IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-SM

COURT –IV

Excise Appeal No.E/51012/2018-EX [SM]

[Arising out of Order-in-Appeal/Original No. 487-SM-ST-JPR-2017dated 28/12/2017 passed by the COMMISSIONER OF CGST & CENTRAL EXCISE-JAIPUR-I(Appeal)]

BHARTI HEXACOM LIMITED …Appellant

Vs.

C.C.E. & S.T.-JAIPUR-I … Respondent

Present for the Appellant : Mr.Hemant Bajaj & Mr.Shagun Arora, Advocates
Present for the Respondent: Mr.K. Poddar, D.R.

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing: 14/11/2018
Pronounced on :_19/12/2018

Final ORDER NO. 53438 /2018

PER: RACHNA GUPTA

Appellant is aggrieved with the order of Commissioner (Appeals) bearing No. 487 dated 28.12.2012.

2. The adjudication in this case began with a show cause notice No.2984 dated 30th March, 2013. The appellant who is engaged in providing telecommunication service, business auxiliary service, business support services, GTA service and sponsorship services and is availing cenvat credit on capital

goods/inputs/ input services was alleged vide the said show cause notice for wrongly availing the cenvat credit of Rs.3,93,540/-.

3. The total demand of Rs.3,93,540/- on this count was proposed to be recovered alongwith the interest of Rs.131070/- and the proportionate penalty. The said demand was confirmed vide the Order-in-Original No.25 dated 31.03.2014. Being aggrieved, an appeal was preferred before Commissioner (Appeals), upheld the following demand.

Particulars	Period Covered	Amount Involved	Deposit/ Reversal	Interest recoverable
Cenvat credit on input services such as outdoor catering, club membership & medical health checkup.	April 2010 to Sept. 2011	Rs.1,18,086/- (ST Rs. 1,14539/- + Cess Rs.3,547/-)	Deposited on 16.08.201 (*under protest*)	Rs.44,701/-
Cenvat Credit on items like desktop, chairs and fire extinguishers	April 2010-Nov. 2011	Rs.2,75,452/- (ST Rs.2,67,429/-+ Cess Rs.8023/-)	Deposited on 16.08.2012 (*under protest*)	Rs.86,369/-
		Rs.3,93,540/		**Rs.1,31,070/**

Still being aggrieved, the appellant is before us.

4. I have heard Ms. Sakun Arora, ld. Advocate for the appellant and Mr. Poddar, ld. D.R. for the Department.

5. For the purpose of impugned adjudication, the definition of input service has to be looked into in accordance of Section 2 (l) of Cenvat Credit Rules. Input service means:-

"input service" means any service, -

(i) used by a provider of taxable service for providing an output service; or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal,

and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage up to the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation up to the place of removal; but excludes services, -

(A) Specified in sub-clauses (p), (zn), (zzl), (zzm), (zzq), (zzzh) and (zzzza) of clause (105) of section 65 of the Finance Act (hereinafter referred to as specified services), insofar as they are used for -

(a) Construction of a building or a civil structure or a part thereof; or

(b) Laying of foundation or making of structures for support of capital goods,

Except for the provision of one or more of the specified services; or

(B) Specified in sub-clauses (d), (o), (zo) and (zzzzj) of clause (105) of section 65 of the Finance Act, in so far as they relate to a motor vehicle except when used for the provision of taxable services for which the credit on motor vehicle is available as capital goods; or

(C) Such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee.

6. Since different inputs/capital goods are in question, the respective arguments and findings are as follows:-

INPUTS ABOUT OUTDOOR CATERING SERVICES

7. Ld. Counsel has submitted that the services of outdoor caterer have been used by the appellant in the events organized for the employees of the company, the events were related to the company. Hence the expenses incurred in engaging the outdoor caterer for the arrangement of refreshment in the said events are not the expenses for any personal use of the employees. It is impressed upon that the said service has rather been used in fulfilment of statutory obligation under Section 46 of the Factories Act. The Cenvat Credit as availed there upon is therefore admissible. The same

is alleged to have wrongly been denied. It is further submitted that the distinction for the services for personal use came into effect from 01.04.2011. Prior to the said period all services used to fall within the phrase activities relating to business. She has relied upon **Hindustan Cococola Beverages Pvt. Ltd. v. CCE, Hyderabad- 2017 (49) STR 88 (Tri.-Hybd.) and Bharti Hexacom India Ltd. v. CCE, Jaipur-I Final Order No. 51963/2017 dated 23.02.2017**.

