

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH - COURT No. III

Service Tax Appeal No. 41188 of 2017

(Arising out of Order-in-Original No.CHN-SVTAX-003-COM-60-2016-17 dated 22.2.2017 passed by Commissioner of Service Tax, Service Tax-III Commissionerate, 2054, 1, II Avenue, Anna Nagar, Chennai 600 040)

M/s.Vodafone Mobile Services Limited

.... Appellant

(now changed as **Vodafone Idea Ltd.**)

9th Floor, TVH Beliciaa Tower-I,
Block-94, M.R.C. Nagar,
Raja Annamalaipuram,
Chennai 600 028.

VERSUS

The Commissioner of CGST & Central Excise

... Respondent

Chennai South Commissionerate
MHU Complex, No.692, Anna Salai,
Nandanam,
Chennai 600 034.

APPEARANCE :

Shri Raghavan Ramabadran, Advocate, for the Appellant

Shri P. Ayyam Perumal, Special Counsel for the Respondent
Shri M. Ambe, Authorized Representative for the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI.C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER No.40853/2024

DATE OF HEARING : 02.05.2024 & 21.06.2024

DATE OF DECISION : 12.07.2024

Per: Ms. Sulekha Beevi. C.S

Brief facts are that the appellant viz. M/s.Vodafone South Ltd. (hereinafter referred to as VSL) is engaged in providing Telecommunication services, Business Support Service, and are also making payment of service tax under reverse charge mechanism for Intellectual property services other than copy right and Transport of Goods by road. The appellant M/s.VSL is operating in six circles for which the service tax registrations are obtained separately for each circle. Although M/s.VSL has one PAN number for income tax purposes, Service Tax is discharged by the respective circles based on the services provided respectively by each of them.

2. The appellant is providing telecommunication services for Chennai Region alone. A Special Audit of the accounts of the appellant was conducted for the period from April 2010 to March 2015 as stipulated under Section 14AA of the Central Excise Act, 1944 as made applicable to Service Tax in terms of Section 83 of the Finance Act, 1944 read with Section 72A of the Finance Act, 1944.

3. During the course of verification of documents by the audit team it appeared that there was short payment of service tax as well as wrongful availment of cenvat credit. The issues noted by the audit team are as follows :

- Non-payment of Service Tax on the consideration received for out-roamer from other entities.
- Non-reversal of Cenvat credit on Business Support Services reimbursed.
- Irregular availment of Cenvat credit on Capital goods;
- Irregular availment of input service credit on collection charges.
- Non reversal of Cenvat on capital goods destroyed by fire.
- Non-payment of service tax on out roaming services between VSL-VSL circle.
- Irregular cenvat credit availed on Inputs
- Irregular Cenvat Credit passed on by debit notes raised to group concerns
- Non-reversal of cenvat availed on input services for which Credit Notes received from Vendor.

3.1 The appellant issued reply dt. 23.06.2015 to the audit objections. Subsequently, Show Cause Notice No.5/95 dt. 16.10.2015 was issued proposing to demand the service tax which was short paid on out roamer revenue and also for recovery of the cenvat credit which was wrongly availed. The notice also proposed to demand interest as well as to impose penalties. After due process of law, the original authority dropped the demand of Rs.18,00,688/- which is the demand alleging wrongful availment of cenvat credit on insurance to employees as well as non-reversal of cenvat credit on capital goods destroyed by fire. The demand in respect of other issues was confirmed along with interest. The original authority imposed penalties also. Aggrieved by such order, the appellant is now before the Tribunal.

4. The Ld. Counsel Shri Raghavan Ramabadrnan appeared and argued for the appellant. The arguments of the learned counsel are summarized as under :

4.1 M/s. Vodafone Mobile Services Ltd. (Appellant") is a reputed telecommunication network provider rendering telecommunication services to their subscribers in Chennai.

4.2 For providing such telecommunication services, the Appellant procures various input services upon payment of applicable service tax and duly availed eligible CENVAT Credit of service tax paid on input services as per the CENVAT Credit Rules, 2004 (CCR, 2004).

Facts relating to service tax levied on out roamer revenue

4.3 The Telecom Regulatory Authority of India (TRAI") and Department of Telecommunication ("DoT") have segregated India into specific telecom service areas. Each telecom service provider is issued with a license for providing telecommunication services within a particular telecom service area, a "licensed service area" or circle".

4.4 The Appellant is part of the Vodafone group, which has pan India operations. To render telecommunication services across India, the Vodafone group has several entities for its operations in different circles. Henceforth, these entities are referred to as "Other Vodafone entities."

4.5 As per TRAI mandate, each telecom service provider can render telecommunication services only on a non-mutual basis within their licensed service area. To use an illustration, the Appellant could render telecommunication services only within Chennai. Another entity, Vodafone West Limited (a Vodafone entity set up in Gujarat) could render telecommunication services only within Gujarat.

4.6. The Appellant operates out of 6 circles in Tamil Nadu. The Chennai circle renders telecommunication services only within Chennai. While separate service tax registrations have been obtained by each of the 6 Circles, all the 6 circles operate under a single PAN.

4.7 A subscriber of appellant can continue using the network of other Vodafone entities and other circles of the Appellant even when the subscribers are roaming, i.e., when they are travelling to locations that are outside the Appellant's circle. The roaming subscribers could recharge their telephone balance(s) using prepaid roaming Electronic top-ups ("E-Top ups) available at distributors and retailers across the country. The issue is only with pre-paid subscribers.

4.8 As service tax was liable to be paid on services provided or agreed to be provided, the applicable service tax would be remitted at the time when the E-Top ups are sent to retailers/distributors by raising invoices containing particulars like value of E-Top up and element of service tax thereon.

4.9 When the Appellant's subscriber purchases a roaming E-Top up within the circle of the other Vodafone entities, that other Vodafone entity would discharge service tax on the said E-Top up. This practise was followed consistently, regardless of whether the roaming circle was an other Vodafone entity or if it was a circle of the Appellant.

4.10 The other Vodafone entity/circle of Appellant would have to then transfer the roaming revenue generated from the roaming subscribers e-top ups to the Appellant. The roaming revenue so transferred was exclusive of service tax, which had already been paid by the other Vodafone entity/circle at the time of sale to the retailers/distributors. The revenue was transferred to satisfy the accounting mechanism prescribed by TRAI, which mandates that payment of a license fee on a certain percentage of the Adjusted

Gross Revenue ("AGR"). AGR includes revenues generated in the telecom circle for which license is obtained and inter alia excludes roaming revenue passed on to the eligible telecommunication service provider.

4.11 Similarly, whenever subscribers of other Vodafone entities or other Circles of the Appellant are roaming in the Appellant's circle (Chennai circle), the subscriber would be able to top up their balances by latching on the Appellant's network. In such circumstances, the Appellant would remit service tax on the e-top up and transfer the roaming revenue (generated from the subscriber of other Vodafone entity / Circle of the Appellant while roaming within its circle) to the other Vodafone entity /Circle of the Appellant. This is an industry wide practise.

Dispute on demand of service tax on out roamer revenue.

4.12 The Impugned OIO Paragraph 33.7 has sought to levy service tax on roaming revenue transferred to the Appellant in respect of outbound roamers by :

- other Vodafone entities
- 5 other circles of the Appellant.

Dispute over availment of CENVAT Credit

5.1 The Appellant availed CENVAT Credit of service tax paid on Operation & Maintenance expenses. Next Generation Network Equipment ('NGN Equipment) port charges, lease line charges, port SDH Transmission charges, premises rent, MIG Annual maintenance etc. Some of these input services were used across the other circles of the Appellant. The Appellant would recover the expenses incurred towards procurement of these input services from the other circles under debit notes. The Department has demanded reversal of CENVAT Credit availed of service tax paid on the sole basis that the said input services were used not just by the Appellant, but also by other circles.

5.2 The Appellant had initially availed CENVAT Credit of duty paid on HDPE Ducts classifiable under CH 39 of the Central Excise Tariff Act, 1985, by treating them as capital goods. Upon realising the inadvertent error, the Appellant classified the HDPE Ducts as inputs and claimed credit of the duty paid. This CENVAT Credit was denied on the ground that the HDPE Ducts do not fall within the definition of 'capital goods' in Rule 2(a) of the CCR or as inputs under Rule 2(k) of the CCR.

5.3 The impugned Order in paragraph 39 has acknowledged that the Appellant has reversed CENVAT credit of Rs.1,12,359/- along with interest of Rs.84,641/- in respect of waste bins, paper rolls etc. and has appropriated the payment. However, the said finding has not found its place in the operative portion of the impugned Order, and the demand of Rs.5.39,542/- on inputs stands confirmed without giving credence to the payments made by the Appellant.

5.4 The Appellant had availed CENVAT Credit of service tax paid to Ms. Indus Towers Ltd. ("Indus") in relation to the credit notes issued by Indus_ for the deficiency in service. The Agreement between Indus and the Appellant stipulated for Indus to pay the Appellant a fixed sum of money in the event that power outage surpasses the maximum tolerance level. This sum is payable to account for the loss of service that the Appellant had suffered in that time. The Revenue has demanded reversal of CENVAT Credit under Rule 4(7) of the CCR.

5.5 The demands confirmed in the impugned order are tabulated as under:

Sl. No.	Issue under dispute	Period	Paragraph (impugned order)	Amount Demanded (Rs.)	
A.	Demand for Service tax on out roamer revenue allegedly constituting `consideration' for telecommunication services	01.04.2010 -31.03.2015	33, 42.0	28,20,45,999/-	
	Outroamer revenue from other Vodafone entities				26,28,88,110/-
	Outroamer revenue from other circles of Appellant				1,97,57,889/-
B.	Demand for reversal of Credit on reimbursements for input services received from other Vodafone entities	Not specified	34, 40	11,35,029/-	
C.	Demand for reversal of Credit availed on service tax paid on input services used to provide BSS to other Vodafone circles	01.04.2010-31.03.2015	34, 42.1	2,80,17,363/-	
D.	Demand for CENVAT credit of service tax paid on collection services received for recovery of outstanding dues	01.05.2011-31.03.2014	36, 42.01	81,43,950/-	
E.	Demand for reversal of Credit of duty paid on HDPE Ducts alleged as not `Capital Goods`	01.05.2010-31.03.2015	35, 42.01	48,35,783/-	
F.	Demand for reversal of credit for credit notes issued by Indus Towers Ltd. under Rule 4 (7) of CCR	Not specified	41, 42.01	12,91,959/-	
G.	Demand for reversal of credit duty paid on HDPE Ducts alleged as not `inputs`	01.12.2010-31.01.2014	39, 42.01	2,24,718/-	
	TOTAL (Rs.)			32,60,09,625/-	

5.6 The Impugned Order has dropped a demand of INR 18,00,688/-in paragraph 42.2. As on date, no revenue appeal has been preferred against the impugned order to this extent of dropping the demand.

