CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
WEST ZONAL BENCH

Service Tax Appeal No. 86719 of 2015

(Arising out of Order-in-Original No. 03/ST-VII/RS/2015-16 dated 13.05.2015 passed by Commissioner of Service Tax-VII, Mumbai-II)

Tata Teleservices (Maharashtra) Ltd. **Appellant**
D-26 TTC Industrial Area,
MIDC, Sanpada PO,
Turbhe, Navi Mumbai 400 703.

Vs.

Commissioner of Service Tax-VII Mumbai **Respondent**
115, New Central Excise Bldg.,
M.K. Road, Churchgate,
Mumbai 400 020.

Appearance:

Shri Prakash Shah, Advocate for the Appellant
Shri M.K. Sarangi, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. **A/85882/2019**

Date of Hearing: 13.05.2019
Date of Decision: 13.05.2019

PER: SANJIV SRIVASTAVA

This appeal is directed against the impugned order dated 13.05.2015 passed by the Commissioner of Service Tax-VII, Mumbai. By the impugned order Commissioner has held as follows:

"5.1 I disallow wrongly availed ineligible CENVAT Credit of Rs 30,55,76,839/- (Rupees Thirty Crore Fifty Five Lakhs Seventy Six Thousand Eight Hundred and Thirty Nine only) and order its recovery from M/s Tata Teleservices (Maharashtra) Ltd., under the provisions of Rule 14 of the CENVAT Credit Rules, 2004 read

with Section 73(2) of the Finance Act, 1994 for the reasons discussed above.

5.2 I order for recovery of interest at appropriate rate from the due date till the date of payment on the amount of demand confirmed at para 5.1 above from M/s Tata Teleservices (Maharashtra) Ltd., under the provisions of Rule 14 of the CENVAT Credit Rules, 2004 read with Section 75 of the Finance Act, 1994.

5.3 I impose a penalty of Rs 30,55,76,839/- (Rupees Thirty Crore Fifty Five Lakhs Seventy Six Thousand Eight Hundred and Thirty Nine only) on M/s Tata Teleservices (Maharashtra) Ltd., under the provisions of Rule 15(3) of the CENVAT Credit Rules, 2004 read with Section 78 of the Finance Act, 1994

5.4 I impose a penalty of Rs 10,000/- (Rupees Ten Thousand only) on M/s Tata Teleservices (Maharashtra) Ltd., under Section 77 of the Finance Act, 1994."

2.1 The appellant is providing taxable services, and avails CENVAT Credit on capital goods and on the input services.

2.2 Pursuant to the business transfer agreement appellant had transferred Passive Infrastructure Business to M/s. 21st Century Infra Tele Ltd., along with all capita assets, capital work in progress and input services received on these assets.

2.3 During the course of audit of the records maintained by the appellant, it was observed that,-

- Appellant had not transferred only passive infrastructure business and not the entire business to M/s 21st Century Infra Tele Ltd.,.
- Such transfer of the passive infrastructure business is not subject to any Central Excise Duty nor levied to Service Tax, and hence the CENVAT Credit taken on the input, input services and capital goods in respect of their passive infrastructure business is not admissible, as that fails to qualify as inputs, input services and capital goods as defined by Rule 2 of the CENVAT Credit Rules, 2004.

- Appellants also were not able to produce those documents against which they had taken the CENVAT Credit on the goods so transferred.
- Appellant had thus availed inadmissible CENVAT Credit amounting to Rs 30,55,76,839/- (Rupees Thirty Crore Fifty Five Lakhs Seventy Six Thousand Eight Hundred and Thirty Nine only) which needs to be recovered from them

