CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Service Tax Appeal No. 87499 of 2019

(Arising out of Order-in-Original No. 51/ST/COMMR/2018-19 dated 18.03.2019 passed by the Commissioner of CGST, Aurangabad)

M/s. Videocon Telecommunications Ltd. **Appellant**
Row House No.3, Pratap Nagar,
Aurangabad 431 001.

Vs.

Commissioner of Cen. Ex. & ST, Aurangabad **Respondent**
N-5, Town Centre, CIDCO,
Aurangabad 431 003.

Appearance:

Shri Rajat Bose, Advocate, for the Appellant
Shri Dilip Shinde, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. **A/87023/2021**

Date of Hearing: 25.10.2021
Date of Decision: 25.10.2021

PER: SANJIV SRIVASTAVA

This appeal is directed against Order-in-Original No. 51/ST/COMMR/2018-19 dated 18.03.2019 passed by the Commissioner of CGST, Aurangabad. By the impugned order Commissioner has held as follows:

"ORDER

6.1 I confirm demand of Service Tax amount of Rs.374,03,10,050/- (Rs. Three Hundred Seventy Four Crore Three lakh Ten thousand and Fifty only) under the provisions of Section 73(1) of the Finance Act, 1994.

6.2 I order recovery of interest at the appropriate rate on the amount confirmed at Para 6.1 above under Section 75 of the Finance Act, 1994.

6.3 I impose Penalty of Rs.37,00,00,000/- (Rupees Thirty-Seven Crore only) under the provisions Section 76 of the Finance Act, 1994."

2.1 The appellant is a provider of telecommunication services and has been operating under cenvat credit scheme. They had an accumulated credit which has been utilized by them for payment of service tax.

2.3 The appellant vide letter dated 25.05.2016 informed that they entered into a transaction with M/s. Bharti Airtel Ltd. in respect of transfer of right to use radio-frequency spectrum for Rs.4,428.00 crores on which service tax of Rs.642.06 crores (including Swachh Bharat cess) was to be paid. This Rs.642.06 crores has been paid by them by utilizing the accumulated cenvat credit to the tune of Rs.3,74,03,10,050/- from the cenvat account and the remaining amount in cash.

2.4 Revenue objected to the utilization of accumulated credit for payment of service tax in respect of this transaction stating that the service of "assignment by the Government of the right to use the radio-frequency spectrum and subsequent transfer thereof" has been made declared service effective from 14.05.2016. Since all the accumulated cenvat credit was for the period prior to this service being made a declared service under Section 66E of the Finance Act, 1994, the utilization of accumulated credit was not in accordance with the provisions of Cenvat Credit Rules.

2.5 A show cause notice dated 25.07.2018 was issued to the appellant asking them to show cause as to why –

"I. the Service Tax amounting to Rs.3,74,03,10,050/- should not be recovered under provisions of Section 73(1) of the Finance Act, 1994;

II. the interest at applicable rates should not be recovered from them under Section 75 of the Finance Act, 1994;

III. penalty under Section 76 of the Finance Act, 1994 should not be imposed upon them, as they failed to make the payment *of Service Tax as prescribed in Section 68 of the Finance Act, 1994;"*

2.6 This show cause notice was adjudicated by the Commissioner by the impugned order referred to in para 1 above. Aggrieved, the appellant has filed this appeal before us.

3.1 We have heard Shri Rajat Bose, Advocate, for the appellant and Shri Dilip Shinde, Assistant Commissioner, Authorised Representative, for Revenue.

3.2 Arguing for the appellant, learned counsel submits that –

- The demand has been confirmed against them by relying upon the definition of inputs, input services and capital goods as per the Cenvat Credit Rules.
- Since these inputs, input services and capital goods have not been used in any manner for providing the output taxable services which were declared services only with effect from 14.05.2016, the utilization of accumulated cenvat credit in respect of the transaction involving these services is not proper.
- While confirming the demand, the Commissioner has also ordered for recovery of interest and imposed penalty under Section 76 of the Finance Act. Rule 3 (4) of Cenvat Credit Rules provides for utilization of the cenvat credit and the said rule is that cenvat credit available with the appellant could have been utilised for payment of service tax on any of the output services provided by them. There is no restriction on utilization of the cenvat credit in the manner stated in the impugned order.
- There is no dispute with regard to admissibility of this cenvat credit to the appellant. Even the Commissioner holds that this cenvat credit was available in the book of accounts of the appellant. Once this credit is available with the appellant, they could have utilized it for payment of service tax in the manner they have done in terms of Rule 4.
- In view of the above, there is no merits in the impugned order and the appeal should be allowed.