5.7 Pursuant to Special Audit conducted under Section 83 of the Finance Act, 1994 ("Act") for the period from April 2010 to March 2015, the Show Cause Notice No. 51/2015 dated 16.10.2015 ("SCN") was issued proposing to demand service tax allegedly short paid and to recover Cenvat credit allegedly wrongly availed along with interest and penalty.

A. The Appellant is not liable to pay service tax on the roaming revenue transferred from other Vodafone entities. [INR 28,20,45,999/-].

A1. It has been alleged in the impugned Order that the Appellant has not paid service tax on consideration received from other Vodafone entities or other circles of the Appellant for providing services to the subscribers. The Appellant submits that the impugned Order has assumed that the amount received from other Vodafone entities operating in other circles is consideration received by the Appellant from the subscribers for rendering the services and that the same is required to be included in the taxable value for payment of service tax. The Appellant denies such an assumption.

A2. The Appellant submits that there is no short payment of service tax inasmuch as the service tax stands remitted at the time of sale of the e-top up to the subscriber. This is a case where the revenue is recorded in the books of the Home Circle to which the subscriber belongs, i.e., the Appellant. It is merely recording a book entry for transfer of revenue to comply with TRAI regulations.

A3. In the background of the facts operating in the instant case, it is evident that service tax has been correctly paid by the other Vodafone entity/circle of the Appellant at the time when the E Top ups are issued and there is no short payment of service tax on out roamer revenue recorded in the books of the Appellant as the same is already tax paid.

A4. In fact, it is the prevailing practise in the telecommunication industry that such e-top up vouchers are inclusive of service tax.

A5. It is an uncontroverted fact throughout the proceedings right from special audit to the impugned Order, that the other Vodafone entity or Circle of the Appellant had remitted service tax on the e-top

vouchers. The remittance of service tax by the other Vodafone entity or circle of the Appellant at the time of issuance of e-top up voucher is in consonance with the statutory provisions in as much as service tax is leviable on services provided or agreed to be provided.

A6. Even assuming that the Appellant is liable to pay the service tax once the roaming revenue is transferred by the other Vodafone entity/circle of the Appellant, the present demand would not survive. If the present demand were to be sustained, there would arise a situation where service tax is imposed twice on the same transaction;

- Once at the time of sale of the e-top by the other Vodafone entity/circle of Appellant to the subscriber of the Appellant;
- And once again on the Appellant after the roaming revenue is transferred to the Appellant.

A7. The Impugned OIO has failed to comprehend that levying the demand on the Appellant would amount to double taxation and has held in paragraphs 33.3-33.4 that the payment of tax by the other Vodafone entity or circle of the Appellant is no substitute to the Appellant's liability to discharge service tax; which finding may be rejected.

A8. In ***Chotey Lal Radhey Shyam vs, CCE Lucknow - 2016 (44) S.T.R. 266 (Tri. - AIL)*** the Tribunal held in paragraph 6 that once the Telecom company (BSNL in that case) had discharged Service Tax on the full value of the SIM cards at the time of sale to its retailers / distributors, no service tax could be demanded from the Assessee therein on the SIM Cards sold by the retailer to the ultimate subscriber. Applying the logic to the instant case, it is submitted that when the other Vodafone entity/circle of the Appellant has remitted applicable service tax, the Appellant cannot be made liable to pay service tax again. The decision of the Tribunal was affirmed by the Hon'ble High Court of Allahabad in ***CCE Vs Chotey Lal Radhey Shyam - 2018 (8) G.S.T.L. 225 (All.)*** A Revenue Appeal filed against the said judgment is pending before the Hon'ble Apex Court in ***Commissioner vs, Chotey Lal Radhey Shyam - 2018 (13) G.S.T.L J4I (SC)***. The decision of the Hon'ble High Court is not stayed as on date.

A9. Further reliance is placed on ***Kakinada Seaports Ltd. vs. CCE, S.T. & CUS., Visakhapatnam-II - 2015 (40) S.T.R. 509 (Tri. - Bang.)***. The Tribunal was faced with a situation where the service provider had paid service tax while the levy was under reverse charge mechanism. In this context, the Tribunal held in paragraph 4.4 that once the service provider has paid the tax under reverse charge mechanism, Service Tax cannot be demanded again from the service recipient, though the liability was on the service recipient at the first instance.

A10. Therefore, any demand of service tax whatsoever would amount to double taxation. It is for the above reasons, the demand is not sustainable.

B. The Appellant has correctly availed CENVAT Credit on business support services. INR 2,80,17,363/-.

B1. The impugned order has demanded reversal of credit availed on service tax paid on input services used by other circles of the Appellant. The basis for demanding reversal is that the Appellant had paid the service tax on the input services which were used not only by the Appellant but also by other circles. [Paragraph 34 of Impugned OIO]

B2. It is submitted that there is no dispute over the fact that:

- a. the input services were used in the rendition of output services:
- b. the Appellant paid applicable service tax on the said input services:
- c. the eligibility of input services to credit under the CCR.

The only dispute is whether Appellant could have taken credit of service tax paid on input services procured by the Appellant company when such input services were also used by other circles of the very same company.

B3. It is reiterated that the Appellant is operating out of six (6) telecom circles for which separate service tax registrations have been obtained for each circle and tax is paid by respective circle. However,

all 6 circles operate under a single PAN. In other words, the 6 circles belong to the very same legal entity.

B4. It is submitted that the denial of credit has no basis in law. Rule 2(l) of the CCR 2004 defines input services as all those services used by a service provider for providing an output service. The Impugned Order has denied credit of service tax paid on input services on the allegation that the input services were utilised by the Appellant and also by other circles of the Appellant. As per definition, the only condition is that the input service must be utilised for providing output service, whereas the Impugned Order has introduced a new condition.

B5. It is submitted that the cost of the service has been borne by the Appellant and hence credit towards such service should be available to the assessee. It is further submitted that no provisions under the Credit Rules stipulates the reversal of Cenvat credit in a scenario where input services are received by one unit of an entity for providing services to other units of same entity. Therefore, the entire demand is misconceived.

B6. Reliance is placed on paragraph 10 of the decision in ***Greaves Cotton Ltd. vs. CCE, Chennai - 2015 (37) S.T.R. 395 (Tri. - Chennai)*** for the proposition that credit cannot be denied merely because the Service Tax on advertisement charges was paid by Unit-I for the advertisement of product of Unit-II, while both are under the umbrella of the same company.

B7. Without prejudice, it is submitted that the Appellant would have been able to obtain registration as an Input Service Distributor (ISD') for such situations. It is now settled that procedural infractions should not obstruct substantive rights available to an Assessee. Reliance is placed on Paragraph 5 of ***Dashion Lid. v. CCE 2013 (288) E.L.T. 291 (Tri. - Ahmd.)*** and affirmed vide Paragraph 7 of ***CCE vs Dashion Lud - 2016 (41) S.T.R. 884 (Guj.)***.

B8. Furthermore, this proposition has been accepted by the Revenue in Part I of the Circular bearing reference No. 1063/2/2018-CX dated 16.02.2018. Therefore the demand merits to be set aside.

C. Demand for reversal of credit on debit notes raised on other Vodafone entities for costs incurred in services is illegal. ||NR 11,35029/-]

C1. The impugned order has also held the Appellant was required to reverse credit of INR 11,35,029/- availed on debit notes raised on other Vodafone entities for costs incurred for the services. However, the impugned order has not recorded separate finding in this regard but for confirmation of the amount in the table at paragraph 42.1.

Reimbursement of costs incurred are not liable to tax

C2. It is submitted that the demand fails at the very outset because reimbursements are not includible in the taxable value for payment of service tax. As per Section 67 of the Act, only consideration for services must be brought to tax. The reimbursement for costs incurred in rendition of services are not consideration for the services rendered. This is apparent from the very demand made in paragraph 13 of the SCN, which alleges that the reimbursements once received represent that the said services were not used for output services. This proposition stands confirmed by the Hon'ble Apex Court in **UOI vs. Intercontinental Consultants and Technocrats Pvt. Ltd. - 2018 (10) G.S.T.L. 401 (S.C)** vide Paragraph 29.

C3. Without prejudice, it is submitted that that demand to this extent is revenue neutral and results in scriptory work in as much as the credit reversed by the Appellant would anyway have been available as credit at the hands of the other Vodafone entities receiving the debit notes.

C4. Reliance is placed on the following decisions of the Hon'ble Tribunal wherein demands were set aside on an acknowledgement that the demands involved merely scriptory work without any revenue impact:

a. **Mando India Ltd. v. Commissioner** - 2019 (2) TMI 75 - CESTAT CHENNAI.

b. **CCE, Rajkot vs. Reliance Industries Ltd.** 2008 (224) E.L.T. I17 (Tri. - Ahmd.)

C5. It is also settled law that when the exercise is academic with no revenue implication, the proceedings merit to be dropped. Reliance in this regard is placed on **CCE v. Indeos ABS Lud. (2010 (254)**

E.L.T. 628 (Guj)) and **CCE v. Narayan Polyplast** [2005] 2005 taxmann.com 450 (SC)

D. The availment of CENVAT credit of service tax paid on collection charges is valid. [INR 81,43,950/-]

D1. The impugned Order has disallowed CENVAT Credit availed on service tax on collection charges paid to collection agents by the Appellant on the reasoning that the definition of input service in Rule 2(l) of the CCR has been restricted w.e.f. 01.04.2011 and that the services provided by the vendors have no nexus with telecommunication services provided by the Appellant.