2.4 Accordingly, show cause notice dated 29.09.2014 was issued to the appellant, asking them to show cause as to why,-

- The wrongly taken CENVAT Credit of *Rs 30,55,76,839/- (Rupees Thirty Crore Fifty Five Lakhs Seventy Six Thousand Eight Hundred and Thirty Nine only) for the period from 2009-10 to m2011-12, should not be disallowed and recovered along with interest under the provisions of Rule 14 of the CENVAT Credit Rules, 2004 read with Section 73(1) & Section 75 of the Finance Act, 1994.*
- *Penalty should not be imposed on them under the provisions of Section 76 of the Finance Act, 1994 for failure to pay Service Tax.*
- *Penalty should not be imposed on them under the provisions of Section 77 of the Finance Act, 1994 for contravention of Rules and provisions*
- *Penalty should not be imposed on them under the provisions of Rule 15 (3) of The CENVAT Credit Rules, 2004 read with Section 78 of the Finance Act, 1994.*

2.5 The matter was adjudicated vide the impugned order as detailed in para 1, supra.

2.6 Aggrieved by the impugned order, appellants have preferred this appeal.

3.1 We have heard Shri Prakash Shah, Advocate for the appellants and Shri M K Sarangi, Joint Commissioner, Authorized representative for the Revenue.

3.2 Learned Advocate appearing for the appellant submits that,-

- Rule 14 of the Cenvat Credit Rules, 2004 has been wrongly invoked in the show cause notice for confirmation of the adjudged dues inasmuch as the said statutory provisions mandates recovery of cenvat credit, when the same was availed or utilized wrongly. Since the show cause notice proposed to recover the central excise duty/service tax on the value of goods/services transferred by the appellant, the provisions of Rule 14 for recovery of the alleged central excise duty/service tax cannot be sought to be recovered under Rule 14 of the rules.
- the credit availed during the period April 2004 to March 2009 had already been demanded vide order dated 07.10.2010. Since credit taken for the disputed period had already been confirmed vide earlier adjudication order, the present show cause notice issued, seeking for recovery of the credit under Rule 14 cannot be sustained. This order was challenged by them before tribunal. Tribunal has vide order as reported at 2015-TIOL-628-CESTAT-Mum, confirmed the demand made on merits but have held to be barred by limitation. Hence these proceedings for disallowance of the same credit cannot be sustained.
- Rule 3(5) of the Cenvat Credit Rules, 2004, has application only when the goods as such are physically removed out of the premises of the service provider. The tower and the tower parts in respect of which this demand has been made remained within the premises of the appellant (service provider), the said statutory provisions cannot be invoked. For this he relies upon the following judgments:
    - TVS Srichakra Ltd. vs. CGST&CE, Madurai - 2018 (15) GSTL 182 (Mad.);
    - Bhilai Steel Plant [2018 (12) GSTL 28 (Chattisgarh)] affirmed in [2018 (12) GSTL J 26 (SC)];
    - Vodafone Mobile Services Ltd. [2018-TIOL-787-CESTAT-AHM].
    - Dalmia Cements (Bharat) Ltd. [2008 (224) ELT 484 9T-Chennai)]
    - Commissioner, Tiruchirappalli [2015 (323) ELT 290 (Mad)]

- L G Balakrishna & Bros Ltd [2016 (340) ELT 708 (T-Chennai)]
- Reckitt and Colman of India Ltd [1996 (88) ELT 641 (SC)]
- Curekraft Chemicals Pvt Ltd. [2009 (247 ELT 506 (T-Chennai)]
- Basawa Technologies Ltd [2017 (352) ELT 227 9T-Del)]
- Dhrampal Lalchand Chud [2015 (323) ELT 753 9Bom)]
- Auto Ignition Ltd [2008 (226) ELT 14 (SC)]
- Dai Ichi Karkaria Ltd [1999 (112) ELT 353 (SC)}

➢ After transfer of the tower business to M/s. 21st Century Infra Tele Ltd., the appellant had not availed any cenvat credit on the tower and tower parts. The entire demand made in respect of the credit taken prior to 30th September 2008 is barred by limitation.

