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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/1291-1292/2008 - EX[DB] & E/S/1245-1246/2008 Date 19/02/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S IDEA CELLULAR LTD
(AS A SUCCESSOR TO M/S IDEA MOBILE
COMMUNICATION LTD) DELHI ROAD,
SONEPAT(HR)
M/S IDEA CELLULAR LTD

Appellant
Vs
Respondent

C.C.E. ROHTAK

I am directed to transmit herewith a certified copy of **Final order No.** 130-131/09&S.O.NO166-67/09-EX[DB]dated 17-2-09 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
   C.C.E. ROHTAK
   SCO NO,6 SECTOR 1, ROHTAK.
2. Adv. / Consult SH. VASUDEVAN, ADV.,
   B-6/10, S.J.ENC.
   N. DELHI-29

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~~4 J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7 M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New - 3
8 Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 Nidheshak publications, I.P.Estate, new Delhi
11 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12 Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai
13 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
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Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

COURT NO. II
Excise Stay Application Nos. 1245-1246 of 2008 in Appeal Nos. 1291-1292 of 2008

[Arising out of the Order-in-Original No. 14/Commr/SU/08/ ST dated 02/04/2008 and 12/Commr/SU/08/ ST dated 24/03/2008 both passed by The Commissioner of Central Excise, Rohtak.]

For Approval and signature :
Hon'ble Shri S.S. Kang, Vice President
Hon'ble Shri Rakesh Kumar, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:
3.	Whether their Lordships wish to see the fair copy of the order?	:
4.	Whether order is to be circulated to the Department Authorities?	:

M/s Idea Cellular Ltd. Appellant

Versus

CCE, Rohtak Respondent

Appearance

Shri Vasudevan, Advocate – for the appellant.

Shri V. Choudhary, Authorized Representative (DR) – for the Respondent.

CORAM:**Hon'ble Shri S.S. Kang, Vice President**
Hon'ble Sh. Rakesh Kumar, Member (Technical)

DATE OF HEARING : 03/10/2008.
DATE OF DECISION : 17-02-2009.

FINAL Order No. 130 - 131 / 09 -EX Dated : __________
STAY ORDER No 166 - 167 / 09 - EX

Per. Rakesh Kumar :-

The appellant are engaged in providing cellular mobile telephone service to their clients, which during the period of dispute, was taxable under the heading "service provided by telegraph authority in relation to a telephone connection", as defined under Section 65 (105) (b) of the Finance Act, 1994. The appellant have set up Base Trans-receiver Station Towers (BTS Towers) at various locations in the circle which emit and receive wireless signals to and fro between a person availing cellular mobile telephone service through his SIM card which is installed in the handset. As soon as the person dials a particular number, the same is transmitted to such towers. From there the number gets transmitted to Base Station Controller (BSC) and from there it is transferred to Main Switching Centre (MSC) of the company. If the

Appellant's subscriber dials the number of another telephone service provider, the MSC instrument of the Appellant through wireless signals requests the MSC of that telephone service provider to connect to his subscriber. The Appellant
Addl custom duty
have taken credit of Central excise duty paid on various
including those
capital goods mentioned above and also the credit of service tax paid on various input services used for providing the output services. The Revenue by invoking Rule 6 (3) (c) of the Cenvat Credit Rules, 2004 has restricted the utilization of Cenvat credit for payment of service tax on the output services to 20% of the amount of service tax payable on the ground that the Appellant in addition to the taxable – "Service in relation to telephone connection", are also providing the "exempted services" (as defined under Rule 2 (e) of the Cenvat Credit Rules, 2004) of "network access to other telephone service providers (inter connectivity services)" for which the concerned telephone service providers are charged "IUC charges", "Tap out charges" and "Mobile terminating charge" and of "permitting the use of their infrastructure like BTS towers etc. by other mobile telephone service provides" for which they are charged "Infrastructure user charge" by the

