CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH AT CHANDIGARH

COURT NO.I

Appeal No.ST/60534/2017-Cus (DB)

(Arising out of OIO No.29/ST/CHD-II/2017 dt.7.4.2017 passed by the Commissioner of Central Excise Central Revenue Building, Plot No.19, Sector 17C, Chandigarh)

M/s. Vodafone Mobile Services Limited **Appellant**
(C-131, Industrial Area, Phase-VIII, SAS Nagar, Mohali)

Vs.

CCE & ST, Chandigarh-II **Respondent**
(Revenue Building, Plot No.19, Sector 17C, Chandigarh)

Present for the Appellant: Shri J.C.Patel, Advocate
Present for the Respondent: Shri Harvinder Singh, AR

Coram: Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr.C.L.Mahar, Member (Technical)

FINAL ORDER No. 60548/2019

Date of hearing/Decision: 04.04.2019

PER.AHSOK JINDAL

The appellant is in appeal against the impugned order wherein the Cenvat credit on capital goods has been denied to the appellant.

2. The facts of the case are that the appellant is engaged in providing telecommunication services and availing credit on duty paid capital goods which were used for providing output service. The Hon'ble Delhi High Court vide order dt.29.3.2011 sanctioned Scheme of Arrangement under Sections 391 and 394 of the Companies Act, 1956 whereby with effect from 1.4.2009, the "Passive Infrastructure Assets" Business of the appellant and 5 other entities

of Vodafone group stood transferred and merged in Vodafone Infrastructure Limited, a group company of the appellant. Post such Scheme of Arrangement, the Passive Infrastructure Assets which stood transferred to Vodafone Infrastructure Limited continued to remain in the same premises and continued to be used by the appellant for providing telecommunication service. A show cause notice was issued to the appellant alleging that upon transfer and merger of the Passive Infrastructure Assets of the appellant to and in Vodafone Infrastructure Limited under the said Scheme, the appellant was required to pay under Rule 3 (5) of the Cenvat Credit Rules, 2004, an amount equal to the credit availed in respect of capital goods which so stood transferred to Vodafone Infrastructure Limited. The matter was adjudicated, the demand under Rule 3 (5) of the Cenvat Credit Rules, 2004, was confirmed. Against the said order, the appellant is before us.

3. The contention of the Ld. Counsel for the appellant is that the issue stands settled in their own case vide Tribunal's Order reported in 2018-TIOL787-CESTAT-AHM. He further submits that the ownership of capital goods is not relevant for the purpose of Cenvat credit. In fact, the capital goods in question continued to be used by the appellant for providing output service. Therefore, in terms of the decision of Hon'ble Punjab & Haryana High Court in the case of CCE vs. Pepsi Foods Limited -2010 (254) ELT 284 (P & H), the Cenvat credit is not required to b reversed.

4. He also submits that it is Revenue neutral situation as the appellant themselves has to reverse Cenvat credit, thereafter to take the same. He further submits that the extended period of limitation is

not invokable in the facts and circumstances of the case. He prayed that the impugned order is to be set aside.

5. On the other hand, Ld.AR reiterates the findings of the impugned order.

6. Heard the parties and considered the submissions.

7. Short issue involved in the matter is that as per scheme of merger, the capital goods have been transferred to the group company and the same were used by the appellant for providing output service. It is a fact on record that these capital goods have not been removed from the premises where they were initially installed. In that circumstance, the issue is whether the appellant is required to reverse Cenvat credit or not?