3.3 Learned Authorized Representative appearing for Revenue reiterates the findings recorded in the impugned order and submits that ,-

➢ the case of the appellant is squarely covered under the provisions of Rule 3(5) of the Cenvat Credit Rules, 2004, accordingly, the show cause notice has rightly invoked Rule 14 of the said rules for recovery of the cenvat demand.

➢ In the case of Navodhaya Plastic Industries Ltd. [2013 (298) ELT 541 (Tri.-LB)] and in the case of Motor Industries Co. Ltd. [2016 (338) ELT 151 (Tri.-Del.)], tribunal has specifically held that Rule 3 (5) of the CENVAT Credit Rules, 2004 to be squarely applicable in similar transaction of the transfer of part of business.

4.1. We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Commissioner has in his order recorded the facts and findings as follows:

“1.2 During the course of audit it was noticed that the assessee entered into a

"Business Transfer Agreement" to be effective from 30.09.2008 with M/s. 21st Century Infra Tele Ltd., situated at KLK Industrial Estate, 5th Floor, Fateh Maidan Road, Hyderabad, Andhra Pradesh - 500 001 for transfer of their Business related only to Passive Infrastructure which comprises of a) Cell Site Steel Towers, b) Shelters that houses transmission equipment, c) Diesel Generators, d) Air Conditioners, e) Cabling and Misc Items and f) Other racks, cables, fire extinguishers and other items viz., permits, quotas, rights, investments etc. g) Plant and Machinery, Business Properties and h) Business Assets for a consideration. The assessee had availed Cenvat credit on goods used for 'Passive Infrastructure' namely erection of Telecone Tower, which was utilised by them for payment of Service Tax. The assessee had' transferred (1) Capital work in progress amounting to Rs.1,56,77,999/- (As per Annexure of the Agreement), (ii) Capital Inventory and Capital assets amounting to Rs.282,07,18,519/- (as per Annexure II of the agreement), (iii) Current Assets amounting to Rs. 13,03,68,908/- (as per Annexure III of the Agreement). Since it is not a case of shift or transfer of business on account of ownership or on account of sale, merger or amalgamation as the assessee has not claimed transfer of Cenvat credit under Rule 10 of the Cenvat Credit Rules, 2004. The assessee has also not reversed Cenvat credit attributable to inputs, capital goods and input services which are lying unutilised which are not actually used.

1.3 Under Annexure I, the assessee had transferred the Capital Work in progress

which includes Air Conditioners, Fire Detectors, Fire Suppressors etc. The assessee had taken Cenvat Credit on these goods either as Capital Goods or as Inputs. The value of these goods at the time of transfer is Rs.1,56,77,999/-.

1.4 Under Annexure II, the assessee had transferred Capital Assets and Inventory comprising of inputs/capital goods which are already installed and functioning at various sites where the assessee had installed their towers for provision of telecom *service. The assessee had taken Cenvat Credit on these goods either as Capital Goods or as Inputs. The value of these goods at the time of transfer is Rs.282,07,18,519/-.*

1.5 In Annexure III, the assessee had transferred assets of input service like Prepaid Rent, Prepaid Maintenance, Prepaid Insurance etc. for the various sites wherein the assessee have installed the towers for providing telecom services. The value of input services thus transferred amounts to Rs. 13,03,68,908/-,

1.6 Thus, the assessee had availed Cenvat Credit on all these goods totally valued at Rs.296,67,65,426/- [Total of (a), (b) & (c) above). The assessee was requested to produce all the documents pertaining to availment of Cenvat Credit but they failed to do so. Since the tower business, has been transferred, it appears that the assessee is required to pay the Cenvat Credit taken on the goods and services used in the creation of these assets or pay appropriate Service Tax on the Transaction value.

