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

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.193 of 2008

(Arising out of Order-in-Original No.ST/Shillong No.10/2008 dated 25 September 2008 passed by Commissioner of Central Excise, Shillong.)

Commissioner of Central Excise, Shillong
(Shillong, Meghalaya.)

...Appellant

VERSUS

M/s.Bharat Sanchar Nigam Limited

.....Respondent

(Dimapur SSA, Nagaland)

<u>APPEARANCE</u>

Shri T.Mondal, Authorized Representative for the Appellant (s)
Shri Avra Majumdar, Advocate for the Respondent (s)

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

<u>FINAL ORDER NO. 76568/2019</u>

DATE OF HEARING : 24 October 2019
DATE OF DECISION : 24 October 2019

P.K.CHOUDHARY :

The appellant department has filed this Appeal against Order-in-Original No.ST/Shillong No.10/2008 dated 25.09.2008, whereby the adjudicating authority held that photocopies of invoices, audited Trial Balance, Advice of Transfer/Transfer Advice Note are valid documents as specified in Rule 9 of Cenvat Credit Rules, 2004. The department was aggrieved against the dropping of the demand of Rs.4,25,67,073/-.

2. Briefly stated the facts of the case are that the respondent assessee namely M/s.Bharat Sanchar Nigam Limited (M/s.BSNL) are engaged in the business of providing 'telephone services'. They had a

system of procuring capital goods necessary for providing their services centrally by a designated authority being NE-II Circle of M/s.BSNL for all the Secondary Switching Areas (SSA) such as Nagaland, Manipur and Arunachal Pradesh. The Designated Authority was Controller of Telecom Stores, Depots, North-Eastern II Circle, Dimapur. After procuring the goods and making payments, the said authority delivered the equipments at the respective SSAs along with Advice of Transfer Debit (ATD). The different offices of the respondent assessee took Cenvat credit based on such ATDs supported by photocopies of original invoices under which, the goods were received by Controller of Stores. Revenue took objection that ATD is not a specified document under 9 of the Cenvat Credit Rules, 2004 against which the Cenvat credit could be taken. Therefore show cause notice adted 22 January 2008 was issued for denying Cenvat credit and also for imposing penalty.

3. Learned Authorized Representative appearing for the Revenue submits that Transfer Advice is not the document specified under Rule 9(1) of Cenvat Credit Rules, 2004 against which credit could have been taken. Further Transfer Advice was bad only by photocopy of invoice and not the original invoices. He submits that but for the verification conducted by the department, this irregularity would not have come to the notice of the department and therefore penalty should be imposed.

4. Learned Advocate appearing for the respondent assessee submits that the assessee was having various Secondary Switching Areas. It was only natural that procurement was done centrally to get competitive bids also for arranging logistics efficiently. From a commercial point of view such an operational approach had to be followed and cannot be faulted as a method to take any unauthorized credit. The only procedural lapse was that the procuring office did not get registered as a dealer as per Rule 9 of Central Excise Rules 2002 which is made applicable for the purposes of Cenvat Credit Rules, 2004. However, necessary documentation has been done inasmuch as all the invoices against which procurements were made are available and also Transfer Advice (TA) has been communicated to the concerned office

where credits were taken. He further submits that since the fact of procurement of capital goods is not disputed and the duty paid thereon is also not disputed and the use of the capital goods in providing taxable services is also not disputed, the adjudicating authority has rightly dropped the proceedings as proposed in the show cause notice. He further prayed that the appeal filed by the department is filed on wrong facts and accordingly the same should be dismissed.