3.3 Learned AR arguing for the Revenue reiterates the findings recorded by the Commissioner in his order-in-original.

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

4.2 The Commissioner in paras 5.1.12 to 5.1.15 has observed as follows:

"5.1.12 I find that the SCN is not objecting the admissibility of CENVAT credit availed by the Noticee. However, it is alleged that payment made through CENVAT credit is not correct. The Noticee had availed CENVAT credit to use it for payment of tax on output service of telecommunication and hence it was allowed. Yes, I do agree with the contention of the Noticee that there is no one to one correlation required in respect of Input service and output service. However, the Cenvat can be used for payment of Service Tax on any output Service which existed at the time of availment of the credit where there are more than one output Services. In this case, the Noticee has availed CENVAT credit on Inputs/Input Services of Telecommunication Services for payment of Service tax on a service that came to existence later. I find that the service of "assignment by the Government of the right to use the radio frequency spectrum and subsequent transfer thereof" was not Service at the time of availment of CENVAT credit as the same was introduced as Declared Service w.e.f. 14.05.2016, vide Finance Act, 2016. Hence, the CENVAT credit could not be utilized for the service that was not in existence at the time of availment of Cenvat credit.

5.1.13 The Noticee submitted that out of the total Cenvat credit of Rs.374,03,10,050/- utilized for payment of Service Tax on the subject services, an amount of Rs.95,24,20,617/- pertained to those input services, which were used for providing the said services. In such a case, even assuming without admitting the allegations of the department in the SCN to be correct, it is submitted that demand of Rs.95,24,20,617/- is liable to be dropped, in as much as the Cenvat credit thereof pertained to input services used in the provision of subject *declared services. To this extent, thus, the proposal in the SCN to demand Service Tax from the Noticee is not sustainable and is liable to be dropped.*

5.1.14 I find that the Noticee has received the right to use radio-frequency spectrum from the Union of India, in respect of which it is liable to pay recurring charges of the license fee to it. On payment of such fee, the Noticee is liable to pay Service Tax under reverse charge. The Noticee received this service as Input Service for providing Output Service of Telecommunication. The business of the Noticee is not the purchase and sale of radio-frequency, and hence, in any case, this cannot be an Input Service for the sale of the radio frequency spectrum. Hence, the submission of the Noticee is not acceptable.

5.1.15 In view of the above, I find that the Noticee misutilized the Cenvat credit for payment of Service Tax on the Service that was not in existence at the time of the availment of the Cenvat credit. This act of the Noticee resulted into the short payment of Service Tax, in violation to provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of Service Tax Rules, 1994 and such short payment of Service Tax of Rs.3,74,03,10,050/- is recoverable from the Noticee under the provisions of Section 73(1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994."

4.3 The Commissioner admits that the cenvat credit was admissible to the appellant and it was squarely covered by the definitions of inputs, input services and capital goods received by them. Once the Commissioner admits that credit was admissible and available with the appellant, then utilization of the same needs to be governed by Sub Rule 4 of Rule 3 of Cenvat Credit Rules, 2004. Sub Rule (4) of the CENVAT Credit Rules, 2004 are reproduced below:-

*"**Rule 3 CENVAT Credit***

(4) The CENVAT credit may be utilized for payment of -

(a) ....
(b) ....
(c) ....

(d) ....

(e) *service tax on any output service:*

4.4 It is settled principle of interpretation of Fiscal Statute, that the statute need to be interpreted as such without addition or deletion of any word in the same. Rule 3 (4) of Cenvat Credit Rules, 2004 does not bar utilization of cenvat credit available with the appellant in respect of any of the output services provided by the appellant at any point of time. The utilization of credit has no co-relation with the input services or inputs used for providing the taxable services, except that they are the output services of the service provider.

4.5 Tribunal has in case of Tally Solution Pvt Ltd [2020 (41) GSTL 520 (T-Bang)] held as follows:

"7. We also find that this issue is already settled in favour of the appellants in various cases cited by the appellants. We find that the cases referred to are not exactly on the similar fact as of circumstances. However, they decide the general principles that in respect of utilisation of credit there is no one to one correlation and cross utilisation of credit is permissible clarification from 10-9-2004. C.B.E. & C. vide Letter F. No. 381/23/2010/862, dated 30-3-2010, clarified that Cenvat credit on inputs, capital goods and input services which are used for manufacture of goods or for provision of services is available in a common pool and can be used for payment of Excise duty and/or Service Tax. Credit accumulated by the service provider or manufacturer on the input services availed as well as inputs is available for payment of Excise duty or Service Tax. Any contra view taken would defeat the very scheme of credit. It has been held in numbers of cases that as far as the inputs or input services are availed on payment of duty and as long as they are capable of being used in the provision of Service Tax and manufacture of excisable goods credit cannot be denied; there is no requirement of one-to-one correlation. We find that the case cited by Authorised Representative is on the issue of transfer of accumulated credit under Rule 10(1) of CCR, 2004 and hence the ratio is not applicable. We also find that Apex Court in the case of Ramesh Foods Ltd. - 2004 (174) E.L.T. 310 (S.C.) held

that there is no requirement of one-to-one co-relation in availment of Cenvat. Therefore, we find that the impugned order is not maintainable."