1.7 The assessee was informed about the objection of the EA-2000 Audit vide letter dated 08-03-2013. The assessee, vide their letter dated 28-09-2013 submitted that the same can be replied after ascertaining the legal position and they will submit their reply through separate letter shortly. However, they did not submit any reply. The details of the inputs/inputs services/capital goods on which the assessee had taken Cenvat Credit and had subsequently transferred them to M/s 21st Century Infra Tele Ltd., and the Service Tax/Central Excise Duty which the assessee is required to pay are detailed as under:

S No	Description of goods/services	Value of goods/ services transferred	Rate of Central Excise duty/Service Tax	CENVAT Credit the assessee is required to pay
1	Capital work in progress as per Annexure I of the agreement dt. 30-09-2008	1,56,77,999.00	10.3%	16,14,834.00
2	Capital Assets and Inventory as per Annexure II of	282,07,18,519.00	10.3%	29,05,34,007.00

	the agreement dt.30-09-2008			
3	*Input services on assets as per Annexure III of the agreement dt.30-09-2008*	*13,03,68,908.00*	*10.3%*	*1,34,27,998.00*
	Total	*296,67,65,426.00*		*30,55,76,839.00*

Discussions and Findings

4.1 to 4.2 ……..

4.3 Availment of CENVAT credit is subject to the conditions, safeguards and procedures prescribed under CENVAT Credit Rules, 2004. Rule 9 of the CENVAT Credit Rules, 2004 in a clear and un-ambiguous term states that CENVAT credit shall be taken on the basis of the documents prescribed under Rule 9. The said requirement is a mandatory requirements.

4.4 Rule 5 of the Service Tax Rules require the assessee to preserve at least for a period of five years immediately after the Financial Year to which such records pertain. There is no justifiable reason for the assessee not to produce the relevant records regarding availment and utilization of CENVAT credit for the period 2009-10 to 2011-12.

4.5 Availment of CENVAT credit is based on documents. The assessee discharges the Service Tax liability on the basis of self assessment. The deportment does not have an opportunity to verify the correctness of availment of CENVAT credit except during audit. Considering the risk in revenue involved, CENVAT Credit Rules, 2004 prescribes specific safeguards conditions and procedures. Sub-rule (5) and sub-rule (6) of the Rule 9 of CENVAT Credit Rules, 2004, entirely put the burden of proof regarding admissibility of the CENVAT credit upon the provider of the output service taking such credit. Facts and circumstances of the cases clearly establishes that the assessee completely failed in discharging the burden of proof regarding admissibility of the CENVAT Credit. A well organized company belonging to large industrial group, does not have any justifiable reason for their failure to produce documents in support of availment of CENVAT *credit. The assessee have violated the conditions and safe guards as well as procedures prescribed under CENVAT Credit Rules. Right to avail CENVAT credit is subject to the fulfillment of the mandatory safeguards, conditions and procedures prescribed. It is not an absolute right. The process of verification cannot be endless. Therefore, in absence of fulfilment of statutory conditions of Cenvat Credit Rules, 2004, the demand of Rs.30,55,76,839/- is liable to be confirmed on this count alone.*

4.6 Also undisputed fact is that the assessee have transferred the 'Passive Tower Business' to M/s 21st Century Infra Tele Ltd., and the said transfer of Passive Tower Business' is neither leviable to Central Excise duty nor Service Tax.

4.7 The assessee have availed cenvat credit on the excisable goods and services used in creating the impugned 'Passive Tower Business'. In assessee's own admission, they have sold 'Passive Tower Business' to M/s 21st Century Infra Tele Ltd. It is pertinent to note that SCN was issued to the assessee seeking to deny cenvat credit availed on towers, tower parts, cabin, cabin parts, pre-fabricated buildings and shelters during the period April, 2004 to March, 2009 on the ground that the said goods were used for erection of telecom towers which is immovable property leviable neither to excise duty nor service tax withstanding the fact telecom towers so erected are used for providing telecom services. The SCN was adjudicated confirming the demand of wrongly availed cenvat credit and ordered recovery of the cenvat credit wrongly availed. The assessee filed appeal against the Order-In-Original before CESTAT. CESTAT, vide order dated 18-03-2015 held the following:

