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

Appeal(s) Involved:

ST/532/2009-DB

[Arising out of Order-in-Original No. 1/2009 dated 09/02/2009 (Corrigendum to OIO No. 1/2009) dated 11.03.2009 passed by Commissioner of Central Excise, Customs and Service Tax, Thiruvananthapuram]

M/s Bharat Sanchar Nigam Limited.,
Kollam
Ssa,bsnlBhavan,vellayittambalam,thirumullavaram
Po Kollam Kerala-691012

Appellant(s)

Versus

C.C.,C.E.& S.T-Trivandrum
T.C.NO.26/334(1&2),
I.C.E BHAVAN,PRESS CLUB ROAD,
TRIVANDRUM
KERALA
695001

Respondent(s)

Appearance:

Mr. Raghavendra, Advocate
NO.543, 12TH CROSS, 8TH MAIN, J.P.NAGAR
2ND PHASE, BANGALORE 560 078

For the Appellant

Mr. Rama Holla, Superintendent (AR)

For the Respondent

Date of Hearing: 22/08/2019

Date of Decision: 15/10/2019

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

HON'BLE SHRI P. V. SUBBA RAO, TECHNICAL MEMBER

Final Order No.20865/2019

Per : P. V. SUBBA RAO

This appeal is filed against the Order-in-Original No. 01/2009 dated 06.02.2009. The appellant, M/s BSNL, hold Service Tax Registration and provide Telephones/Telex/Telegraph etc. services. A SCN dated 17.04.2006 was issued to them alleging that they are also providing and collecting charges on non-taxable services including rental from junction links, inter-connection link charges, port charges, infrastructure charges etc., and have not given any intimation regarding maintenance of separate accounts for input services for the taxable and exempted services. As per Rule 6(3)(c) of CCR, 2004 the provider of output service providing both taxable and exempted services who has opted not to maintain separate accounts of receipt, consumption and inventory of input and input service meant for use in providing output service shall utilize CENVAT credit to the extent of an amount not exceeding twenty per cent of the amount of Service Tax payable on the taxable output service. It is alleged that during the period March 2005 and September 2005, the appellants have utilized CENVAT credit in excess of its twenty per cent limit. Therefore, the SCN proposed to recover the excess CENVAT credit so utilized amounting to Rs.86,79,806/- from the appellant along with interest under proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14 of CCR, 2004. It also proposed to demand interest on the aforesaid amount and impose penalties under Section 77 & 78 of the Finance Act, 1994. The Ld. Adjudicating authority confirmed the demand along with interest as above by his Order-in-Original No. 04/2006/ST dated 16.11.2006 and also imposed penalties. Aggrieved, the appellant appealed to the CESTAT who, vide Final Order No. 1023/08 dated 22.08.2008, remanded the matter back to the original authority for a *de novo* decision. By the impugned order, the Ld. Adjudicating authority again confirmed the demand of excess CENVAT credit as proposed in the SCN along with interest under Section 75 and imposed penalty under Section 77 of the Finance Act, 1994. Hence, this appeal.

2. Heard both sides and perused the records.

3. Learned Counsel for the appellant submits that the demand has been made under Rule 6(3)(c) of CCR, 2004 on the ground that they had utilized the CENVAT credit in excess of twenty per cent. He would urge that a plain reading of Rule 6(3) shows that the appellant is required to maintain separate records in respect of inputs/input services used by them in providing exempted as well as taxable services. This Rule does not, in any way, indicate that they have to maintain separate records for capital goods used in providing exempted and taxable services. Therefore, the limit laid down in Rule 6 (3) (c) of twenty per cent of CENVAT credit towards payment of Service Tax applies only to the CENVAT credit availed on the inputs/input services. He agrees that they have not maintained separate records of inputs/input services used in providing exempted and taxable services therefore the limitation under Rule 6(3)(c) applies to them. They have not utilized CENVAT credit of input or input services in excess of twenty per cent of the Service Tax paid during the relevant period. However, in the SCN, the Department has erroneously taken CENVAT credit on the capital goods also while calculating the aforesaid twenty per cent. If this component is removed, they are well within the twenty per cent limit and therefore the entire demand has to fail on this account. He would rely on the CBEC Circular No.137/203/207-CX-4 dated 01.10.2007 which clarifies as follows:

"2. The matter has been examined. The basic purpose of identifying 17 specified services for special dispensation is that these services are used in relation to the entire activities of the service provider and cannot be co-related or apportioned with any individual service (whether taxable or exempted) provided by such service provider. For example service tax paid on construction of an office of a service provider (who provides more than one service) cannot be linked with any particular service provided by him as it may be using it for various purposes and for all services provided by him. ***Thus, these services are similar in nature to capital goods which is a part of fixed assets/cost that cannot be apportioned for maintaining separate records. It is for this reason that there is no restriction in taking and utilization of credit on these services, so far as they are used for providing some taxable services. If the restriction of 20% is applied to these services also, this basic purpose would be defeated. As regards, 'taking' of credit is concerned, that is anyway available to all input services and there would not have been any reason to select these 17 services for placing them under sub-rule (5)*** *they have been placed in a separate sub-rule [i.e. sub-rule (5)] because in respect of utilization of credit of tax paid on these services, the restriction of 20% does not*

apply, while the restriction applies in all other cases. In conclusion the credit taken in respect of the services can be utilized for payment of service tax without any limit."

