CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

Service Tax Appeal No. 55441 of 2014

[Arising out of Order-in-Original No. 99-102/2014-15 dated July 31, 2014, passed by the Commissioner (Adj) New Delhi]

Alcatel Lucent India Ltd. ... **Appellant**
Plot No.25, Sector 18, Electronic City
Gurgaon-122015.

Versus

Commissioner of Service Tax ... **Respondent**
IAEA House, 17 B, IP Estate,
MG Marg, New Delhi 110002.

APPEARANCE:

Shri Tarun Gulati and Shri Ankit Sachdeva, Advocate for the Appellant
Shri Radhey Tallo, Authorised Representative for the Department

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P V SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING/DECISION: JANUARY 21, 2021

FINAL ORDER NO. 51039 /2021

JUSTICE DILIP GUPTA

The appellant has filed this appeal against that part of the order dated July 31, 2014 passed by the Commissioner (Adjudication[1]) that has denied CENVAT Credit on the service tax received from the sub-contractors and also on the service tax paid by the appellant on import of services under reverse charge mechanism. The remaining demands contained in the four show cause notices dated October 23, 2009 for the period 2004-09, October 21, 2010 for the period 2009-10, October 04,

1. **the Commissioner**

2011 for the period 2010-11 and November 27, 2012 for the period 2011-12 have been dropped.

2. Two issues therefore, arise for consideration in this appeal:

> **A.** Whether services provided by the sub-contractors qualify as input services for the Appellant and thus, CENVAT Credit is admissible on the invoice of the sub-contractors or not?
>
> **B.** Whether Appellant is eligible for CENVAT Credit on service tax paid by on import of services under reverse charge mechanism for period prior to April 18, 2006?

3. In so far as the **first issue** is concerned, Shri Tarun Gulati, learned Counsel appearing for the appellant has relied upon an order dated January 08, 2018 passed by the Commissioner, Rohtak in the case of the appellant for a subsequent period 2014-15, wherein the Commissioner has observed that the services provided by the sub-contractors are 'input services' for the appellant and the appellant is eligible to take credit of the service tax. Learned Counsel has also placed reliance upon an order dated August 24, 2018 of the Tribunal in Service Tax Appeal No. 53011/2015 in the matter of the appellant for the period 2012-13.

4. Learned Authorised Representative for the Department has, however, supported the findings recorded by the Commissioner on this issue.

5. The Commissioner has denied CENVAT Credit on the services received from sub-contractors because of the clarification contained in the Master Circular dated August 23, 2007. The relevant portion of the Master Circular is as follows:

"Circular No. 96/7/2007-S.T., dated 23-8-2007

Master Circular clarifying technical issues relating to taxation of services

Reference Code	Issue	Clarification
999.03/ 23-8-07	A taxable service provider outsource a part of the work by engaging another service provider, generally known as sub-contractor. Service tax is paid by the service provider for the total work. In such cases, whether service tax is liable to be paid by the service provider known as sub-contractor who undertakes only part of the whole work.	A sub-contractor is essentially a taxable service provider. The fact that service provided by such sub-contractors are used by the main service provider for completion of work does not in any way alter the fact of provision of taxable service by the sub-contractor. Services provided by sub-contractors are in the nature of input services. Service tax, therefore, leviable on any taxable service provided, whether or not, the services are provided by a person in his capacity as a sub-contractor and whether or not such services are used as input services. The fact that a given taxable service is intended for use as an input service by another service provider does not alter the taxability of the service provided.

6. The Commissioner has denied the benefit of the Circular for the reason that the Master Circular would only relate to a situation where part of the whole work is carried out by the sub-contractor, but in the present case, the whole work was performed by the sub-contractor.

7. This observation of the Commissioner in the impugned order is not only factually incorrect because a bare perusal of the agreement indicates that only a part of the work was assigned to the sub-contractor, but even otherwise the Circular cannot be restricted to a case where part of the whole work is performed by the sub-contractor.