D2. The Appellant submits that the services rendered by the collection agents are essential to the telecommunication service provided by the Appellant. The services provided by the collection agents are two-fold-

- With respect to collecting the bills from the subscribers who are unable to pay their dues through the normal mechanism of cheque/cash at Vodafone stores. online payment, etc.
- With respect to collecting the defaulting payments from the post-paid subscribers, after the expiry of their credit period (20 days after the end of their billing cycle).

D3. Thus, the Appellant pays these collection agents either a specified percentage of the collections made or as a fixed sum, depending on the agreement between the collection agents and the Appellant.

D4. The Appellant submits that the Tribunal has allowed Cenvat credit of service tax paid on services of collection agents for collection of dues in **Commissioner, CGST, Jaipur vs. Bharti Hexacom India Ltd. - 2023 (5) TMI 520 - CESTAT NEW DELHI** by observing that collection agency services are covered within the 'means' clause of Rule 2(l) of the CCR. In this regard, reliance is also placed on Paragraph 7.1 of **Vodafone Essar Cellular Limited v. Commr. Of G.S.T and Central Excise, 2018 (9) TMI 985 -CESTAT CHENNAI**, wherein credit availed on collection charges were held to be eligible.

D5. Thus the Appellant has correctly availed CENVAT Credit on the service tax paid on the consideration paid to the collection agents for their services.

E. The Appellant is eligible to avail CENVAT Credit of duty paid on HDPE Ducts. [INR 50,60,501/-]

E1. The impugned Order has disallowed CENVAT Credit availed on HDPE ducts on the allegation that they do not qualify as 'capital goods' under Rule 2(a) or as 'inputs' under Rule 2(k) of the CCR. (Paragraphs 35 & 39 of Impugned OIO]. HDPE ducts are inputs eligible to credit because they are essential to the rendition of telecommunication services.

E2. The Appellant submits that HDPE ducts are essential to the Appellant's business inasmuch as the HDPE Ducts are used to sheath the Optical Fibre Cables (OFC). They ensure longevity of the OFCs by protecting them from mechanical damage and offering resistance from chemicals and corrosive soils. The absence of the ducts would cause wear and tear of the OFCs and disrupt the continuous provision of the telecommunication service. In short, the HDPE ducts are indispensable to the Appellant's business of telecommunication services.

E3. The Appellant submits that the Hon'ble High Court of Delhi in **Vodafone Mobile Services Limited vs CST Delhi - 2019 (27) G. S. T. L. 481 (Del.)** has held in paragraph 53 that the term 'all goods' occurring in Rule 2(k) of the CCR would cover all the goods used for providing Output Services except those which are specifically excluded in Rule 2(k). The Hon'ble Delhi High Court held that the test of functional utility should be satisfied for any goods to qualify as 'inputs' under Rule 2(k) and that the definition is wide enough to bring all goods which are used for providing an output service. The Revenue has challenged the Order of the Hon'ble Delhi High Court before the Hon'ble Apex Court in **Special Leave Petition (Civil) Diary No. 17536 of 2019**. The Hon'ble Apex Court has issued notice in the Revenue Appeal. However, the Order of the Hon'ble Delhi High Court has not been stayed.

Though credit of duty paid on the HDPE ducts was inadvertently taken under 'Capital goods' credit is available as inputs'

E4. The Appellant had inadvertently availed CENVAT Credit of duty paid on the HDPE ducts under the 'capital goods' category. There is no dispute that applicable duty was remitted on the HDPE Ducts and that the HDPE Ducts are used in the rendition of telecommunication services. The only dispute is as to whether the duty paid is eligible for credit.

E5. The Appellant submits that the duty paid on the HDPE Ducts is available to the Appellant as 'inputs even if it had been inadvertently availed as 'capital goods'. Reliance is placed on Paragraph 21 of **CCE vs. Modi Rubber Ltd.** - 2000 (119) E.L.T. 197 (Tribunal - LB) in this context.

F. The Appellant has correctly availed CENVAT Credit on the services provided by the vendor and no reversal is required under Rule 4(7) of the Credit Rules. [INR 12,91,959/-]

F1. The impugned Order has confirmed the demand for reversal of credit on the ground that the Appellant has not reversed the CENVAT Credit on the credit notes issued by Indus Towers Ltd. [Paragraph 41 of Impugned OIO]

F2. The Appellant submits that the credit notes issued by Indus Towers Ltd. did not include the service tax component and appellant has obtained a declaration from Indus attesting to this fact.

F3. In this regard, the Appellant submits that the credit note issued by Indus is only on account of deficiency of service provided by Indus. The Appellant has submitted declarations from Indus that adjustment under Rule 6(3) of the Service Tax Rules, 1994 had not been availed by Indus Towers Ltd. The Appellant thus submits that as the entire tax amount due has been paid, and no adjustment claimed, there can be no denial of CENVAT credit to the Appellant.

G. The extended period of limitation ought not to be invoked. Equal penalty ought not to be imposed.

G1. The entire demand is based on details scrupulously maintained by the Appellant and out of the statutory returns periodically filed by the Appellant. The Appellant has all along cooperated with the Department during the course of special audit. Therefore, it is incorrect on part of Revenue to allege suppression with intent to evade payment of tax. Reliance is placed on:

- a. *Tally Solutions Pvt. Ltd. CCE, Bangalore*
2020 (4) G.S.T.L. 520 (Tri. - Bang.)
- b. *CCE vs. Zyg Pharma Pvt. Ltd., 2017 (358) ELT 101 (MP)*
- c. *Max Life Insurance Company Ltd. v. Commissioner- 2022 (67) G.S.T.L. 569 (Tri. - Del.)* - Notice issued in Revenue Appeal [*Commissioner v. Max Life Insurance Company Ltd. - 2023 (69) G.S. T.L. J11 (S.C).*

G2. Further, the issues involved in the present Appeal involve interpretation of complex statutory provisions. It is well settled that in such cases, an Assessee cannot be saddled with the intent to evade payment of tax, and hence extended period of limitation cannot be invoked. Reliance is placed on **International Merchandising Company, LLC Vs. CST - 2022 (67) G.S. T.L. 129 (S.C.)**.

G3. The SCN was issued on 16.10.2015 for the period from 01.04.2010 to 31.03.2015. The demand for the period from 01.04.2010 to 30.09.2013 is barred by limitation.

G4. Reliance is placed on the decision of the Hon'ble Apex Court in **UOI vs Rajasthan Spinning & Weaving Mills- 2009 (238) E.L. T. 3 (S.C)** for the proposition that the conditions for invoking extended period of limitation are similar to the conditions for imposing equal penalty. Thus, if it is demonstrated that extended period of limitation cannot be invoked, then it follows that equal penalty ought not to be imposed.

G5. Without prejudice, it is submitted that this is a fit case for extending the benefit under Section 80 of the Act, which was operative for the entire period under dispute.

H. There can be no interest liability fastened on the Appellant as the demand itself falls.

H1. The Appellant submits that interest is not payable because the demand fails. The Appellant submits that there is no short payment of service tax, and the Appellant has availed the CENVAI Credit correctly

H2. Thus, no interest is payable, and no penalty can be levied on the Appellant. The Ld. Counsel for the appellant prayed that the appeal may be allowed.

6. The Learned Special Counsel Shri P. Ayyam Perumal appeared and argued for the Department.

6.1 In regard to the first issue as to the non-payment of service tax on the out-roamer revenue transferred from other Vodafone entities as well as from other circles of VSL, the learned counsel for the department adverted to the findings in para-33 of the impugned order. It is submitted that the subscribers of VSL Chennai have the option to recharge their mobiles from other circles, that are owned by different entities / companies who have separate service tax registration and PAN. Based on a special software designed, the appellant is able to arrive at the value of recharge done by their subscribers at other circles of other entities. At the month end, invoices are raised by VSL Chennai on other circles based on the value recharged by VSL Chennai's subscribers at the other circle. The value of the card is paid to appellant by the respective circles from whom, the subscriber of appellant has recharged. These amounts are reflected as out roamer revenue in the books of the appellant on usage basis. Thus, the amount received by appellant from the other circles is only on the recharges made by the subscriber of the appellant in different circles. This amount is a consideration received by the appellant to render services to the subscribers and therefore has to be included in the taxable value for payment of service tax.

The appellant has not discharged service tax on such invoices / transactions / revenue although they are the service provider to the subscribers.

6.2 Similarly, the appellant is operating in six circles for which the service tax registrations are obtained separately for each circle and tax was paid from the respective jurisdictions by the respective circle services providers. Although the appellant has one PAN number for income tax purposes, the service tax is discharged by the respective circles based on the services provided by each of them. On verification of the documents by the audit team, it was observed that the appellant was realizing out roamer revenue for providing out roamer service outside the jurisdiction of the circle of the appellant but within the jurisdiction of the other circles of the same company i.e. Vodafone South Limited. It is explained by the Ld. Counsel for the department that when the subscriber recharges from a different circle other than the home circle within the VSL, the revenue generated at the other circle is passed on to the home circle as out roamer revenue. This revenue is ultimately the consideration received by appellant for providing services to their subscribers.

6.3 The main contention of the appellant is that the out roamer revenue so transferred to the home circle has been discharged to tax by the out roamer circles and therefore the appellant is not required to pay service tax. Para 33.4 of the impugned order was adverted to by the Ld. Counsel for the department to submit that the appellant has not furnished any document to show that these out roamer circles have discharged service tax on the out roamer revenue that has been transferred to the appellant. Therefore the contention of the appellant cannot be accepted.

6.4 As per Rule 2 (1) (d) (ii) of the Service Tax Rules, 1994 "person liable for paying service tax" in a case other than sub-clause (i), means the 'provider of service'. As per the above rule, the service provider is required to pay service tax and it cannot be done by any other person. Further, payment made by any other person cannot be a substitute for payment of service tax by the appellant. The appellant being provider of output services, the out roamer revenue is subject to levy of service tax at the hands of the appellant. Since

there is no dispute that the appellant is providing services to all its subscribers irrespective of the fact that recharge (E-top) was done outside the home circle, the appellant has to discharge service tax on the out roamer revenue received by them.

