CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/956/2010-DB & ST/957/2010-DB

[Arising out of (i) Order-in-Original No.01/2010 (ST) dated 09/02/2010 & (ii) Order-in-Original No.02/2010 (ST) dated 10.2.2010 both passed by the Commissioner of Central Excise, Bangalore-I Commissionerate, Bangalore.]

M/s. BHARAT SANCHAR NIGAM LTD
MOBILE SERVICES, 4TH FLOOR,
ANNEX BUILDING,
KARNATAKA TELECOM CIRCLE,
NO.1 S.V. ROAD, HALASUR,
BANGALORE – 560 008.

Appellant(s)

Versus

The Commissioner of Central Excise
BANGALORE-I Commissionerate
POST BOX NO 5400,
CR BUILDINGS,
BANGALORE – 560 001.
KARNATAKA

Respondent(s)

Appearance:

Mr. Cheriyan Punnoose, Advocate
A.K.B. ASSOCIATES
#211, COMMERCE HOUSE, 9/1,
CUNNINGHAM HOUSE,
BANGALORE – 560 052.
KARNATAKA

For the Appellant

Dr. J. Harish, AR

For the Respondent

Date of Hearing: 16/07/2018
Date of Decision: 24/07/2018

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No: 20991 - 20992 / 2018

Per : P. ANJANI KUMAR

M/s. Bharat Sanchar Nigam Limited, Mobile Services, Karnataka Telecom Circle, Bangalore, the appellants, are registered with Service Tax Commissionerate, Bangalore. During the special audit conducted by the internal audit party, it was noticed that during the period 1.11.2007 to 30.6.2008 and 1.7.2008 to 31.3.2008, the appellants have availed erroneous CENVAT credit on goods like angles, channels, beams, falling under Chapter 72 and 73 of Central Excise Tariff Act and prefabricated buildings/shelters/PUF panels falling under Chapter Heading 9406. Two show-cause notices dated 20.4.2009 and 9.9.2009 demanding duty of Rs.20,53,318/- and Rs.4,14,76,279/- were issued to the appellants. Both the show-cause notices were confirmed vide Order-in-Original No.2/2010-ST dated 10.2.2010 and Order-in-Original No.1/2010-ST dated 9.9.2010. The Commissioner of Service Tax, Bangalore has observed that the definition of word 'inputs' contains two parts, one in respect of goods used in manufacture of finished goods and the other part is in respect of the goods used for providing output services; the first part of the definition, which is in respect of materials used in the manufacture of finished goods includes the goods which are indirectly used in or in relation to the manufacture of finished goods apart from the goods which are directly used in the manufacture of finished goods. The words and expression 'in or in relation to' or 'directly or indirectly' gave an enlarged scope to the definition of the word 'inputs' in the first part of the definition, which is applicable only to the manufacturing activity. Whereas, as per the second part of the definition, which is application for service provider, the 'inputs' means all goods used for providing output services. Here in the second part of the definition, the words and expressions 'in or in relation to' or 'directly or indirectly' are not present. In the absence of such expression, one cannot give an enlarged connotation to the second part of the definition and one has to construe that the only goods which are used directly for providing output service are 'inputs'. The legislative intent that can be gathered from the two sets of wordings in the said two parts of the definition is clear and unambiguous and its intention is not to include the materials used indirectly for providing output service within the ambit of the definition of 'inputs'. He has relied upon the decision in the case of ***Commissioner of Income Tax vs. Tara Agencies: 2007 (214) ELT 491 (SC)***. The Commissioner while confirming the duty has also imposed penalty of Rs.25 lakhs and Rs.1 lakh on the appellants. Aggrieved by the order, the appellants are in appeal before this Bench.

2. The learned counsel for the appellant has submitted that the Commissioner has given a clear finding at para 15 of the Order-in-Original No.1/2010 that "the materials in questions viz., angles, channels, beams, etc., are actually used by the assessee's contractors for erecting the telecommunication towers and the towers so erected are used for providing telecommunication services. Therefore, I find that the materials procured are not directly used for providing the output service though the same are used indirectly for providing the service". The learned counsel for the appellants has stressed on the point that the Commissioner has given a finding to the effect that the inputs are indirectly used and submitted that the facts of the case are different from the ones where such credit has been held ineligible for the telecom operators.

2.1 On the issue of levy of penalty, the learned counsel has submitted that as per the ratio of the following cases, penalty cannot be imposed on the appellants as this is an issue pertaining to interpretation of words in the statute. The Tribunal in such cases has also set aside the penalty in case of demands within the period of limitation.

- *Vodafone Essar South Ltd. vs. Commissioner of Service Tax: 2018 (4) TMI 226 – CESTAT Bangalore.*
- *M/s. Bharat Sanchar Nigam Ltd. vs. CCE: 2017 (2) TMI 439 – CESTAT Hyderabad*
- *M/s. Bharat Sanchar Nigam Ltd. vs. CST, Chennai: 2018 (4) TMI 1108 – CESTAT Chennai*
- *M/s. Fascel Ltd. & Others vs. CST, Ahmedabad: 2017 (1) TMI 1283 – CESTAT Ahmedabad*

3. The learned departmental representative has drawn the attention of this Bench to the decision of Bombay High Court reported in ***2015 (40) STR 422*** in the case of ***Vodafone India Ltd.*** wherein it was held that telecommunication towers, parts thereof, shelters, prefabricated buildings purchased by the appellants for providing telecommunication services are not entitled for input tax credit. The learned AR has also submitted that similar was the decision in the case of ***Bharati Airtel Ltd.: 2014 (35) STR 865 (Bom.)***. Therefore, there is no force in the arguments of the counsel for the appellants. Regarding the imposition of penalty also, he has submitted that instant cases

are involving only normal period and therefore, the arguments of the appellants are not valid and penalty was correctly imposed.