Appellant. Since the Appellant have utilized the Cenvat credit for payment of service tax on the taxable output service without keeping in mind the restriction provided in rule 6 (3) (c), the Commissioner vide the impugned orders-in-original No. 12/Commr/SU/08/ST dated 24/03/08 and No. 14/Commr/SU/08/ST dated 02/04/08 has –

(a) confirmed Cenvat credit demands of Rs. 3,10,84,357/- and Rs. 7,36,40,470/- respectively for periods from October 2004 to September 2006 and October 2006 to March 2007 respectively under Rule 14 of Cenvat Credit Rules, 2004 readwith Section 73 (1) of the Finance Act, 1994 alongwith interest on this amount at the applicable rate ; and

(b) imposed penalties of Rs. 3,10,84,357/- and Rs. 7,36,40,470/- on the Appellant under Rule 15 of the Cenvat Credit Rules, 2004 readwith Section 78 of the Finance Act, 1994.

It is against these orders that these two appeals have been filed.

2. Heard both the sides.

2.1 Shri V. Laxmi Kumaran, Advocate, the learned counsel for the Appellant made the following submissions :-

(1) Providing interconnectivity and permitting use of infrastructure to other telephone service providers are not "exempted services", as the same were not taxable during the period of dispute. Only a service which is taxable can be exempted from tax, not the service which are not taxable at all. All kind of non-payment of service tax on services which are not taxable, cannot be considered as exempted services under Rule 2 (e) of the Cenvat Credit Rules, 2004.

(2) The service of "access to network" provided by the Appellant to other telephone service providers in respect of incoming calls is subsumed in the telephone services being provided by those telephone service provider to their respective clients, as in respect of calls originating in network of other service providers and terminating in the Appellant's network, it is the telephone service providers from whose network the calls originate who charge full amount from their respective clients for those calls and pay service tax on the same and thereafter the call charges collected by them are shared with the Appellants as per the formula prescribed by the TRAI. Thus the interconnectivity charges being received by the Appellant from other telephone service providers are nothing but their share of the call charges collected by other service providers

in respect of the calls originated from their network and terminated in the Appellant's network.

(3) Even if the interconnectivity and infrastructure use services are treated as 'exempted services', as defined under Rule 2 (e) of the Cenvat Credit Rules, 2004, as per the provisions of Rule 6 (4), capital goods Cenvat credit is available, as the capital goods are not used by the Appellant exclusively for providing exempted service and as per the provisions of Rule 6 (5), the provisions of sub-rule (1), (2) and (3) of Rule 6 of Cenvat Credit Rules, 2004 are not applicable in respect of 17 input taxable services specified in clauses (g), (p), (q), (r), (v), (w), (za), (zm), (zp), (zy), (zzd), (zzg), (zzh), (zzi), (zzk), (zzq) and (zzr) of Section 65 (105) of the Finance Act, 1994 unless these services are exclusively used for providing exempted services and credit of whole of service tax paid on these input services shall be allowed even if these services are used for providing non-exempt as well as exempted services. As per the Board's Circular No. 137/203/07-CX-4 dated 1/10/07 – "the 17 services specified in Rule 6 (5) are similar in nature to capital goods which is a part of fixed assets/costs that cannot be apportioned for maintaining separate records, that it is for this reason that there is no restriction on taking and utilization of credit on these services so far as they are used for providing some taxable services, that if the restriction of 20% is applied

to these services also, this basic purpose would be defeated and that credit taken in respect of these services can be utilized for payment of service tax without any limit. In view of this, the 20% limit prescribed in Rule 6 (3) (c) is not applicable in respect of capital goods Cenvat credit and service tax credit in respect of 17 services specified in Rule 6 (5). Tribunal in case of **CCE, Goa vs. V.M. Salgaonkar & Bros. Pvt. Ltd.** reported in **2008 (10) S.T.R. 609 (Tri. – Mumbai)** has held that Rule 6 (3) (c) is not applicable in respect of service tax credit of service tax paid on 17 services specified in Rule 6 (5) if these services are not exclusively used for providing exempted services or manufacture of exempted goods and that if an assessee is allowed to take any input duty credit, he should be allowed to utilize the same, as there is no reason for allowing some credit and not permitting its utilization.

