CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPLICATION (MISC) NO. 85776 OF 2022
(on behalf of respondent)
WITH
SERVICE TAX APPEAL NO: 87460 OF 2016

[Arising out of Order-in-Original No: 74/STC-IV/MRRR/16-17 dated 30th June 2016 passed by the Commissioner of Service Tax – IV, Mumbai.]

Commissioner of CGST & Central Excise
Mumbai Central
GST Bhawan, 115 Maharshi Karve Road
Churchgate,Mumbai - 400020 …***Appellant***

versus

Vodafone Idea Limited
Windsor, 5th Floor, Off CST Road, Near Vidyanagari,
Kalina, Santacruz (E), Mumbai – 400098 ***…Respondent***

APPEARANCE:

Shri Anand Kumar, Additional Commissioner (AR) for the appellant

Shri S S Gupta, Chartered Accountant for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A/85901/2022

DATE OF HEARING: 29/08/2022
DATE OF DECISION: 26/09/2022

PER: C J MATHEW

Miscellaneous application is allowed. Registry is directed to amend records for change of name of appellant and respondent.

2. In this appeal of Revenue against order-in-original no. 74/STC-IV/MRRR/16-17 dated 30th June 2016 of Commissioner of Service Tax – IV, Mumbai dropping proceedings for recovery of CENVAT credit availed by M/s Idea Cellular Ltd amounting to Rs. 11,28,86,302/- for 2008-2009 and 2009-2010, the issue for resolution is whether

(a) 'debit note' suffices for the documentation requirements prescribed in rule 9 of CENVAT Credit Rules, 2004, and

(b) if it does, whether such debit notes/invoices pertaining to reimbursements of diesel and electricity costs incurred by the service provider on which tax under Finance Act, 1994 has been duly discharged enables the recipient to take credit.

3. It is seen from records that M/s Spice Communications Ltd (since taken over by the respondent herein, M/s Idea Cellular Ltd) came under audit scrutiny for the said years and, based on their objection, proceedings were initiated for recovery of credit of `4,05,31,447 and ` 7,23,54,855 availed in April 2008 - March 2009 and April 2009 - February 2010 respectively. It was taken note that the said credit had been taken against 'debit notes' issued by M/s GTL Infrastructure Ltd to them in which charges for electricity, diesel and rent had been adjusted in accordance with the terms of 'infrastructure

provision agreement' dated 8th May 2006 between them and the provider. It was also held that the CENVAT Credit Rules, 2004 does not incorporate diesel as eligible input and that electricity is not a taxable service under Finance Act, 1994 to enable such availment.

4. The respondent herein is a 'telecom service operator' and, for securing towers, entered into agreements with owners for installation of their dishes/antenna. The service agreements required deposit of rent and energy on the basis of estimate of electricity charges besides cost of diesel that was required for operational continuity during power shutdown in proportion to the utilization for the recipient of service and for the actuals to be adjusted through debit notes. The service tax liability discharged by the provider is included in the debit note and credit was availed accordingly. The objection of the audit in this case culminated in the issue of show cause notice that was ultimately dropped by the adjudicating authority leading to this appeal.

5. According to the Learned Authorised Representative, the adjudicating authority had dropped the proceedings pertaining to service rendered for M/s Quippo Telecom Infrastructure Ltd, amounting of ₹ 3,79,19,638, on the ground that credit had been availed against invoices; however, it is his contention that the expenses therein being inputs used by the provider for rendering of

service, with diesel as well as electricity not being eligible 'inputs' or 'input service', as the case may be, under rule 2 of the CENVAT Credit Rules, 2004 the credit was accordingly taken.

6. According to Learned Chartered Accountant, the issue of acceptability of 'debit notes' for availment of CENVAT credit stands settled by several decisions among which are that of the Hon'ble High Court of Rajasthan in *Commissioner of Central Excise, Jaipur – I v. Bharti Hexacom Ltd [2018 (6) TMI 435 RAJASTHAN HIGH COURT]*

> *'9. Taking into consideration the fact that even first authority while considering the matter has admitted the debit note which was produced though holding it to be in contravention under Rule 9 of the Cenvat Credit Rules, 2004 but in view of the different decisions of the tribunal and in view of the observations made by the Gujarat High Court and Delhi High Court, the view taken by the tribunal is required to be accepted and the same is accepted.'*

and of the Tribunal in *Tata Motors Ltd v. Commissioner of Central Excise [2017 (8) TMI 835 CESTAT MUMBAI]* holding that