8. The said issue has been examined by this Tribunal in the appellant's own case reported (supra), wherein this Tribunal has observed as under:-

> "7. Heard the parties and considered the submissions. On careful consideration of the submissions made by both sides, I find that the issue to be decided by me is, whether the appellant is required to reverse the Cenvat credit on transfer of capital goods to their sister unit, in terms of Rule 3(5) of Cenvat Credit Rules, 2004 or not? The ld. Counsel for the appellant relied on various judicial pronouncements. Therefore, the issue is to be decided whether in terms of Rule 3(5) of Cenvat Credit Rules, 2004 the capital goods are required to be physically removed or mere transfer can be said that goods have been removed. The said issue has been examined by the Hon'ble Apex Court in the case of J.K. Spinning and Weaving Mills Limited vs. UOI - 1987 (32) ELT 234 (SC)=2002-TIOL-559-SC-CX-LB wherein the Hon'ble Apex Court observed as under:-
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> "38. It is submitted on behalf of the appellants that the Explanations to Rule 9 and Rule 49 are ultra vires the provision of Clause (b) of sub-section (4) of Section 4 of the Act inasmuch as "place of removal" as defined therein, does not contemplate any deemed removal, but a physical and actual removal of the goods from a factory or any other place or premises of production or manufacture or a whatehouse etc. This contention is unsound and also does not follow from the definition of place of removal. Under the definition place of removal may be a factory or any other place or premises of

production or manufacture of the excisable goods etc. The Explanations to Rules 9 and 49 do not contain any definition of "place of removal", but provide that excisable goods produced or manufactured in any place or premises at an intermediate stage and consumed or utilised for the manufacture of another commodity in a continuous process, shall be deemed to have been removed from such place or premises immediately before such consumption or utilisation. Clause (b) of sub-section (4) of Section 4 has defined "place of removal", but it has not defined 'removal'. There can be no doubt that the word 'removal' contemplates shifting of a thing from one place to another. In other words, it contemplates physical movement of goods from one place to another."

As per the said decision of Hon'ble Apex Court, for the goods are required to be physically removed, in Cenvat Credit Rules or in Central Excise Act, nowhere removalhas been defined. Therefore, the verdict of Hon'ble Apex Court is binding on me. Moreover, the decision of Associated Cement Co. Limited (supra) was examined by this Tribunal in the case of Bhilai Steel Plant (supra) wherein this Tribunal observed as under:-

Jam, Id. Advocate for the respondent.

"10. Ld. A. R. submits that in terms of Rule 3(4) of the Cenvat Credit Rules, the payment of an am6untequiv`lent to the credit availed on capital goods is required to be made inasmuch as the power plant stands sold to M/s BESCL even though there is no physical removal of goods even after sale. He argued that the transaction was nothing short of physical removal of the capital goods. He relied upon the decision of the Honble Karnataka High Court in the case of Commissioner of Central Excise, Belgaum vs. Associated Cement Co. Limited - 2009 (236) ELT 240 (Kar.) - 2007-VIL-Ol-KAR-CE=2007-TIOL-802-HC-KAR-CX He emphasized that the decision of the Honble High Court was in similar facts.

11. .....

12. It is an admitted fact that of the case that there was no physical removal of the capital goods from the factory of the respondent. The central point for consideration is whether the amount is required to be paid under Rule 3(4) of the Cenvat Credit Rules is to be paid by taking such capital goods as removed from the factory. Revenue relied upon the decision of the Hon'ble Karnataka High Court in which a view was taken, in the light of the erstwhile Rule 57Q of the Central Excise Rules, that such an amount would be payable even in the absence of any physical removal of capital goods. The Hon'ble High Court held that the transaction of sale of the entire power plant to different entity is nothing short of physical removal.

However, the respondent has relied upon several case laws in which contra view has been taken. Ld. Counsel has relied on the decision of the Honble Supreme Court in J.K. Cotton Spinning and Weaving Mills Ltd. vs. UOI - 1987 (32) ELT 234 (SC) - 1987-VIL -04-SC-CE=2002-TIOL-559-SC-CX-LB wherein the meaning of the word 'removal' has been examined. The Apex Court held as follows: "There can be no doubt that the word 'removal' contemplates shifting of a thing from one place to another. In other words, it contemplates physical movement of goods from one place to another." In the Tribunal decision in the case of L.G. Balakrishnan and Bros. Limited (supra), the Tribunal has examined a similar question as is before us and

considered the meaning of the word 'removal' as explained by the Hon'ble Supreme Court and held as under:

