IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.06.2017

CORAM :

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER,
and
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR,

CMA No. 2594 of 2013

The Commissioner of Central Excise,
No.1, Foulks Compound,
Anai Medu,
Salem 636 001. ... Appellant/Respondent

Vs.

M/s.Bharath Sanchar Nigam Limited,
Office of the General Manager (Telephone),
Salem 636 007. ...Respondent/Appellant

PRAYER: Civil Miscellaneous Appeal filed under Section 35G of the Central Exercise Act, 1944, against the Final Order No.868 /12 dated 27.07.2012 passed by CESTAT, South Zone, Chennai

For Appellant : Ms.Hema Murali Krishnan
Senior Standing Counsel for
Mr.K.Ravi Anantha Padmanaban

For Respondent : Mr.G.Natarajan

JUDGMENT
(Judgment of the Court was made by RAJIV SHAKDHER,J.)

1. This is an appeal preferred by the revenue against the final Judgment and order passed by the Customs, Exercise and Service Tax Appellate Tribunal (in short "the Tribunal") which sets out three dates. The record shows that the operative portion of the Judgment was pronounced on 27.07.2012, while the copy of the Judgment, which has been placed on record, denotes two other dates, that is, the dates on which the judgment was signed. The Technical Member, evidently, signed the judgment on 03.08.2012, where as the Judicial Member signed the same on 06.08.2012. Be that as it may. The only issue which arises in the appeal is as to whether the assessee, which in this case is

BSNL, could have claimed CENVAT credit in respect of capital equipment, which was removed for use to another place within the same zone.

2. In order to adjudicate upon the instant appeal, the following broad facts are required to be noticed.

2.1. The assessee is in the business of providing telephone services throughout India. In order to render a service, the assessee has created Secondary Switching Areas (in short "SSAs") in various parts of the country, including the State of Tamil Nadu. Each such SSA is registered under the Finance Act, 1994 (In short "the Act").

2.2. We are informed that for the purpose of provisioning of telephone services, the SSA are divided into three zones i.e., Salem, Chennai and Madurai. It appears that the assessee had purchased certain capital equipment, qua which, CENVAT credit to the tune of Rs.1,15,86,320/- (Rupees one crore fifteen lakhs eighty six thousand three hundred and twenty only) was claimed by it for the period spanning between September 2005 to April 2006. Admittedly, the capital equipment, which was received by the Salem SSA was used for provisioning of telephone services by other SSAs.

2.3. The Revenue, evidently, raised an objection with regard to the same and, accordingly, issued a show cause dated 13.10.2006. By virtue of this show cause notice, a demand in the sum of Rs.1,15,86,320/- (Rupees one crore fifteen lakhs eighty six thousand three hundred and twenty only) was raised along with interest and penalty. The matter, accordingly, proceeded to adjudication.

2.4. The adjudicating authority vide Order-In-Original dated 26.03.2007 confirmed the demand. Furthermore, the assessee was called upon to pay interest under Section 75 of the Act. In addition thereto, penalty in the sum of Rs.10,000/- (Rupees ten thousand only) was also imposed on the assessee under Section 76 of the Act.

3. Being aggrieved, the assessee preferred an appeal to the Tribunal. The Tribunal vide order dated 29.10.2008 set aside the Order-In-Original dated 26.03.2007 and remanded the matter with a direction to examine the matter from a "technological point of view" and also with regard to the issue, which was at the heart of the matter, that is, as to whether the assessee could claim CENVAT credit, when capital equipment which was received by one SSA was used by another SSA.

4. Based on the aforementioned direction, the adjudicating

authority passed a fresh Order-In-Original dated 20.07.2009, whereby, once again, it confirmed the demand for tax amounting to Rs.1,15,86,320/- (Rupees one crore fifteen lakhs eighty six thousand three hundred and twenty only). The assessee was also called upon to pay interest and penalty.

5. It is in this background, the matter travelled for the second time to the Tribunal. The Tribunal, via the impugned judgment and order have made the following crucial observations:

> "..... 6.We have considered arguments on both sides. Firstly, we notice that if the DGM (Projects), Salem followed the procedure of getting registered as "input service distributor" and then distributed the credit to SSA Salem there was nothing wrong in the credit availed by the appellant. Basically the issue involved is one of procedures and not a case of mis-utilisation of any ineligible credit. Further, we note that there has not been any distribution of credit involved because of the entire credit taken at one location was taken in one office making it easy for Revenue to conduct verification as may be necessary. The argument of the appellants that the premises where the equipments are used belong to BSNL and not to any other party and it is also used for completion of services originating from Salem also are strong arguments in favour of the appellants. Since MODVAT credit is a substantial benefit, we are of the view that the impugned credit should not be denied on account of procedural defects of minor nature as pointed out by the Revenue. Therefore, we hold that the impugned order is not maintainable. So we set aside the order and allow the appeal...."

