IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No. 76231 of 2019

Arising out of Order-in-Appeal No.13/KOL-South/2019 Dated 17/01/2019 passed by Commissioner of CGST & CX (Appeal-I), Kolkata.

M/s. Vodafone Idea Limited
(DLF IT Park-I, 08 Major Arterial Road, Tower C, Rajarhat, Kolkata-700156)

Appellant (s)

VERSUS

Commr. of CGST & Central Excise, Kolkata South Commissionerate
(180, Rajdanga Main Road, Kolkata, West Bengal)

Respondent (s)

APPERANCE :
Mr. Deepro Sen, Advocate for the Appellant
Mr. P. K. Ghosh, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

FINAL ORDER NO…75131/2023

Date of Hearing : 23 February 2023
Date of Decision : 23 February 2023

PER R. MURALIDHAR

The Appellant has been issued Show Cause Notice on the ground that they are not eligible to take Cenvat Credit for the services provided by the Commission Agent. The Department has placed reliance on the judgment of Hon'ble High Court of Gujarat in the case of Commissioner of C. Ex-Ahmedabad v. Cadila Healthcare Ltd. [2013 (30)STR 3 (Guj)] for making the demand of Rs.9,66,313/- for the period 2012-13 to 2014-2015. The extended period in terms of Section 73 (1) has been invoked.

2. After due process, the Adjudicating Authority confirmed the demand along with interest and imposed equal amount of penalty in terms of Section 78 of the Finance Act, 1994. On Appeal, the Commissioner (Appeals) has dismissed the same. Hence, the Appellant is before the Tribunal.

3. The Ld. Advocate appearing on behalf of the appellant submits that the Services of the Commission Agent is not in relation to either sale of their product or for providing any sales promotion services. They have engaged the service of Commission Agent to collect the debts from various

subscribers. Based on the collection done by the service provider, a percentage to the same is given to them as commission. The Appellant have also submitted some sample copies of the invoices raised by the service provider. The Ld. Advocate submits that on identical issue, the co-ordinate Bench of CESTAT, Chennai has taken the view that they are eligible for the Cenvat Credit and submits a copy of the relevant case law of Vodafone Essar Cellular Ltd. Vs. Commr. of CGST, Chennai, 2018 (9) TMI 985-CESTAT Chennai.

4. He also relies on similar issues decided by Mumbai Tribunal in the following cases:-

(i) Bajaj Finance Ltd. Vs. CCE, Pune 2018 (10) GSTL 251 (Tri. Mumbai)
(ii) Bajaj Finance Ltd. Vs. CCE, Pune, 2019 (6) TMI 1593-CESTAT Mumbai

5. He further submits that the allegation in the SCN was only to the extent that the assessee is not eligible to avail Cenvat Credit on Commission Agent Services as per the Hon'ble Gujarat High Court's judgment in the case of Cadila Healthcare Ltd., however the Commissioner (Appeals) has traversed beyond the SCN and has held that the service of collection of debt is received subsequent to the mobile services provided by the Appellant and therefore the credit of the same is not allowed. The Appellant relies on the following case laws:

(i) Commissioner of Central Excise Vs Gas Authority of India Ltd., 2008 (232) ELT 7 (SC)

(ii) Commissioner of Customs, Mumbai Vs. Toyo Engineering India Limited, 2006 (201) ELT 513 (SC)

(iii) Warner Hindustan Ltd. vs. Collector of Central Excise, Hyderabad, 1999 (113) ELT 24 (SC)

(iv) Commissioner of Central Excise, Nagpur Vs. Ballarpur Industries Ltd. [2007 (215) ELT 489 (SC)

6. The Ld. Advocate also submits that the demand is time barred as the issue pertains to interpretation and they have furnished all the relevant details in the ST-3 Returns. Therefore there can be no suppression on their part. He relies on the following case law:-

(i) Ispat Industries Ltd. Vs. Commissioner of Central Excise, Raigad, 2006 (199) E. L. T. 509 (Tri.-Mum.)

(ii) Singh Brothers Vs. Commissioner of Cus. & C. Ex., Indore, 2009 (14) S. T. R. 552 (Tri.-Del.)

