

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI**

Appeal No.: ST/00451/2010

(Arising out of Order-in-Original No. 003/2010-ST dated 31.03.2010 passed by Commissioner of Customs, Central Excise and Service Tax, Coimbatore)

M/s. Vodafone Essar Cellular Ltd. : Appellant

Vs.

Commissioner of G.S.T. & Central Excise, : Respondent
Chennai South Commissionerate

Appearance:-

Shri. Raghavan Ramabadran, Advocate
for the Appellant

Smt. P. Hemavathi, Commissioner (AR) &
Shri. K. Veerabhadra Reddy, ADC (AR)
for the Respondent

CORAM:

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing/Decision: 03.09.2018

Final Order No. 42376 / 2018

Per Bench,

The appellants are engaged in providing telecommunication services and are holding Service Tax Registration. They hold Centralized Service Tax Registration for the State of Tamil Nadu other than Chennai. On scrutiny of records, it was noticed that the appellants had availed ineligible credit on inputs and input services.

Show Cause Notice dated 21.10.2008 was issued for the period 10.09.2004 to 31.03.2008. After due process of law, the Original Authority confirmed the demand along with interest and imposed penalties. Aggrieved, the appellants are now before this Tribunal.

2.1 On behalf of the appellant, the Ld. Counsel Shri. Raghavan Ramabadran appeared and argued the matter. He furnished the details of the issues under consideration along with the demand and penalties as shown in the table below :

Sl. No.	Particulars	Amount of credit involved (INR)	Penalty
1.	Credit on Towers and Shelter Materials	11,17,77,543/-	11,17,77,543/-
2.	Credit availed on sale of SIM cards	15,04,201/-	15,04,201/-
3.	Credit on input services pertaining to tower/shelter	9,12,30,660/-	10,19,65,784/-
	Credit on input services pertaining to activities relating to business	1,07,35,123/-	
4.	Credit availed on input services denied due to insufficient information	58,60,300/-	58,60,300/-
TOTAL		22,11,07,828/-	22,11,07,828/-

2.2.1 The Ld. Counsel submitted that in respect of **Sl. No. 1** in the above table which pertains to credit availed on Towers and Shelter Materials, presently the issue is decided in favour of the Revenue by the decision of the Larger Bench in *Tower Vision India Pvt. Ltd. Vs. C.C.E. (Adj.), Delhi – 2016 (42) S.T.R. 249 (Tri. – LB)* which was

approved by the decision of the Hon'ble Bombay High Court in *Bharti Airtel Ltd. Vs. Commissioner of Central Excise, Pune-III – 2014 (35) S.T.R. 865 (Bom.)*. He submitted that appeals are pending before higher courts.

2.2.2 With regard to this issue, the Ld. Counsel however argued on the ground of limitation and submitted that the period from April, 2007 to March, 2008 would fall within the normal period and the demand prior to April, 2007 is hit by limitation. The appellants were under *bona fide* belief that credit is eligible and hence availed the same. The issue was contentious and had travelled up to the Larger Bench and being an interpretational issue, the invocation of extended period or the imposition of penalties cannot sustain.

2.2.3 That on similar grounds, this Tribunal vide *Final Order No. 40194-40207/2018 dated 22.01.2018* and in the appellant's own case reported in *2018-VIL-193-CESTAT-CHE-ST* had set aside the demand for the extended period as well as the penalties for the normal period.

2.3.1 In regard to the demand raised in Sl. No. 2 for the credit availed on sale of SIM Cards, he submitted that the Department

alleges that the appellant has sold the SIM Cards and therefore, the credit availed on the SIM Cards has to be reversed.

2.3.2 He relied upon the decision of the Hon'ble Apex Court *in Idea Mobile Communication Ltd. Vs. C.C.E. & Cus., Cochin – 2011 (23) S.T.R. 433 (S.C.)* and argued that in the said decision, the Hon'ble Apex Court had held that in such transactions there is no sale of SIM Cards and that the value of the SIM Cards form part of activation charges and the dominant transaction being service, would be liable to service tax. He also adverted to the appellant's own case before the appellate authority in VAT proceedings wherein it was held that there is no sale involved for supply of SIM Cards and that there cannot be any levy of Sales Tax. He thus argued that when there is no sale of SIM Cards involved, the Department cannot require the appellant to reverse the credit or demand the credit availed on SIM Cards.