8. This issue also stands decided in favour of the appellant in the matter of the appellant for a subsequent period from 2014 to 2015, where the Commissioner placed reliance on the above Circular dated August 23, 2007 and made the following observations:

The order dated January 08, 2018

> "15. I have also examined the Clarification Code No. 999.03 referred to in CBIC Circular No. 96/7/2007-ST dated 23.08.2007 which is more relevant to the instance case as the case pertains to period 2014-15. Vide this referred Code, Board has clarified that a sub-contractor is essentially is a taxable service provider and the fact that the services provided by such sub-contractors are used by the main service provider for completion of his work does not in any way alter the fact of provision of taxable service by the sub-contractor. It also states that services provided by sub-contractor are in the nature of input services and service tax is leviable on the services provided by the sub-contractor.
>
> 16. I find in this case, it remains undisputed that the sub-contracted services received by the notice are being used for providing output services. Only allegation is that these services are not taxable and hence not qualified to be treated as input services. I find that the noticee is availing Cenvat credit on the sub-contractor services and discharging its liability on the higher value of the taxable services. Thus, I see that Department in no way has been put to the disadvantage. I find that the noticee has also contended that the allegation that entire services have been sub-contracted is also not true as some core activities like provision of software etc. are still carried out by them. In such a situation, the allegation that the services of sub-contractor are not to be treated as input services cannot be sustained."

9. It can be seen from the aforesaid order passed by the Commissioner that the decision of the Division Bench of the Tribunal in Service Tax Appeal No. 53011 of 2015 decided on August 24 2018 in the matter relating to the appellant for the period 2012-13 was also relied upon.

10. It needs to be noted that a Larger Bench of the Tribunal in **Commissioner of Service Tax** vs. **Melange Developers (P) Ltd**.[2] also observed that a sub-contractor renders a taxable service to a main contractor and the relevant portion is reproduced below:

> "15**.** It is not in dispute that a sub-contractor renders a taxable service to a main contractor. Section 68 of the Act provides that every person, which would include a sub-contractor, providing taxable service to any person shall pay Service Tax at the rate specified. Therefore, in the absence of any exemption granted, a sub-contractor has to discharge the tax liability. The service recipient i.e. the main contractor can, however, avail the benefit of the provisions of the Cenvat Rules. When such a mechanism has been provided under the Act and the Rules framed thereunder, there is no reason as to why a sub-contractor should not pay Service Tax merely because the main contractor has discharged the tax liability. As noticed above, there can be no

2. [2019] 106 taxmann.com 52 (New Delhi-CESTAT)

> possibility of double taxation because the Cenvat Rules allow a provider of output service to take credit of the Service Tax paid at the preceding stage."

11. In view of the above, it has to be held that the Commissioner was not justified in denying CENVAT Credit to the appellant on the services received from the sub-contractor.

12. The **second issue** that arises for consideration is regarding denial of CENVAT credit on service tax paid by the appellant on import of service under a reverse charge mechanism for the period prior to April 18, 2006. The relevant part of the order passed by the Commissioner is reproduced below:

> "The assessees in their defence reply dated 26.4.2011 submitted that CENVAT credit is available in respect of service tax paid as a recipient of service under section 66A of the Act.
>
> Whereas as per Rule 3(1)(ixa) of Cenvat Credit Rules, 2004:
>
> 3.(1) A manufacturer or producer of final products or a provider of output service shall be allowed to take credit of –
>
> (ixa) the service tax leviable under section 66A of the Finance Act.
>
> The above said clause has been inserted in Cenvat Credit Rules, 2004 by Finance Act, 2011 w.e.f. 18.4.2006 vide Notfn No. 23/2004-CE (NT) dated 10.9.2004. Therefore the cenvat credit of service tax paid under section 66A taken w.e.f. 18.4.2006 by the assessee. However, I disallow the cenvat credit of service tax paid under section 66A prior to 18.4.2006 by the assessee amounting to Rs.8,34,170/- however the Service Tax paid under reverse charge after 18.4.2006 is eligible to be taken as CENVAT Credit thus I allow Cenvat Credit of Service Tax of Rs.4,73,12,612/- and Rs. 3,58,07,426/- in respect of Show Cause Notice dated 23.10.2009 and 21.10.2010. "

13. Learned Counsel for the appellant has relied upon decisions of the Tribunal in **Commissioner of Central Excise and Service Tax** vs. **3M India Ltd**.[3] as also **Aditya Birla NOVO Ltd. Vs. Commissioner of Central Excise, LTU, Mumbai**[4] to contend that the observations

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3. 2017-TIOL-77-CESTAT/BANG

4. 2016-TIOL-576-CESTAT-MUM

made by the Commissioner are not correct and that the appellant is entitled to avail CENVAT credit.

