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

Appeal No. ST/1001/2009
(Arising out of Order-in-Original No.32/2009-ST dated 24.08.2009 passed by CCCE & ST, Hyderabad - II)

Ericsson India Pvt Ltd ….. Appellant(s)

Vs.

CCCE & ST, Hyderabad - II ….. Respondent(s)

Appearance
Shri G. Prahlad, Advocate for the Appellant.
Shri Arun Kumar, Dy. 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: 31.12.2018
Date of Decision: 11.01.2019

FINAL ORDER No. A/30033/2019

[Order per: P.V. Subba Rao.]

1. This appeal is directed against Order-in-Original No. 32/2009-ST dated 24.08.2009.

2. The appellant is a company engaged in providing services to leading telecom operators. They have a branch office in Secunderabad and corporate office in Gurgaon. Their branch office in Secunderabad is registered separately as an entity under service tax and so is their corporate office at Gurgaon. Both filed ST-3 returns to their corresponding Commissionerates. The corporate office at Gurgaon is engaged both in providing services as well as in supply of equipment (trading) which is an exempted service. They discharged service tax under category of Consulting Engineer Services, Erection, Commissioning & Installation Services and Management, Maintenance & Repair services etc. The corporate office is also registered as input service distributors (ISD) and distributes credit which

they received among their branch offices and locations across the country including the appellant herein. The appellant herein is not engaged in trading activity and is only providing taxable services. Therefore, they are not providing any exempted services. They issued bills exclusively for taxable services provided by them and take credit of the input services which they received as well as the credit distributed by their corporate office as ISD. A show cause notice was issued on 06.02.2009 alleging that

(1) The credit availed by the appellant on some input services are not correct as they pertain to trading by their corporate office and hence not available as per Rule 6 of CENVAT Credit Rules, 2004.

(2) The appellant is not eligible to take credit on consultancy charges and insurance charges as these were exclusively used for trading activities.

(3) The credit of business expenditure incurred by the appellant has sought to be denied on the ground that they do not qualify as input services.

3. The show cause notice further alleged that they their corporate office has erred in transferring their input service credit as it should not have, at any point of time, exceeded 20% of the output service tax liability of the company. Show cause notice therefore proposed to demand CENVAT credit, wrongly availed, along with interest and impose penalties.

4. After following due process, the learned Commissioner vide his impugned order confirmed the demands as proposed. Hence, this appeal was filed on the following grounds:

(a) The credit distributed by the ISD cannot be questioned at the branch level as has been held by the Tribunal in the case of Godfrey Philips India Pvt Ltd [2009 (239) ELT 323 (Tri-Ahmd)]

(b) A corporate office is registered under various services and is also engaged in trading activity but there is no exempted service provided in the branch office in Secunderabad. The entire demand was on the basis of audit objection which, if any, should have been taken up with the corporate office.

(c) The allegation in the show cause notice is that the credit has been used in excess of 20% of service tax liability in violation of Rule 6(3) of the CCR as applicable during the relevant period. However, this limit was subsequently removed and CBEC vide its circular 137/72/2008-CX 4 dated 21.11.2008 clarified that it was only the utilization of the credit which was restricted and not its availment. The unutilized credit in excess of 20% of the service tax paid can be used in the subsequent year. It has been held by the Tribunal in the case of Federal Express Corporation [2014 (36) STR 375] that if the credit was utilized in excess of 20% of the service tax during the relevant period, only interest on the differential amount is recoverable. The major portion of the demand is time barred as the relevant period is April, 2005 to March, 2008 while the show cause notice was issued on 06.02.2009. There has been no suppression of facts on the part of the appellant as all relevant information has been furnished in their returns as required under the law.

(d) The entire issue involves a bona fide interpretation of law and they should not be penalised on this account.

5. Learned departmental representative reiterates the findings of the lower authorities and asserts that the appellant and their corporate office are essentially the same entity, although, registered as two different registrants under the service tax and therefore, they should have knowledge

of the credit transferred by their head office as ISD. The appellant has violated Rule 6(3)(c) of CCR, 2004 as applicable during the relevant period by utilizing CENVAT credit in excess of 20% of the service tax paid on their corporate office. He also argued that certain amounts of credit on Flower arrangement, Garden Maintenance services, Outdoor catering, Real estate agent services etc., distributed by their corporate office are in no way connected to the provision of output service of the appellant at Secunderabad. Regarding limitation, he asserts that in terms of Rule 9(5) and 9(6) of CCR, 2004 "the burden of proof regarding the admissibility of the CENVAT credit shall lie upon the manufacturer or provider of output service taking such credit". In this case, it is incumbent upon the appellant to have ensured that the credit was taken especially so when the credit was approved by their own corporate office. Therefore, the demand as well as the penalties is sustainable.

6. We have considered the arguments on both sides and perused the records. There is nothing in the allegations that show that the appellant (Ericsson India Pvt Ltd, Secunderabad) registered as service tax payer in their Secunderabad office had taken any credit wrongly. They have not rendered any exempted services and were therefore, not required to reverse any CENVAT credit. There is also nothing on record to show that they have availed CENVAT credit in excess of 20% of the service tax paid by them in their office. The allegation in the show cause notice is that the corporate office, which is a separate registrant and also as an ISD (although part of the same corporation) which is registered in Gurgaon (Haryana) had wrongly taken CENVAT credit and distributed it to their branch office in Secunderabad. Therefore, if these allegations are true, the demand, if any, and penalties, if any, is imposable on the corporate office. Although, the

appellant and their corporate office are part of the same legal entity, it is inconceivable that their branch office in Secunderabad who have received credit through ISD invoices from their corporate office has full knowledge of how the credit was availed by their corporate office and how it was transferred to their various branch offices across the country. As far as the appellant is concerned, they have legitimately taken credit on the basis of the ISD invoices which they received from their own corporate office. We, therefore, find no ground to hold that appellant has not discharged his responsibility under Rule 9 regarding the admissibility of the credit to them. The demand, interest and penalties are therefore, not sustainable.

7. In view of the above, the appeal is allowed and the impugned order is set aside.

(Pronounced in the Open Court on 11.01.2019)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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