of interconnection became taxable w.e.f. 01.6.2007 under telecommunication service.

3. The Appellant was availing CENVAT credit on inputs, input services and capital goods and utilizing the same for discharging its liability of service tax on output services.

4. The Appellant was issued a Show Cause Notice No. 19/Commr./LKO/2009-10 dated 07.09.2009 for the period November, 2004 to May, 2007 alleging that the Appellant was providing both taxable and non-taxable service (IUC) and was thus required to maintain separate accounts in respect of input services and CENVAT Credit on such input services in terms of Rule 6(2) of the CCR in respect of taxable and non-taxable output services, failing which, the Appellant could have utilized CENVAT Credit for discharging its

liability only upto 20% of the amount of service tax payable on taxable output service in terms of Rule 6(3)(c) of the CCR and as the said restriction was not adhered to by the Appellant, excess utilization of the CENVAT credit became inadmissible. Further, the show cause required the Appellant to show cause as to why inadmissible Cenvat Credit amounting to INR 42,75,24,003/- should not be recovered from them.

5. The appellant submitted its reply contending that the restriction in Rule 6(3) of CCR is not applicable in respect of credit taken on input services specified under Rule 6(5) of CCR as well as Cenvat Credit taken on capital goods. It was further submitted by the Appellant that the provision has not specified any particular period in respect of restriction on utilisation of credit only to 20% service tax liability. Therefore, the Appellant has not utilised the credit in excess.

6. The said Show Cause Notice was adjudicated through Order-in-Original No. 24/Commissioner/Lko/ST/2010 dated 27.8.2010 and the Adjudicating Authority accepted the submission of the appellant that the restriction contained in Rule 6(3) of CCR is not applicable in respect of credit taken on input services specified under Rule 6(5) of CCR as well as Cenvat Credit taken on capital goods. However, the Ld. Commissioner held in the Order-in-Original that the credit amounting to INR 7,63,18,307 availed on Capital Goods was not admissible, therefore, he disallowed such credit and confirmed demand for the same. He, further, held that in the month of January, 2005, there was excess utilisation of Cenvat Credit to the tune of INR

59,77,550/-, which should have been paid in cash, therefore, such utilisation of credit was disallowed and demand in respect of the same was confirmed. Thus, the demand amounting to INR 8,22,95,857/- (7,63,18,307/- + 59,77,550/-) on account of excess utilization of Cenvat Credit and credit on capital goods was confirmed under Rule 14 of CCR read with Section 73 (1) of the Finance Act, 1994 and penalty of an equal amount was also imposed under Rule 15(4) of CCR read with Section 78 of the Finance Act, 1994.

7. Heard the Ld. Counsel Shri Atul Gupta for the Appellant. It has been contended that the impugned order went beyond the scope of Show Cause Notice as there was no allegation and proposal regarding disallowance of credit on Capital Goods. The proposal in the show cause notice was restricted to the ground that the Appellant used the credit in excess of quota of 20% of the liability of service tax payable on its output services. There was no proposal in the show cause notice to deny any credit availed on items treated as capital goods. Thus, in confirming the demand on account of credit taken on capital goods, the Ld. Adjudicating Authority had travelled beyond the scope of the Show Cause Notice and the impugned order ought to be set aside on this ground alone. Show Cause Notice is the foundation of the case made out by the department and the adjudicating authority cannot travel beyond such show cause notice. Such impugned order thus in violation of the principles of natural justice also. Reliance was placed on Commissioner of Customs, Mumbai Vs. Toyo Engineering India Ltd. 2006 (201) and Commissioner of Central Excise and

Customs, Gujarat Vs. Sun Pharmaceutical Industries Ltd. 2015 (326) ELT 3 (SC).

8. The Ld. Counsel for the Appellant further contended that the Appellant never exceeded the quota of Cenvat Credit available for utilization upto a limit of 20% of the service tax liability payable on its output services as there was no bar of utilization on monthly basis. Through the Table (reproduced below) available on page 13 of the impugned order, it was explained that the Appellant had not utilised the full limit of the quota in the months of November and December, 2004 as the Appellant was entitled but short utilised credit to the tune of INR 20,66,664/- and INR 90,78,897/- respectively as evident from the Table below.

PERIOD	SERVICE TAX PAYABLE	PAID BY CENVAT CREDIT	TOTAL ADMISSIBLE CENVAT CREDIT (DOES NOT COME UNDER THE AMBIT OF RESTRCITION IMPOSED BY RULE 6(3) OF CCR	MAXIUM ADMISSIBLE CREDIT AVAILABLE FOR DISCHARGING THE SERVICE TAX LIABLITY IN TERMS OF Rule 6(3) (c) OF Cenvat Credit Rules 2004 (20% OF col.2)	Cenvat credit used (3-4)	Cenvat credit entitlement not used (6-5)
1	2	3	4	5	6	7
Nov-4	20400188	17341104	15327730	4080038	2013374	-2066664
Dec-04	21408605	16752294	21549470	4281721	-4797176	-9078897
Jan-05	23537186	20099365	9414377	4707437	10684988	5977551
Feb-05	26281138	8734454	6453338	5256228	2281116	-2975112

Further, in the subsequent months also, the appellant short utilised its quota of the entitlement of utilisation of credit. Further, reliance was placed on the ratio on this issue already decided in the matter of Idea Cellular Ltd. Vs. Commissioner of Central Excise, Rohtak – 2009 (16) STR 712 (Tri.-Del) and Vijyanand Roadlines Ltd. Vs. Commissioner of Central Excise, Belgaum 2007 (7) STR 219.

9. Lastly, it was contended by the Ld. Counsel for the Appellant that the service – 'interconnection usage' was not subject to service tax and it was known to the Department, as prevalent practice in the industry and therefore, the demand for extended period is not sustainable, the demand is based solely on the ST-3 Returns filed by the Appellant. Reliance has been placed on the decision of Accurate Chemicals Industries Vs. Commissioner of Central Excise, Noida 2014 (300) ELT 451 (Tri.-Del.). The action of the Appellant was bonafide and all the facts were recorded in the documents maintained by the Appellant. No facts were suppressed by the Appellant with an intention to evade payment of service tax. At any rate, the situation involved interpretation of complex legal provision and thus, extended period was not invocable.

10. Heard the Ld. DR Shri Mohammad Altaf, who was supported the Impugned Order-in-Original.

11. Having considered the rival contentions, we find that the impugned order, while disallowing the credit on capital goods, has travelled beyond scope of the show cause notice. It is a settled principle of law that no demand can be sustained unless the same is

based on a proposal in the Show Cause Notice. The Show Cause Notice is the foundation in the matter of demand and recovery of duty, penalty and interest as held by the Apex Court in the case of CCE Vs. Ballarpur Industries Ltd. [2007 (215) E.L.T. 489 (S.C.)]. Once the Show Cause Notices do not propose to deny any CENVAT Credit availed on items treated as capital goods, the same could not have been taken up and adjudicated in the Impugned Order. Thus, the demand of INR 7,63,18,307/- confirmed in impugned order on this issue is not sustainable and is set aside.

12. Further, on the issue of excess utilisation of credit, it is evident from the Table that the Appellant was entitled to further utilise credit amounting to INR 20,66,664/- and INR 90,78,879/- in the months of November and December, 2004 and there is no bar in law to restrict the utilisation of such quota of entitlement in the subsequent months. Thus, the entitlement of INR 1,11,45,561/- (INR 20,66,664/- + INR 90,78,897/-) is in excess of INR 59,77,551/- which is the short fall in the month of January, 2005. We are in agreement with the ratio of the decisions on this issue in the matter of Idea Cellular Ltd. Vs. Commissioner of Central Excise, Rohtak – 2009 (16) STR 712 (Tri.-Del) and Vijyanand Roadlines Ltd. Vs. Commissioner of Central Excise, Belgaum 2007 (7) STR 219 where it was held that utilisation is not restricted to monthly or quarterly basis and it can be utilised at any point of time. In view of the same the demand of INR 59,77,551/- confirmed on this issue is thus not sustainable and is set aside.

13. Since the demands confirmed are set aside, therefore, the demand of interest as well as imposition of penalty has also been set aside. The impugned order is modified to the extent indicated as above and the appeal is allowed in full with consequential relief as per law. The issue of limitation is kept open.

(Dictated and pronounced in the open Court)

-Sd/-	-Sd/-
(ANIL G. SHAKKARWAR)	(ANIL CHOUDHARY)
Member (TECHNICAL)	Member(JUDICIAL)

(K. Gupta)

प्रमाणित प्रति/Certified True Copy
05/01/18
Asstt. Registrar
(C.E.S.T.A.T.)
MARG, ALLAHABAD-211001