14. In **3M India Ltd.**, it was observed by the Tribunal as under:

> 2. "……….The only question to be decided by me in this appeal is whether the assessee has availed CENVAT credit wrongly as alleged in the show cause notice and whether the impugned order passed by the Commissioner (Appeals) allowing appeal of the assessee on the ground that assessee was not liable to pay service tax under the reverse charge mechanism until the introduction of Section 66A of the Finance Act, 1994. It is undisputed that service tax was paid for input services on reverse charge method (import of service in March, April, November, 2005. It is also undisputed that service tax liability on this type of service came into effect only from 18.04.2006 with the introduction of Section 66A of the Finance Act, 1994……
>
> 3. Therefore, keeping in view the above facts, I am of the considered opinion that in the first instance, respondent was not liable to pay service tax and secondly having paid it, the assessee is entitled to get CENVAT credit and the assessee has rightly availed the CENVAT credit. Further, I note that by subsequent order of this Tribunal dated 19.02.2014 in the appellant's own case, assessee was held to be entitled to take CENVAT credit also. Therefore, I am of the considered opinion that the Commissioner (Appeals) has rightly held that in the facts and circumstances of this case, extended period cannot be invoked as there is no suppression with intent to evade payment of duty on the part of the assessee. Therefore, I do not find any merit in the appeal filed by the Revenue and the same is dismissed and the impugned order is upheld."

15. In **Aditya Birla NUVO Ltd.,** the Tribunal observed as follows:

> "7. I have heard the ld Counsel for the parties and carefully perused the material on record including the circulars issued from time to time by the CBEC and also the judgements cited at bar by both sides.
>
> 8. After going through the various circulars and the judgements I find that there is only one charging section in the service tax i.e. Section 66, Section 66A is merely a deeming provision which deems that the services provided by various service providers are provided by service recipients in India. Section 66A is not a charging section and the same has also been made clear by Circular 354/148/2009-TRU dated 16.07.2009 and in the said circular CBEC has made it clear that there is no mistake or omission in that relevant provision of CENVAT Credit Rules, 2004 and credit of tax paid on imported services should be allowed if they are in the nature of input services. Further, in this case the tax was paid under section 66 of the Finance Act, and hence the credit is admissible to the appellant. Further, as per the

> department impugned order though the tax itself was not required to be paid then in that case credit is nothing but a refund of the tax erroneously paid by the appellant in their CENVAT Credit account. Further, in the case of Bajaj Allianz General Insurance (supra) the bench of this Tribunal by relying upon the judgement of the Supreme Court in the case of CIT vs Mahalakshmi Textile Mills Ltd. [1967 (66) ITR 710 (SC) has held that the Cenvat Credit taken by the appellant is nothing but refund of the service tax paid by them on the services which were not required to pay service tax. The above said decision is squarely applicable in the facts and circumstances of the present case. Further, in the case extended period cannot be invoked as the appellant have been disclosing the credits in their ER-1 returns and they were under a bonafide belief that they are liable to pay tax in terms of Rule 2(1)(d)(iv) and also entitled to take credit and the issue involved in the present case was with regard to interpretation of statutory provision and moreover the ld. Commissioner has also not given any finding that the appellant have suppressed anything from the department. Further, I find that the judgement cited by the ld. AR are not applicable in the facts and circumstances of the present case and it is not necessary for me to deal with each and every judgement separately. "

16. In view of the aforesaid decisions of the Tribunal, it has to be held that the Commissioner was not justified in denying CENVAT credit on the service tax paid by the appellant on import of services for the period prior to April 18, 2006.

17. Thus, for the reasons stated above, it is not possible to sustain the order dated July 31, 2014 passed by the Commissioner to the extent it denies CENVAT Credit on the services received from sub-contractors and on service tax paid by the appellant on import of services under reverse charge mechanism prior to April 18, 2006. This part of the order of Commissioner is, accordingly, set aside. The appeal is allowed to the extent indicated above.

(JUSTICE DILIP GUPTA)
PRESIDENT

(P V SUBBA RAO)
MEMBER (TECHNICAL)

SS/Shreya