CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Service Tax Appeal No. 88736 of 2018

(Arising out of Order-in- Appeal No. MUM-DGPM-WRU/APP-192/17-18 dated 21.05.2018 passed by the. Additional Director General, DGPM, WRU, Mumbai.)

Tata Internet Services Limited. **…..Appellant**
Technologies Knowledge park,
Mahakali Caves Road, Chakala,
Andheri (East), Mumbai 400093

Vs.

Commissioner of GST & CX, **…..Respondent**
4th Floor, Transport House,
Poona Street, Masjid (East)
Mumbai - 400009

APPEARANCE:

Shri. Prasad Paranjape, Advocate for the appellant
Shri. Prabhakar Sharma, (AR) for the respondent

CORAM: **Hon'ble MR. AJAY SHARMA, MEMBER (JUDICIAL)**

FINAL ORDER No: A/85280 / 2022

DATE OF HEARING : 16.02.2022
DATE OF DECISION : 31.03.2022

Per: AJAY SHARMA

This appeal has been filed impugning the order dated 21/05/2018 in appeal No. MUM-DGPM-WRU/APP/17-18 passed by the Principal Additional Director General, DGPM, WRV, Mumbai by which Learned Commissioner rejected the appeal filed by the appellant and upheld order of the Adjudicating Authority.

2. The issue involved in this appeal is as to whether appellants have utilized excess credit i.e. more than the limit prescribed under Rule 3(5) of Service Tax Credit Rules, 2002 (for the period April, 2004 to August, 2004) and Rule 6(3) of the Cenvat Credit Rules, 2004 during the period September, 2004 to September, 2007?

3. It is the case of Revenue that the Appellants are providing both taxable as well as exempted services. The exempted services are 'Renting of server room' and 'ISP to ISP interconnectivity'. During the course of audit it is noticed that the appellant inspite of providing both taxable as well as exempted services, used credit of more than 35% for the period April to 10/09/2004 and more than 20% with effect from 10/09/2004 upto September, 2007 without maintaining separate accounts. Total excess credit utilized by the appellant works out to Rs. 29,61,325/- and accordingly a Show Cause Notice was issued on 19/10/2009 demanding the aforesaid amount alongwith interest and penalty. The said Show Cause Notice was adjudicated by the Adjudicating Authority and the said authority vide Order-in-Original dated 20/01/2016 confirmed the demand of Rs. 29,61,325/- and ordered for recovery of the same from the appellant under Rule 14 of CCR, 2004 read with section 73(2) of Finance Act, 1994 alongwith interest and penalties under different provisions of Finance Act. Upon appeal being filed by the appellant, the learned Commissioner vide impugned order dated 21.05.2018 dismissed the appeal.

4. Learned Counsel for the appellants submit that the appellants had maintained separate books of accounts and had utilised credit in accordance with law. He further submits that the appellant had produced the copy of the relevant books of accounts before the audit personnel as well as to the Adjudicating Authority but the same was not taken into consideration by the Adjudicating Authority merely because the

same was self-attested and not certified by any Chartered Accountant. According to learned Counsel, the appellant vide letter dated 10/10/2005 to the department had given detailed description of both the services provided by them, therefore no suppression can be attributed to the appellants. Learned Counsel further submits that Rule 3(5) of Service Tax Credit Rule and Rule 6(3) CCR 2004 restricts the utilization of credit but does not render the credit inadmissible per se. In support of this submission learned Counsel placed reliance on the circular 137/72/2008-CX.4 dated 21/11/2008 and also on the decision of the Tribunal in the matter of *DHL Logistics Private Limited v/s CCE, Thane-II reported in 2015(38) STR 620 (Tri-Mum)* and submits that service tax paid by utilizing the credit in excess of the restriction prescribed under Rule 3(5) or Rule 6(3) cannot be demanded. Learned Counsel fairly concedes that both the aforesaid submission were not raised before the lower authorities but since it is a question of law, therefore he is raising it for the first time before the Tribunal. Per contra learned Authorised Representative appearing for Revenue supported the findings of the lower authorities. According to learned Authorised Representative, for the period April, 2004 to March, 2005 during which period the major portion of Cenvat credit was taken, no copy of credit register was provided and only from April, 2005 onwards the copies of the relevant register were submitted before the Adjudicating Authority. He, therefore, prayed of dismissal of appeal filed by the appellant.

5. I have heard learned Counsel for the appellant and learned Authorised Representative appearing for the Revenue and persued the case records including the written submissions and case laws filed by learned Counsel. From the record it has come to my notice that there are material contradictions in the order of the Adjudicating Authority and the same also have been repeated in the impugned orders. On the one hand it has been recorded that the credit register was not produced but at the same time it has also been recorded that although both the

register is produced but it is self attested and not attested by any Chartered Accountant therefore it cannot be looked into. At some place in the order of the lower authority it is also recorded that although the appellant has produced the register before them but since they failed to produce it at the time of investigations, therefore, it cannot be looked into during Adjudicating proceedings. According to me, the aforesaid view of the Adjudicating Authority is not correct. Not only that, the Adjudicating Authority also recorded the findings that the major portion of the demand is from September, 2004 to March, 2005 (*it has been wrongly mentioned as March, 2004 in the order)* whereas the assessee has given copies of input tax register from April, 2005, which is completely wrong as the letter dated 17/02/2009 by the appellant to the department specifically mentioned about submission of copies of records maintained by them for the period June, 2003 to January, 2004 and April, 2004 to March, 2005. ST-3 returns for the period April, 2005 to September, 2007 were also submitted by the appellants on 19/05/2009 as demanded by the department vide letter dated 12/05/2009. From the perusal of the impugned order it seems that the first appellate authority i.e. learned Commissioner has also not applied independent mind and merely endorsed or repeated the findings and observations recorded by the Adjudicating Authority.

6. Therefore, in my view orders of the Authorities below are liable to be set aside and the matter needs to be remanded for de novo adjudication. Admittedly the appellant has also not raised the ground about the applicability of the circular dated 21/11/2008 issued by CBEC before the authorities below, although it is very material, as according to learned Counsel prior to 01/04/2008 restriction was only for utilization of credit and not for taking of credit per se and therefore even if service tax is paid by utilizing credit in excess of restrictions prescribed under Rule 3(5) or Rule 6(3) it cannot be demanded again. Although, I am not commenting upon the merits of this

argument raised by learned Counsel but am of the view that the circular dated 21/11/2008 might have a bearing on the issue involved herein. Since it was raised for the first time before me, the lower authorities did not have an opportunity to deal with the same, therefore on this count also the appeal needs to be remanded.

7. In view of the discussion made in the preceding paragraphs, I am inclined to remand the appeal to the Adjudicating Authority for de novo adjudication for deciding all the issues afresh including the issue of limitation after giving a proper opportunity of hearing to the appellants. The appellant is directed to produce all the relevant documents/ materials in support of their submission before the Adjudicating Authority. The appeal is accordingly allowed by way of remand.

(Pronounced in open Court on 31.03.2022)

(Ajay Sharma)
Member (Judicial)

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