6.5 The next contention put forward by the appellant is that they have paid service tax in-Roam E-top issued by them at Chennai and such amount paid can be adjusted with the demand made in the instant case. The Ld. Counsel for the department submitted that the said contention is not acceptable as in roaming and out roaming are two entirely different transactions. While service tax on in roaming is discharged by the appellant on an unfulfilled service the credit can only be claimed after fulfilment of the conditions prescribed in Rule 6 (3) of Service Tax Rules, 1994 and it cannot be alternatively adjusted against service tax on roaming.

6.6 It is submitted that as per Section 65 (7) of Finance Act, 1994 during the relevant period "assessee" has been defined as "*a person required to pay service tax and includes its agent*". In the present case, the assessee is the service provider who is liable to pay service tax while providing taxable service to any person in terms of the provision contained in section 68 of the Finance Act. Further, in terms of Cenvat Credit Rules, 2004, an assessee, who is the service provider, is eligible to avail cenvat credit of tax paid on capital goods, inputs and credit of input services used by him. This being the law, cannot be deviated at any cost. But in the instant case, so far as contention of appellant that the service tax was paid by other entities of other circles and by entities from the same circle, is not legally sustainable. The appellant being service provider and who has availed cenvat credit is required to pay service tax. However, as per the definition of "assessee" as in Section 65 (7) his agent can discharge service tax on behalf of the assessee after entering into an agreement to that effect. But in the instant case, the other entities and other circles are not agents of the assessee.

6.7 It is mandatory on the part of appellant to come up with documentary evidence to establish payment of service tax by other entities. When the assessee claims that the service tax stands paid by other entities without producing any documentary evidence, the

original authority has correctly rejected the contention of the appellant.

6.8 The judgment relied by the appellant in the case of *Chotey Lal Radhey Shyam Vs CCE Lucknow* (supra) is not applicable to the facts of the case for the reason that the issue involved in that case was the dispute of non-payment of service tax on the profit margin earned by appellant on the sale of SIM cards and recharge coupons of BSNL. The issue is entirely different and not applicable. Further the department has filed appeal before the Hon'ble Apex Court against the judgment of Hon'ble High Court of Gujarat which is still pending.

6.9 The judgment in the case of *Kakinada Seaports Ltd.* (supra) cannot be applied to the facts of this case as the said judgment involves payment of service tax under reverse charge mechanism which is altogether different.

6.10 The decision in the case of *Jaipuria Infrastructure Developers Pvt. Ltd.* (supra) is not of assistance as the matter was remanded to the original authority to verify the facts of payment of service tax and therefore not applicable to the facts of the case. It is prayed that the first issue as to demand of service tax on out roamer revenue may be upheld as confirmed by the original authority.

7. In regard to the second issue of non-reversal of cenvat credit on Business Support Service, the findings in para 34 was reiterated. It is noted by the audit team that the appellant has received expenses from other circles on lease line charges, transmission charges, annual maintenance etc. The appellant though paid service tax on the entire consideration as per the invoices issued for such Business Support Services has been reimbursed part of the consideration by other circles who have also shared these services along with appellant. When the appellant has been reimbursed part of the consideration by the other circles, the appellant ought to have reversed the credit in respect of such reimbursed expenses. The adjudicating authority has therefore correctly upheld the confirmation of ineligible credit on this issue.

7.1 The decision relied by the appellant on *Greaves Cotton Ltd.* (supra) is not applicable for the reason that in the said case the issue

was regarding availment of cenvat credit whereas the issue involved in the instant case is non-reversal of cenvat credit on the portion of consideration reimbursed. The contention of the appellant that they would be able to pass on credit as an Input Service Provider and non-registration as ISD is only a procedural lapse cannot be accepted. The decision in the case is therefore not applicable.

8. The third issue is with regard to irregular availment of cenvat credit on capital goods. The appellant has availed cenvat credit on 'ducts' and these ducts do not fall under Chapter 39 of Central Excise Tariff Act, 1985. Such ducts do not qualify as 'capital goods' as per definition in Rule 2(a) of CCR 2004. These ducts are not being used for providing telecommunication service but is used as a protective resistant to chemicals and corrosive soils for eliminating maintenance. The adjudicating authority has rightly denied the credit.

9. The next issue is with regard to irregular availment of input service credit on collection charges. The appellant has wrongly availed credit of service tax paid in respect of services rendered by collection agents. The collection agent service is a post-service activity and has no nexus with providing telecommunication services. For the period after 1.4.2011 the definition of input services has been amended and the expression "*activities relating to business*" stands omitted. The appellant is therefore eligible to avail credit only when the input services have nexus with the output services provided. In the present case, the collection agent service does not have any nexus with the output service viz. telecommunication service rendered by appellant and hence the original authority has correctly denied the credit.

10. The other issue is with regard to irregular availment of cenvat credit passed on by debit notes raised to group concerns. As per the audit reports, it was noted that the appellant has raised debit notes on their group concerns in order to pass on charges like lease line charges, black berry services, reimbursement of expenses like E&Y charges, cable and wireless for bandwidth etc. The appellant has availed cenvat credit of service tax paid on these charges and failed to reverse the cenvat credit attributable to that portion of the services in respect of which reimbursements were sought. The

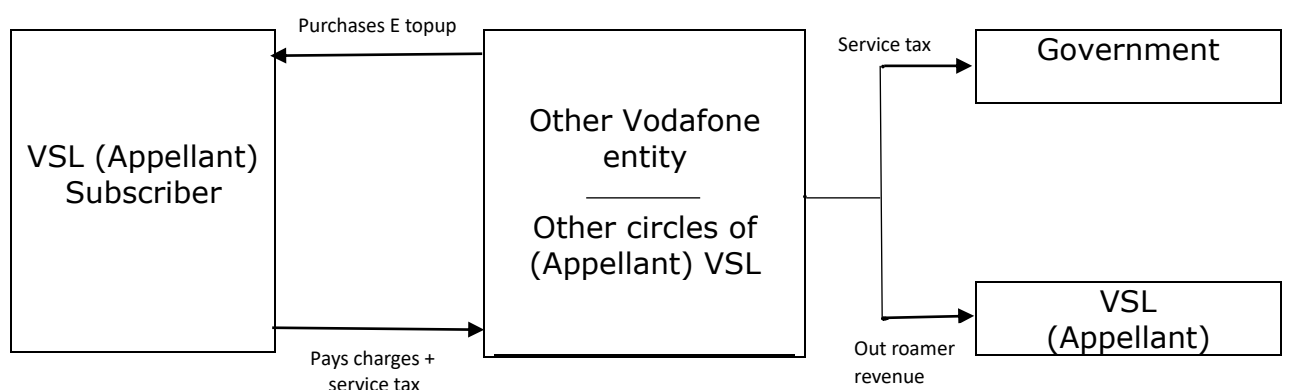
contention of the appellant that they have correctly availed input service credit on such charges though some part of the services has been used by other units and the credit proportionate to that could have been distributed as an ISD etc. cannot be accepted. All the circles have independent service tax registration and being decentralized, the output service tax in the respective circles are discharged out of the cenvat credit availed by the respective circles and balance payable by cash. If no reversal of cenvat credit was made on the reimbursement of expenses, then one circle may be adjusting the entire cenvat credit including the portion not used for providing output service which is not the intention of the law. The contention of the assessee that entire exercise is revenue-neutral and it is only a procedural lapse has been correctly rejected by the adjudicating authority.

11. The next issue is with regard to non-reversal of cenvat credit availed on input services for which the credit notes were received from vendors. As per the SCN, M/s.Indus Tower Ltd. (ITL) who is one of the vendors of the appellant have raised certain credit notes pertaining to reversal of value of input services on account of certain disputes on Energy billing etc. The appellant has availed cenvat credit on the full value at the time of receipt of the bill and has not reversed the value of credit pertaining to the credit notes issued by M/s.ITL. The contention of the assesses is that the service tax amount has not been included in the credit note. It is also stated by them that credit notes have been issued on account of deficiency in providing the services. Further, no adjustment in 6 (3) of Service Tax Rules has been claimed by ITL . The original authority has correctly held that when part of the consideration has been returned as per credit notes, the appellant ought to have reversed credit pertaining to such credit notes. The Ld. Counsel for Department prayed that the appeal may be dismissed.

12. Heard both sides.

13. The first issue that arises for analysis is the demand of service tax on the out roamer revenue received by the appellant from other entities as well as out roamer revenue received from other circles within VSL. According to the department, the appellant being the service provider is liable to pay service tax on the out roamer revenue transferred to them from other entities as well as other circles. The defence put forward by the appellant is that the service tax on such consideration collected from the subscribers has already been paid to the Government by other entities as well as other circles within VSL.

14. From narration of facts, the consequence of transaction is such that the recharge vouchers / E-top ups are purchased by appellant's subscribers from other entities or from other Circles while they are in roaming circle. While selling the RCV/E-Top ups, the customer pays the charges for receiving the services of the RCV as well as the service tax on such service. According to appellant, the Vodafone entity operating in the roaming circle who has collected the charges along with service tax pays service tax to the Government exchequer. The charges collected from the subscribers are then transferred to the appellant. All these are done by internal accounting system. The transaction can be diagrammatically illustrated as under:-



14.1 The appellant has submitted that they have to account the revenue received for providing service for the purpose of ascertaining the license fee that has to be paid. The Ld. Counsel for the appellant explained that a license agreement has been entered by the appellant with the Government for provision of Unified Access Service (UAS). Part-III of the agreement stipulates the financial conditions. As per

these conditions, the appellant has to pay license fee annually @ 10% Adjusted Gross Revenue (AGR), excluding spectrum charges. The agreement also stipulates at para-19 as to how to calculate the AGR. As per para 19.2 of the agreement for the purpose of arriving at AGR, the service tax on provision of service as well as the tax paid to the Government is to be excluded. In order to calculate the AGR for payment of license fee, the appellant maintains an uniform software by which they are able to understand roaming revenue of different entities as well as other circles and the same are transferred to the appellant and vice versa. For better appreciation of the liability to pay license fee and the calculation of AGR, the relevant para of the agreement entered by the appellant with the Government is reproduced as under :

PART-III FINANCIAL CONDITIONS

18. FEES PAYABLE

18.1 Entry Fee :

No additional entry fee shall be charged from CMSPs for migration to UASL.