> *'4(ii) On the issue of denial of cenvat credit on the debit notes we are of the view that even though the Rule prescribed challan and invoice as valid document for availing the cenvat credit but if all the information required to be mentioned in the invoice is otherwise appearing on the debit notes, the said debit notes must be allowed for taking the credit. In the decisions of Pallipalayam Spinners (P) Ltd (supra) and Phrmalab Process Equipments Pvt Ltd (supra), credit on debit notes have been allowed on the ground that debit notes bear all the information as required under Rule 4A of Service Tax Rules. We therefore set aside the demand on this*

count.'

as well as that of the Tribunal in *Commissioner of Central Excise, Indore v. Gwalior Chemical Industries Ltd [2011 (274) ELT 97 (Tri-Del.)]* holding that

'4. The only point of dispute in this case is as to whether the respondent could take service tax credit on the basis of the documents called debit notes cum bills issued by the service providers for the service provided by them to the Respondent. From the records, it is also seen that the debit notes cum bills are not in the nature of supplementary invoices, but are of the nature of invoices and Assistant Commissioner in the order-in-original has given a clear finding that the debit note cum bill contain all the requisite information as per the provisions of Rule 9(1) of the Cenvat Credit Rules, 2004, that the service provider has also charged the service tax and has deposited the taxes to the exchequer and that the debit notes cum bills are in the name of the respondent. From the nature of these documents called debit notes cum bills in the Commissioner (Appeals)'s order, it is clear that the same are in the nature of invoices as these documents not only contained the information about the name of the service provider, the nature of the service provided, but also the value of service and the service tax charged. In view of this, I am of the view that these documents have to be treated as invoices and it would not be correct to deny the Cenvat credit to the respondent just because these documents invoice are mentioned as debit notes cum bills. I find that same view has been expressed by the Tribunal in the case of Karur KCP Packaging Pvt. Ltd. v. CCE, Trichy (supra) and Pharmalab Process Equipments Pvt. Ltd. v. CCE, Ahmedabad (supra).

5. The learned Departmental Representative has cited the judgment of Larger Bench of the Tribunal in the case of CCE, New Delhi v. AVIS Electronics Pvt. Ltd. (supra), wherein it was held

that when as per the provisions of the Cenvat Credit Rules, the credit could be taken only on the basis of duplicate copy of invoice or in the case of loss of duplicate copy in transit on the basis of other copy with the necessary permission of Jurisdictional Assistant Commissioner, the Cenvat credit could not be taken on the basis of other copies or in the case of loss of duplicate copy, without the permission of the Jurisdictional Assistant Commissioner. The issue involved in this case is totally different and, hence, I am of the view the ratio of this judgment is not applicable to the facts of this case. The learned Departmental Representative has cited judgment of Hon'ble Punjab & Haryana High Court in the case of S.K. Foils Ltd. v. CCE, New Delhi-III (supra) and of Hon'ble Madhya Pradesh High Court in the case of Executive Engineer (Civil), MPEB v. Asstt. Commr., C. Ex., Ujjain (supra). The issue involved in these cases are totally different. In the case of S.K. Foils Ltd., the issue involved was as to whether the Cenvat credit could be taken on the basis of carbon copy of the invoice, while the issue involved in the case of Executive Engineer (Civil), MPEB was as to whether Cenvat credit could be taken on the basis of invalid invoices which are not in conformity with the Rules. In this case, there is no dispute that the documents called "debit notes cum bills" contain all the information which is required to be mentioned in the invoices and except for the name of the document, there is no difference between the debit note cum bill and invoice. The nature and value of the service provided and the service tax paid has been shown in these documents and it is not disputed that the service tax has been paid to the Government. In view of these circumstances, I hold that there is no infirmity in the impugned order. The Revenue's appeal is dismissed. The cross-objection also stands disposed of.'

and of the Hon'ble High Court of Telengana in *Tiara Advertising v. Union of India 2019 (30) GSTL 474 (Telangana)]* holding that

'16. As regards the issue of debit notes, Sri A. Radha Krishna, Learned Senior Standing Counsel, is not in a position to dispute

> *the case law relied upon by the petitioner in its reply dated 16-5-2016. It is not his case that any of these decisions was overturned or that there is a binding decision of a higher judicial authority to the contrary. He also has no explanation to offer as to why the second respondent did not even deal with the case law cited before him. We therefore hold that disallowance of Cenvat Credit on the ground that the petitioner had availed the same by producing debit notes instead of invoices cannot be accepted.'*

with that of the Tribunal in *Pharmlab Process Equipment Pvt Ltd v. Commissioner of Central Excise, Ahmedabad [2009 (242) ELT 467 (Ahdmd)]* holding that

