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

Appeal Nos. ST/166-167/2009 & ST/42/2011

Arising out of Order-in-Original No. 04/Commissioner/ST/2009 dated 31.03.2009 passed by the Commissioner of Central Excise & Service Tax, Guwahati.
(ii) O/O No. CCE/Shillong/ No. 01/2009 dated 30.03.2009 passed by the Commissioner of Central Excise, Shillong.
(iii) O/O No. 19/Commissioner/ST/Kol/2010-11 dated 15.11.2010 passed by the Commissioner of Service Tax, Kolkata.

1. M/s. Bharti Airtel Ltd.
2. M/s. Bharti Hexacom Ltd.
3. M/s. Hutchison Telecom East Ltd.

….Appellant(s)

Vs.

Commissioner of Central Excise, Guwahati
Commissioner of Central Excise, Shillong
Commissioner of Service Tax, Kolkata.

….Respondent(s)

Appearance:
Shri Ravi Raghavan, Advocate & Harsh Shukla, C. A. & Ms. N. Agarwal, C. A. for the Appellant (s)
Shri A. K. Das, Spl. Counsel for the Respondent(s)

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL
HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

Date of Hearing/Decision: - 30.10.2018

ORDER No…FO/A/77224-77226/2018

Per Bench:

The facts of the case in brief are that the appellants are engaged in providing telecommunication services and are holding service tax registration. During the period of dispute, the appellants had availed

CENVAT Credit on towers, tower materials and shelters which were used by the appellants for providing telecommunication service.

On scrutiny of records, it was noticed that the appellants had availed ineligible credit on towers, tower material and shelters. Proceedings were initiated against the appellants. The Original Authority confirmed the demand alongwith interest and penalty. Aggrieved, the appellants are now before this Tribunal.

2. On behalf of the appellants, Ld. Advocate Shri Ravi Raghavan appeared and argued the matter. The Department was represented by Shri A. K. Das, Special Counsel.

3. The Ld. Advocate appearing on behalf of the appellants submitted that the issue on availment of credit on towers and shelters materials has been decided in favour of the Department by the decision of the Larger Bench in Tower Vision India Pvt. Ltd. Vs. Commissioner of Central Excsie (Adj.), Delhi 2016 (42) STR 249 (Tri.-LB) which was approved by the decision of the Hon'ble Bombay High Court in Bharti Airtel Ltd. Vs. Commissioner of Central Excise, Pune-III 2014 (35) STR 865 (Bom.). He submitted that appeals are pending before higher courts.

4. The Ld. Advocate on behalf of the appellants submitted the following details:-

Appeal No.	**ST/166/2009**	**ST/167/2009**	**ST/42/2011**
SCN date	28.08.2008	22.08.2008	30.07.2009
Period of dispute	January 2005 to March 2008	April 2006 to March 2008	March 2005 to February 2008
CENVAT Credit demand	Rs.14,93,15,569/-	Rs.2,82,59,347/-	Rs.2,59,64,803/-
Demand time-barred	Rs.10,42,67,439/-	Rs.1,76,28,572/-	2,59,64,803/-

However, the Ld. Advocate argued on the ground of limitation and submitted that the appellants were under bona fide belief that credit is eligible and hence availed the same. It is his submission that the issue was contentious and had travelled upto the Larger Bench and being an interpretational issue, the invocation of extended period or the imposition of penalties cannot sustain.

In this regard, the Ld. Advocate relied upon the following judgments:-

(i) Assistant Commissioner of CGST-VIII, Vejalpur Vs Vodafone Essar Gujarat ltd. 2018 (8) GSTL 105 (Guj.).

(ii) Assistant Commissioner of CGST-VII, Vastrapur Vs. Bharat Sanchar Nigam Ltd. 2017-TIOL-2663-HC-AHM-ST.

(iii) Vodafone Essar South Ltd. & Ors Vs CST, Bangalore 2018-TIOL-1169-CESTAT-BANG.

(iv)Vodafone Essar Digilink Ltd. Vs. Commissioner of Central Excsie, Panchkula 2018-TIOL-669-CESTAT-CHD

(v) Bharti Airtel Ltd. & Ors Vs. CST, Chandigarh-12017- TIOL-4081-CESTAT-CHD

(vi) Vodafone Essar South Ltd. & Ors Vs CST Chennai Final Order No. 40194-40207/2018 dated 22.11.2018.

(vii) Bharti Airtel Ltd. & Ors Vs Commissioner GST and vice-versa 2018-VIL-193-CESTAT-CHE-ST.

(viii) Vodafone Essar Ceeluar Ltd. Vs CGST & CE, Chennai Final Order No. 42376/2018 dated 03.09.2018.

5. The Ld. Special Counsel supported the findings in the impugned order.

6. We have considered the submissions of both sides and perused the documents on record and the various decisions relied upon.

7. We find that the issue that arises for consideration is with regard to availment of credit on tower and shelter material. We observe that the issue stands decided against the appellants by various decisions

including the decision of the Hon'ble High Court of Bombay in the case of Bharti Airtel Ltd. (Supra). The Tribunal in the case of Vodafone Essar South Ltd. Vs. Commissioner of Central Excise, & Service Tax, Chennai, vide Final Order dated 22.01.2018, has followed the decision of Bharti Airtel ltd. (Supra) as well as the Larger Bench's decision on Tower Vision India Pvt. Ltd. (Supra) and held that the appellants are not eligible for such credit. However, the Tribunal, taking note of the facts of the case, had set aside the demand for extended period as well as the penalties for the normal period. For this, the Tribunal relied upon the decision in Vodafone Mobile Services Ltd. reported in 2017-TIOL-1904-CESTAT-Hyderabad.

8. We also observe from the records that in the present appeals, the appellants have filed their ST-3 returns regularly and have disclosed the credit availed on tower and shelter materials. The allegation is that they have filed their ST-3 returns in a routine manner without specifically stating that the inputs as towers and shelter materials were erected and embedded to earth to form immovable property. We find no substance in the said allegation. Further, there is no evidence adduced by the Department to substantiate the claim of suppression with intent to evade payment of service tax. We further note that there were conflicting decisions on the issue regarding admissibility of credit on tower and shelter material. There were also numerous proceedings initiated by the department against most of the telecommunication companies. Hence, there is no question of suppression with intent to avail irregular credit.

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9. Thus, following the decisions cited supra, we hold that demand beyond the normal period of limitation is not sustainable, hence set aside. We confirm the demand within the normal period of limitation alongwith interest. Therefore, the demands for the extended period are set aside. Considering, the issue on hand being one of interpretation of the statutes and also since the Tribunal has taken a consistent view that the extended period is not invokable, the penalties imposed by the impugned orders are also set aside.

Therefore, the appeals are disposed of in the above terms by confirming the demand within the normal period of limitation alongwith interest and setting aside the demand beyond the normal period and the penalties imposed. The appeals are thus partly allowed.

Appeal No. ST/42/2011

10. Thus, following the decisions cited supra, we are of the opinion that extended period cannot be invoked and the penalties are unjustified.

In view of the above, the appeal is allowed. Demand alongwith interest and penalties are set aside as being time-barred.

11. All the three appeals are disposed of in the above terms.

(Dictated and pronounced in the open court.)

(V. PADMANABHAN)
MEMBER (TECHNICAL)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

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