18.2 License Fees :

The Licensee shall pay Licence fee annually @ 10 % of **Adjusted Gross Revenue (AGR)**, excluding spectrum charges. Separate spectrum charges would be required to be paid by the Licensee.

However, w.e.f. 1.4.2004 for first four years, Annual Licence fee payable shall be @ 10 % of AGR. The Licensor reserves the right to modify the above mentioned Licence Fee any time during the currency of the Agreement.

18.3. Radio Spectrum Charges :

18.3.1 In addition to the licence fee as per clause 18 2, the Licensee shall pay spectrum charges on revenue share basis of 2% of AGR towards WPC Charges covering royalty payment for the use of cellular spectrum upto 4.4 MHz + 4.4 MHz and Licence fee for Cellular Mobile handsets & Cellular Mobile Base Stations and also for possession of wireless telegraphy equipment as per the details prescribed by Wireless Planning & Coordination Wing (WPC). Any additional band width, if allotted subject to availability and justification shall attract additional Licence fee as revenue share (typically 1% additional revenue share if Bandwidth allocated is upto 6.2 MHz + 6 2 MHz in place of 44 MHz + 44 MHz). However, while calculating 'AGR' for limited purpose of levying spectrum charges based on revenue share, revenue from wireline subscribers shall not be taken into account.

18.3.2 Further royalty for the use of spectrum for point to point links and other access links shall be separately payable as per the details and prescription of Wireless Planning & Coordination Wing. The fee / royalty for the use of spectrum / possession of wireless telegraphy equipment depends upon various factors such as frequency, hop and link length, area or operation and other related aspects etc. Authorization of frequencies for setting up Microwave links by Licensed Operators and issue of Licenses shall be separately dealt with WPC Wing as per existing rules.

19. Definition of 'Adjusted Gross Revenue' :**19.1 Gross Revenue:**

The Gross Revenue shall be inclusive of installation charges, late fees, sale proceeds of handsets (or any other terminal equipment etc.), revenue on account of interest, dividend, value added services, supplementary services, access or interconnection charges, roaming charges, revenue from permissible sharing of infrastructure and any other miscellaneous revenue, without any set-off for related item of expense, etc.

19.2 For the purpose of arriving at the "Adjusted Gross Revenue (AGR)" the following shall be excluded from the Gross Revenue to arrive at the AGR :

- I. PSTN related call charges (Access Charges) actually paid to other eligible / entitled telecommunication service providers within India;
- II. Roaming revenues actually passed on to other eligible / entitled telecommunication service providers and;
- III. Service Tax on provision of service and Sales Tax actually paid to the Government if gross revenue had included s component of Sales Tax and Service Tax."

15. From the above, it can be seen that the practice of transfer of out roamer revenue to the circle which provided service to the subscriber is for the purpose of ascertaining the AGR which is the basis for payment of Licence fees. The appellant has maintained proper accounting of the out roamer revenue received by them from other entities as well as other circles. During the special audit conducted for the period April 2010 to March 2015 when this issue that service tax is not paid by the appellant on out roamer revenue was pointed out by the audit team, the appellant furnished detailed reply dt. 23.06.2015. It was explained by the appellant to the audit team that service tax is collected along with charges from the subscriber when the Recharge Vouchers are sold. The other Vodafone entity / other circle who has collected the service tax from subscriber deposits the service tax to the government. Only the out roamer revenue excluding the service tax is transferred to appellant. Since the service tax on the charges have already been deposited, the same cannot be demanded again from the appellant. It is also the case of the appellant that similarly, the appellant when sells Recharge Vouchers to subscribers of other Vodafone entity and other circles, the appellant collects the charges and services tax from the subscriber. Appellant then pays the service tax to the government even though the service provider is the other Vodafone entity or

other circle. The out roamer revenue is then transferred by appellant to the other Vodafone entity / other circles.

15.1 Relevant part of the reply to the audit objections read as under :

2. Service tax not discharged by "Out roamer Revenue"

- 2.1 During the course of audit, it was observed by your good self that during the period April 2010 to March 2015, the Company has not paid service tax on out roaming revenue recorded in the books. Accordingly, the Company has been directed to pay service tax amounting to Rs. 26,28,88,110/- along with applicable interest.
- 2.2 In this connection, at the outset it is submitted that there is no short payment of service tax by the Company during the subject period. In this regard, we request you to refer to our submission provided herein below:
 - (i) VSL is engaged in the business of providing GSM mobile telecommunication Network in Chennai to its subscribers under a license issued to them by the Department of Telecommunication, Government of India for establishing, maintaining and operating the Cellular Mobile Telephony Services (CMTS) in the referred region. The subscribers of VSL include both prepaid and post-paid subscribers located in the Territory of Chennai (home circle).
 - (ii) Similarly, other Vodafone entities are engaged telecommunication services in their respective telecom circle.
 - (iii) Prepaid telecommunication services are provided through Recharge Coupon Vouchers (RCV) / Electronic Top up (E Top up) to be procured by the subscribers from various retailers located throughout the country.
 - (iv) Service tax in respect of prepaid services is discharged by the Vodafone entities at the time of supply of RCV / E Top-up to the distributors in their respective telecom circles. Such service tax is discharged on the MRP of the RCV or E Top up supplied.
 - (v) The RCV/ E Top ups are then supplied by the distributors to the retailers before the same is procured by the subscribers for recharging the balance amount on their mobile phone number.
 - (vi) In case where prepaid subscribers of the Company visit places outside the state of Tamil Nadu (roaming circle), they can recharge their balance amount only through E Top up available with the retailer located in the roaming circle.
 - (vii) As already explained above, service tax in respect of E top up procured by the roaming subscriber has already been paid by the Vodafone entity operating in the roaming circle at the time when such E Top up would have been issued to the distributor.
 - (viii) Further, it is submitted that during his visit in the roaming circle, the subscriber uses the telecom infrastructure set up and provided by the Vodafone entity operating in such roaming circle. It should be noted that value of such support services provided to the roaming subscriber is recharged separately by such Vodafone entity from VSL along with applicable service tax. No service tax is charged in case where VSL itself is operating in the roaming circle.
 - (ix) At this point, it should be noted that to be able to provide telecommunication services in any circle throughout India, Vodafone has to pay a license fee to the Department of Telecommunication. Such license fee is calculated as a certain percentage of revenue earned through provision of telecommunication service in specified circles which is dependent on the subscriber base of the Vodafone entity operating in such circle.

- (x) Given that in the instant case the subscriber, recharging the talk time balance, is not registered with the Vodafone entity operating in the roaming circle, value of recharge one by the subscriber is transferred to VSL which is operating in the home circle of the subscriber. Such amount is subsequently recognised as revenue in the books of VSL home circle as and when the balance is utilised by the subscriber for availing telecommunication services.
- 2.3 On the basis of the above, it is clear that transfer of amount in the instant case is required for identifying amount of revenue earned by a Vodafone entity from a particular telecom circle which is essential for computing license fee and for preparing necessary reports for the management. Such transfer is not against any service provided by VSL to the Vodafone entity operating in the roaming circle.
- 2.4 Given the above, it is submitted that service tax on the services provided to the subscriber has been appropriately discharged by the Vodafone entity operating in the roaming circle and service tax on the same value of service should not be demanded from VSL. This view finds support from the case of **Lilason Breverics vs. CCE(2010) 24 STT 279 (CESTAT SMB)** wherein tax was paid by the service provider instead of service receiver, it was held that demand of tax again on the same service is not sustainable.
- 2.5 In relation to instant transaction, your good self is of the view that service tax, on the amount of E Top-up recharged by a roaming subscriber, has been erroneously paid by the Vodafone entity in the roaming circle and the same should be claimed as refund by such entity. Further, your good self is of the view that service tax on such revenue should have been paid by VSL as a service provider.
- 2.6 At this point, it should be noted that similar to other Vodafone entities, VSL has also paid service tax on E Top-up procured in Chennai by roaming subscribers registered with other Vodafone entities.
- 2.7 Therefore, even if it is assumed but not accepted that VSL should have paid service tax on subject roaming revenue, it should be noted that service tax paid by VSL on E Top-up procured in Chennai by roaming subscribers, should be available as refund to the Company. In this regard, amount of service tax paid by VSL on such E Top-up during the subject period has been attached as **Annexure A** to the this letter,
- 2.8 On perusal of details provided in **Annexure A** above, it is evident that service tax paid by VSL on subject E Top-up exceeds the amount of service tax proposed to be demanded from VSL in the instant case. Hence, it is apparent that current issue is a revenue neutral situation wherein VSL has already paid service tax which was supposedly not payable by the Company and the same is also more than the alleged short payment of service tax in relation to the subject issue.
- 2.9 On the basis of submission made herein above, it is apparent that service tax on the services provided to the roaming subscriber has been appropriately paid to the credit of the Central Government and VSL is not required to pay service tax on such services. Hence, point of observation in the audit related to this issue should be dropped instantly."

16. The appellant has consistently stated that the service tax on the out roamer revenue has already been discharged by the entity who has collected it. The Department does not have a case that while transferring the out roamer revenue, the other Vodafone entity had transferred the service tax also to appellant. The SCN has been issued pursuant to a special audit. The copy of the special audit

report dt. 24.04.2015 under Section 14AA of the Central Excise Act, 1944 has been placed before us. Para 1.2 of the report is the findings and observations with regard to service tax on out roamer revenue. At para 1.26, the auditor's view is noted. On the basis of the appellant's reply that the service tax has already been discharged by other entities, it is observed by audit team that the assessee being the service provider has to discharge service tax on out roaming revenue. Even though assessee put forward the contention that service tax stands discharged by the entity / other circle, it is not stated in the audit report that the other entity has not discharged the service tax. The contention that the appellant has discharged service tax on the out roamer revenue of other entities has also been put forward before the audit team. The relevant part of the audit report reads as under :

1.2) ST not discharged on "OutRoamer Revenue" by the Assessee:

Outroamer Revenue:

Meaning :- Chennai Subscriber (Assessee's customer) recharging his mobile from a different circle (other than from Chennai owned by a different entity:

1.2.1) Facts:

The Subscribers of the Assessee (Vodafone South Limited, Chennai), have the option to recharge their mobiles from Other Circles, that are owned by different Entities/ Companies, who have separate ST Registration and PAN.