6. Ms.Hema Murali Krishnan, who appears for the Revenue, says that the impugned judgment is unsustainable as CENVAT credit can be availed of by the assessee, only if the capital goods, qua which credit for tax paid is taken, are used by the SSA, in which it is received.

6.1. This arguments of the learned counsel is pivoted, on her interpretation of provisions of Rule 3(1) (i) of Cenvat Credit Rules, 2004. For the sake of convenience, the same is extracted herein below:

> "3 (1) A manufacturer or producer of final products or a provider of [output] service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of-
>
> (i) the duty of excise specified in the First

Schedule to the Excise Tariff Act, leviable under the Excise Act:

[Provided that CENVAT credit of such duty of excise shall not be allowed to be taken when paid on any goods--

(a) in respect of which the benefit of an exemption under Notification No.1/2011-CE, dated 1st March, 2011 is availed; or

b. specified in serial numbers 67 and 128 in respect of which the benefit of an exemption under Notification No.12/2012-CE, dated the 17th March, 2012 is availed;]

....

Paid on__

(i) any input or capital goods received in the factory of manufacture of final product or premises of the provider of output service on or after the 10th day of September, 2004; and

(ii) any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004..."

6.2. Therefore, it is the learned counsel's contention that since the capital goods were used by an SSA other than the one, in which they were received, the assessee could not have availed of CENVAT credit.

7. On the other hand, Mr.Natarajan, has drawn our attention to Rule 3(5) of the Cenvat Credit Rules, 2004. Based on the proviso to Rule 3(5) of the Cenvat Credit Rules, 2004, Mr.Natarajan, says that no reversal of CENVAT credit can be sought, where capital goods though removed outside the premises of the provider of output service are removed for the purpose of providing output service. Therefore, in sum, the argument is that the mere factum of removal of capital goods on which CENVAT credit has been taken will not lead to denial of credit, if it is shown that the capital goods were removed by the service provider to provide output services.

8. We heard the learned counsel for the parties and perused the records.

9. Clearly there is no dispute about the fact that the assessee had purchased the capital goods for Salem SSA, which were used by other SSAs.

9.1.Consequently, the factum of removal of the capital goods from the premises, in which they were received is not in dispute. It is also not disputed before us that though the capital goods were removed to a place outside the premises of

Salem SSA, they continued to be used by other SSAs, who had not, in fact, claimed CENVAT credit qua the very same equipment.

9.2. Therefore, as correctly argued by Mr.Natarajan, the assessee cannot be denied the right to avail the CENVAT credit. The position in this behalf is, in our view, supported by the manner in which Rule 3(5) of Cenvat Credit Rules, 2004, is framed. For the sake of convenience, the said Rule is extracted herein below:

> "...... (5) When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9;
> Provided that such payment shall not be required to be made where any inputs or capital goods are removed outside the premises of the provider of output service for providing the output service."

10. Furthermore the submission of Hema Murali Krishnan, which is based on, as indicated above, on her interpretation of Rule 3 (1) (i), cannot be accepted, for the reason that Rule 3 (1)(i) allows, inter alia, a provider of output service to take CENVAT credit of any duty of excise, which is paid on capital goods received in the premises of the provider of output service, whereas, there is nothing in the said Rule which suggests that CENVAT credit would be available to an output service provider, only if, the capital goods in issue are used in the very same premises. This interpretation accords with what we have stated with regard to Rule 3(5) read with the proviso appended thereto. Accordingly in our view no substantial question of law arises for our consideration. The appeal, in our opinion, has no merit. Consequently, the Civil Miscellaneous Appeal is dismissed. There shall, however, be no order as to costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

The Customs, Exercise and Service Tax Appellate Tribunal,
South Zone, Chennai.

+1cc to Mr.S.JaiKumar, Advocate SR.No.45650
+1cc to M/s.Hema Muralirishnan, Advocate SR.No.45855

CMA No. 2594 of 2013

RV(CO)
GN(19/07/2017)