- *Honourable High Court of Bombay in the case of M/s Bharti Airtel Limited came to a conclusion that cenvat credit cannot be availed on goods which are not used in the factory for manufacture of excisable goods nor used for providing any output service. Tower and parts thereof which are fastened and fixed to the earth after erection become immovable and therefore cannot be goods.*

- *Since the issue involved is covered by the judgement of the jurisdictional High Court, judicial discipline demands that ratio of jurisdictional High Court is to be followed.*

The assessee has not disputed the fact of availing cenvat credit on goods used for erection of telecom towers. The assessee has not made available the documents for verification to the officers of Audit Department. The assessee has failed to discharge the burden of proof regarding the admissibility of cenvat credit required under Sub Rule (5) and (6) of Rule 9 of Cenvat Credit Rules, 2004. Therefore, the amount of Rs.30,55,76,839/- taken as cenvat credit is the amount of cenvat credit wrongly availed and liable to be demanded and recovered in terms of Rule 14 of Cenvat Credit Rules, 2004.

4.8 The assessee have contended that since they have transferred the entire 'Passive Infrastructure Business' to 21st Century along with the liabilities hence in terms of Rule 10(2) of CCR, they were eligible to transfer the balance of unutilized credit lying in their cenvat account. I find that Rule 10(2) of Cenvat Credit Rules, 2004 has provision for transfer of cenvat credit lying unutilized in assessee's account to the transferred, sold, merged, leased or amalgamated business. But the present case is not a case of "transfer of balance of unutilized credit lying in cenvat account". In fact the present case is about wrong availment of cenvat credit on inputs, input services and capital goods used in setting up of the 'Passive Tower Business' which was sold to M/s 21st Century Infra Tele Ltd. Therefore, the same is not covered under Rule 10(2) of Cenvat Credit Rules, 2004. I also find that even in case of request under Rule 10(2) of Cenvat Credit Rules, 2004 for transfer of "Balance of unutilized credit lying in cenvat account", the same requires to be allowed by the Competent Authority which is Deputy Commissioner/Assistant Commissioner as required under Rule 10(3) of Cenvat Credit Rules, 2004, subject to fulfilment of conditions and procedures prescribed under the said Rules. But the assessee has failed to produce any evidence to show that they have followed the conditions and procedure prescribed under Rule 10 (2) and 10(3) of Cenvat Credit Rules, 2004 so as to get the approval of the

Deputy Commissioner/Assistant Commissioner in this regard. Notwithstanding the above, the assessee is not even entitled to take the credit. Any such credit is a case of wrong availment of ineligible cenvat credit and is liable to be recovered.

4.9 Assessee has also contended that the Demand for the period from April, 2009 to March, 2012 is barred under Section 73 of the Act. The assessee, in their reply dated 03.02.2012 have themselves admitted that the issue was raised during the course of EA-2000 audit conducted by the department on their records. Thus it is evident that the department was not aware till the date of audit the fact that the assessee has been availing Cenvat credit without having original cenvatable invoices as required under Rule 9 of Cenvat Credit Rules, 2004. Neither they have informed to the Department about transfer of 'Passive Tower Business' to M/s 21st Century Infra Tele Ltd. without reversing the cenvat credit attributable to inputs, input services and capital goods used in creating the impugned 'Passive Tower Business'. Availment of cenvat credit under Cenvat Credit Rules, 2004 is subject to fulfilment of conditions prescribed and the observance of the procedure specified under the Cenvat Credit Rules, 2004. The onus is on the person availing credit in terms of Rule 9(5) and Rule 9(6) of Cenvat Credit Rules, 2004. The assessee have never declared to the Department about transfer of 'Passive Tower Business' to M/s 21st Century Infra Tele Ltd. without reversing the cenvat credit attributable to inputs, input services and capital goods used in creating the impugned 'Passive Tower Business'. Therefore, the fact of misdeclaration and contravention of the provisions of law with intent to evade service tax by wrongly taking ineligible cenvat credit & utilizing the credit so taken are clearly established."