7. Accordingly, he prays that the Appeal may be allowed both on merits as well as on account of limitation.

8. The Ld. Authorized Representative submits that the issue in the present case is squarely covered by the decision of the Hon'ble Gujarat High Court in the case of CCE, Ahmedabad-II Vs. Cadila Healthcare Ltd. 2013 (30)STR 3 (Guj), wherein it is held categorically that Cenvat Credit is not eligible for the services rendered by the Commission Agent.

9. He further submits that the Commissioner has not traversed beyond the Show Cause Notice since the activities of Collection Agents is not mentioned specifically in the inclusive portion of the definition of input services under Rule 2 (l) of Cenvat Credit Rules, 2004. He further submits that the fact of taking the Cenvat Credit has come to the knowledge of the Department only on account of verification of the records and hence the invocation of extended period is fully justified. In view of the same, he prays that the Appeal may be dismissed.

10. Heard both sides.

11. The relevant portions of the judgment of Hon'ble Gujarat High Court in the case of Cadila Healthcare Ltd. are reproduced below;-

> *5.2 Commission paid to the foreign agents : The assessee availed of CENVAT credit of Rs. 39,45,791/- towards commission paid to foreign agents. According to the assessee, out of the total amount paid as service tax, they had availed of CENVAT credit only on that part which was attributable to dutiable products manufactured in their plant only and that no CENVAT credit has been availed on exempted goods. It was contended that service tax paid on commission paid to commission agents for sale of final products is available as credit according to the inclusive part of the definition of input service, which includes services in relation to sales promotion. Reference was made to the definition of business auxiliary service as defined under Section 65(19) of the Finance Act, 1994 which lays down that business auxiliary service means any service in relation to (i) promotion or marketing or sale of goods produced or provided by or belonging to the client or (ii) promotion or marketing of service provided on behalf of the client and includes services as a commission agent.*
>
> *(i) The Adjudicating Authority held that on a perusal of the definition of commission agent as defined under clause (a) to the Explanation under Section 65(19) of the Act, a commission agent is a person who acts on behalf of another person and causes sale or purchase of goods. In other words, he is directly responsible for selling or purchasing on behalf of another person and that such activity cannot be considered as sales promotion. According to the Adjudicating Authority there is a clear distinction between sales promotion and sale. A commission agent is directly concerned with sales rather than sales promotion.*

He, accordingly, held that service provided by commission agent does not fall within the purview of the main or inclusive part of the definition of input service as laid down in Rule 2(l) of the Rules and, therefore, the assessee was not eligible for CENVAT credit in respect of the service tax paid on commission paid to foreign agents.

(ii) The Tribunal has held that foreign commission agent service is in the nature of sales promotion and without any elaborate discussion in respect thereof has held that CENVAT credit was admissible on service tax paid in respect of such service. The Tribunal while reversing the findings recorded by the Adjudicating Authority has not given any reasons in support thereof and has merely placed reliance upon its findings in relation to the services rendered by the Clearing and Forwarding agents.

(vi) As noted hereinabove, according to the assessee the services of a commission agent
would fall within the ambit of sales promotion as envisaged in clause (i) of Section 65(19) of the Finance Act, 1994, whereas according to the appellant a commission agent is a person who is directly concerned with the sale or purchase of goods and is not connected with the sales promotion thereof. Under the circumstances, the question that arises for consideration is as to whether services rendered by a commission agent can be said fall within the ambit of expression 'sales promotion'. It would, therefore, be necessary to understand the meaning of the expression sales promotion.

(viii) From the definition of sales promotion, it is apparent that in case of sales promotion a large population of consumers is targeted. Such activities relate to promotion of sales in general to the consumers at large and are more in the nature of the activities referred to in the preceding paragraph. Commission agent has been defined under the explanation to business auxiliary service and insofar as the same is relevant for the present purpose means any person who actson behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration. Thus, the commission agent merely acts as an agent of the principal for sale of goods and such sales are directly made by the commission agent to the consumer

12. From the above extract, it can be observed that the issue before the Hon'ble High Court was in respect of sale of goods, promotion of sale of goods, etc. by the Commission Agent The Hon'ble High Court held as Commission Agent in this case is only selling the goods and not undertaking any Sales Promotion work, the Respondent would not be eligible for the Cenvat Credit. Further it would be relevant to note here that

an amendment was brought in w.e.f. 3.2.2016 to allow Cenvat Credit on 'Sales Promotion' also, so as to overcome the difficulty faced by the assesses in view of Gujrat High Court Decision.

