IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Service Tax Misc. Appl. (CT) No. 40129/2022
and
Service Tax Appeal No.41117/2015

(Arising out of Order-in-Original No. 28/2014-Commr. Dated 26.12.2014 passed by the Commissioner of Central Excise and Service Tax, Coimbatore)

M/s. Vodafone Idea Limited **Appellant**
No. 1046, Avinashi Road
Coimbatore – 641 018.

Vs.

Commissioner of GST & Central Excise **Respondent**
MHU Complex, No. 692, Anna Salai
Nandanam, Chennai – 600 035.

APPEARANCE:

Ms. Shwetha Vasudevan, Advocate for the Appellant
Shri Vikas Jhajharia, AC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri P. Anjani Kumar, Member (Technical)

Final Order No. **40248 / 2022**

Date of Hearing : 10.6.2022
Date of Decision: 13.6.2022

Per Ms. Sulekha Beevi C.S.

Brief facts are that M/s. Vodafone Cellular Ltd. (herein after referred to as VCL) hold service tax registration for providing taxable services under various categories. They had availed CENVAT credit of excise duty, service tax paid on inputs and capital goods under CENVAT Credit Rules, 2004. Later, with a view to sharing of passive infrastructure among mobile operators and by way of a scheme of arrangement duly approved by the Hon'ble High Court of Madras on

19.11.2019, VCL demerged its Passive Infrastructure Assets (herein after referred to as PIA) to a new and separate legal entity M/s. Vodafone Essar Infrastructure Ltd. They did not reverse the credit availed by them. The department was of the view that the appellant has to reverse the credit availed by them on capital goods in terms of Rule 3(5) / Rule 3(5A) of CENVAT Credit Rules, 2004. Show Cause Notice was issued proposing to recover the ineligible credit along with interest and also for imposing penalties. After due process of law, the original authority confirmed the demand along with interest and imposed equal penalty. Aggrieved by such order, the appellants are now before the Tribunal.

2. The learned counsel Ms. Shwetha Vasudevan appeared and argued for the appellant. She submitted that during the period 2009 – 10, the appellant and the companies of VCL decided to demerge their PIA to form a new company. As per the order of the Hon'ble High Court of Madras dated 19.11.2019, the scheme of amalgamation was approved and consequently the PIA of VCL was transferred to Vodafone Essar Infrastructure Ltd. The scheme of arrangement was given retrospective effect from 1.4.2009.

3. It is the case of the department that the appellant ought to have reversed the credit under Rule 3(5) on such formation of infrastructure company to which the capital goods have been transferred. She adverted to Rule 3(5) of CENVAT Credit Rules, 2004. Which reads as under:-

> "(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:
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> 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"

4. She submitted that the words used in the above provision is that credit has to be reversed when the capital goods are removed from the factory. In the present case, there is no such physical removal of the capital goods. Further, the capital goods are continued to be used by the appellant company for their output services. She submitted that the first proviso to Rule 3(5) states that such reversal is not required when inputs or capital goods are removed outside the premises for the purpose of providing the output services. The learned counsel argued that it is an undisputed fact that the appellant continues to use the capital goods for rendering their output services which is evidenced by the scheme of arrangement for sharing infrastructure for the purpose of providing telecommunication services.

5. The learned counsel submitted that the issue is decided in the appellant's own case by the Chandigarh Bench of this Tribunal as reported in 2019 (5) TMI 1350 – CESTAT Chandigarh.

6. The learned AR Shri Vikas Jhajharia supported the findings in the impugned order.

7. Heard both sides.

8. The issue is whether the appellants are liable to reverse the credit on the capital goods consequent to the formation of another company Vodafone Essar Infrastructure Ltd. by which there is transfer and merger of PIA of the appellant as per the scheme of arrangement.

9. As narrated from the facts above, there is no dispute that even after transfer, the capital goods are continued to be used by the appellant for providing output service. The Tribunal in the appellant's own case has analyzed the very same issue. The Tribunal relied upon the decision of the Hon'ble Supreme Court in the case of J.K. Spinning and Weaving Mills Ltd. Vs. Union of India reported in 1987 (32) ELT 234 (SC) to observe that removal means physical and actual removal of the goods from the factory to any other place. The relevant portion of the order is reproduced as under:-

> *"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:-*
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> *"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 4 ST/60534/2017-Cu (DB) 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-KARCE=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 5 ST/60534/2017-Cu (DB) 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 6 ST/60534/2017-Cu (DB) credit as the capital goods have not been physically removed from the premises where they were initially installed."

10. In the present case, there is no physical removal of capital goods from the premises of the appellant. In para 9 of the said order, the Tribunal held that appellant is not required to reverse the CENVAT credit as the capital goods have not been physically removed from the premises where they were initially installed.

11. By judicial discipline, Following the said decision, in the appellant's own case, we are of the considered opinion that the demand cannot sustain. The impugned order is set aside. The appeal is allowed with consequential reliefs if any.

12. The miscellaneous application filed by the appellant for change of cause title is allowed.

(Pronounced in open court on 13.6.2022)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

(**P. ANJANI KUMAR**)
Member (Technical)

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