4. He would submit that it is very clear from the aforesaid Circular of CBEC that the limit of twenty per cent applies only to the CENVAT credit availed on inputs and input services and not to the capital goods credit. He further relies on the case laws of ***Idea Cellular Ltd. Vs Commissioner of Central Excise, Rohtak [2009 (16) STR 712 (Tri. Del.)]***in which the Principle Bench of the Tribunal has held that the capital goods credit is not covered by Rule 6(3)(c). Further, in the case of ***BSNL Vs Commissioner of Central Excise, Lucknow [2019 (5) TMI 512-CESTAT ALLAHABAD]*** identical decision was given. He would submit that in view of the above, the case is covered clearly in their favour and the appeal needs to be allowed and the impugned order set aside.

5. On his specific query from the Bench as to how much of the credit taken pertains to capital goods and what percentage of it pertains to input/input services, Ld. Counsel fairly submits that he does not have the details with him.

6. Learned Departmental Representative reiterates the findings of the impugned order and submits that the Learned Commissioner examined this matter in Para 10 & 11 of the impugned order which are reproduced below:

"10. The notwithstanding clause is available only in CENVAT Credit Rules, 2004. That is, the same is incorporated only after the introduction of cross credit between Excise Duty and Service Tax. Considering the absence of any restriction of utilization of credit in CENVAT Credit Rules, 2002 and separate account need be maintained only in respect of inputs or input services, whether it can be presumed that the word 'credit' appears in Rule 6(3)(c) of CENVAT Credit Rules, 2004 relates only to input credit and input service credit and not capital goods credit. It appears to be a presumption and in delegated legislation too, a presumption cannot be considered as an aid, or a tool for interpretation.

11. When the non obstante clause of 'Not withstanding anything contained in… was introduced and credit allowed for inputs, capital goods and input services, for discharging Service Tax liability as stipulated under Rule 6(3)(c), it appears, the meaning of credit need not be read as it appears in Rule 6(2). It need not be *restricted to the credit of inputs or input services. Further, in the absence of any specific exclusion to any specific credit, it appears to be proper and just to understand the meaning of CENVAT credit as inclusive of all credits. Thus, excluding any specific credit, credit of capital goods, is unintended by Rule and hence the restriction imposed by Rule 6(3)(c) on credit utilization by output service provider to the extent of 20% is applicable to the total sum of all credits and cannot exclude any specific credit."*

7. We have considered the arguments of both sides and perused the records. It is not in dispute that the appellant has provided both taxable and exempted services and has availed CENVAT credit. The SCN alleges that they have not maintained separate accounts of inputs/input services for exempted and taxable services and hence should not have utilized CENVAT credit in excess of twenty per cent of the Service Tax payable what they did. Ld. Counsel agrees that they have not maintained separate records but asserts that the twenty per cent limit under Rule 6(3)(c) pertains only to the CENVAT credit on inputs/input services and not CENVAT credit on capital goods. The SCN has wrongly demand the total amount of CENVAT credit including that on the capital goods. The relevant portion of Rule 6(3)(c) is reproduced below:

"Rule 6 (3)

(c) the provider of output service shall utilize credit only to extent of an amount not exceeding twenty per cent of the amount of service tax payable on taxable output service.

Explanation I. - The amount mentioned in conditions (a) and (b) shall be paid by the manufacturer or provider of output service by debiting the CENVAT credit or otherwise.

Explanation II. – If the manufacturer or provider of output service fails to pay the said amount, it shall be recovered along with interest in the same manner, as provided in Rule 14, for recovery of CENVAT credit wrongly taken.

It is the view of the Learned Commissioner that in the absence of any specific restriction, Rule 6(3) (c) applies to the entire CENVAT credit and not just to the CENVAT credit on inputs/input services.

8. We find that this issue is no longer *res integra* and it has been decided by the Principal Bench of the Tribunal in the case of Idea Cellular Ltd. (supra) and by the

Allahabad Bench of the Tribunal in the case of BSNL (supra) that the twenty per cent restriction in Rule 6(3) (c) applies only to the credit on inputs/input services and not to the credit on capital goods.

9. However, in the absence of specific details, we are unable to determine whether the appellant has exceeded the limit of twenty per cent of inputs/input services credit or not. Hence, we find that this is a fit case to be remanded to the original authority for the limited purpose of examining whether the appellant has exceeded the limit of twenty per cent of the inputs/input service credit from the relevant period. If so, the demand gets sustained to that extent and not beyond it. Considering the facts and circumstances of this case, we find this is a fit case to invoke Section 80 and set aside the penalties even if any portion of the demand sustains after re-calculation. The appeal is therefore disposed of as below the demand to the extent, if any,

(i) If the appellant has utilized CENVAT credit on inputs/inputs services in excess of twenty per cent of the Service Tax payable, the demand to that extent is sustained and the rest is set aside.

(ii) Interest is payable on the amount of demand, if any, as above.

(iii) All penalties are set aside invoking Section 80 of the Finance Act.

(Order was pronounced in Open Court on **15/10/2019**)

(S.S GARG)
JUDICIAL MEMBER

(P. V. SUBBA RAO)
TECHNICAL MEMBER

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