(4) In view of the above, the 20% ceiling in Rule 6 (3) (c) would not be applicable for the utilization of capital goods Cenvat credit and service tax credit in respect of 17 services specified in Rule 6 (5) for payment of service tax on output service. The 20% ceiling on utilization would be applicable only on the credit other than the – 'capital goods Cenvat credit and service tax credit of the 17 Rule 6 (5) services'. If the 20% ceiling is applied in this manner, it will be found that the Appellant's input duty credit/ input service tax credit/ utilization for payment of

service tax on the output service has overshot the ceiling only on a few occasions by small amounting. As per Tribunal's judgment in case of **A.C. Nielsen Org Marg (P) Ltd. vs. CCE, Delhi** reported in **2006 (3) S.T.R. 503 (Tri. – Del.)**, assessment stipulated in Rule 7 (4) of Service Tax Rules, 1994 is half yearly and not monthly and therefore excess tax paid in one month can be adjusted against short payment in other month within the same half year period.

(5) Since there was dispute as to whether "inter-connectivity service" provided by one telephone service provider to another is taxable or not under heading "Service provided by Telegraph authority to its clients in relation to telephone connection" and since this issue was finally settled vide Board's letter No. 149/2/04-CX-4 dated 13/06/04 to BSNL, the Appellant cannot be accused of suppressing from the Department the fact that they are providing some services like inter-connectivity which are not taxable. Therefore only normal limitation period for demand of allegedly wrongly taken Cenvat credit is available and bulk of demand raised vide show cause notices dated 14/05/07 and 23/08/07 is time barred.

2.2 Shri V. Choudhary, the learned Departmental Representative made the following submissions –

(1) Since the definition of "exempted service" in Rule 2 (e) of Cenvat Credit Rules 2004 includes non-taxable service also, the "inter-connectivity service" and "infrastructure use service" being provided by the Appellant to other telephone service providers are "exempted services" and hence the provisions of Rule 6 (1), 6 (2) and 6 (3) would be attracted and the ceiling on utilization of input/capital goods Cenvat credit and service tax credit for payment of service tax on output service, as prescribed in Rule 6 (3) (c) would be applicable.

(2) Rule 6 (4) permits taking of full capital goods Cenvat credit and Rule 6 (5) permits taking of full service tax credit in respect of 17 services specified in Rule 6 (5), if the capital goods and the 17 specified services are used for providing taxable (non exempt) as well as exempted services. But taking of tax credit and its utilization for payment of tax on output service are two different things – the latter is not permitted by clause(c) of Rule 6 (3). Board's circular No. 137/203/07-CX-4 dated 01/10/07 is not binding on the adjudicating authority.

(3) Rule 6 (3) (c) is a provision for staggering the credit utilization for payment of service tax on put services, in cases where common inputs, capital goods and input services in respect of which Cenvat/service tax credit has been taken, are used for providing taxable

as well as exempted services. There is nothing in this rule to leave the capital goods or the 17 services specified in Rule 6 (5) from this ceiling.

(4) The demands are not time barred.

3. We have carefully considered the submissions from both the sides. The Appellant as a 'telegraph authority', as defined under Section 65 (111), provide cellular mobile telephone service, taxable during the period of dispute under Section 65 (105) (b). They had taken Cenvat credit/service tax credit of Central excise duty paid on various items of capital goods/service tax paid on various input services used in providing the output services which was being used for payment of service tax on the output service. Since in addition to the Appellant, there are a number of other companies designated as 'Telegraph authority' for providing landline or mobile telephone services, each having separate network and since a subscriber of a telephone service provider should be able to not only make telephone call to any person including persons who are the subscribers of other telephone service providers,