4. Heard both sides and perused the records. We find that to appreciate the issue as to whether the appellant would be entitled for availing CENVAT credit in respect of excise duty paid on purchase of towers and parts thereof, prefabricated buildings, reference to Central Excise Credit Rules would be necessary.

> "Rule 2(a)(A) of the Credit Rules defines 'capital goods' as under :-
>
> "2. In these rules, unless the context otherwise requires, -
>
> (a) "capital goods" means :-
>
> (A) the following goods, namely :-
>
> *(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, (heading 6805, grinding wheels and the like, and parts thereof falling under heading 6804) of the First Schedule to the Excise Tariff Act;*
> (ii) Pollution control equipment;
> *(iii) components, spares and accessories of the goods specified at (i) and (ii);*
> (iv) moulds and dies, jigs and fixtures;
> (v) refractories and refractory materials;
> (vi) tubes and pipes and fittings thereof; and
> (vii) storage tank,
>
> *used –*
>
> *(1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or*
>
> *(2) for providing output service."*
>
> (emphasis supplied)
>
> Rule 2(k) defines "*input*" as under :-
>
> *"2(k) "input" means –*
>
> (i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to

the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production;

(ii) all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any out service.

Explanation 1 - The light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

Explanation 2 - Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacture;"

Rule 3 provides for credit on excise duty paid in discharging liability towards service tax payable by the manufacturer. Rule 3 of Cenvat Credit Rules provides as under :-

Rule 3. Cenvat credit. - *(1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the Cenvat credit) of –*

(i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act;
(ii) the duty of excise specified in the Second Schedule to the Excise Tariff Act, leviable under the Excise Act;
(iii) the additional duty of excise leviable under Section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978);
(iv) the additional duty of excise leviable under Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);
(v) the National Calamity Contingent duty leviable under Section 136 of the Finance Act, 2001 (14 of 2001);
(vi) the Education Cess on excisable goods leviable under Section 91 read with Section 93 of the Finance (No. 2) Act, 2004 (23 of 2004);
(via) the Secondary and Higher Education Cess on excisable goods leviable under Section 136 read with Section 138 of the Finance Act, 2007 (22 of 2007);
(vii) the additional duty leviable under Section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v), (vi) and (via);
(viia) the additional duty leviable under sub-section (5) of Section 3 of the Customs Tariff Act :

Provided that a provider of taxable service shall not be eligible to take credit of such additional duty;

(viii) the additional duty of excise leviable under Section 157 of the Finance Act, 2003 (32 of 2003);

(ix) the service tax leviable under Section 66 of the Finance Act;

...........”

4.1 As observed by the High Court of Bombay, the following position emerges vis-à-vis the capital goods and inputs.

“(i) *Capital goods*

Only those goods qualify for Cenvat credit as capital goods which are covered under Chapters 82, 84, 85, 90, 68.02 and those under Heading 6805 of the First Schedule to the Central Excise Tariff Act, pollution control equipment or those which are components, spares and accessories of these goods and *used* in the factory of the manufacturer of the final products or *for providing output service*, but does not include any equipment or appliance used in an office,

(ii) *Inputs*

All goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, *used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not* and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or *in relation to manufacture of final products or for any other purpose, within the factory of production; and all goods*, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, *used for providing any out service. Explanation 2* to the definition of inputs is relevant which includes *goods used in the manufacture of capital goods which are further used in the factory of the manufacture.”*

4.2 We find that the learned Commissioner has analyzed the issue correctly and has made a clear distinction between inputs eligible for manufacture and inputs eligible for taxable output service. We find that the issue is squarely covered by the decisions of ***Vodafone India Ltd.*** (supra) and ***Bharati Airtel Ltd.*** (supra). Therefore, following the ratio of the above judgments, we find that the legal position on this matter is clear and well settled. There is no ambiguity in the use of words in the Rules. There is a clear-cut distinction between the inputs used and eligible for credit for a manufacturer vis-à-vis inputs used and eligible for a specific provider. Therefore, we are of the opinion that the learned Commissioner order is legal and proper and as such needs no intervention.

4.3 However, considering the fact that the appellants are government undertaking and the issue in the present appeals is in the nature of interpretation of eligibility of CENVAT credit or otherwise, imposition of penalty is unwarranted and accordingly set aside. Moreover, one can take recourse to Section 80 of the Finance Act, 1994 by setting aside the penalties. We follow the decisions of the Tribunal in the following cases:

- *Vodafone Essar South Ltd. vs. Commissioner of Service Tax: 2018 (4) TMI 226 – CESTAT Bangalore.*
- *M/s. Bharat Sanchar Nigam Ltd. vs. CCE: 2017 (2) TMI 439 – CESTAT Hyderabad*
- *M/s. Bharat Sanchar Nigam Ltd. vs. CST, Chennai: 2018 (4) TMI 1108 – CESTAT Chennai*

- *M/s. Fascel Ltd. & Others vs. CST, Ahmedabad: 2017 (1) TMI 1283 – CESTAT Ahmedabad*

5. In view of the above, we dismiss the appeals while setting aside the penalties.

(Order was pronounced in Open Court on **24/07/2018**.)

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

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