8. While rebutting these arguments, the ld. DR submitted that the Commissioner (Appeals) has relied upon various case laws as mentioned in para A to B of para 8(B) of the impugned order and has rightly denied the outdoor catering services to be an eligible input for availing cenvat credit.

9. After hearing both the parties qua this demand, I am of the opinion as follows:-

10. The bare perusal of input definition as above, makes it abundantly clear that the services as that of outdoor catering can very much be the input service provided, the services are not used primarily for personal use or consumption of any employee. Prior 01.04.2011 there was no exclusion clause in the aforesaid definition, which makes it abundantly clear that the service irrespective of personal use/ consumption by the employees was an eligible input service. The period in dispute

is April 2010 to September, 2011. Hence the cenvat credit till March, 2011 is admissible to the appellant.

11. With respect to the cenvat credit on outdoor catering services for the period from April 2011 to September, 2011, I find that the outdoor catering services have been obtained by the appellant company for all its employees in general, while holding an event for the employee of the company as a whole. In that scenario, the term 'personal use' as in the above definition cannot be attributed to the given circumstances and cenvat credit cannot be denied on the outdoor services. Case law of **Hindustan Cococola (Supra)** is squarely applicable. In the present case also admittedly, the cost of catering services has been born by the appellant company and has not been recovered from the employees. Such service is therefore held to be an input service for which the appellant was entitled to take the credit. The order under challenge to that extent is set aside.

FOR MEMBERSHIP FEE OF THE CLUBS

12. The ld. Counsel for appellant has submitted that they have paid certain Membership/admission fees of the employee's social outings and offsites of the company. Such outings are impressed upon to be the part of the business development policies as being essential to maintain a good professional enforcement being the part of HR Policies all over

the industries and as such is the activity relating to the business. Credit is therefore wrongly denied. She has relied upon **Phinolex Cable Ltd. vide Order No.A/2056/15/SMB, dated 30.06.2015 and Recold Tharmo Ltd. vide Order No.A/3698/15/SMB, dated 30.10.2015.**

13. Ld. DR while reiterating the arguments that the activity was exclusively for the personal benefit of the employee and as such has rightly been denied to be an eligible credit has prayed for the order to be upheld.

14. I opine that the adjudicating authorities below while denying the cenvat credit thereupon have held that there is no evidence produced by the appellant to prove any nexus of the services availed by the assessee to the business activity of the appellants. No doubt, appellant was supposed to produce such evidence as may prove as to who actually paid the said fee. As it will be the deciding criteria as to whether the fee was paid for the company as a whole under any of its policy for enhancing employee efficiency or those have been born by the individual employee for the sake of their own entertainment. Apparently there is no such evidence on record. In absence thereof, I find no infirmity in the order under challenge. The authority below has rightly relied upon the decision in the case of **Mudra Port & SEZ Ltd. Vs. CCE reported as 2009 (18) STT 314 (Tri.-Mumbai)** wherein, it was held that service tax paid on club house fee meant for the recreation of workers is not an eligible credit as it is not used for providing output services. I, therefore,

find no infirmity in the said finding. The order to said extent is hereby upheld.

HEALTH CHECKUP OF EMPLOYEES OF THE APPELALNT.

15. Ld. Counsel for appellant has submitted that facility of Medical Check-up was provided by the company to the employees under its Medi-claim Policy in view of grater assurance about the health of the employees. The said benefit has resulted in increased work efficiency of the employees, thereby ultimately affecting the business. Hence, the Health Checkup was not at all for personal use of the employees but in the interest of the business of the appellant, hence has wrongly been denied by the adjudicating authority below. **Reliance is placed on Prism Cement v. CCE, Bhopal, Central Excise Appeal No.50140/18, Final Order dated 04.04.2018 and Atlas Documentary Facilitators Co. P. Ltd. vs. CST, Mumbai-I -2017 (50) STR 22 (Tri. – Mum.).**

16. Ld. DR on the other hand has justified the findings even to this aspect. The original adjudicating authority has denied the service to be an input service only on the ground that M/s. Fortis Escort has provided service to individual employee and not to the assessee.

