CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 86957 of 2017

[Arising out of Order-in-Original No: 33-35/ST/COMMR/2016 dated 27th December 2016 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad.]

Videocon D2H Ltd … ***Appellant***
Bunglow No.9, Near Osmanpura Police Station,
Pratap Nagar, Aurangabad – 431 005

versus

Commissioner of Central Excise, Customs & Service Tax …***Respondent***
N-5 Town Center, CIDCO, Aurangabad – 431 030

APPEARANCE:

Shri Madhav Rao, Advocate with Shri Mihir Deshmukh, Advocate for the appellant

Shri KM Mondal, Special Counsel for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/85341 / 2020

DATE OF HEARING: 03/09/2019
DATE OF DECISION: 26/02/2020

PER: C J MATHEW

The issue for determination in this appeal of M/s Videocon

D2H Limited, against order order-in-original no. 33-35/ST/COMMR/ 2016 dated 27th December 2016 of Commissioner of Central Excise, Customs & Service Tax, Aurangabad, is the obligation on the part of provider of 'output service' to keep the capital goods in constant use for avoiding the consequence of rule 14 of CENVAT Credit Rules, 2004. Initiating the proceedings against the appellant, in relation to the facility at Greater Noida and at Aurangabad in two separate show cause notices, for recovery on the ground that 'consumer premises equipment', removed from the premises of the assessee to that of the recipient, were allowed to remain there even after deactivation of service for up to 620 days without corresponding reversal of the credit availed on procurement of such. It would appear from the records that 'set-top boxes' and 'control instrument' were supplied by appellant to enable the reception of signals at the site of the recipient. The appellant is a provider of 'broadcasting service' and, in that capacity, enters into agreement with customers who are provided with the 'consumer premise equipment' and it would appear that, between 2009-10 and 2013-14, 17,59,504 customers disconnected the service despite which the equipment was allowed to remain at their premises leading to availment of ineligible CENVAT credit to the extent of ₹39,17,72,895/-. Furthermore, another ₹ 83,84,193/- constituted ineligible availment as the said equipment had been written-off in the books of the assessee. On conclusion of the proceedings, the adjudicating authority confirmed a total demand of ₹40,63,50,355/-, along with interest thereon, besides imposing penalties of like amount under rule 15 of CENVAT Credit Rules, 2004.

2. According to Learned Counsel for the appellant, the proceedings were superfluous insofar as the demand pertaining to written-off equipment is concerned; he contends the appellant had, on their own, reversed the CENVAT credit despite which this amount had been included in the notices, as well as in the impugned order, merely on account of factual reporting in an audit. It would, therefore, appear that ineligibility of credit on this count is not under challenge. It is also the contention of Learned Counsel that a necessary condition for eligibility to CENVAT credit is procurement for 'pass through' to the premises of the customer with no provision having been made for usage as a continuing condition for eligibility. He drew attention to the erroneous application of rule 3(5) of the CENVAT Credit Rules, 2004 which is intended only when goods are removed 'as such' and not to 'post-usage' removal. It is further submitted that discontinuation of paid services does not forestall access to free channels as well as advertisements which continued to be broadcast to such customers. It is also contended that discontinuation of paid service is not stoppage of service as consideration is received also for installation and maintenance.

3. Relying on the decision of the Hon'ble Supreme Court in *Commissioner of Customs & Central Excise, Nagpur v. Ispat Industries Ltd [2015 (324) ELT 670 (SC)],* wherein it was held that

> *'16. It will thus be seen that where the price at which goods are ordinarily sold by the assessee is different for different places of removal, then each such price shall be deemed to be the normal value thereof. Sub-clause (b)(iii) is very important and makes it clear that a depot, the premises of a consignment agent, or any other place or premises from where the excisable goods are to be sold after their clearance from the factory are all places of removal. What is important to note is that each of these premises is referable only to the manufacturer and not to the buyer of excisable goods. The depot, or the premises of a consignment agent of the manufacturer are obviously places which are referable only to the manufacturer. Even the expression "any other place or premises" refers only to a manufacturer's place or premises because such place or premises is stated to be where excisable goods "are to be sold". These are the key words of the sub-section. The place or premises from where excisable goods are to be sold can only be the manufacturer's premises or premises referable to the manufacturer. If we are to accept the contention of the revenue, then these words will have to be substituted by the words "have been sold" which would then possibly have reference to the buyer's premises.'*

Learned Counsel contends that 'place of removal' has a particular connotation. It is also contended that the Hon'ble Supreme Court in *State of Haryana v. Dalmia Dadri Cement Ltd [2004 (178) ELT 13 (SC)],* by holding that