At the month end, invoices are raised by the Assessee on other circles based on the value recharged by the Assessee's Subscribers at the Other Circle. These amounts are reflected as Revenue in the books of the Assessee on usage basis.

However, the Assessee did not discharge Service Tax on such Invoices/transactions although it is the "Service Provider" to such subscribers.

1.2.2) Issue:

Vodafone South Ltd. **Chennai** (VSLC) subscriber recharges his mobile from other circles. Such transactions are treated as "Out Roamer" transactions and taken to Revenue Account in Assessee's books as they are the Provider of Service. **Whether VSLC is liable to Service Tax on Out roaming Revenue?**

1.2.3) Analysis:

1.2.3.1) Out Roaming Revenue:

Based on a special software designed, the Assessee is able to arrive at the value of recharge, done by its Chennai Subscribers at Other Circles. This figure is recognized as Revenue in Assessee's books on usage basis of its Chennai Subscriber. The value of the card (excluding Service Tax) is paid to the Assessee by the respective Circles from whom, the Assessee's Subscriber had recharged.

While Outroaming is treated as a Revenue in books, corresponding Service Tax was not discharged.

1.2.3.2) Definition of "Service"

Sec. 65B (44) of Finance Act, defines Service as under:

"Service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-.....

Based on the above definition,

- a) The Assessee is providing the Service to its Chennai Subscribers although they have recharged from Other Circles.
- b) There is a consideration that is passed on to the Assessee from Other Circles. Inter Company entries are booked for the above transactions.
- c) It is an activity carried out by one person to another.
- d) In fact, ST is discharged, when the same subscriber recharges his card from the Home Circle, while no ST is charged when the same Subscriber recharges it from Other Circles.

1.2.3.3) Person liable to paying service tax:

Relevant Provisions under Service Tax:

Rule 2 (1) (d) (ii) of the Service Tax Rules states as under:

"person liable for paying service tax",

-

ii) *In a case other than sub-clause (i), means the **provider of service**.*

1.2.3.4 Thus based on the above definition, only the Service Provider is liable for paying Service Tax. It cannot be done by any other person. Payment made by any other person, cannot be a substitute for non-discharge of tax by the Assessee

1.2.3.5. Since, the assessee being the provider of output service, all Out Roamer transactions are liable to Service Tax and the Assessee is liable for payment of Service Tax.

1.2.4) Treatment in Books and in ST3 Return:

1.2.4.1) Books:

All Out Roamer transactions are recognized as Revenue, on Usage basis, in Assessee's books.

On "Out Roamer" transactions the Assessee claims the Card Value amount from different companies (Assessee's Subscribers who have recharged from Other circles).

1.2.4.2) ST 3 Return:

Out roamer Revenue though treated as a Revenue in books, is **not** disclosed as a **Taxable Value** in the **ST 3 Returns**.

1.2.5) Assessee's View:

- **Revenue Neutrality:**

It is informed by the Assessee, that although ST is not discharged by us, the same is discharged at the Primary Level, by a different entity, and hence it is Revenue Neutral.

This stand cannot be accepted since, the assessee being the provider of service, has availed cenvat on all input and input services and on capital goods even on such services provided to Outroamer subscribers and to claim that ST need not be discharged by it since it has already been discharged by another entity at the Primary level defies all logic.

It is only natural that if some other entity has paid Service Tax on an "Unfulfilled Service" on advance basis, it is left to such assessee only to claim refund as per rule 6(3) of Service Tax Rules and not to have the same setoff through some other assessee. Hence this Revenue Neutral concept may not be acceptable.

b) The assessee then came with an argument that, since the ST discharged on inroaming transactions is in excess of their ST dues on outroaming value, such excess can now be claimed as a dischargement of the \$T dues on outroaming.

This cannot be accepted since

- i) inroaming and outroaming are two entirely different transactions. While, ST on inroaming discharged by the assessee is on an unfulfilled service, at best, credit/refund can only be claimed, after fulfillment of the conditions prescribed in rule 6(3) of Service Tax Rules, it cannot be alternatively adjusted against ST on Outroarming. This is only an after thought, now put across by the assessee.
- i) The assessee has not fulfilled the conditions specified in rule 6(3) and hence may not be eligible to claim credit on such excess.
- ii) No such claim of credit is reported in ST 3 Returns.
- iv) Outroaming value is considered as a Revenue in books of accounts but not disclosed in ST3 returns.

1.2.6) Our View:

- i) It is an undisputed fact that the Assessee is providing Service to all its subscribers who are its customers, irrespective of the fact that the recharge was done at the Home Circle or Outside. The practice of discharging ST on Home Circle Revenue but not on Outroaming Revenue defies all logic.
- ii) The Assessee is the Service Provider for all Outroaming Revenue and hence is liable to Service Tax. As per provisions of Rule 2 (1) (d) (ii), the person liable for payment of Service Tax, is only the **"Service Provider"** who provides such service and not by any other person , and in this case the Assessee being the Service Provider should have discharged the Service Tax on Outroaming Revenue.
- iii) Further, on all Outroaming services provided by the Assessee to its customers, full Cenvat Credit had been availed by the assessee. After having availed the full Cenvat Credit for providing the Outroaming services to its own subscribers, the assessee ought to have discharged his liability to Service Tax on Outroaming Revenue.
- iv) Off-Setting ST discharged by some other entity against the Assessee's liability to discharge Service Tax on the claim it is Revenue Neutral, is against the provisions of law, especially when, the law provides for adjustment of ST paid on Unfulfilled services to the assessee who has discharged the tax.
- v) The Industry Practice is to discharge Service Tax on "Outroamer Services" as the same is treated as Revenue in books. (eg.) Aircel Cellar Ltd."

17. On perusal of the above audit report, the explanation given by the assessee that service tax has already been discharged by the other Vodafone entity or other circle though seen noted and understood by the audit team has not been accepted. In para 1.2.5 it is noted by the audit team that if any other entity has paid service tax without providing service, on advance basis, such assessee is left to claim refund. The contention of the assessee that service tax already stands discharged by other entity is not negated by the audit team. The department has no explanation as to what happened to the service tax collected by the other Vodafone entities or other circles on the out roamer revenue which is the subject for demand of service tax in the present dispute. The department has to explain the same and cannot leave it for guess work. The audit report concludes by merely saying that the appellant being the service provider has to pay service tax.

17.1 In the impugned order, the adjudicating authority has rejected this contention put forward by the appellant, by observing that the appellant has not submitted any documents to show that other entities have already discharged service tax. The Ld. Counsel appearing for the Department has harped much upon this observation of the adjudicating authority, to argue that the demand confirmed is correct. The facts reveal that the department has quantified the out roaming revenue from the accounts maintained by the software system of the appellant. There is no allegation that along with E top up charges the service tax also has been transferred to the appellant. Even as per the SCN, only the out roamer revenue has been transferred to the appellant. The department has to say then as to what happened to the service tax collected. It is also not the case that those Vodafone entities which collected the tax have not paid to government exchequer. There is no evidence of any proceedings initiated against such other Vodafone entities in this regard. As per the audit report and facts after weighing the balance of probabilities the strong inference that can be drawn is that service tax has already been discharged on the out roamer revenue to the government exchequer. The service tax having been already discharged on the services provided to the subscriber, the department cannot again collect the service tax.

18. In the case of ***Chotey Lal Radhey Shyam vs, CCE Lucknow*** (supra), similar issue as to demand of service tax on an assessee when the tax has already been discharged by another came up for consideration. The issue considered by the Tribunal in the said case was whether service tax is payable on the SIM cards sold by distributors. It was observed that since BSNL had already paid the service tax on SIM cards sold, the demand of service tax from the franchisee again would amount to double taxation. The said decision was upheld by the Allahabad High Court as reported in **2018 (8) GSTL 225 (All.)**. the relevant paragraphs read as under :

“3. On 20th April, 2016, appeal was admitted on following substantial questions of law : -

(i) Whether the Hon’ble CESTAT has erred in not confirming the demand of Service Tax along with interest and imposition of penalties (as confirmed in the Order-in-Original, dated 3-10-2010) for the period in question when the “Business Auxiliary Service” was clearly defined under Section 65(19) of the Finance Act, 1994 and included services rendered by the respondent?

(iii) When the Hon’ble Apex Court in the case of *Idea Mobile Communication* reported in [2011 \(23\) S.T.R. 433](#) (S.C) has held that the value of SIM card forms part of activation charges as no activation is possible without valid functioning of SIM card and the value of taxable service is calculated on the gross total amount and the present transactions to BSNL and payment by BSNL were different, whether the Hon’ble CESTAT was justified in dropping the demand?

(iv) Whether the Hon’ble CESTAT erred in treating it as double taxation when Services are distinct? Service Tax is paid on the full value of SIM card by BSNL under the “Telecommunication Service” and not under “Business Auxiliary Service”. In the instant case Service Tax has been demanded from the respondent under the category of “Business Auxiliary Service” on the commission received from BSNL, which is different from “Telecom Service”.

(v) Whether the Hon’ble CESTAT was justified in rejecting the plea of the Department when the Hon’ble CESTAT itself had given detailed reasons for the same vide paragraphs 18 to 21 of the final Order Nos. ST/A/684-687/2012, dated 6-11-2012 in case of *M/s. Martend Food & Dehydrates Pvt. Ltd.* which was relied upon in this case holding that “The argument that tax should not be demanded in situation where somebody else has paid tax on the taxable value of a service is not an argument that can be accepted normally” and has itself referred to Board’s Circulars?