> *'4. Commissioner (Appeals) also has taken the same view. However, from the copies of debit notes submitted during the hearing I find that the debit notes issued by the service provider contained the details of service tax payable, description of the taxable service (sales commission), value of the taxable service, registration no. of the service provider, name and address of the service provider. These are the details which are required as per Rule 9(2) of CENVAT Credit Rules, 2004. The observations of the Assistant Commissioner are contrary to the facts noticed by me on the basis of documents submitted before me. Since it is not clear as to whether the same documents which were produced before me were produced before the Assistant Commissioner or not, the matter has to go back to the Assistant Commissioner who shall go through the documents, verify whether service has been received and whether all the particulars as required under the Rules are available in the debit notes and adjudicate the matter afresh. If documents contain details required under Rule 98 (sic) [9(2)] of CENVAT Credit Rules, benefit of Service Tax Credit may be extended. Needless to say the appellants shall be given an opportunity to present their case and also the Assistant Commissioner shall be free to get any verification if necessary done.'*

7. Learned Chartered Accountant also points out that in their own dispute in *Idea Cellular Ltd v. Commissioner of Central Excise, Mumbai [final order no. A/89500/2016 dated 28th July 2016 disposing off appeal no. ST/384/2010 against order-in-original no. 04/STC/BR/10-11 dated 28th April 2010 of Commissioner of Customs & Service Tax, Mumbai]* the eligibility of reimbursements for diesel has already been settled thus:

> *'(d) Demand in respect of supply of Diesel*
>
> *Revenue authorities went to deny this credit on the ground that diesel is excluded input from availing CENVAT credit. He find that the show-cause notice indicates credit is sought to be denied in respect of the services that were rendered in supply of diesel. It is claimed by the learned Chartered Accountant that they had availed credit of service tax paid on the various services which are associated with the supply and running of DG set and not availed the credit of duty paid on Diesel. This stand was taken by the appellant before adjudicating authority. It seems that the same is accepted by the adjudicating authority as there are no findings recorded on this issue. On perusal of definition of inputs and input services in Rule 2(k) and (l) of Cenvat Credit Rules, 2004, we find that CENVAT credit cannot be availed of duty paid on Diesel, but there is no bar in availing CENVAT credit of service tax paid on services associated with delivery of diesel, loading in DG set etc. Accordingly, we hold that CENVAT credit cannot be denied to appellant on this point. The appeal is allowed.'*

8. It is further contended by Learned Chartered Accountant that the decision of the Tribunal in *Commissioner of Central Excise, Jaipur – I v. Mangalam Cement Ltd [2017 (47) STR 349 (Tri-Del)]*

has made it clear that

> *'4. Admittedly, the show cause notice alleged that the credit availed by the respondent on mining service and excavation service which are related to extraction of limestone from their mines are not eligible for input service credit as the said service is not covered by the provisions of Rule 2(1) of the Cenvat Credit Rules, 2004. The original authority found the respondent eligible for the credit as the services are in connection with procurement of raw material and accordingly dropped the demands. Now, the Revenue is aggrieved by this order on the ground that the actual classification of the service should be under "supply of tangible goods" introduced only w.e.f. 15-5-2008. We find the present plea taken by the Revenue is entirely on different ground not agitated before the lower authority. Further, it is well settled position of law that the credit availed by an assessee cannot be denied or varied on the ground that the classification of service should have been made in a different category by the provider of service. Variation in the classification or consequent rate of payment of Service Tax is not possible at the end of the recipient of service. There is nothing on record to state that the category of service or payment of Service Tax has been varied during the material time by the provider of service. In the absence of such situation, we find that the present appeal which is beyond the scope of the proceedings concluded against the respondent has no legal basis and merits. Accordingly, the appeal by the Revenue is dismissed.'*

9. On considering the submissions made by both sides, it is seen that availment of credit, whether against invoices or against debit notes that contain substantially the same information as prescribed in rule 9 of CENAT Credit Rules, 2004 stands settled by the decision of the Tribunal and of the several High Courts as noted *supra.* It is seen from the debit notes, as well as the invoices in question, that, while

the adjustments reflect the separate charges as provided in the master service agreements, discharge of tax liability therein under Finance Act, 1994 by the provider of service and raising of the amount as due from the recipient of the service is not in doubt. It is settled law that once the tax has been collected, it is not within the jurisdiction of the tax authorities governing the recipient to contend that such payment of tax was not in consonance with the law. Furthermore, the grounds of appeal relied upon definition of the 'inputs' to contend that diesel is not a permissible 'input. It would appear that the competent authority has not been able to draw a distinction between diesel as goods and any duties paid thereon being ineligible for availment of credit and a charge raised upon the recipient of the service as value of the service on which tax liability under Finance Act, 1994 has been duly discharged.

10. In view of the above we find that the grounds of appeal lack merit and appeal of Revenue is consequently dismissed.

(Order pronounced in the open court on 26/09/2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*