> *'10. We are unable to accept the submission of Mr. Bana that, in order to get the exemption it must be shown that the goods in question, namely, the cement supplied by the assessee in this case was actually used in the generation or distribution of electrical energy. It must be noted that the important words used in the relevant provisions are goods for use by it in the generation or distribution of such energy (emphasis supplied by us). On a plain reading of the relevant clause it is clear that the expression "for use" must mean "intended for use". If the intention of the legislature was to limit the exemption only to such goods sold as were actually used by the undertaking in the generation and distribution of electrical energy, the phraseology used in the exemption clause would have been different as, for example, "goods actually" used or "goods used".',*

has made it amply clear that the expression 'used' is to be interpreted as 'intended for use' and that CENVAT Credit Rules, 2004 did not envisage that discontinuation of use would disentitle them from the privileges of CENVAT credit availed. Relying upon the decision of the Hon'ble High Court of Madras in *Commissioner of Central Excise, Coimbatore v. Lakshmi Machine Works Ltd [2015 (321) ELT 577 (Mad)]*, it was argued that the reference to

> *'4. The Tribunal, on a careful consideration of the case and upon hearing either side and carefully considering the decisions placed before it held in favour of the assessee. For better clarity, the relevant portion of the order, is quoted hereinbelow :-*
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> > *"5. I have carefully considered the records of the case and rival submissions. I find that the appellants had*

> *removed 'used capital goods' on payment of Rs. 42,400/-. In terms of the ratio of the decision of the Tribunal in Madurai Coats case (supra), the appellants are not required to reverse any credit when they removed capital goods after putting it to use for about 8 years. The appellants were required to reverse the credit equal to the credit originally availed only if the capital goods were removed "as such" which meant without putting the machinery to any use. In the facts of the present case, therefore, the appellants were not required to reverse any credit. In the circumstances, the impugned order demanding differential credit of Rs. 95,181/-, interest thereon and imposing penalty on the appellant is not sustainable. Accordingly, the impugned order is set aside and the appeal is allowed."'*

makes it abundantly clear that the expression 'as such' does not include goods that had been used. According to him, it is evident from the observation of the Hon'ble Supreme Court in *Karnataka State Financial Corporation v. N Narasimahaiah & Others [2008 5 SCC 176]*

> *'33. Even if the legislation is beneficient, the same by itself would not be held to be extendable to a situation which the statute does not contemplate. [S. Sundaram Pillai, etc. v. V.R. Pattabiraman AIR 1985 SC 582]'*

that the tax administration is precluded from invoking a non-existent provision. On the contrary, the stand taken by the adjudicating authority in the proceedings against M/s Dish TV India Ltd has been cited as supportive of their contention. Furthermore, reliance is placed on the decisions in *Commissioner of Central Excise, Indore v. Surya Roshni Limited [2003 (155) ELT 481 (Tri.Del.)], Commissioner of Central Excise & Customs v. Biopack India Corporation Ltd. [2010 (258) ELT 56 (Guj.)], Hindustan Corporation Ltd v. Commissioner of*

Central Excise [2014 (314) ELT 672 (Tri.Bang.)] as well as *Commissioner of Income Tax v. Bharat Bijlee Ltd [(2014) 365 ITR 258)]* and *Ishikawajima Harinia Heavy Industries Ltd. v. Director of Income Tax, Mumbai [2007 (3) SCC 481]*.

4. According to Learned Special Counsel appearing for respondent, the adjudicating authority has clearly laid down the framework of the dispute as agitated by the appellant and has responded to each of these cogently. Contending that it is an admitted fact that the said capital goods were taken to the premises of the customers and never returned, he submits that the rendering of service that is not taxable does not suffice to entitle the appellant to CENVAT credit and that capital goods are entitled to credit only if used in providing output services for which reliance is placed on rule 6(4) of CENVAT Credit Rules, 2004 and the definition of 'exempted service' in rule 2(e) of CENVAT Credit Rules, 2004. Discountenancing the scope of interpreting 'used' as 'intended for use', it is argued that the circumstances in which the Hon'ble Supreme Court was called upon to lay down the difference is not germane to the present proceedings and was made in an entirely different context. According to him, the decision of the Tribunal in *Dish TV India Ltd v. Director General of Central Excise Intelligence [final order no. 50878/2019 dated 11th July 2019],* being non-speaking, is not sufficient precedent.

5. Besides inviting our attention to the relevant statutory provisions, he attached special importance to the decision of the Hon'ble High Court of Gujarat in *Commissioner of Central Excise, Surat – I v. Neminath Fabrics Pvt Ltd [2010 (256) ELT 369 (Guj.)]* which held that

> *'20. Thus, what has been prescribed under the statute is that upon the reasons stipulated under the proviso being satisfied, the period of limitation for service of show cause notice under sub-section (1) of Section 11A, stands extended to five years from the relevant date. The period cannot by reason of any decision of a Court or even by subordinate legislation be either curtailed or enhanced. In the present case as well as in the decisions on which reliance has been placed by the learned advocate for the respondent, the Tribunal has introduced a novel concept of date of knowledge and has imported into the proviso a new period of limitation of six months from the date of knowledge. The reasoning appears to be that once knowledge has been acquired by the department there is no suppression and as such the ordinary statutory period of limitation prescribed under sub-section (1) of Section 11A would be applicable. However such reasoning appears to be fallacious inasmuch as once the suppression is admitted, merely because the department acquires knowledge of the irregularities the suppression would not be obliterated.'*

to contend that the plea of limitation is not applicable.