2.4 The third and fourth issues in the above table pertain to input services availed by the appellant for providing the output services.

2.5.1 The Ld. Counsel has given details with regard to various input services (in Sl. No. 3.) which are in dispute in the present appeal.

The same is shown in the table below along with submissions put forward by the appellant counsel.

Sl. No.	Input service on which credit is currently disputed	Precedent in favour of credit eligibility
1.	Erection, construction and installation of Towers and Shelters: Services such as Civil construction, Electrical work, Labour & Misc. Charges, Erection & Installation, Erection & Painting, etc. [A to C of Annexure-1]	The said services have been held to be eligible by this very Hon'ble Tribunal in assessee's own case vide <i>Final Order No. 40194-40207/2018 dt. 22.01.2018</i>
2.	Collection charges [D] of Annexure-1	(i) <i>Nav Bharat Tubes Ltd. Vs. C.C.E., Jaipur</i> [2010 (18) S.T.R. 470 (Tri. – Del.)] (ii) <i>Bajaj Finance Ltd. Vs. C.C.E., Pune-I</i> [2018 (10) G.S.T.L. 251 (Tri. – Mum.)]
[E] of Annexure-1		
3.	Boarding & Lodging of company officials	(i) <i>Maruti Suzuki India Ltd. Vs. C.C.E., Delhi</i> [2017 (47) S.T.R. 273 (Tri. – Chan.)] (ii) <i>HPCL Vs. C.C.E., Visakhapatnam</i> [2017 (47) S.T.R. 136 (Tri. – Hyd.)]
4.	Corporate Consultancy	(i) <i>Navaratna S.G. Highway Prop. Pvt. Ltd. Vs. Commr. of S.T., Ahmedabad</i> [2012 (28) S.T.R. 166 (Tri. – Ahmd.)] (ii) <i>Apotex Pharmachem India Pvt. Ltd. Vs. C.C.E., Cus. & S.T., Bangalore-I</i> [2017 (50) S.T.R. 26 (Tri. – Bang.)]
5.	Pandal Shamiana Service	(i) <i>DBOI Global Services Pvt. Ltd. Vs. C.S.T. Mumbai</i> [2017 (48) S.T.R. 157 (Tri. – Mum.)]
6.	Market Study for Maharashtra circle	(i) <i>Adani Port and Special Economic Zone Ltd.</i> [2016 (42) S.T.R. 1010 (Tri. – Ahmd.)] (ii) <i>Includes clause of the definition</i>
7.	Cargo Handling – Shifting of Office Records	(i) <i>John Deere India Pvt. Ltd. Vs. C.C.E.</i> [2016 (41) S.T.R. 990 (Tri. – Mum.)]
8.	Bank Commission Charges paid by executive	(i) <i>C.C.E., Surat Vs. Vishal Malleables</i> [2013 (287) E.L.T. 234 (Tri. – Ahmd.)]
9.	Cleaning services	(i) <i>C.C.E. Vs. Rane TRW Steering Systems Ltd.</i> [2015 (39) S.T.R. 13 (Mad.)]

10.	Commission paid for purchase of land & other liaison work	Covered under 'Means' clause of definition – Land is used to set up antenna for providing telecommunication infrastructure
11.	Credit Card payment	Specified in 'Includes' clause of definition of Input Services as 'financing' when used in relation to business.
12.	For goods removed outside the premises (transportation of goods to cell site)	(i) Covered under 'means' clause as without the equipments, output service cannot be provided.
13.	Garden-maintenance & supply of pot plants	(i) <i>C.C.E. & S.T., LTU Vs. Rane TRW Steering Systems Ltd. [2015 (39) S.T.R. 13 (Mad.)]</i>
14.	Installation of router	Covered under 'Means' clause of definition – Router is integral and necessary to channel signals for effective rendition of telecommunication services.
15.	Insurance	(i) <i>C.C.E. Vs. Nash Industries [2016 (45) S.T.R. 233 (Tri. – Bang.)]</i>
16.	Land survey	Covered under 'Means' clause of definition – Land is used to set up antenna for providing telecommunication infrastructure, services of surveyors are solicited to survey and analyse the available lands.
17.	Loan for corporate	Specified in 'Includes' clause of definition of Input Services as 'financing' when used in relation to business.
18.	Outdoor catering	(i) <i>C.C.E., Udaipur vs. Manglam Cement [2018 (9) G.S.T.L. 17 (Raj.)]</i> (ii) <i>Assessee's own case in Final Order No. 40194-40207/2018 dt. 22.01.2018</i>
19.	Rent paid on cell sites leased	Covered under 'Means' clause of definition –Premises used to provide output services
20.	Rent paid on other leased premises used for providing output service	Renting of immovable property credit
21.	Soil investigation for cell site	Covered under 'Means' clause of definition – Soil Investigation is necessary for installing and erecting stable cell sites.
22.	Subscription paid to club	(i) <i>C.C.E., Udaipur Vs. Manglam Cement [2018 (9) G.S.T.L. 7 (Raj.)]</i>