4.5 In case of New Swadeshi Sugar Mills [2005 (191) E.L.T. 200 (Tri. - Del.)] tribunal observed as follows;

*"**8.The already accumulated earned credit by a manufacturer can be utilised by him for the payment of duty of any product, as is evident from the co-joint reading of the Rules 3(3) and 9, as observed above. The ratio of law laid down in K.M. Sugar Mills (supra) is also fully attracted to the case of the appellants. In that case, it has been observed that where rule itself provides for utilisation of credit for payment of any duty of excise on any final product, then there is no warrant to give it a restricted meaning.** Apart from this, the right of the appellants to claim the utilisation of the already earned credit before the enforcement of the Cenvat Credit Rules, 2002, also stands saved by the provisions of Section 38-A of the Act which enacts that where any rule, notification, order is amended, repealed, superseded, then such amendment, repeal, supersession shall not affect the previous provisions of any rule, notification or order so amended, repealed, rescinded or anything done or suffered thereunder and will also not affect any right, privilege or liability acquired or incurred under any rule, notification or order, so amended, repealed, rescinded. This very view has been taken by the Larger Bench of the Tribunal in Kisan Sahkari Chini Mills Ltd v. CCE, Kanpur [2001 (131) E.L.T. 370]. Under the earlier Cenvat Credit Rules, 2001, the appellants had a right to utilise the Modvat credit standing in their account, in the statutory record, for discharge of duty on the dutiable products, and the same did not stand affected, in view of the provisions of Section 38A of the Act, on the introduction of the new Cenvat Credit Rules, 2002. Therefore, the appellants are entitled to utilise the Cenvat credit earned by them and lying in their balance as on 28-2-2002 prior to 1-3-2002, for discharge of duty of any dutiable product."*

4.6 In case of Dai Ichi Karkaria Ltd [1999 (112) E.L.T. 353 (S.C.)], Hon'ble Supreme Court, explaining the provisions of Modvat Credit scheme, observed as follows:

*"**17.**It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. **The credit is, therefore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.**"*

4.7 Board has by Circular No 962/05/2012-CX dated 28.03.2012, even admitted to utilization of CENVAT Credit earned subsequently for payment of arrears. The text of Circular is reproduced below:

Subject: Payment of arrears from Cenvat Credit earned at a later date

Reference was received from the field formation seeking clarification on the issue as to whether the arrears of duty can be paid by utilizing the cenvat credit which has accrued subsequent to the period to which the arrears pertained. Such clarification has been sought in view of first proviso to rule 3(4) of the Cenvat Credit Rules, 2004. As per this proviso, "while paying *duty of excise or service tax, as the case may be, the cenvat credit shall be utilized only to the extent such credit is available on the last day of the month or quarter, as the case may be, for payment of duty or tax relating to that month or the quarter, as the case may be."*

2. Doubts have been raised whether these restrictions will be applicable to duty payable in terms of Section 11A or duty paid after due date in terms of rule 8 of the Central Excise Rules, 2002.

3. The matter has been examined in the Board. Practice ascertained from field formations points out that in majority of cases the payment of demands confirmed under Section 11A are being permitted to be paid by utilizing cenvat credit without linking the same to the period to which these demand pertain.

4. A harmonious reading of rule 8 of Central Excise Rules' 2002 and first proviso to rule 3 (4) of the Cenvat Credit Rules, 2004 indicates that the restriction with regard to the utilization of cenvat credit is relating to the normal payment of duty in terms of rule 8 of the Central Excise Rules, 2002, where duty for a particular month or quarter is to be discharged by the 5th of the next month. For this proviso, the cenvat credit allowed to be used is what was in balance on the last date of that month or quarter and not what accrued thereafter. Even in case of duty paid late in terms of rule 8, the credit available for utilization will remain same i.e. the credit in balance on the last date of month or quarter, as the case may be.

5. Further duty payable under rule 8 is on a different footing from duty payable under Section 11A. Duty under Rule 8 is paid after self determination by the assessee unlike Duty payable under Section 11A where generally the duty is determined by the Central Excise officer and the payment is mandated after such determination. There is no time limit prescribed under Section 11A i.e., monthly or quarterly unlike the date prescribed under Rule 8 (i.e., 5th of the next month). Therefore, the restriction on the utilization of the cenvat credit accruing subsequent to the last date of the month or quarter in which the arrears arise, is not applicable to the demands confirmed under Section 11A of the Central Excise Act, 1944.

This circular clearly shows the intention of the scheme, and delinks the utilization of CENVAT Credit from the inputs used in the manufacture of the said goods.

4.8 The objection raised to utilization of credit by the Revenue for payment of service tax on the services which have been included in the category of declared services cannot be sustained.

4.9 Since we do not sustain the demand, the demand for interest and penalties imposed too cannot be sustained.

5. In view of the above, the appeal is allowed and the impugned order set aside.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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