but also receive the telephone calls originating from anywhere including the network of other telephone service providers, all the telephone service providers, whether landline or mobile, have to have inter-connection with each other and they bill each other for the inter-connectivity i.e. providing access to their network to the calls originating from network of other telephone services providers – the telephone service provider from whose network the call originates, collects the full charges for the call from its subscriber, and pays the service tax on that amount, and if the call has terminated in the network of some other service provider, the call charges are shared with that service provider as per a formula prescribed by TRAI. The charges for such inter-connectivity are called ICU charges/Mobile terminating charges. "Tap out charges" are the charges for providing connectivity to the subscriber of other mobile telephone service provider who is roaming i.e. has moved out of home network. "Infrastructure charges" being received by the Appellant are for permitting the use of their infrastructure like BTS Towers etc. by other cellular mobile telephone service providers. There is no dispute about the fact that, the 'inter-connectivity services', 'roaming service and 'infrastructure use service' being provided by the Appellant to other telephone service providers were not taxable during the period of dispute. The point of dispute is as to whether these services can be treated as "exempted services" covered by Rule 2 (e) of the Cenvat Credit Rules 2004 for invoking the provisions of Rule 6 (3) (c) ibid.

3.1 It has been pleaded, that – 'inter connectivity/ network access service', 'roaming service' and 'infrastructure use service' are not 'exempted services' as the same are not even taxable. We do not agree with this contention, as the definition of "exempted services' as given in Rule 2 (e) of Cenvat Credit Rules 2004 is as under –

> "Exempted services' means taxable services which are exempted from the service tax leviable there and include services on which no service tax is leviable under Section 66 of the Finance Act, 1994".

Thus the expression 'exempted services' covers not only the services taxable under Section 66 of the Act, which are fully exempt from service tax by some exemption notification issued under Section 93, but also those services which are not taxable under Section 66 of the Act. In view of the wordings of Rule 2 (e) of Cenvat Credit Rules 2004, the services, in question, have to be treated as 'exempted services'.

3.1.1 It has been pleaded by the Appellant that the service of network access/inter-connectivity provided by the Appellant to other telephone service providers in respect of incoming calls is subsumed in the telephone service being provided by those telephone service providers to their respective subscribers and, therefore, the Appellant cannot be said to be providing 'exempted service' in addition to the taxable mobile telephone service, warranting application of Rule 6 (3) (c) of Cenvat Credit Rules 2004. We do not agree with this plea as the service of network access i.e. inter-connecting, being provided by the Appellant to other telephone service providers, is a service quite distinct from the telephone service being provided by those telephone service providers to their respective subscribers.

3.2 In view of the above, we hold that during the period of dispute, the Appellant were providing certain – "exempted services" in addition to the non-exempt taxable telephone service and, therefore, the provisions of Rule 6 (3) (c) would get attracted.

4. Second plea of the Appellants is that even if the provisions of Rule 6 (3) (c) are attracted, the limit of '20% of the service tax payable' on utilization of tax credit for payment of service tax on telephone service is not applicable in respect of capital goods Cenvat credit and service tax credit in respect of 17 input services specified in Rule 6 (5). We agree with this plea of the appellant as -

(a) In terms of the provisions of sub-rule (4) of Rule 6 of the Cenvat Credit Rules 2004, capital goods Cenvat credit is not permissible only when the capital goods are exclusively used for manufacture of 'exempted goods' or for providing 'exempted service', implying that in a situation where the capital goods are used for providing non exempt taxable service as well as "exempted service" or for manufacture of non exempt dutiable goods as well as 'exempted goods', the capital goods Cenvat credit shall be available ;

(b) In terms of the provisions of sub-rule (5) of Rule 6 of Cenvat Credit Rules 2004, service tax credit in respect of 17 input services specified in this sub-rule shall be available unless such services are used exclusively in or in relation to providing "exempted service" or manufacture of 'exempted goods', implying that in a situation when these services are used for providing non exempt taxable services as well as 'exempted services', or for manufacture of non-exempt dutiable goods as well as 'exempted goods' the credit will be available; and

(c) Tribunal in its judgment in case of CCE, Goa vs. V.M. Salgaonkar & Bros. Pvt. Ltd. (Supra) with regard to provisions of Rule 6 (3) (c) has held that if an assessee being eligible for some Cenvat service credit takes the credit, he should be allowed to utilize the same, as there is no reason for allowing some credit and not permitting its utilization.

