CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court – I

Appeal No. ST/146/2009

(Arising out of Order-in-Original No. 24/2008 - ST dated 27.11.2008 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II)

M/s Idea Cellular Ltd., …..Appellant(s)

Vs.

Commissioner of Central Excise, Customs and Service Tax, Hyderabad-II …..Respondent(s)

Appearance
Shri Archit Aggarwal, Chartered Accountant for the Appellant.
Shri M. Chandra Bose, Additional Joint Commissioner (AR) for the Respondent.

Coram:
Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)
Hon'ble Mr. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 09/05/2018
Date of Decision: 09/05/2018

FINAL ORDER No. A/30581/2018

[Order per: M.V. Ravindran]

This appeal is directed against Order-in-Original No. 24/2008 - ST dated 27.11.2008.

2. Heard both sides and perused the records.

3. On perusal of records, it transpires that the issue relates to demand of service tax liability utilized in excess of due credit by the appellant during the period April, 2004 to December, 2004. From the records, it transpires that appellant is a service provider who provides exempted as well as taxable and does not maintained separate accounts for the said services for the indeed services. As per the provisions of Rule 6(3) (c), during the relevant period appellant is required to utilized only 20% of the amount of the service tax payable from the CENVAT credit. It is the case of the Revenue that during the month of September, 2004 to December, 2004 appellant has utilized CENVAT credit in excess of 20% of the service tax payable. The Adjudicating Authority has upheld the allegations made in the show cause notice.

4. Learned Chartered Accountant draws our attention to the Provisions of Rule 6(3)(c) of the CENVAT Credit Rules, and submits that there is no time period indicated in the said provision for collection of 20% of the amount to be utilized and draws our attention to the chart annexed in page No. 7 and today's submission it is also (in the appeal memorandum) for the period April, 2004 to March, 2005 the appellant has not utilized the CENVAT credit in excess of 20% of the tax payable. It is his submission that identical issue of the

very same appellant has been decided in their favour by the Tribunal as reported at [2009 (16) STR 712] and followed by the Bench as reported at [2016 (9) TMI 1136- CESTAT-Mumbai].

5. Learned Departmental Representative reiterates findings of the lower authorities.

6. The issue has been correctly stated by both sides and we find that the demand of tax liability is only in respect of the two months September, 2004 and December, 2004 wherein CENVAT credit in excess have been utilized. The reference to the said chart which we reproduce:

IDEA CELLULAR LTD

CENVAT UTILIZATION WORKING

Please Note that, Idea has not provided any exempted services, however if we apply 35% / 20% ceiling limits against input service utilization - following are the summary of observations in figures

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)
Month	Servvice Tax payable	Paid in CASH	Paid in CENVAT	UTILIZATION OF Capital Goods/ CESS as per return	Utilization of input credit on account of 16 specified services under rule 6(5)	Utilization of Input services- as per return	% of input services utilization to srvice tax payable	Amt of utilization (Had we restricted to ceiling limit)	Total Amt available as per celing (services max + capital goods actuals)	Excess / (Short) for the month		Return due date
								35.00%				
								20.00%			Remark	
Apr-04	1,39,98,828	1,31,11,957	8,86,871	-	-	8,86,871	6.34%	48,99,590	48,99,590	(40,12,719)	Short Utilized	5/25/2004
May-04	1,47,51,641	1,36,42,149	11,09,492	-	-	11,09,493	7.52%	51,63,074	51,63,074	(40,53,581)	Short Utilized	6/25/2004
Jun-04	1,62,64,358	1,41,97,278	20,67,080	-	-	20,67,080	12.71%	56,92,525	56,92,525	(36,25,445)	Short Utilized	7/25/2004
Jul-04	1,70,25,113	1,57,96,841	12,28,272	-	-	12,28,272	7.21%	59,58,790	59,58,790	(47,30,518)	Short Utilized	8/25/2004
Aug-04	1,56,51,652	1,29,85,686	26,65,966	-	-	26,65,966	17.03%	54,78,078	54,78,078	(28,12,112)	Short Utilized	9/25/2004
Sep-04	1,59,51,102	56,01,994	1,03,49,108	88,20,841	2,41,910	12,86,357	8.06%	31,90,220	1,20,11,061	(16,61,953)	Short Utilized	10/25/2004
Oct-04	1,83,20,938	1,65,01,423	18,19,515	12,696	-	18,06,818	9.86%	36,64,188	36,76,884	(18,57,369)	Short Utilized	11/25/2004
Nov-04	2,09,75,494	1,95,09,789	14,65,705	2,93,065	-	11,72,640	5.59%	41,95,099	44,88,164	(30,22,459)	Short Utilized	12/25/2004
Dec-04	2,53,87,908	1,49,14,069	1,04,73,839	45,57,612	17,93,930	41,22,297	16.24%	50,77,582	1,14,29,124	(9,55,285)	Short Utilized	1/25/2005
Jan-05	2,40,49,511	2,16,08,408	24,41,103	4,98,267	-	19,42,836	8.08%	48,09,902	53,08,169	(28,67,066)	Short Utilized	2/25/2005
Feb-05	2,28,00,866	2,10,43,058	17,57,808	-	-	17,57,808	7.71%	45,60,173	45,60,173	(28,02,365)	Short Utilized	3/25/2005
Mar-05	2,58,22,999	2,10,00,000	48,22,999	9,60,394	-	38,62,605	14.96%	51,64,600	61,24,994	(13,01,995)	Short Utilized	3/31/2005
	23,10,00,410	18,99,12,652	4,10,87,758	1,51,42,875	20,35,840	2,39,09,043		5,78,53,821	7,47,90,626	-	-	-

× 20%

= Rs. 4,62,00,082

7. The provisions of Rule 6(3) (c) are also reproduced which reads as under:

> *c) the provider of output service shall utilize credit only to extent of an amount not exceeding twenty per cent of the amount of service tax payable on taxable output service.*

8. Learned Chartered Accountant was correct, there is no time period mentioned in Rule 6(3) (c) of the CENVAT Credit Rule for collecting the CENVAT credit. We also find strong force from contentions raised by the Learned Chartered Accountant in respect of the very same assessee having been decided as early as 17.02.2009 and followed again in July, 2016. We reproduce the findings of the Bench in order dated 17.02.2009 in paragraph No. 4.2.

> ***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.*

9. In view of the fact that identical issue in respect of the very same assessee has been decided by two Division Benches. We do not find any reason to deviate from such a view already taken. Accordingly, we hold that the impugned order is unsustainable and liable to be set aside and we do so. The impugned order is set aside and the appeal is allowed with consequential reliefs if any.

(Order dictated & pronounced in open court)

P. VENKATA SUBBA RAO
MEMBER (TECHNICAL)

M.V. RAVINDRAN
MEMBER (JUDICIAL)

Lakshmi….