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

Dated: 27/09/2017

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. ST/A/71157/2017-CU[DB] dated 03/07/2017

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/Stay/53891/2014	ST/53480/2014	**ZEE MEDIA CORPORATION LTD** FORMERLY KNOWN AS M/S ZEE NEWS LIMITED FC-19, SECTOR - 16A, NOIDA,UP

Name and Address of Respondent

2 C.C. & C.E. & S.T.-Noida
C-56/42...SECTOR 62,
NOIDA,
UTTAR PRADESH-201307

Copy To

3 Advocate(s) / Consultant(s):

V. Lakshmi Kumaran
5, JANGPURA EXTENTSION LINK
ROAD NEW DELHI-110014

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, 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,Ist Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. 1

APPEAL No. ST/53480/2014-CU[DB] with
STAY Application No. ST/Stay/53891/2014

(Arising out of Order-in-Original No. 69/Commr/Noida/2013-14 dated 25/03/2014 passed by Commissioner of Customs, Central Excise & Service Tax, Noida)

Zee Media Corporation Ltd. **Appellant**

Vs.

Commissioner of Central Excise & Service Tax, Noida **Respondent**

Appearance:

Shri Atul Gupta (Advocate) for Appellant
Shri Rajeev Ranjan (Joint Commissioner)AR for Respondent

CORAM:

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

Date of Hearing : 03/07/2017
Date of Decision : 03/07/2017

FINAL ORDER NO.- 71157/2017.........

Per: Anil Choudhary

The issue in this appeal filed by the appellant is whether the show cause notice is validly issued by invoking the extended period of limitation and whether Service Tax input credit was rightly taken by the appellant during the period from 1st January, 2010 till 29th March, 2010, pending approval of the scheme of the demerger by the Hon'ble High Court, which was approved by the order of Hon'ble High Court dated 19 March, 2010. The order of the High Court dated 19.03.2010 was filed with the Registrar of companies on 29 March, 2010. Under the said scheme of the demerger, it was provided that the scheme will be operative from 29 March, 2010, but effective from 01 January, 2010 and whether Service Tax on Reverse Charge Basis under the classification 'online information and data access or retrieval services' falling under Section 65(105)(zzzzb) have been rightly demanded.

2. Brief facts of the case are that the appellant is engaged in news business and in the business of telecasting other entertainment programs and is registered with the Department. Further, the Appellant was receiving various images and text materials by way of retrieval from the website of foreign companies viz. M/s Reuters, ATPN under proper agreements and was making payments for the same.

3. Subsequently, the Appellant considered it appropriate to separate the Regional General Entertainment Channel Business from the News Business and to continue the business as '24x7' news channels in prominent Indian Regional Languages. Thus, a scheme of demerger was formulated under which the Regional General Entertainment Channels were transferred to Zee Entertainment Enterprises Ltd. (hereafter referred to as 'ZEEL'). The Appellant and the transferee company (ZEEL) entered into the scheme of arrangement for the above said purpose and the said scheme was submitted before Hon'ble High Court of Bombay. The said scheme was approved by the Hon'ble Bombay High Court

vide its order dated 19.03.2010. The Certified copy of the Order of the Hon'ble Bombay High Court was received by the Appellant on 25.03.2010 and the same was submitted to the Registrar of Companies on 29.03.2010. In the said scheme, it was provided that the scheme will be operative from 29.03.2010 but effective from 01.01.2010. Till March 29.03.2010, such outgoing channels were a part of the business of the Appellant and the Appellant was carrying on the business and activities in relation to them including taking of credit and payment of Service Tax. Accordingly, invoices for input services were issued and received in the name of the Appellant only and being eligible to take credit, it took the credit of the Service Tax paid on such input services.

4. Vide the show cause notice dated 31 March, 2013, it was alleged that during the course of audit, it was observed that the appellant are receiving various images and text materials by way of retrieval from the website of Foreign Companies namely M/s Reauters & ATPN under the proper agreements. Those images/text materials are used by appellant in their rendering 'online information and data base access retrieval service' for receiving such material from the said foreign-based companies. Appellant have made payment to them. Scrutiny of financial records and statements reveals that appellant have made payment during the financial year 2007-08 to 2010-11 of various amounts amounting to Rs. 45, 23, 799/-.

5. Further, on scrutiny of balance sheet for 2009–10, (RUD-II), it was noticed that the scheme of arrangement under Sections 391 to 394 of the companies Act and other applicable provisions between the Zee News Ltd (appellant) and ZEEL and their respective shareholders and creditors was sanctioned by Hon'ble Bombay High Court at Mumbai and filed with Registrar of Companies. Pursuant to the said scheme, Regional General Entertainment channels, namely- Zee Bangla, Zee Marathi, Zee Telgu, Zee Talkies, Zee Cinema, Zee Gujrati & Zee Kannada were transferred to ZEEL with effect from 01 January, 2010 on going concern basis. Thus, assets and liabilities in respect of aforementioned channels have been transferred to ZEEL. On examination of Cenvat accounts, it was noticed that appellant had taken credit of input service in respect of outgoing 6/7 channels transferred to ZEEL. Therefore, the audit had bifurcated the credit for the period January 2010 to March 2010, which involves credit of input service relating to the said 6/7 channels to the tune of Rs. 6,67,92,233/- out of total credit aggregating to Rs. 8,47,08,673/-.