13. In the present case, the Commission Agent is not rendering any service towards sale/Sales Promotion of the present Appellant. The Commission Agent is only an Agent engaged in collection of debts from various subscribers. Therefore, the very premise to issue Show Cause Notice basing on the decision of the Hon'ble Gujarat High Court is erroneous on the part of Department. The Hon'ble Gujarat High Court judgment is on an entirely different type of Commission Agent and is not applicable to the facts of present case.

14. The Hon'ble CESTAT, Chennai in the case of Vodafone Essar Cellular Ltd. Vs. Commr. of CGST, Chennai 2018 (9) TMI 985-CESTAT Chennai has gone on the very same issue of the eligibility of Cenvat Credit for the services rendered by Commission Agents and held as under:-

> *7.1 The third issue that arises for consideration is the credit availed on various input services. The appellant has given the details of the various input services in the table as shown above. The services of erection, construction and installation of towers and shelters was availed by the appellant for providing output service of telecommunication. These services have direct nexus with the output service and therefore, is eligible for credit. The Tribunal in the appellant's own case vice Final Order dated 22.01.2018 has allowed the credit for this reason, we hold that the credit on this service is eligible. The appellant has availed credit on collection charges which are nothing but charges paid to Bill Collection Agnecies. In the case of Bajaj Finance Ltd. Vs. C.C.E, Pune-I-2018 (10) G.S.T.L.251 (Tri.-Mum.) it was held that assessee is entitled to CENVAT Credit on input services with were used for repossession of vehicle by recovery agent. Here, the appellants have used the facility of Bill Collectors/Agents for recovery of the bills from customers. Thus, the said credit availed on such collection charges, in our view, is eligible. The various other services as shown in the table, except that shown in SI. No. 22, have been held to be eligible for credit in various decisions as cited in the table.*

15. In the case of Bajaj Finance Ltd. Vs. Commissioner of Central Excise, Pune, 2018 (10) G. S. T. L. 251 (Tri.-Mumbai), the Mumbai Tribunal has held as under:-

> *The appellant have availed Cenvat credit on the repossession charges charged by the recovery agent to the appellants, repossession of vehicle was carried out by the recovery agent in*

connection with the recovery of the overdue loan amount. In our view the lending service is not limited to disbursing the loan but it includes the recovery of the said lended money which is one of the vital part of the overall activity of lending of money. Therefore the service received for taking repossession of the vehicle by recovery agent is an input service which is used for the service of lending. The definition of input service under Rule 2(l) of Cenvat Credit Rules, 2004 reads as under:-

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

From the above definition it can be seen that any service used for providing output service is an input service. As discussed above, the service of taking repossession of the vehicle which is an activity in relation to recovery of the loan is used for overall service of lending. Therefore as per the main part of the definition,

16. The definition of input service as per Rule 2 (l) of Cenvat Credit Rules, 2004 during the period under dispute reads as under:-

"input service" means any service, -

(i) used by a provider of [output service] for providing an output service; or

(ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal,

and includes services used in relation to modernisation, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal;

[but excludes],

xxxxxxxxxxxxxxxxxxxxxxxxx

17. A careful reading of this definition would clarify that any Input Service which is used by the output service provider would be eligible for Cenvat Credit so long as any service is not specified under the 'exclusion' list. In the present case as has been held in the cited cases of Vodafone Bajaj Finance, the collection of debts is an integral part of Appellant's Business. Therefore, when they use the collection Agent for collecting the debts, the same would fall under Clause (i) of the Input Definition.

