IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Appeal No.ST/51/2009

(Arising out of Order-in-Original No.27/Commr/ST/Kol/2008-09 dated 24.11.2008 passed by the Commissioner of Service Tax, Kolkata)

Commissioner of Service Tax, Kolkata
Applicant (s)/Appellant (s)

Vs.

M/s. BSNL Ltd.
Respondent (s)

Appearance:

Shri D.Haldar, AC(AR) for the Appellant (s)
None for the Respondent (s)

CORAM:
Hon'ble SHRI P.K.CHOUDHARY, Member (Judicial)
Hon'ble SHRI Bijay Kumar, Member (Technical)

Date of Hearing/Decision:- 05.06.2018

ORDER NO.FO/76219/2018

Per Shri P.K.Choudhary

The facts of the case in brief are that the respondent assessee as alleged, availed and utilized 100% duty paid on capital goods in the same financial year i.e. 2006-2007 in contravention of provision of Rule 4(2) of Cenvat Credit Rules, 2004. It has also been alleged that there is a short payment during the period 2006-2007 on account of service tax liability. Accordingly show cause notice was issued. It is the case of the revenue that on scrutiny of ST-3 Returns for the period April, 2006 to September, 2006 and for the period October, 2006 to March, 2007, it is noticed that there have been short payment in some months and excess payment in some other months. The Adjudicating Authority passed the following order:

> *"I find that the demand has been issued as the formalities for provisional assessment has not been adhered to in terms of the provision of the law. But the fact remains that the said assessee*

should pay Service Tax only on the value realized by them, After going through the records and documents submitted by the said assessee and considering allegations of the Show Cause Notice it is found very much convincing that the said assessee have paid excess amount of Service Tax and Education Cess amounting to Rs.94,22,954/-. Calcutta Telephones is having six sources of collection of Service Tax on telecom services from its various segment namely Basic (Sub-ledger), Mobile (CMTS), Circuits (CS), Value added and Circuit (LD), IUC (Special Cell), Sale of Cash Card (Collection center). Separate accounts/ records are maintained for Service Tax recoverable and payable by this six different units. The information regarding Service Tax payable from May'06 to September'06 wrongly advised as Rs.13,13,05,889/- instead of Rs.11,79,06,245/- by CMTS unit. So the excess amount of Rs.1,33,99,644/- was paid to Service Tax Department in respect of Service Tax payable amount for CMTS unit for the first half i.e. April'06 to September'06. The advice received from sub-ledger unit towards payment of Service Tax for the month of September'06 for Rs.7,34,40,000/- and for the month of March'07 for Rs.7,65,00,000/- towards payment of the same on 5th October'06 and 5th April'07 respectively on provisional basis as the actual Service Tax payable figure for every month is available at the end of 4th week of the following month of collection of Service Tax. The provisional payment of Service Tax is made on an average computation keeping to the higher side to avoid short payment. But the actual amount of Service Tax received by sub-ledger unit was Rs.6,69,72,262/- and Rs.7,61,86,136/- for the month of September'06 and March'07. So there is total excess payment of Rs.94,22,954/- during the period 2006-07. The explanation forwarded by the said assessee in this respect is accepted. So the demand of the Service Tax including Education Cess amounting to Rs.1,02,95,650/- for the period 2006-07 is not sustainable. Consequently there is no question of penalty and interest.

The second issue is the allegation of availment of irregular CENVAT credit on capital goods amounting to Rs.77,50,386/- during the period 2006-07. The said assessee were required to avail 50% of the Central Excise Duty paid on the capital goods against each invoice/voucher receipt during 2006-07. The said assessee inadvertently availed 100% of CENVAT credit on some invoices/vouchers and left the others without availing any credit. In support of their contention they have submitted sample documents relatable to credit on capital goods availed during November'06. For the serial numbers of 'Credit Utilisation Register' from 1477 to 1481, they availed credit of Rs.21,03,446 and education cess of Rs.42,069/-. It has been *alleged that the credit was 100% of the duty paid which should be 50% of the duty paid amount. The said assessee submitted documents to show that they were actually having Central Excise Invoices showing payment of Central Excise Duty and education cess amounting to Rs.43,14,137/- on capital goods available in November' 06. They have actually taken credit of Rs.21,03,436/- (ED) and Rs.42,069/- (education cess) which is less than 50% of the available amount. They did not submit all the documents for the period 2006-07. But they have submitted that the same thing happened for the entire period of demand and they have not actually taken any excess credit. In absence of any contrary evidence available with the impugned notice, I would accept the submission of the said assessee. As such it is observed that the said assessee have actually availed 50% of the total amount of credit available to them. Effectively there was no excess credit taken by them. As such the demand under Rule-14 of CENVAT Credit Rules' 2004 in this case is not sustainable."*

Revenue has preferred this appeal against the impugned order.

2. None appears on behalf of the respondent assessee inspite of issuance of notice. No request for adjournment has been received. Since the matter is very old i.e. pertaining to the year 2009, the appeal is taken up for disposal.

3. Heard ld. D.R. appearing on behalf of the Revenue.

4. The Revenue in their grounds of appeal have submitted as under:

> *"It may be a fact that the assessee availed of 100% of the duty paid on capital goods in respect of some invoices inadvertently, but this irregularity cannot be equated with the fact of non-availing of Cenvat Credit in respect of other invoices in a financial year. Since the assessee took 100% credit of duty paid on capital goods in same financial year violating the provision of Rule 4(2) of the Cenvat Credit Rules, 2004, 50% of the same, i.e., 77,50,386/- should be recovered along with interest in terms of Rule 14 of the Rules ibid, and penalty should be imposed on the assessee under rule 15 of the Rules ibid as proposed in the Show Cause Notice."*

5. We are of the considered view that though the assessee is entitled to cenvat credit of 50% on the capital goods in the year of receipt/ balance 50% is available to them in subsequent year.

Availing credit @ 100% on some invoices and not availing any credit in respect of other invoices in the same year cannot be appreciated. It would be appropriate to call for the entire documents and verify the claim of the assessee. Accordingly, the matter is remanded to the Adjudicating Authority to verify the documents eligible for availing the cenvat credit under Cenvat Credit Rules, 2004 and to pass an order in accordance with law. Needless to mention a reasonable opportunity of hearing be granted to the respondent assessee. The appeal filed by the Revenue is allowed by way of remand to the Adjudicating Authority.

(Operative Portion of the Order already pronounced in the Open Court)

S/d.
(P.K.Choudhary)
Member (Judicial)

S/d.
(Bijay Kumar)
Member (Technical)

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