6. It further appeared to Revenue that services provided by the appellant fall under Section 65(105)(zzzzb) of the Finance Act, 1994, i.e., 'Online Information and Data Base Access Audit or Retrieval Service', according to findings of the Audit Team. As per definition of the service, "Any service provided or to be provided by any other person in relation to

Development and Supply of content for use in 'telecommunication' services, 'Advertising' agency service and Online Information and Data Base Access or Retrieval Services." Further, 'development and supply of content' includes development and supply of mobile value-added services, music, movie, movie clips, ring tones, wallpaper, mobile games, data, whether or not aggregated, information, news and animation films. It further appeared to the Revenue that those images, text materials which are assessed by the appellant from the website of service providers like Reauters, ATPN etc, are used by appellant in their rendering of online information and data base access or retrieval service. It further appeared that appellant imported the service from abroad but not paid Service Tax under Reverse Charge Mechanism as provided under Section 66A of the Finance Act. It further appeared that so far the Cenvat Credit is concerned during the period 01 January, 2010 to March 2010, the same is irregularly taken in view of Rule 4A of Service Tax rules read with Rule 9(2) to of CCR 2004. So far the invocation of extended period is concerned, it appeared to Revenue that the facts came to notice only during scrutiny of records like ledger, balance sheets, invoices, Cenvat credit account etc maintained by the appellant and such details were not disclosed to Department at any stage in any report or returns. Thus, the appellant have suppressed the facts and accordingly proviso to Section 73(1) of the Finance Act is applicable for invocation of extended period of limitation. Accordingly, Service Tax of Rs. 45,23,799/- was demanded on online information and data base access and/or retrieval service on Reverse Charge Basis and Cenvat Credit of Rs. 6,67,92,233/- was proposed to be disallowed for contravention of Rule 9(2) of CCR, 2004 read with Rule 4A of STR, 1994. Further penalty was proposed under Rule 15 of CCR, 2004 along with penalty under Section 76 and 78 of the Act.

7. The show cause notice was adjudicated on contest by the learned Commissioner who, vide the impugned Order-in-Original was pleased to confirm the proposed demands with interest and further levied penalty under Section 76, Section 78 and also a penalty of Rs. 6,67,92,233/- under Rule 15(3) of CCR read with Section 78 of the Act. In the impugned order, the learned Commissioner held that the appellant could not avail the Cenvat credit in respect of 6/7 outgoing channels, and therefore appellant was not entitled to take such credit. Thus, the credit so taken was irregular/illegal. Regarding the other aspect, the learned Commissioner held that in respect of the various images/text materials received by the appellant from Foreign Companies, it is irrelevant whether appellant is providing online information and data base retrieval service for determining the tax liability on the appellant as the liability arose due to provisions relating to Reverse Charge Mechanism.

7. Being aggrieved, the appellant is before this Tribunal. The learned counsel for the appellant has urged that the Cenvat credit in respect of 6/7 outgoing channels were legally and properly taken by the appellant during the relevant period January 2010 to March 2010, as at that time, only a single legal entity that is the appellant company was in existence. The other company namely ZEEL relating to the 6/7 outgoing channels was not operating any business in respect of such channels. It was the appellant company which was performing all the business relating to and including all those 6/7 channels during that period. Thus, the appellant was correctly taking and utilizing credit during the relevant period. Further, he submitted that there is no bar under the law which prohibits from taking the credit before the effective date of the demerger or the approval of the demerger by the Hon'ble High Court. Even for transferring the credit pursuant to demerger, the appellant is required to first take the Cenvat Credit in respect of input services received during the relevant period. The appellant will be able to transfer credit only once such input services credit is taken by them. Further, the learned counsel refers to sub Rule 2 of Rule 10 of CCR, which reads as follows: –

If the provider of output service shifts or transfers in business on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the business to a joint venture with the specific provision for transfer of liabilities of such business, then the provider of output service shares be allowed to transfer the Cenvat Credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated business. Further, from sub Rule 3 of Rule 10 of CCR provides: –

"The transfer of the Cenvat Credit under sub Rule (1) and (2) shall be allowed only if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory or business premises to the new site or ownership and the inputs or capital goods on which credit had been availed of are duly accounted for to the satisfaction of the Deputy Commissioner of Central Excise as the case may be the Assistant Commissioner of Central Excise. Thus, sub Rule (2) of Rule 10 is only an enabling provision to alleviate the restriction on transfer of Cenvat Credit to another legal entity in case of sale, demerger, amalgamation, case of transfer of business and such rule nowhere prohibits the transferor company from retaining the credit. Further, Rule (3) of Rule 10 indicates that such transfer will be allowed only when input capital goods in respect of which credit was transferred were also transferred to the transferee. Whereas in the present case, the Cenvat Credit in respect of input services was already consumed to a certain extent before 29 March, 2010. It is further urged by the learned counsel that in any case, there was no time limit prescribed for transferring the credit to the transferee company who got received the business in respect of such outgoing companies. The learned counsel also relied on the single member ruling of this Tribunal in RSPL Ltd v/s CCE reported at 2017-TIOL-1752-CESTAT-Delhi, wherein the assessee RSPL was paying Service Tax on royalty paid to company which was later merged pursuant to amalgamation order of the High Court from on appointed date. The brief facts was that appellant RSPL was engaged in manufacture of detergent cake and powder with the brand name of the Ghari Industries Private Ltd. Appellant RSPL paid royalty charges along with service tax for use of the brand name. RSPL availed credit of service tax paid on such royalty charges. Later on, the appellant RSPL merged with M/s Ghari Industries Private Ltd (brand owner) pursuant to amalgamation order of the High Court dated 01.02.2008. The High Court order for amalgamation was with effect from 01 April, 2006. The Revenue had attained a view that in terms of the High Court order that two entities became one and as such there is no warrant of payment of royalty by the appellant RSPL to the brand owner company and the invoice for such payment becomes infructuous for the purpose of availing that credit. Accordingly, the credit availed was held to be inadmissible. Under such facts, this Tribunal held – admittedly the dispute arose because of the order of merger dated 1 February, 2008, allowing merger with effect from the retrospective date 01 April, 2006. However, during the material time when Service Tax was discharged by the appellant RSPL, the same was illegally paid and credited to the Government. As such tax paid on input service was held to be correctly utilized by the appellant in terms of Cenvat Credit Rules, 2004. Further, it was noted that eligibility of Cenvat Credit on merit was not disputed by the Revenue. It was also held that later development that on different proceedings under the provisions of company law cannot make a duty paid service tax availed credit during the material time is improper. It was also observed that there were no to legal entities during the material time where valid and legal and the same does not become infructuous, simply because these legal entities were amalgamated letter though effective from the record date.

Accordingly, the learned counsel prays for allowing their appeal with consequential benefits. The learned counsel also relied on the ruling in the case of Technocraft Industries India Ltd v/s CCE, Mumbai-III 2000 (120) ELT 106 (Tribunal), wherein it was held that by this Tribunal that the effect of amalgamation/merger etc. takes place only from the effective date instead of from the transfer date, that is, the activity during the pendency of the approval of such a scheme does not become improper/illegal due to the operation of such scheme with the retrospective effect. Moreover, in view of the admitted fact on record that part of the credit already stood utilized prior to 29 March, 2010 for discharging of Service Tax levied on output services of the 6/7 outgoing channels. Thus, the demand based on the input credit is wholly untenable and misconceived by the learned Commissioner.

8. So far the ground as to applicable on extended period is concerned, the learned counsel urges that it is well found by the Revenue that the transactions have been properly recorded in the books of accounts ordinarily maintained. Further, it is not the case that the appellant has not disclosed the relevant facts as required in the periodical returns filed with the Service Tax Department. It was further urged that the scheme of the demerger was duly advertised in the newspapers having wide circulation where the Registrar Office, etc. in the jurisdiction of the concerned High Court and as such the allegation is bad and without any substance. Thus, it was urged that the appeal be allowed on the ground of limitation alone.

9. So far the issue of online information data and/or retrieval service is concerned, as held by the learned Commissioner, the appellant did not provide such service as an output service which was allegation in the show cause notice for demanding duty and as such the demand of Rs. 45 lakhs is not maintainable on this score also.

10. The learned AR for the Revenue have relied on the impugned order.

11. Having considered the rival contentions, we find that there is no element of suppression, concealment or any action, inaction on the part of the appellant to evade the

payment of duty nor any collusion etc., so as to attract the proviso of Section 73(1) of the Finance Act read with Section 11A of the Central Excise Act. Accordingly, we hold that the show cause notice is bad for invoking the extended period of limitation. We further notice that the as per the show cause notice, Revenue have got all the information from the records maintained by the appellant in the ordinary course of the business. Not a single instance of any manipulation or suppression and/or misinformation have been pointed out, save and except the bald allegations made in the show cause notice. Accordingly, we hold the show cause notice to be not maintainable. Thus, the appeal is allowed by setting aside the impugned order. The appellant shall be entitled for the consequential benefits in accordance with law. As we have decided the appeal on the points of limitation, we have not recorded the findings on merits. Stay petition also stands disposed of.

(Dictated and pronounced in Court)

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

-Sd/-
(ANIL CHOUDHARY)
Member(JUDICIAL)

Ankit

प्रमाणित प्रति/Certified True Copy
11/10/17
सहायक पंजीकार/Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
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