18. The Chennai Tribunal in the case of BS & B Safety Systems India Ltd. Vs. Commissioner of C. Ex., Chennai-IV, 2017 (52) S.T.R. 174 (Tri. - Chennai) has gone into the definition of Input Service and has held as under:-

> *4. Definition of "input service" in Rule 2(l) of the Cenvat Credit Rules, 2004 w.e.f. 1-4-2011 consists of two portions. The second portion is exclusion portion (A) (B) (BA) and (C), listing out specific services which are not to be considered as an eligible input service. The first portion of the definition, however, is an inclusive definition. The words used in an exclusive definition denotes exhaustive meaning and cannot be treated as restrictive in any sense. When we are dealing with an inclusive definition, it would be inappropriate to put a restrictive interpretation upon terms of wider denotation. This is the view that has been consistently taken by the Apex Court in a number of judgments. For example, in the case of Bharat Cooperative Bank (Mumbai) Ltd. v. Coop. Bank Employees Union, AIR 2007 SC 2320, the Hon'ble Court held that "on the other hand, when the word "includes" is used in the definition, the legislature does not intend to restrict the definition; makes the definition enumerative but not exhaustive. That is to say, the term defined will retain its ordinary meaning but its scope would be extended to bring within it matters which in its ordinary meaning may or may not comprise".*
>
> *6. In the circumstances, when the services disputed in this case viz. Business Auxiliary Service, Banking and Other Financial Services and Technical Services are not specifically excluded by the exclusion portion of the definition and in any case they are services essential directly or in relation to manufacture or business activities, the same would definitely fall within the ambit of Rule 2(l) ibid. In the event, I hold that all the services disputed herein are eligible input services for the purpose of Rule 2(l) ibid.*

19. The Hyderabad Tribunal in the case of Pepsico India Holdings (Pvt.) Ltd. Vs. Commr. of Central Tax, GST Commissionerate, Tirupati 2022 (56) G. S. T. L. 22 (Tri.-Hyd.) has held as under:-

> *21. For a service to qualify as 'input service' under Cenvat Credit Rules, 2004 post 2011, the service in question need not be covered even by the very wide definition of manufacture under Section 2(f) of the Central Excise Act. Any service which is used not only in manufacture but also 'in relation to' manufacture will also qualify as input service. The scope of input service is further enlarged with the expression whether directly or indirectly used in the definition of input service. Thus, there are :*
>
> *(a) Actual manufacture;*
>
> *(b) Processes incidental or ancillary to manufacture which are also manufacture;*
>
> *(c) Activities directly in relation to manufacture (i.e., in relation to 'a' and 'b' above);*
>
> *(d) Activities indirectly in relation to manufacture (i.e., in relation to 'a' and 'b' above);*
>
> *22. All four of the above qualify as input service as per Rule 2(l)(ii) as applicable post 1-4-2011. Although setting up the factory is not*

> *manufacture in itself, it is an activity directly in relation to manufacture. Without setting up the factory, there cannot be any manufacture. Services used in setting up the factory are, therefore, unambiguously covered as 'input services' under Rule 2(l)(ii) of the Cenvat Credit Rules, 2004 as they stood during the relevant period (post 1-4-2011). The mere fact that it is again not mentioned in the inclusive part of the definition makes no difference. Once it is covered in the main part of the definition of input service, unless it is specifically excluded under the exclusion part of the definition, the appellant is entitled to Cenvat credit on the input services used. This Bench has already taken this view in Kellogs. Similar views have been taken by the other Benches in the other cases mentioned above.*
>
> *23. In view of the above, the impugned orders denying Cenvat credit and ordering its recovery along with interest and imposing penalties cannot be sustained. The impugned orders are set aside and the appeals are allowed with consequential reliefs, if any.*

20. In view of the forgoing, the Appeal is allowed on merits.

21. As submitted by the Ld. Advocate, the fact of taking Cenvat Credit on Commission Agent Service is regularly reported in the periodical ST-Returns filed by the Appellant. Further, the issue of Cenvat Credit on Commission Agent Service is a matter of interpretation and the Department was in error in equating Collection Agent's service in the present case with that of the service provided by the Commission Agent towards sale of goods/sales promotion in the Cadilla Case. Therefore, the allegation of suppression with an intent to evade cannot be sustained. Hence, I hold that the proceedings are hit by limitation and the confirmed demand for the extended period is set aside.

22. Since the issue is being decided on merits and limitation, the issue as to whether the Lower Appellate Authority has gone beyond the scope of SCN has not been gone into.

23. The Appeal is allowed in the above terms with consequential relief.

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

Sd/-

(R. Muralidhar)
Member (Judicial)

Pooja