6. It is seen from CENVAT Credit Rules, 2004 that duties paid on 'capital goods' procured by a provider of output services is allowed to

be taken as credit by the said provider of output services. At no place in the said Rules is there any condition of deployment in operations for eligibility to CENVAT credit. It would stand to reason that a commercial entity would not be procuring capital goods that it does not intended to utilize. On the other hand, under the generic provisions, credit that has been wrongly utilized is liable to be recovered. It is between these two that Revenue seeks to situate the appellant for enforcing its proposal to recover credit. That the appellant was a provider of output service at the time of procurement of the capital goods is not in doubt. Neither is there any question that the said goods do not conform to the definition in rule 2(a) of CENVAT Credit Rules, 2004 at the time of its receipt at the premises of the appellant. It is not in challenge that the provider of output service is unable to deploy the capital goods at any other premises for providing output service and, hence, removal to the premises of the customer does not constitute a disqualification for availment of credit.

7. We are not required to pursue the submissions of the appellant that the expression ‘place of removal’ or ‘use’ are relevant for determination of continued eligibility. The case of Revenue rests upon removal of equipment from the premises of the provider which, from a certain point in time, ceased to be used by them for rendering the output services and, therefore, justifying resort to rule 3(5) of CENVAT Credit Rules, 2004 for fastening consequent liability. The

expressions employed in rule 3(5) of CENVAT Credit Rules, 2004 are ‘removed’ and ‘as such’. The appellant is a provider of taxable services and the expression ‘removal’, as utilized in Central Excise Act, 1944, is germane only for determination of valuation with intent to subject manufactured goods to assessment which does not logically lend itself for applicability to a provider of output service. Moreover, the said expressions are neither qualified with ‘grammatical variations and cognate expressions’ nor amenable for adoption within CENVAT Credit Rules, 2004. Instead, it would be appropriate for us to lay emphasis on the scheme of CENVAT Credit Rules, 2004 which was reframed to cover input services procured by manufacturers and providers of output services as well as inputs procured by manufacturers and providers of output services. In the present dispute, we are concerned with ‘capital goods’ alone. ‘Capital goods’, by their very nature, are not absorbed into the final product let alone finding inclusion in intangible ‘output service’. It is not contemplated, either in Finance Act, 1994 or in general commercial usage, that capital goods should be in perpetual operation. The absence of such condition in CENVAT Credit Rules, 2004 reflects this common understanding that capital goods are dutiable on procurement and that, unlike the availment of credit of duties suffered on inputs, credit thereof is permitted at certain specified stages and, that too, only twice. On the other hand, inputs carry with it the requirements inalienability and permanent usage for inclusion in the product or services offered by the manufacturers/service providers and non-compliance thereof would automatically impact eligibility to continue with credit. Dis-connection of service is preceded by usage, even for a time, of the capital goods which suffice to continue the eligibility owing to existence as such even after service has been rendered. This is clear from the provisions of rule 3(5) of CENVAT Credit Rules, 2004 in accordance with which the manufacturer is required to reverse the credit in full when cleared as such and, under rule 3(5)(a), to reverse in proportion to remenant value after being put to use and at the appropriate rate of duty in the event of transformation as 'waste and scrap'. The discharge of the respective liabilities, under these varying circumstance, is contingent upon obligation to clear the capital goods against invoice as envisaged in rule 9 of CENVAT Credit Rules, 2004. Furthermore, as per

> '3. *CENVAT Credit.*
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> *(1) xxxxxx*
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> *(6) The amount paid under sub-rule (5) and sub-rule (5A) shall be eligible as CENVAT credit as if it was a duty paid by the person who removed such goods under sub-rule (5) and sub-rule (5A).*

the deeming of the said payment to be 'duty' paid is an unambiguous indicator that the object of this provision is not to restrict the credit but to enable the recipient of such goods to be entitled to CENVAT credit. Consequently, it is only upon the transfer of possession to another manufacturer/provider of output service that credit originally availed can be curtailed and for the facilitation of availment by the successor manufacturer/provider of output services. In these circumstances, and in the absence of any specific statutory provision requiring such reversal along with absence of further availment of credit by any other assessee, we are constrained to hold that the impugned order is erroneous in its presumption and in application of law; the consequential demand of tax, as well as other detriments, is also not in accordance with the law.

8. For these reasons, we set aside the impugned order and allow the appeal.

(Order pronounced in the open court on 26/02/2020)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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