23.	Commission paid to dealers in lieu of subsidy given for handsets	(i) Activity relating to business
24.	Warehousing services	Specified in 'Includes' clause of definition of Input Services: Storage up to place of removal
25.	Laying of optical fibre	Covered in means clause

2.5.2 He argued that the period involved is prior to 01.04.2011 when the definition of input service had a wide ambit as it included the words “activities relating to business”. Therefore, all the above services are eligible for credit.

2.6.1 With regard to the issue in **Sl. No. 4**, the Ld. Counsel had given the breakup of the credit denied on this count to the tune of Rs. 58,60,300/- which is shown in the table below :

Description	No. of Records	Credit Denied (INR)
Documents not produced	43	7,27,848/-
Payment Details not provided	338	14,70,513/-
Inadequate Details	29	36,60,394/-
Ineligible services (Pandal Shamiana Service)	2	1,545/-
TOTAL	412	58,60,300/-

2.6.2 He submitted that the credit for defect in the invoices cannot be denied as these are only procedural lapses.

3.1 The Ld. AR Shri. K. Veerabhadra Reddy supported the findings in the impugned Order.

3.2 He submitted that the issue whether credit can be availed on towers and shelter materials has been laid to rest by the decision of the Hon'ble High Court of Bombay in the case of *Bharti Airtel Ltd.* (*supra*) wherein it has been held that the credit is not eligible. He adverted to para 32.0 of the impugned Order and argued that the appellants are guilty of suppression of facts as they have availed credit on the materials used to erect towers which are embedded to earth and therefore, the invocation of extended period is correct and proper.

3.3 With regard to the issue of credit availed on SIM Cards, the Ld. AR submitted that since the SIM Cards have been sold, the appellants have to reverse the credit and therefore, the demand on this count is also correct and proper.

3.4 With regard to the issue of credit availed on various input services, he submitted that these input services do not have any nexus with the output service provided by them and therefore, do not qualify as input services. He adverted to Sl. No. 22 of the table of input services and submitted that the said service pertains to membership fee paid to club and therefore, cannot be allowed.

3.5 It is strongly argued by the Ld. AR that Rs. 58,60,300/- availed by the appellant has been rightly denied for the reason that appellant has not produced documents to support the credit availed. The necessary details were not provided with regard to the various services and therefore, the credit has been denied.

4. Heard both sides.

5.1 The first issue that arises for consideration is with regard to the credit availed on **Tower and Shelter Materials** under the category of inputs. The said issue stands decided by various cases including the decision of the High Court of Bombay in the case of *Bharti Airtel Ltd.(supra)*. This Tribunal in the appellant's own case vide *Final Order dated 22.01.2018* has followed the decision of *Bharti Airtel Ltd. (supra)* as well as the Larger Bench decision in *Tower Vision India Pvt. Ltd. (supra)* and held that the appellants are not eligible for such credit. However, the Tribunal, taking note of the facts of the case, had set aside the demand for the extended period as well as the penalties for the normal period. For this, the Tribunal had relied upon the decision in *Vodafone Mobile Services Ltd. reported in 2017-TIOL-1904-CESTAT-HYDERABAD*.

5.2 In the present case, in para 32.0, the Commissioner has discussed the issue of limitation. It is seen that the appellants have filed their ST-3 returns regularly and have disclosed the credit availed on Tower and Shelter Materials. The allegation is that they have filed the ST-3 returns in a routine manner without specifically stating that the inputs such as Tower And Shelter Materials were erected and embedded to earth to form immovable property. We find no logic in such an allegation.

5.3 It is also stated that the appellants vide their letter dated 14.08.2006 and 03.10.2006 addressed to the Superintendent of Central Excise had intimated their activities regarding tower and pre-fabricated buildings. Thus, the appellants had disclosed all the details as required by the Department as and when called for, apart from disclosing the credit availed in their ST-3 returns. It is also seen that they were under the *bona fide* belief that they are entitled to avail the credit of duty paid on tower and pre-fabricated building materials used for providing output service of telecommunication services.