17. To my opinion the contention of Department is not acceptable because medical check-up irrespective it is in the interest of the business of the appellant or it is for personal

benefit of the employee, it is the individual employee only who has to be medically examined. Relevant would be, as to who has made the payment therefore. It is apparent that the payment thereof has been made by the company. Also it cannot be ruled out that the good health of employee will make them readily available for rendering the activities related to business. The appellants are in telecommunication business. Their employees are required to function for long hours and even at odd hours. The health of an employee may affect the activity of the appellants business. Hence, to my opinion the expenditure incurred by the appellant company for getting medical check-up of their employees, though individually, is definitely an input service. I draw my support from a decision of Allahabad Tribunal in the case of **HCL Technologies Ltd. vs. Commissioner, Central Excise, Noida – 2017 (48) STR 129**. Order to that extent is hereby set aside.

CENVAT CREDIT ON ITEMS LIKE DESK-TOP, CHAIRS & FIRE EXTINGUISHERS

18. Ld. Counsel has impressed upon that Desk-top and Chairs are indispensible tool for all business operation i.e. for providing telecommunication services. Even fire extinguisher is an essential item in the business premises of the appellant, without which, the appellant is not suppose to operate its premises. Hence all these articles are the capital goods.

Reliance placed on ICICI Lombard General Insurance Co. Ltd. vs. CCE – 2016 (42) STR 938 (Tri.-Mum.) and Mylan Labs v. CCE – 2017 (6) TMI 669 (CESTAT- Hyderabad).

19. Ld. DR, on the other hand, has impressed upon the findings of the Commissioner (Appeals) in para 6 of the order has impressed upon that only such category of goods as are mentioned in Rule 2 (a) (A) Clauses (i) (iii) of Cenvat Credit Rules as used for providing output services can qualify as capital goods and none other. The order to this extent is prayed to be upheld.

20. Before adjudicating, definition of capital goods needs to be looked into which is as follows:-

(a) "capital goods" means:-

the following goods, namely:-

(A)
(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No. 68.05 grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Excise Tariff Act;

(ii) pollution control equipment;
(iii) components, spares and accessories of the goods specified at (i) and (ii);
(iv) moulds and dies, jigs and fixtures;
(v) refractories and refractory materials;
(vi) tubes and pipes and fittings thereof; and
(vii) storage tank, used-

(1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or

(2) for providing output service;

21. Thus, any goods which are used for providing output service can be classified as the capital goods. Appellant admittedly are providing telecommunication services. Admittedly, the services are provided through various servers. The individual employee to remain connected to those servers need computer/desk-top. Therefore these are opined as an indispensible tool used by the employees of the appellant company for providing the output services of telecommunications. The cenvat credit is opined to have wrongly been denied. Commissioner (Appeals) though has impressed upon the desk-tops, chairs and furnitures to be the equipments or appliances used in an office as to not to be included under the definition of capital goods. But I am of the opinion that it is only in case of factory of a manufacturer of final product that any equipment or appliances used in his office are excluded from the definition of capital goods. The appellant herein admittedly is not a factory. His activity is covered under Section 2 (a) (A) (2) of CCR, 2004 and as such the credit cannot be denied merely holding these articles to technically be called as equipment or appliances. Keeping in view the same even the chairs used in the office of a telecommunication company are the capital goods. I draw my support from the decision of **ICICI Lombard General Insurance Co. Ltd. (supra**), wherein the tables and chairs

used by a general insurance company's employees to render insurance services to their clients were held to be the capital goods. With respect to the fire extinguishers, I am of the opinion that fire extinguishers are qualified under Chapter 84. Hence, are the capital goods in view of Rule 2 (A) (i) of CCR. Otherwise also fire extinguishers are the statutory mandate for any premise to be sanctioned for its use. Seen from that angle also no question arises for denying the cenvat credit on any of these articles. Order under challenge to this extent is also set aside.

22. As a result of entire above discussion, except for the denial of cenvat credit for Membership Fee of the Clubs, the order under challenge is set aside. Appeal stands partly allowed.

[Pronounced in the Open Court on 19/12/2018]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita