CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH - COURT NO. 2

Service Tax Appeal No. 922 of 2010

(Arising out of Order-in-Original No. 01/2010(ST) dated 09.02.2010 passed by Commissioner of Central Excise, Bangalore I Commissionerate, Bangalore.)

Commissioner of Service Tax, Bangalore

No. 16/1, S.P. Complex,
Lalbagh Road,
Bangalore. **.............Appellant**

VERSUS

Bharat Sanchar Nigam Ltd.

Mobile Services,
Karnataka Telecom Circle,
Halasur,
Bangalore. **...........Respondent**

Appearance:

Mr. Cherian Ponnusse, Advocate for the Appellant.
Mr. Neeraj Kumar, Superintendent (AR) for the Respondent.

Coram:
Hon'ble P.A. Augustian, Member (Judicial)
Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 21588 /2024

Date Of Hearing:18.06.2024

Date Of Decision: 17.12.2024

Per: P.A. Augustian

The issue in the present appeal is whether recovery can be made for the amount, which is utilized wrongly towards payment of service tax, when the Adjudication Authority held that the appellant had availed ineligible CENVAT Credit and directed recovery of the same along with interest.

2. The brief facts are alleging that the appellant M/s. Bharat Sanchar Nigam, during the period from July 2008 to March 2009, had availed ineligible CENVAT Credit, Show Cause Notice was issued on 09.09.2009 for demand of CENVAT Credit of Rs. 4,14,76,279/- along with interest and imposed penalties. There was also a proposal for recovery of Rs. 2,07,38,140/- along with interest, since payment of service tax was made by using the ineligible CENVAT credit. However Adjudication authority confirmed only demand against CENVAT Credit of Rs. 4,14,76,279/- along with interest and imposed penalties. There was no finding regarding recovery of Rs. 2,07,38,140/-. Aggrieved by impugned order the present appeal is filed by the department.

3. When the matter came up for hearing, Ld. Authorised Representative (AR) submits that once there was a proposal for recovery of Rs. 2,07,38,140/- along with interest, Adjudication authority ought to have confirmed this demand also in addition to confirmation of demand of CENVAT Credit of Rs. 4,14,76,279/- along with interest. Learned Counsel for the respondent submits that once demand against wrongly availed CENVAT credit is confirmed, there cannot be another demand for recovery of service tax, which was discharged by utilizing, so called wrongly availed credit, for the reason that by recovery of the wrongly availed credit, whatever service tax paid by utilizing Cenvat credit will hold good. As regards the eligibility of the appellant for availing the CENVAT Credit, the appeal filed by the assessee against the impugned order was upheld by this Tribunal vide

order Final Order No. 20991-92/2018 dated 24.07.2018 to the extent of the demand and set aside the penalty imposed in the appellant. Aggrieved by said order, the respondent herein had filed an Appeal No. CEA. 05/2019 before the Hon'ble High Court of Karnataka and it is still pending and awaiting the outcome of the decision of the Hon'ble Apex court in the identical matters.

4. Learned counsel for the respondent further submits that the issue is squarely covered by the decision of the Tribunal in the matter of **City Central Mall Nasik Pvt., Ltd., in the Appeal No. ST/876/2012** where it is held that;

> "7. *The services which was used after completion of construction of shopping mall were also used ultimately for the renting of shopping mall therefore the same is input service for providing the service of renting of immovable property service. We also observed that the adjudicating authority has not given clear reasoning for denying this particular credit. Accordingly we set aside the demand of Cenvat credit of Rs. 55,01,660/-. As regard demand of service tax amounting to Rs.2,06,07,771/- this demand was confirmed on the ground that the service tax was paid to the extent of this amount by utilising the Cenvat credit, which was held inadmissible. In this regard we are of the view that once demand was of wrongly Cenvat credit is proposed, there cannot be an another demand of recovery of service tax which was discharged by utilizing so called wrongly availed credit for the reason that by recovery of the wrongly availed credit whatever service tax paid by utilizing Cenvat credit will hold good, no further recovery can be made. Therefore the demand of service tax even though paid by utilising the Cenvat credit again confirmed for recovery is not legal and proper. Therefore the demand of service tax amounting to Rs. 2,06,67,771/- is set aside."*

5. Heard both sides and perused the records.

6. We find that in this case the department has demanded Cenvat credit of the ineligible service tax and confirmed the demand along with interest and imposed penalties. We will find the department is in appeal on that portion of the order of the adjudication authority, wherein he has not given any findings with regard to the proposal for recovery of service tax paid utilising the ineligible Cenvat credit. We find that once the demand for the ineligible Cenvat credit is confirmed and confirming the demand of the service tax paid utilising the ineligible Cenvat credit would amount to double recovery of the service tax, hence it is not legally tenable. The issue is also squarely covered by the decision of the Tribunal in the case of M/s. City Central Mall, Nashik Pvt., Ltd., (supra).

7. In view of the above discussion, we find that the appeal is unsustainable and deserves to be set aside.

8. Accordingly the appeal filed by the Revenue is dismissed.

(Order pronounced in open court on 17.12.2024)

(P.A. Augustian)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

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