5.4 Taking all these factors into consideration and taking note of the discussions in para 32.0 to 35.0 of the impugned Order, we are of

the considered opinion that there is no iota of evidence to establish that the appellant is guilty of suppression of facts with intent to evade service tax.

5.5 Thus, following the Final Order cited *supra*, we are of the opinion that the extended period cannot be invoked and the penalties imposed are unjustified.

6. The next issue is with regard to the credit availed on **SIM Cards**. The allegation of the Department is that since the appellants have sold the SIM Cards, the credit availed on such SIM Cards has to be reversed by them. The Hon'ble Apex Court in the case of *Idea Mobile Communication Ltd. (supra)* has held that the value of the SIM Card provided to distributors/franchisees for further sale to customers is includible in the taxable value of services. In the appellant's own case, the demand for levy of VAT on the sale of SIM Cards was dropped by the Deputy Commissioner of Commercial Taxes by holding that the sale of SIM Cards is not goods sold or intended to be sold to the customer. For these reasons, we find that the credit availed by the appellants on SIM Cards is eligible and the demand for reversal cannot sustain.

7.1 The third issue that arises for consideration is the credit availed on various input services. The appellant has given the details of the various input services in the table as shown above. The services of erection, construction and installation of towers and shelters was availed by the appellant for providing output service of telecommunication. These services have direct nexus with the output service and therefore, is eligible for credit. The Tribunal in the appellant's own case vide *Final Order dated 22.01.2018* has allowed the credit. For this reason, we hold that the credit on this service is eligible. The appellant has availed credit on collection charges which are nothing but charges paid to Bill Collection Agencies. In the case of *Bajaj Finance Ltd. Vs. C.C.E., Pune-I – 2018 (10) G.S.T.L. 251 (Tri. – Mum.)* it was held that assessee is entitled to CENVAT Credit on input services which were used for repossession of vehicle by recovery agent. Here, the appellants have used the facility of Bill Collectors/Agents for recovery of the bills from customers. Thus, the said credit availed on such collection charges, in our view, is eligible. The various other services as shown in the table, *except* that shown in Sl. No. 22, have been held to be eligible for credit in various decisions as cited in the table.

7.2 It is also to be noted that the definition of input services during the period prior to 01.04.2011 had a wide ambit as it included the words “activities relating to business”. Thus, all the services in the said table from Sl. No. 1 to 25 (except Sl. No. 22) are held to be eligible by us.

7.3 In Sl. No. 22, the appellant has availed credit on the subscription paid to club. It is not established by the appellant as to why or how such services are related to the output services provided by them. Therefore, in our view, the credit availed on subscription paid to club does not qualify as input service and therefore, the disallowance of credit on such service is upheld.

8.1 The appellant has argued that the credit of Rs. 58,60,300/- has been disallowed for the reason that the appellants have not produced necessary documents and that the documents do not contain necessary details. He has argued that this was only a procedural infraction and is to be contained. We cannot find any merit in the contention raised by the appellant without producing documents on which credit has been availed, and without furnishing necessary details of such documents so as to establish the

credit availed, the appellant cannot contend that the credit is eligible.

8.2 For these reasons, we hold that the authorities below have rightly disallowed the credit to the tune of Rs. 58,60,300/- . However, the demand in respect of this amount which pertains to the extended period will require to be set aside as discussed above. Thus, only that part of the credit which pertains to the normal period would sustain.

9. From the above discussions, we hold that :

- The credit availed by the appellant on issue No. 1 is sustained on merits and the demand for the extended period is set aside along with the penalties for the normal period.
- On issue No. 2, the demand is set aside.
- On issue No. 3, the demand on all input services except in respect of subscription paid to club (Sl. No. 22) is set aside. The demand in Sl. No. 22 falling within normal period is upheld along with interest and penalties.
- On issue No. 4, the entire demand is upheld along with interest and penalties except for the amount falling within the extended period. The impugned Order is modified in the

above terms and we consider that the matter is remanded to the adjudicating authority for the limited purpose of quantifying the demand for the normal period as discussed above.

10. Thus, the appeal is partly allowed in above terms with consequential benefits, if any.

(Operative part of the order was pronounced in open Court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

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