4.3 From the facts as recorded by the Commissioner in the impugned order and reproduced above it is quite evident that the Appellant has transferred certain part of their business i.e. passive infrastructure business to 21st Century Infra Tele Ltd., as per the agreement dated 30.09.2008 along with all the capital assets etc. Definitely these capital assets, inputs and input services in respect of which the present demand has been made in terms of Rule 14 of the CENVAT Credit Rules, 2004 read with Section 73 of the Finance Act, 1994, is in respect of which those gods goods and services which were received by the appellant prior to that date. Against these goods and services appellant has availed the CENVAT credit prior to that date. Appellant has taken a specific stand that after the transfer of this business on 30.09.2008, they have not taken any credit in respect of the goods and services received after this date. This fact that the entire credit which is sought to be recovered from the appellant by application of Rule 3(5) and other rules of the CENVAT Credit Rules, 2004, has been taken by the appellants prior to 30.09.2008, is not in dispute. We have stated “rule 3(5) and other Rules of CENVAT Credit Rules, 2004” because the facts as recorded in the impugned order do not clearly state whether the demand is made in terms of which rule, at some place it states that it is for appellant to produce the required documents for verification by the officers auditing the unit, at other place the demand is made for the reason of transfer of the part of business without reversing the credit.

4.4 Commissioner has in para 4.9 of the impugned order (reproduced above), justified invocation of extended period only for the reason of non production of documents. In para 4.4, he records that the documents need to be preserved for the period of five years from the financial year to which it pertains as per Rule 5 of Service Tax Rules, 1994. Thus if the documents were for the period prior to 30.09.2008, then they were required to be preserved and not beyond 31.03.2014. Thus in terms of what Commissioner has himself recorded in impugned order, non availability/ production of documents on any date after 31.03.2014, cannot be ground for invoking extended period of limitation.

4.5 In para 4.7, Commissioner has referred to the earlier adjudication order and the order of tribunal dated 2015, in respect of the same goods and services. He states that dispute in respect of the admissibility of the credit on these goods and services is subject matter of that order. Undisputedly CESTAT has in its order dated 2015 held as follows:

"8.1 M/s. TTL herein were issued show-cause notices dated 22/04/2010, 07/10/2010 and 24/10/2011 directing them to show cause as to why the Cenvat credit availed by them on towers, towers parts, cabin, cabin parts, medi-claim services and goods other than towers, pre-fabricated buildings and shelters availed during the period April 2004 to March 2011 to be considered as ineligible and be not demanded along with interest and also directed them to show cause as to why penalties be not imposed on them. One of the show-cause notices was invoking extended period while other two show-cause notices are issued for the demands within the limitation period. The said show-cause notices were issued on scrutiny of Cenvat credit accounts maintained by M/s. TTL. It was noticed by the authorities that M/s. TTL has availed Cenvat credit under capital goods and subsequently under the inputs. M/s. TTL were informed that they are ineligible to avail the said Cenvat credit in response to which M/s. TTL defended their action due to which the lower authorities came to a conclusion that M/s. TTL had deliberately avoided in furnishing the details and mis-declaring about the eligibility to avail Cenvat credit on capital goods/inputs. The appellant, M/s. TTL contested the issue on merits, limitation and also put in various alternative submissions.