5. Heard both sides and perused the appeal records.

6. We find that no fresh evidences has been brought by the appellants before us to take a different view. The relevant paras of adjudication order are reproduced :-

> *"4.1 In regard to the allegation of Cenvat credit of Rs.42,56,561.00 wrongfully taken during the period October'04 to March'05 on improper documents they have contended that their records/documents evidenced that the credit was taken correctly. In support of their claim they submitted certified copies of the original and they also produced original copies at the time of hearing. I have examined the records submitted in defence and am convinced that their claim is substantiated with documentary evidence. I therefore, find that the allegation of Cenvat credit taken on improper documents during the period October' 04 to March' 05 is unfounded and the amount of Rs.42,56,561.00 is to be deducted from the amount proposed to be recovered.*
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> *4.2 As regards alleged amount of Cenvat credit of Rs.2,21,20,817.00 wrongfully taken during the period from October'05 to March'06 on improper documents BSNL has contended that in the financial year 2005-06 actual credit taken was Rs.94,12,966.00 only. They submitted that it might be seen from page no.12 of their Trial Balance for 2005-06 that total Cenvat credit taken was Rs.1,82,33,946.00 only which included the unavailed balance amount of Rs.23,41,689.00 of previous year (2004-05). Having the unavailed balance amount of Rs.23,41,689.00 been excluded, remaining amount comes to*

Rs.1,58,92257.00 which comprised Cenvat credit of Rs.94,45,283.00 on capital goods and Customs duty of Rs.64,46,974.00 on imported goods from Nortel Network. Further Rs.94,45,283.00 also included Edu. Cess of Rs.32,317.00 on capital goods which had been wrongly debited to Cenvat credit head instead of Edu. Cess head.

4.3 From perusal of the copies of Invoices it is evident that during the year 2005-06 the assessee had taken Cenvat credit of Rs.94,12,966.00 on Capital goods and Cenvat credit of Rs.64,46,974.00 on imported goods from Nortel Network which are corroborated by the figures reflected in the Audited Trial Balance for 2005-06 (Audited Trial Balance is the final document for a financial year in respect of each SSA). On the other hand investigation has not brought on records the details of Invoice wise figures to arrive at the alleged amount of Rs.2,21,20,817.00. Therefore in absence of any evidence contrary to the submission of the notice in this regard, I find force in the contention of the assessee and of the view that the allegation of Cenvat credit of Rs.2,21,20,817.00 wrongfully taken on improper documents during the period from October, 05 to March,06 does not sustain.

4.4 So far as the allegation of Cenvat credit taken wrongfully on customs duties is concerned, they submitted the actual credit taken on customs duty instead of counter veiling duty was Rs.64,46,974.00 for the capital goods imported form Nortel Network. They admitted the fact that they had wrongfully availed Cenvat credit of Rs.64,46,974.00 on customs duty and not Rs.2,24,66,759.00 as alleged in the notice. I have perused the records submitted in defence and find that Cenvat credit has been taken on Customs duty which is not admissible in terms of Cenvat Credit Rules, 2004. BSNL too has not disputed it, rather they admitted the fact of wrongful Cenvat credit taken on customs duty. The only matter of dispute in this respect is in regard to *amount involved, i.e., whether the amount should be Rs.2,24,66,759.00 as alleged in the notice or Rs.64,46,974.00 which the BSNL has contended it to be. I find that the basis for the calculation of the amount involved or the documents based upon for calculation has not been provided by the investigation and since there is nothing on record to challenge the submissions of BSNL and since BSNL's contention is supported by the figures shown in the Audited Trial Balance, hence I am inclined to accept the submission of BSNL. Therefore I find the amount of Cenvat credit of Rs.64,46,974.00 taken wrongfully on Customs duty is liable to be denied and recovered from them with due interest."*

7. We find that the existence of original invoice and its genuineness is not disputed by Revenue. In fact such documents were produced before the lower authorities. Therefore, the duty involved has been paid and there is no dispute that the equipment in question has been used at the sites where credits were taken. In such circumstances, considering the commercial practice which was necessary for efficient procurement of the equipments in question, this procedural lapse cannot be considered a reason to deny Cenvat credit involved. Therefore, following the precedent decisions of the Tribunal, we do not find any reason to interfere with the order of the adjudicating authority in this respect and accordingly the same is sustained. The appeal filed by the Revenue is dismissed.

(Operative part of the order was pronounced in the open Court.)

SD/

(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/

(BIJAY KUMAR)
MEMBER (TECHNICAL)

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