

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.03.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR. JUSTICE T.RAJA

C.M.A. No.545 of 2015

Commissioner of Service Tax

"Newry Towers"" No.2054-I, 2nd Avenue
12th Main Road, Anna Nagar,
Chennai - 600 040.

.. Appellant/Respondent

- Vs -

M/s.Aircel Cellular Limited
Vth Floor, Spencer Plaza
No.769, Anna Salai,
Chennai - 600002.

.. Respondents/Applicant

Appeal filed under Section 35-G(2) of the Central Excise Act, 1944 r/w Section 83 of the Finance Act, 1994. against the order dated 05.04.2013 passed by Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.40112 of 2013.

against the order dated 28.12.2010 on the file of the Commissioner of Central Excise, Chennai-III, Ch-34 made in Order in Original No.30/2010.

For Appellant

: Mr.V.Sundareswaran
Standing Counsel

For Respondent

: Mr.Raghavan Ramabadran

J U D G M E N T
(DELIVERED BY R.SUDHAKAR, J.)

This Civil Miscellaneous Appeal is filed by the Revenue as against the order of the Customs, Excise and Service Tax Appellate Tribunal, allowing the appeal filed by the assessee granting the benefit of Cenvat credit on the service tax paid on Access Deficit Charges to BSNL, raising the following substantial question of law:

"Whether the Tribunal has fallen into error by holding that Access Deficit Charge is an Input Service as

per the definition in Rule 2(1) of the Cenvat Credit Rules, 2004."

2. The brief facts of the case are as follows:

The assessee in this case availed credit of service tax paid on various input services used in providing the taxable service. One of the credits so availed is the service tax paid on Access Deficit Charges (ADC) to BSNL. The said ADC is charged by BSNL on the basis of number of calls made by the assessee's subscribers to BSNL at remote locations. The service tax was charged by BSNL for the ADC charges and the assessee paid service tax thereon. The Department collected the same without demur accepting the same as for telecom services. The Department denied the input credit taken by the assessee on the ground that what is provided by BSNL is a facility and not telecom services. The Department was of the view that Access Deficit Charges are paid by the respondent/assessee for fulfilment of a license obligation and are in no way connected with providing output service. Hence, they are not entitled to take credit of service tax paid on Access Deficit Charges. Accordingly, show cause notice was issued to the respondent. The Adjudicating Authority took the view that it was only a facility extended to connect the end user by BSNL where the networking facility was not feasible for the respondent. Consequently, the Adjudicating Authority denied the service tax credit on the payment towards ADC holding as follows:

"From the foregoing, it would emerge that ADC charges are levied by BSNL to access mostly on rural/remote areas where there is no connectivity by the service provider. Hence it can be inferred that it is only a FACILITY extended, facilitating the service provider to connect the end user by the BSNL where the networking facility is not feasible by the assessee in question. That apart by rendering the ADC facility, by the BSNL to the assessee cannot be construed by any stretch of imagination as a service, whereby the assessee treat this as an input service qualifies for rendering his output service. This being the situation, availing the service tax credit on payment of ADC charges is incorrect in terms Rule 2(1) of the Cenvat Credit Rules 2004."

3. Aggrieved by the Order-in-Original, the assessee pursued the matter before the Tribunal.

4. The Tribunal took the view that the service provided by the BSNL to the assessee is a telecom service as defined under Section 65 (109a) of Finance Act, 1994 and held as follows:

"We have considered the arguments on both sides. We are not in agreement with the argument that BSNL is providing only a facility and not any service to the appellant. After classifying the facility provided by

BSNL as 'Telecom services" and collecting the service tax under such head, Revenue cannot turn around and argue that this is not a service. Even otherwise, we are convinced that the service provided by BSNL to the appellant is a Telecom service as defined in section 65(109a) of Finance Act, 1994. Since this service is required by the appellant for providing output services to appellant's customers, it is obviously an 'input service' as per definition at Rule 2(1) of Cenvat Credit Rules, 2004. Therefore the appellant is entitled to take Cenvat credit on such services. Therefore, we allow this appeal of the appellant in respect of the first issue."

5. Being aggrieved by the order of the Tribunal, the Revenue has filed the present appeal before this Court.

6. Heard learned Standing Counsel appearing for the Revenue and the learned counsel appearing for the assessee and perused the materials placed before this Court.

7. The interpretation in this case revolves around Rule 2(1) of the Cenvat Credit Rules, 2004 which reads as follows:

"RULE 2. Definitions - In these rules, unless the context otherwise requires -

(a).....

.....

(1) "input service" means any service,-

(i) used by a provider of taxable service for providing an output service, or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal,

and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage up to the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry and security, inward transportation of inputs or capital goods and outward transportation up to the place of removal."

8. In this case, we find that the finding of fact by the Tribunal that the facility provided by BSNL to the assessee, who, in turn, provide such services to their subscribers, is nothing but a telecom service is justified. The Department has not produced any material

to contradict this finding of fact.

9. A plain reading of Rule 2(1) of the Cenvat Credit Rules, 2004 makes it clear that the assessee in this case is the user of the service provided by BSNL and that service is used for providing output service to the customers of the assessee. Therefore, the definition squarely applies to the facts of the present case. Since the assessee has satisfied the requirement of Rule 2(1) of the Cenvat Credit Rules, 2004, the Department was not justified in taking a different view contrary to the said provision.

10. In the light of the above, we find no reason to interfere with the order of the Tribunal. Accordingly, the question of law is answered against the Revenue and in favour of the assessee. Consequently, this Civil Miscellaneous Appeal stands dismissed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Customs, Excise & Service Tax Appellate Tribunal
South Zonal Bench, 1st Floor, Shastri Bhavan Annexe
26, Haddows Road, Chennai 600 006.

2.The Commissioner of Central Excise
Chennai III
Chennai -34

1 cc to Mr.Lakshmi Kumaran ,Advocate, SR.No.17182
1 cc to Mr.V.Sundareswaran ,Advocate, SR.No.17181

C.M.A. No.545 of 2015

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