4.1 We also find that the Board in its Circular No. 137/203/2007-CX-4 dated 01/10/07 has clarified as under -

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

4.1.1 From the above circular of the Board there is no doubt that the intention of the Government is not to restrict the utilization of the credit of 17 services specified in sub-rule (5) of Rule 6 to the 20% limit specified in Rule 6 (3) (c) and this will apply with equal force to capital goods Cenvat credit for which a similar provision has been made in sub-rule (4) of Rule 6 and which are also part of fixed assets that cannot be apportioned for maintaining separate records. As per Hon'ble Supreme Court's judgment in case of **CCE, Bolpur vs. Ratan Melting & Wire Industries** reported in **2008 (231) E.L.T. – 22 (S.C.)**, the Board's instructions are binding on the Departmental officers unless contrary view has been expressed by Hon'ble Supreme Court or any High Court. In this case neither any such judgment of Hon'ble Supreme Court or High Court has been produced, nor the Department has shown as to how the Board's instructions, which are its own instructions, are contrary to statutory provisions. We, therefore, have no hesitation in holding that the word "credit" in the expression – "the provider of output service shall utilize credit only to the extent of..." in sub-rule (3) (c) of Rule 6 does not include the 'capital goods credit' and the 'service tax credit in respect of 17 services referred to in sub-rule (5)' and accordingly the ceiling of '20% of the service tax payable' on utilization of credit for payment of service tax, as prescribed in Rule 6 (3) (c), has to be compared not with total credit utilization, but with the utilization of the credit, other than the capital goods credit and service tax credit in respect of the 17 input services mentioned in rule 6 (5) and only the utilization of the credit, other than the "capital goods Cenvat credit and service tax credit in respect of 17 services specified on Rule 6 (5)", which is in excess of 20% of the service tax payable, which would not be permissible. For example if the service tax payable is Rs. 100/-, the available capital goods Cenvat credit and credit of 17 input services specified in Rule 6 (5) is Rs. 70/- and available credit other than capital goods Cenvat credit and Rule 6 (5) services credit is Rs. 30/-, while the entire available capital goods Cenvat credit and Rule 6 (5) services credit of Rs. 70/- can be utilized, the utilization of the credit other than the capital goods Cenvat credit plus service tax credit in respect of 17 Rule 6 (5) services, would be restricted to 20% of Rs. 100/- i.e. Rs. 20/- and Cenvat credit utilization of (Rs. 30/- – Rs. 20/-) i.e. Rs. 10/- would not be permissible.

4.2 The Appellant have pleaded that if the 20% ceiling on utilization is applied only to credit of services other than the services covered by Rule 6 (5) and credit of inputs goods other than capital goods, utilization of credit for payment of service tax, in excess of the ceiling has taken place only in January 2005, March 2005 and May 2005 and this excess utilized credit cannot be demanded as Rule 6 (3) (c) is silent with regard to the period during which the 20% credit shall be utilized and in this regard reliance has been placed on Tribunal's judgment in case of **Vijayanand Roadlines Ltd. vs. CCE, Belgaum** reported in **2007 (7) S.T.R. – 219 (Tri. – Bang.)**, wherein the Tribunal with reference to Rule 3 (5) of the Service Tax Credit Rules, 2002, which is pari-materia with Rule 6 (3) (c) of the Cenvat Credit Rules, 2004, has held that the utilization is not restricted to monthly or quarterly basis and that it can be utilized at any time. We agree with this plea. In the case of Vijayanand Roadlines Ltd. (Supra) the Appellant during June 2003 to December 2003 period, as against service tax credit utilization quota of 35% of the total service tax payable, had paid entire service tax through PLA and they utilized the unutilized quota of payment through duty credit for January 2003 – December 2003 period, during January 2004 – March 2004 period and the Tribunal held that there is no time frame fixed in Rule 3 (5) of the service tax credit Rules, 2002 for utilization of the credit to the extent of 35% of the tax liability. Applying the ratio of the Tribunal's judgment in M/s Vijayanand Roadlines Ltd. case, to this case, if during certain months, the credit utilization for payment of service tax was less than the 20% ceiling specified in Rule 6 (3) (c) of Cenvat Credit Rules, 2002, the unutilized credit of those months has to be adjusted against utilization in excess of the 20% ceiling, in other months.