"10. In view of the above settled decision, we find that the provisions of Rule 3 (5) are not attracted in the present case. The original authoritys attempt to distinguish the above findings is not appropriate. He found that these decisions are regarding change of ownership of whole factory whereas here only a part of the factory is transferred. We find such finding as untenable. Further, regarding question of issue of invoice by the appellant for sale and transfer of capital goods and inputs to the new legal entity, we find on perusal of sample invoice that these are not in voices in terms of Rule 11 of Central Excise Rules, 2002. The appellant contended that the goods were identified with value for the purpose of business transaction and not for sale transaction in terms of Sales Tax or Central Excise provision. We note that the invoices issued did not contain the details of any removal, mode of transport, rate of duty, duty payable thereon etc., as per the requirement of Rule 11 (2) of Central Excise Rules, 2002. We also note that based on these invoices no credit can be availed by any buyer as these are not in terms of Rule 9 of Cenvat Credit Rules, 2004. In view of settled legal position regarding need for physical removal of capital goods or inputs, in order to attract the provisions of Rule 3 (5) of Cenvat Credit Rules, 2004, we find that there is no justification to invoke such provision to demand and recover any amount from the appellant in this case. As such, we find no justification for the confirmation of demand towards capital goods. The same reasoning is applicable to the recovery of amount for the inputs amounting to Rs. 91,76,449/-. The demand towards such recovery is also not sustainable. There is no allegation or finding regarding any irregular credit availed on inputs or capital goods or usage of these goods for other than approved purposes."

13. We also note that the Tribunal has taken similar view in all the cases cited by the respondent. The Tribunal decision cited in the case of Steel Authority of India Limited - 2007 (219) ELT 960 (Tri-Del.) - 2007-VIL-60-CESTAT-DEL-CE=2007-TIOL-438-CESTAT-DEL has dealt with identical facts pertaining to another unit of respondent at Rourkela. We also note that the respondent has cited similar decision from the Hon'ble Allahabad High Court as well as Madras High Court."

Further, I find that after the decision of Associated Cement Co. Limited, the Honble Karnataka High Court itself has examined the issue again in the case of Commissioner vs. Ultra Tech Cement Limited - 2015 (321) ELT A150 (Kar.) and dismissed the appeal filed by Revenue, affirming the decision of this Tribunal, reported in 2014 (310) ELT 554 (Tri. Bang.)=2014-TIOL-2714-CESTAT-BANG. In that circumstances, I hold that appellant is not required to reverse the Cenvat credit as the goods have not been physically removed from their premises to their sister unit."

9. Therefore, relying on the decision of this Tribunal reported (supra), we hold that the appellant is not required to reverse Cenvat

credit as the capital goods have not been physically removed from the premises where they were initially installed.

10. Further, it is a Revenue neutrality situation as observed by this Tribunal:-

> "8. Further, I find that in the case of Indeos ABS Limited (supra), the jurisdictional High Court observed as under:-
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> "3. As can be seen from order of the Tribunal dated 10-11-2008 impugned in this appeal, the Tribunal has disposed of the appeal holding that the goods manufactured by the assessee were being cleared to its own sister concern, who is availing the benefit of Modvat Credit. The Tribunal has further found that as such whatever duty the assessee was paying was available as credit to its own unit (sister concern) and hence the entire exercise was revenue neutral."
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> As the goods have been transferred to their sister unit, in that circumstance, it is a Revenue neutrality situation. In that circumstance also, the appellant is not required to reverse the Cenvat credit."

11. We also take note of the fact that the whole of duty has been confirmed by invoking the extended period of limitation. We hold that the extended period of limitation is not invokable.

12. In view of the above analysis, we set aside the impugned order and allow the appeal with consequential relief, if any.

(operative part of order was pronounced in the open court)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

(C.L.MAHAR)
MEMBER (TECHNICAL)

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