4. We find that similar controversy came up before Tribunal, Principal Bench, New Delhi in *Daya Shankar Kailash Chand v. Commissioner of C. EX. & S. T., Lucknow*, [2013 \(30\) S.T.R. 428](#). After considering judgment of Supreme Court in *Idea Mobile Communication Ltd.*, [2011 \(23\) S.T.R. 433](#) (S.C.), Tribunal passed following judgment : -

“We have seen the Supreme Court’s judgment in the case of *Idea Mobile Communication Ltd.* [[2011 \(23\) S.T.R. 433](#) (S.C.)]. The issue involved before the Hon’ble Supreme Court was as to whether the value of the SIM cards is required to form part of the activation charges or not. Inasmuch as the issue before the Hon’ble Supreme Court was entirely different than the issue involved in the present case we are of the view that following said decision

by Commissioner (Appeals) in preference to the decision of Tribunal on the same issue as involved in the present case is not proper. We also refer to the latest decision in the case of *Martend Food & Dehydrates Pvt. Ltd.* vide Final Order Nos. ST/A/684-687/2012-Cus., dated 6-11-2012, wherein after taking note of the entire case law available on the said issue, the Tribunal in a detailed order has held that activity of purchase and sale of SIM card belonging to BSNL where BSNL has discharged the Service Tax on the full value of the SIM cards, does not amount to providing business auxiliary services and confirmation of demand on the distributors for the second time is not called for. By following the said decision, we set aside the impugned order and allow the appeal with consequential relief to the appellants.”

5. Then, again similar controversy came up in Central Excise Appeal No. 21 of 2013, *Commissioner Central Excise v. M/s. Daya Shankar Kailash Chandra Mal* [[2014 \(34\) S.T.R. J99](#) (All.)] and a Division Bench of this Court consisting of Hon’ble Rajiv Sharma and Hon’ble Dr. Satish Chandra, JJ, vide judgment dated 25th July, 2013 dismissed appeal at admission stage passing following order : -

“Heard Mr. Rajesh Singh Chauhan, learned Counsel for the appellant.

In nutshell, the case of the appellant is that M/s. Daya Shanker Kailash Chandra/respondent having Service Tax Registration under the category of ‘Business Auxiliary Service’ is a partnership firm which is providing the service on behalf of M/s. Bharat Sanchar Nigam limited (BSNL), a company incorporated under the Companies Act, 1956 for providing services of promotion and marketing/distribution of its various products. During the course of enquiry, it was observed that the respondent neither paid Service Tax amount to Rs. 6,87,387/- including cess during the periods 2008-09 and 2009-10 including April, 2010 nor submitted ST-3 returns as and when required. Accordingly, a show cause notice was issued to the respondent. The case was adjudicated by the Additional Commissioner, Central Excise, Lucknow, vide order dated 25-10-2011, wherein the adjudicating authority confirmed the demand of Rs. 6,87,389/- under the proviso to Section 73(1) of the Finance Act, 1994 along with interest and imposed penalty under (sic) Section 78 of the said Act. Feeling aggrieved, the respondent preferred an appeal before the Commissioner (Appeals), who, vide order dated 30-4-2012, upheld the order dated 25-10-2011. Thereafter, the respondent filed an appeal before the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), which was allowed vide order dated 18-12-2012. Hence, the instant appeal.

After hearing learned Counsel for the appellant, we are of the opinion that no substantial question arises in the instant appeal, in view of the decisions of the Apex Court in the case of *Martend Food & Dehydrates Pvt. Ltd.* vide final order dated 6-11-2012, wherein it was held that activity of purchase and sale of SIM Card belonging to BSNL where BSNL has discharged the service tax on the full value of the SIM cards does not amount to providing Business Auxiliary Service. Therefore, no interference is called for.

Accordingly, the appeal is dismissed at the admission stage itself.”

6. Judgment of Supreme Court in *Idea Mobile Communication Ltd.* [[2011 \(23\) S.T.R. 433](#) (S.C.)] (supra) has been considered by Tribunal, Principal Bench, New Delhi and similar issue has already been considered in aforesaid judgment of this Court, with which we do not find any reason to take a different view. Hence, aforesaid questions are answered against Revenue, following aforesaid judgments.

7. Appeal is, accordingly, dismissed. Interim order, if any, shall stand vacated.”

Though department has filed appeal against the said decision before the Apex Court, there is no stay of operation of the judgement passed by the Hon'ble Apex Court.

19. In the case of ***Kakinada Seaports Ltd. vs. CCE, S.T. & CUS, Visakhapatnam-II*** (supra) the contention raised by the appellant therein was that service tax when already discharged by another cannot be again demanded from the assessee. The facts reveal that according to the agreement signed by appellant therein with the Government of Andhra Pradesh (GOAP), the appellants were given permission to build and operate existing berths as well as to develop and operate additional berths etc. The appellant had collected the revenue for the operation services rendered by them and handed over the share of GOAP. Service tax was discharged by GOAP on the amount received by them. The demand was made on the appellant therein by the department alleging that in terms of Notification No.30/2012-ST the appellant is liable to pay the service tax under reverse charge mechanism. The Tribunal observed that since the service tax on the consideration has already been discharged by GOAP, the demand on the appellant again cannot sustain. Relevant paragraphs read as under :

“4.4 The second ground taken by the appellant is that on the same service, tax cannot be demanded twice. In this case GOAP has paid the tax and in fact tax has been reimbursed by the appellant. Apparently in the initial period of introduction of negative list and the amendment of Finance Act, both GOAP and the appellant did not take note of the provisions and consequently GOAP continued to pay tax. The question that arises is whether in a situation like this where service provider viz., GOAP has paid the tax even though not liable to pay the same can again be demanded from the appellant. Since taxable event is one and the same, there cannot be levy of Service Tax twice. Therefore, we find ourselves in agreement with the submission that once the service provider has paid the tax under reverse charge mechanism, Service Tax cannot be demanded from the appellant. Nevertheless it has to be appreciated that this is a mistake on the part of the appellant since they were liable to pay the tax but did not pay. However, remedy would lie in imposition of penalty for contravention of relevant provisions but not recovery of Service Tax. In this case penalty has been imposed on the ground that Service Tax was not paid and not for mere contravention of provisions.

4.5 Under the circumstances discussed above, we find that the demand for Service Tax of more than Rs. 5.88 crores cannot be sustained.”

20. After analysing the facts and following the above decisions, we are of the considered view that the demand of service tax on out

roamer revenue cannot sustain and requires to be set aside. Ordered accordingly.

21. The second issue is with regard to the demand confirmed for non-reversal of cenvat credit on Business Support Services (BSS) which were reimbursed. The Ld. Counsel for appellant explained that the appellant availed input services (BSS) in the nature of lease line charges, transmission charges, annual maintenance etc. The appellant paid service tax on the entire consideration for the services. These services were not only used by the appellant but also used by other circles and these other circles shared the cost as per debit notes raised against them. The department is of the view that the appellant having shared the use of such services with other circles and also received the reimbursement of expenses for such services, the appellant is eligible only for proportionate credit, in respect of such services. The Ld.Counsel for the appellant submitted that the service tax having been paid by appellant on the entire consideration, the Department cannot deny credit to the appellant. It is also argued that, in any case, if the appellant had obtained Input Service Distributor Registration they would be able to pass on the credit to other circles also who were utilizing the services. It is thus argued that the situation would be only a procedural lapse and the credit cannot be denied.

21.1 From the facts, we find that department does not deny that appellant has used the services. So also, it is not denied that appellant has paid the service tax on the entire consideration. Merely because part of the consideration was reimbursed by other circles who had also used the services, the demand has been confirmed alleging that the appellant is eligible to avail proportionate credit only. It is pointed out by the Ld. Counsel for appellant that the definition of "input services" given in Rule 2(l) of Cenvat Credit Rules, 2004 does not say that the entire input services should be used only by a single output service provider. It merely states that input service has to be used by the output service provider. In the present case, the services have been used by other circles who are also output service providers. We find that the appellant having paid the service tax on the entire consideration and having consumed the services,

the department cannot deny the credit alleging that the services are shared with output service providers of other circles.

21.2 The Ld. Counsel relied upon the decision in the case of ***Greaves Cotton Ltd.*** (supra) wherein it was held that credit cannot be denied merely because the service tax was paid by Unit I for the output service (advertisement charges) when Unit II also had used the services.

21.3 The decision in the case of ***Dashion Ltd.*** (supra) has been relied to argue that non-obtaining registration as Input Service Distributor (ISD) is only a procedural infraction for which the substantive right of credit cannot be denied. The credit that is sought to be denied on account of the debit notes issued while sharing the input services, in our opinion, cannot sustain and the demand requires to be set aside. Ordered accordingly. This issue is found in favour of the appellant and against the Revenue.

22. The appellant has availed credit on HDPE ducts under the category of 'capital goods'. It is argued by the Ld. Counsel for appellant that the HDPE ducts are essential to the appellant's business in as much as the HDPE ducts are used to provide a cover to the optical fibre cables. Though the appellant had availed credit under 'capital goods' they have put forward the plea before the adjudicating authority that these items would fall within the definition of 'inputs'. As per Rule 2 (k) (iv) of CCR 2004, input means, '*all goods used for providing any output service*'. The Department has denied the credit alleging that the ducts are not used for providing telecommunication services and are only used as a resistant or protective cover for the optic fiber cables.

22.1 In the case of ***CCE Vs Modi Rubber Ltd. - 2000 (119) ELT 197 (Tri.-LB)*** it has been held that the credit cannot be denied if the goods fall under the category of "inputs" even though the assessee has availed it under the category of "capital goods". Though the adjudicating authority referred to these decisions, has denied the credit by observing that the goods neither qualify as "capital goods" nor as "inputs". After examining the facts, we find that since the goods are used as protective cover for optic fiber cables which are indispensable for providing output service of telecommunication

service, we are of the considered opinion that the credit availed on such items is eligible. The Demand raised on this count requires to be set aside. Ordered accordingly.

23. The input service tax credit on collection charges has been denied alleging that these are not used for providing output services and that the collection agency services do not have nexus with the output service. The period involved is prior to 1.4.2011 as well as post-1.4.2011. The definition of "input service" had been amended with effect from 1.4.2011 so as to exclude certain services. However, the definition remains the same with regard to input services used for providing output services.