28. Learned Counsel argued that the Cenvat credit availed on the towers and pre-fabricated buildings/shelters are to be allowed to them on the ground that they have been providing output service of infrastructure facilities to various other telecommunication service providers. It is the submission that if they are providing services under the infrastructure service, which in these cases is called "passive telecom infrastructure'. They relied upon the decision of the Hon'ble High Court of Andhra Pradesh in the case of Sai Sahmita Storages Ltd., SG Navaratna Highway and GTL Infrastructure Ltd. (supra) to submit that if immovable property comes into existence but used for providing services on which tax is payable, Cenvat Credit cannot be denied on the inputs. They would also rely upon the judgements of this Bench in the case of GTL Infrastructure Ltd., for the proposition. We gave an anxious consideration on the *submissions made on this point. In our considered view, we find arguments put forth by the learned Counsel needs to be rejected at the outset itself, inasmuch as the first and foremost in all these three cases, the issue before the Hon'ble High Court and the Tribunal was that the appellants therein were providers of storage and warehousing services; immovable property service and business auxiliary service, for which they need to have infrastructure in its place. In the cases in hand, with which we are dealing with are the telecommunication companies providing cellular services, we find that basically all the appellants herein are providers of telecommunication/cellular services and the facility created by them in form of towers and pre-fabricated buildings are for their own use. Predominantly, the towers and pre-fabricated buildings/shelters were utilised by the appellants herein for rendering their own telecom/cellular services. In view of this ratio laid down in the case of Sai Sahmita Storages Ltd., SG Navratna and GTL Infrastruture Ltd., (supra) may not apply, as the facts in those cases are totally different than the facts in these bunch of appeals. Be that as it may, we find that as the issue involved in this case is covered by the direct judgement of the jurisdictional High Court, judicial discipline demands that ratio of jurisdictional High Court is to be followed by this Bench.*

29. In one of the appellant's case i.e., TTL one more argument was of a demand of the ineligible Cenvat credit includes the Cenvat credit availed on service tax paid to the insurance companies for group insurance of the employees. We find that this part of the denial of Cenvat credit of the appellants, (TTL) is not in consonance of the law as has been settled on the issue, as there is no dispute that such insurance was for employees, to that extent the appeal of TTL needs to be allowed.

30. All the appellants herein have assailed the orders of the adjudicating authority on limitation at least in respect of one show-cause notice in each case, wherein extended period was invoked. We find strong force in the contention raised by the learned Counsel. We find in the case of TTL, RIL, RCL various audits took place and the said audit report did not indicate any error in availing the Cenvat credit on towers, pre-fabricated *buildings and shelters. In the case of Vodafone Essar Ltd. and Idea Cellular Ltd., we find that arguments put forth are the same that they are availing Cenvat credit, utilised the same and had informed the department about their activity in the ST-3 returns. It is also noted that the issue of availment of Cenvat credit on the towers and pre-fabricated buildings and shelters was being disputed before the various forum and hence all the appellants could have entertained a bonafide belief that they were eligible to avail Cenvat credit of duty paid on towers and pre-fabricated buildings/shelters.*

31. In our view the law as to invocation of extended period for demand of tax is well settled. In T.N. Dadha Pharmaceuticals Vs. CCE Madras - 2003 (152) ELT 251, the Hon'ble Apex Court held that three requirements have to be cumulatively satisfied for invoking extended period while observing as under:

"A perusal of the proviso, extracted above, makes it clear that where duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of the Central Excise Act or of the rules made thereunder with intent to evade payment of duty by such person or agent, the period of limitation of one year in the main section is substituted by the words "five years". In other words, where the said proviso is attracted the duty etc. can be claimed even after expiry of one year for an extended period of five years from the date of the demand. To invoke the proviso three requirements have to be satisfied, namely, (1) that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded; (2) that such a short-levy or short-payment or erroneous refund is by reason of fraud, collusion or willful mis-statement or suppression of facts or contravention of any provisions of the Central Excise Act or the rules made thereunder; and (3) that the same has been done with intent to evade payment of duty by such person or agent. These requirements are cumulative and not alternative. To make out a

case under the proviso, all the three essentials must exist." (emphasis supplied)