4.3 The demand for excess utilized credit is, therefore, required to be quantified as per our findings in para 4.1 and 4.2 above.

5. Another plea of the Appellant is that longer limitation period of five years under proviso to Section 73 (1) for recovery of excess utilized credit and penal provision of Rule 15 (4) of Cenvat Credit Rules, 2004 readwith Section 78 of

the Finance Act, 1994 have been wrongly invoked as there is absolutely no wilful misstatement, fraud or suppression of facts etc. with intention to evade the service tax. We agree with this plea of the Appellant, in view of the following –

(a) In each ST-3 return filed during period of dispute, the details of the service tax payable and the service tax paid through credit and through cash under TR-6 challans have been given and therefore the Appellant cannot be accused of concealing the fact that during certain months, their utilization of credit for payment of service tax had exceeded the limit of 20% of the service tax payable.

(b) The dispute in this case is linked with the question as to whether or not the 'inter-connect usage charges' being charged by one telephone service provider from another for network access attract service tax and the Board vide letter No. 199/2/2004-CX-4 dated 15/06/04 intimated BSNL that Interconnect usage charges would not attract service tax. In view of this background, it would be totally unfair for the Department to claim that it was not aware that the Appellant were providing non-taxable service like inter-connectivity, roaming service etc.

5.1 Hon'ble Supreme Court in cases of **CCE vs. Chemphar Drug & Limits** reported in **2989 (40) E.L.T. – 276 (S.C.)** and **Pushpam Pharmaceuticals Company vs. CCE, Mumbai** reported in **1995 (78) E.L.T. – 401 (S.C.)** has held that something positive, rather than mere inaction or failure on the part of an assessee has to be proved before invoking extended limitation period under proviso to Section 11A (1) of the Central Excise Act, 1944 and that since the expression – 'Suppression of facts' has been used in the company of strong words such as fraud, collusion in wilful default, it cannot be interpreted or mere omission – the act constituting 'suppression' must be deliberate. In this case neither the circumstances indicate 'suppression of facts', misstatement, fraud etc. nor any evidence in this regard has been produced. Therefore neither the demand beyond the normal limitation period of one year is sustainable nor penalty under Rule 15

(4) of Cenvat Credit Rules, 2004 readwith Section 78 of the Finance Act, 1994 is attracted.

6. In view of the above discussion, we hold that while the provisions of Rule 6 (3) (c) of the Cenvat Credit Rules, 2004 are attracted and wrongly utilized credit, if any, is recoverable with interest, the demands are sustainable only for the normal limitation period of one year and have to be quantified as per our findings in para 4.1 and 4.2 above and no penalty is imposable under Rule 15 (4) of Cenvat Credit Rules, 2004 readwith Section 78 of the Finance Act, 1994. Therefore, both the impugned orders are set aside and the matters are remanded to the Commissioner for de-novo adjudication as per our above directions. The appeals stand disposed off as above.

(Pronounced in the open court on 17/12/09.)

(S.S. Kang)
Vice President

(Rakesh Kumar)
Member (Technical)

PK