23.1 In the case of ***Commissioner of Central Goods & Service Tax, Jaipur Vs Bharti Hexacom India Ltd.*** - 2023 (5) TMI 520 - CESTAT NEW DELHI, the Tribunal has held that collection agency service is covered within the main clause of Rule 2(l) of CCR 2004. Relevant para of the decision is reproduced as under :

"14. This apart, what needs to be noticed is that the view taken by the Joint Commissioner that since the activities in respect of collection /recovery of post-paid plan outstanding dues had been undertaken after completion of the provision of taxable output services they would not be covered in the main part or the inclusive part of the definition of input service is not correct. Rule 2(l) of the 2004 Rules provides that the input service must be used for providing output service. The provider of output service, therefore, shall be eligible to avail CENVAT Credit on all those services which are used for providing output services without which the provision of the said output service would become impossible or commercially inexpedient. What, therefore, follows is that services having relation with the business of providing of output service would be covered by the definition of input service. In this connection, reference can be made to the decision of the Tribunal in *Bajaj Finance Ltd. Vs. Commissioner of Central Excise, Pune* **2018 (10) GSTL 251 (Tri.-Mumbai)** wherein the Tribunal held as follows:

4. xxxxxxxxxxxx From the above definition it can be seen that any service used for providing output service. As discussed above, the service of taking repossession of the vehicle which is an activity in relation to recovery of the loan is used for overall service of lending. Therefore as per the main part of the definition, the service of recovery agent received by the appellant is an input service. The appellant also claimed that his service is related to „Security" which is specified in the inclusion part of the definition as one of the input service. We find that the vehicle on which the appellant have given the loan is hypothecated with the appellant as the security. Therefore in connection to the recovery of the loan this vehicle is taken under repossession, therefore this service is clearly covered under the definition of „Security" which means "a thing deposit or pledged as a guarantee of the fulfilment of an undertaking or the repayment of the loan,

to be forfeited in case of default. In view of this definition the service of taking repossession of the vehicle from the borrower is a part of security service which is specifically included in the definition of input service. For this reason also the service of repossession provided by the recovery agent to the appellant is an input service. Therefore the appellant is clearly entitled for the Cenvat credit on such input service. However it is observed from the submission of the Ld. Counsel that the amount of recovery charges was recovered by the appellant from the individual borrowers at the time of giving repossession of the vehicle in case the borrower has repaid the amount. In this regard the proceedings related to demand of Service Tax on such part is pending before this Tribunal. Since that is not a subject matter of the proceedings of the present case, the same cannot be taken into consideration for deciding the issue on merit involved in the present case. However, the Revenue is free to take appropriate action in accordance with law, if it is found that against the credit of input service i.e. seizing charges if any exempted service is provided. As per our above discussion, the appellant is entitled for the Cenvat credit on the service of repossession of vehicle provided by the various recovery agent to the appellant against the output service of the appellant i.e. lending of money (Banking and Other Financial Service), accordingly the impugned order is set aside. The appeal is allowed.

15. In Vodafone Essar Cellular Ltd., the Tribunal also reiterated the aforesaid views in the following manner:-

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 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-1 - 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.

16. In view of the aforesaid discussion, it has to be held that the respondent was entitled to avail CENVAT Credit of service tax discharged on the commission paid by the respondent to collection agents for collection of dues of post-paid plans from the subscribers.

17. The appeal filed by the Department would, therefore, have to be dismissed and is dismissed.”

23.2 Without collection of dues from customers, the appellant would not be able to run its business and provide output services. For these reasons, we find that the credit availed on collection agent charges is legal and proper.

24. The appellant has availed credit on various inputs like waste bin, paper rolls, diaries, award shields and ducts etc. under the category of "inputs". The department has denied credit of Rs.5,39,542/- being the input credit availed on these items. The appellant reversed the credit of Rs.1,12,359/- along with applicable interest of Rs.84,641/- which is the credit availed in respect of waste bin, paper rolls, diaries, etc. However, they contested that the input credit availed in respect of ducts is eligible on the ground that these are used to get cover the buried the HDPE conduit which helps to provide protection from corrosion and thus eliminates maintenance. The Ld. Counsel submitted that they are contesting a demand of Rs.2,24,718/- being the amount pertaining to HDPE ducts only. The issue with regard to ducts whether eligible as input credit has already been discussed in the preceding paragraph. For the same reasons, we find that credit is eligible. However, the amount requires to be verified by the adjudicating authority.

25. Another issue raised in the SCN is the irregular availment of cenvat credit passed on by debit notes to group concerns. It is alleged in the SCN that the appellant has raised debit notes on their group concerns to pass on charges like lease line charges, black berry services, reimbursement of expenses like E&Y charges, cable and wireless for bandwidth etc. The case of the department is that the appellant has availed credit of the service tax paid on these input services although part of the consideration was reimbursed by their group concerns who also used these services. The Department is of the view that the appellant is eligible to avail only proportionate credit for which they have borne the expenses (though service tax paid entirely) and the credit attributable to the amount which has been reimbursed by the group concern is to be reversed. The very same issue has been considered with regard to BSS. The appellant has argued that in any case, if they had obtained ISD registration they would be able to pass on the credit to their group concerns and it is only a procedural lapse. For the reasons recorded in para 24 as above, we find that the credit cannot be denied when the appellant

has paid the service tax on the entire consideration in respect of these input services. We hold that the credit is eligible.

26. Credit has been denied in respect of input services for which credit notes were received from vendors. In the SCN it is alleged that M/s.Indus Tower Ltd. (ITL) which is one of the vendors of the appellant have raised credit notes pertaining to reimbursement of value of input services on account of certain disputes between them. It is alleged that though the appellant has been issued credit notes by ITL so as to return part of the consideration, the appellant has availed cenvat credit on the full value of the bill without reversing the value pertaining to credit notes issued by the vendors. Ld. Counsel has submitted that even though the vendor (ITL) issued credit notes it was only for the value of services and it did not include the service tax amount. The service tax amount was already collected by ITL from the appellant on which the appellant has availed credit. The vendor M/s.ITL has issued a certificate stating that they have paid the service tax collected from appellant to the government exchequer and that they have not returned the service tax by issuing credit notes. The appellant has furnished a letter issued by M/s.ITL along with appeal paper book. Since the appellant has borne the burden of service tax, we are of the opinion that the appellant has rightly availed the credit. The demand raised on this count cannot sustain and requires to be set aside.

27. Ld. Counsel for the appellant argued on the ground of limitation also. It has to be stated that the demand has been raised pursuant to the special audit conducted by the department. The entire figures and details for issuing the show cause notice has been taken from the accounts maintained the appellant. There is no positive act of suppression alleged or established against the appellant. There is no allegation in the SCN that appellant did not cooperate with the department or that department had unearthed some hidden figures or parallel invoices. The appellant has filed periodical statutory returns and also discharged service tax. During special audit, the department has taken the view that out roaming revenue is subject

to levy of service tax at the hands of appellant also and also raised objection of availment of certain credit. The show cause notice has been issued only on such interpretational issues. In such circumstances, we find that there is no ingredients to invoke the extended period or to impose penalties. The decision in the case of **International Merchandising Company** (supra) would be applicable and are reproduced below :

“22. The final submissions which need to be considered is whether (i) the extended period of limitation would stand attracted in the case of the first show cause notice; and (ii) whether a valid ground for the imposition of a penalty was made out. In this regard, reliance has been placed on behalf of the appellant on the decision of this Court in *Padmini Products v. CCE, Bangalore* [(1989) 4 SCC 275 = [1989 \(43\) E.L.T. 195](#) (S.C.)] to submit that the extended period of limitation would not be attracted as the appellant has not acted with dishonest or fraudulent intent.

23. In Paragraph 4.20 of its order, the Tribunal has specifically observed that the present case involves the interpretation of statutory provisions. Having said this, the Tribunal in the concluding paragraph of its decision held that since the matter was being remitted back to the Commissioner for re-determination of the quantum of demand, the amount of penalty would have to be re-determined in accordance with the duty demand confirmed in the demand proceedings.

24. We are of the considered view that the Tribunal having come to the conclusion that the issue turned upon an interpretation of the provisions of Section 65(68) and Section 65(86b) of the Finance Act, 1994, there was no warrant to allow the invocation of the extended period of limitation and to direct the determination of the penalty following the re-quantification of the demand. The extended period of limitation would clearly not stand attracted in respect of the first show cause notice dated 20 October, 2009. The show cause notice shall hence have to be confined to the normal period of limitation excluding the extended period.

25. As far as the penalty is concerned, we are of the considered view that there was no warrant for the imposition of the penalty as the dispute in the present case essentially turned on the interpretation of the statutory provisions and their inter-play with the circular issued by the CBEC. Finally, we also order and direct that the view of the Tribunal on the applicability of the provisions of Section 65(86b) of the Finance Act, 1994 as amended has been reversed by this Court. On remand in pursuance of the impugned order of the Tribunal, the adjudicating officer shall abide by the above directions.

26. The appeals shall stand allowed in part in the above terms.”

27.1 For the reasons stated above and following the decision cited above, we hold that invocation of extended period is not legal and proper. Penalties also require to be set aside. The issue on limitation is held in favour of the appellant.

28. From the foregoing discussions and findings, we hold that –

(a) Demand of service tax, interest and penalties on out roaming revenue is entirely set aside.

(b) Denial of cenvat credit on BSS is set aside.

(c) Denial of cenvat credit availed on capital goods on 'ducts' is set aside. Appellant is eligible to avail credit under the category of 'inputs'.

(d) Denial of credit on items like waste bin, paper rolls, diaries, award shields etc. under the category of "inputs" is upheld. Denial of credit on HDPE Conduits is set aside. However, the quantification of this amount is required to be verified by the adjudicating authority.

(e) Denial of input service tax credit on collection charges is set aside.

(f) Denial of cenvat credit passed on by debit notes to group concerns is set aside.

(g) Denial of credit availed in respect of input services for which credit notes were received from vendors (M/s.ITL) is set aside.

(h) Demand of interest and penalties are set aside.

29. In the result, the appeal is partly allowed with consequential reliefs, if any, as above.

(pronounced in open court on 12.07.2024)

sd/-

(VASA SESHAGIRI RAO)
Member (Technical)

sd/-

(SULEKHA BEEVI. C.S)
Member (Judicial)