It would therefore, be necessary to establish whether all the three requirements are cumulatively exist in the instant case as laid down by the Apex Court. No collusion, fraud, misstatement, suppression of facts or contravention of any statutory provisions or rules made there under, with intent to evade payment of duty is forthcoming these cases. It is evident and not in dispute that not only returns were filed periodically but audit was also conducted by the department. Even in the audit through returns were available, issues raised herein were not raised in few cases. In one of the cases Tribunal cannot lose the sight of the vital fact that final audit report during the concerned period did not indicate wrong availment of Cenvat credit on towers and pre-fabricated buildings. The omission which is subsequently alleged therefore, cannot be said to be beyond the department's knowledge. The facts in all these cases clearly show that appellants conduct was bonafide and there was no design to commit any fraud or to evade any duty. The issue is mainly of interpretation without involving suppression of material facts with intent to evade duty. In all these cases it is not the case of revenue that appellants have failed to disclose any material information which was statutorily prescribed to be disclosed in their periodical returns. In our view once the assessee has regularly filed service tax returns disclosing all the requisite particulars and additionally even audit has taken place, allegation of suppression of facts with intent to evade duty cannot be sustained. It was for the authorities to properly verify the returns and seek information or put queries, if not done so assessee cannot be penalised and more so with allegation of suppression of facts. In all these cases the appellants have not failed to disclose any particulars which were legally required to be disclosed and revenue also did not ask any further details during the relevant period as to the issue. We find that judgement of Hon'ble High Court of Bombay in the case of Rajkumar Forge Ltd., Vs. UOI - 2010 (262) ELT 155 (Bom) = 2010-TIOL-622-HC-MUM-CX and the Hon'ble Karnataka High

Court in the case of CCE, Bangalore Vs. MTR foods Ltd., - 2012 (282) ELT 196 (Kar) = 2011-TIOL-696-HC-KAR-CX has appreciated that if the returns were filed promptly and audit has also taken place; as there were no lack of bonafides; their Lordships took a view that in such a situation extended period cannot be invoked. In our considered view, in all these appeals all the appellants acted under bonafide belief that they are eligible for Cenvat credit of duty paid on towers and pre-fabricated buildings and filed returns indicating availment and utilisation of credit, allegation of suppression of material facts with intent to evade tax cannot be sustained.

32. We find considerable force in the arguments raised by the learned Counsel on limitation; accordingly, we hold that the impugned orders that confirms the demands invoking extended period of Cenvat Credit availed and utilised by all appellants herein, are unsustainable and are liable to set aside and we do so.

33. As regards the demands which are within the limitation period; on merits the issue is covered against the appellants, demands in respect of show-cause notices which are within the limitation period are liable to be upheld and the impugned order to the extent are sustainable. The demands within the limitation period as confirmed are upheld along with interest.

34. In our considered view, as the issue was of are interpretative nature i.e., as to eligibility of Cenvat credit or otherwise on the towers and the building and had to be settled in the hands of the Hon'ble High Court, the appellants could have entertained a bonafide belief. Hence, all the penalties imposed on all the appellants herein are set aside by invoking the provisions of Section 80 of the Finance Act, 1994."

4.6 Since categorically in the case of appellant itself, in respect of the same credit taken tribunal has held against invocation of extended period of limitation, we do not find any reason to invoke the same by a show cause notice issued in year 2014. The demand in our view fails entirely on this ground itself.

4.7 Since we find the entire demand to be barred by limitation, demand for interest and penalty also cannot be sustained and needs to be set aside.

4.8 Since we have set aside the entire the demand on ground of limitation we have not commented on the merits of issue and the decisions relied upon by both the sides to justify the merits in their favour.

5.1 In view of discussions as above, we do not find any merits in the impugned order, thereby setting aside the same we allow appeal filed by the appellant.

(Pronounced in the open court)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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