**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**STA No.6/2019 (O&M)
Date of decision:03.09.2019**

Commissioner of Central Excise, Commissionerate Rohtak

.............Appellant

v.

M/s Bharat Sanchar Nigam Limited.

..............Respondent

**Coram: Hon'ble Mr.Justice Jaswant Singh
Hon'ble Mr.Justice Lalit Batra**

Present:- Mr.Sourabh Goel,Advocate for the appellant

<u>Jaswant Singh,J,</u>

Since there is delay of 153 days in refiling the appeal, CM 6243-CII/2019 has been filed seeking condonation of said delay.

Similarly to condone the delay of 2070 days in filing the appeal, CM 6244-CII/2019 has been filed.

Both the applications seeking condonation of delay are accompanied by affidavit of Mr.Vijay Mohan Jain, Commissioner of Central Goods and Services Tax Commissionerate,Rohtak.

<u>Main case.</u>

Respondent-BSNL, engaged in providing "Telephone Service" is registered for the purpose of paying service tax on such service and availing cenvat credit on capital goods and input services used in providing output service. It is alleged that after an enquiry, it was observed that respondent, though providing both taxable and non-taxable services, was not maintaining separate account of cenvat credit for the taxable and exempted/non-taxable services and utilizing the same for payment of service tax for taxable services as per Rule 6 of the Cenvat Credit Rules,2004 (for short 2004 Rules). It is alleged that respondent was entitled to utilize cenvat credit upto 20% of the service tax payable, whereas it was utilizing cenvat credit upto 100% of service tax payable. It was allegedly found that respondent had utilized excess cenvat credit of Rs.94,57,161/- for the months of March, June 2005 and March and April 2006 in contravention of Rule 6(3)(c) of 2004 Rules. Authorised representative of respondent made a statement to the effect that they were providing both taxable and non-taxable services; availing input services/capital goods credit-common to both taxable and non-taxable services; that they were not maintaining separate accounts for taxable and non-taxable services; that they were not aware about the provisions of the 2004 Rules and on being pointed out by the Department, respondent had deposited the same on 19.12.2006. According to the appellant said amount of Rs.94,57,161/- was liable to be recovered under Rule 14 of 2004 Rules read with Section 73(1) 73(2) of the Act by invoking the extended period of limitation of five years for omission and failure on their part in disclosing to the Central Excise Department the fact of providing both taxable and non-taxable services and willfully suppressing utilization of 100% service tax credit for payment of service tax payable instead of 20% in terms of Rule 6(3)(c) of 2004 Rules. The respondent was also considered liable to pay penalty under Rule 15 of 2004 Rules read with Section 78 of the Act. Further interest was also recoverable under Section 75 of the Act.

Accordingly, a show cause notice dated 12.5.2007 was issued to the respondent. The Adjudicating Authority vide Order in Original dated 17.3.2008(A-2) confirmed the demand of service tax alongwith interest and appropriated the said demand. Penalty of equivalent amount was also imposed upon the respondent.

Aggrieved against the adjudication order (A-2) respondent filed appeal before CESTAT,New Delhi. The learned Tribunal vide final order dated 21.2.2002, which is impugned in this appeal, allowed the appeal. It is averred that the appellate order has been passed in a mechanical manner and without application of judicial mind. Hence the present appeal.

Following substantial questions of law have been raised in the present appeal:-

> A) Whether the Appellate Authority is correct in allowing the appeal filed by the respondent vide Final Order No.ST/A/166/12 dated 21.2.2012 without appreciating the facts and circumstances of the instant case and findings of the Final Order No.130-131/09&S.O.No.166-67-EX(DB) dated 17.02.2009 in case of Idea Cellular?
>
> B) Whether the Adjudicating Authority is correct in not confirming the re-quantified demand alongwith interest and not imposing penalty upon the respondent under Section 78 of the Finance Act,1994 for their act of suppression of facts with malafide intention?
>
> C)Whether the Ld.Tribunal committed a grave error in relying upon the order in case of Idea Cellular case reported as 2009(16)STR 712 (Tri-Del as in the said case the Ld.Tribunal had remanded back the case back to the adjudicating authority for de novo adjudication?

At the time of hearing,learned counsel for the appellant admits that in view of instructions dated 22.8.2019 issued by Ministry of Finance,Department of Revenue, Central Board of Indirect Taxes and Customs (Judicial Cell) the instant appeal would not be maintainable before this Court, as demand amount i.e. 94,57,161/- is to be recovered, which is below the monetary limit of Rs. 1 Crore.

In view of the said instructions dated 22.8.2019 learned counsel for the appellant prays for withdrawal of the instant appeal, however the question of law raised would remain open.

Dismissed as withdrawn with liberty aforesaid.

Since the appeal stands dismissed as withdrawn, no orders are required to be passed in the applications seeking condonation of delay.

(Jaswant Singh)
Judge

03.09.2019. **(Lalit Batra)**
joshi **Judge**

Whether Speaking/reasoned	**Yes/No**
Whether Reportable	**Yes/No**