(2014) 05 CESTAT CK 0015

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Appeal No. 816, 817 Of 2008

?Bharat Sanchar Nigam Limited APPELLANT

Vs

C.S.T., Delhi RESPONDENT

Date of Decision : 23-05-2014

Acts Referred:
Finance Act, 1994 — Section 76, 77

Citation : (2014) 05 CESTAT CK 0015

Hon'ble Judges : G. Raghuram, J;Rakesh Kumar, Technical Member

Bench : Division Bench

Advocate : Alok Mahajan, Jayant Sahay

Final Decision : Allowed

Judgement

1. The facts leading to filing of these appeals are, in brief, as under:-

1.1 The appellant, a Government of India Undertaking, are engaged in providing telecommunication services. The Commissioner, Service Tax, Delhi

vide order-in-Original dated 1.9.2008 confirmed service tax demand of Rs.7,63,100/- and Cenvat Credit demand of Rs.4,66,918/- along with interest

and imposed penalties on them under Section 76 on the grounds that :-

(a) for the month of October, 2003 whereas the tax payment through the Department of Telecommunication was Rs.40,15,010/-, the service tax

payable worked out to Rs.43,40,626/- and as such, there is short payment of Rs.3,25,625/-;

(b) for December, 2003 against service tax liability of Rs.22,58,992/-, the payment of service tax through department of Telecommunication was

Rs.18,75,318/- and as such, there was short payment of Rs.39,07,354/-;

(c) for the month of Feb. 2004, there is short payment of Rs.53,080/- ; and

(d) they have wrongly availed Cenvat Credit of Rs.4,66,918/- as this credit has been taken on the basis of the invoices in which the important details

like service tax registration number of the service providers, description of the input services, etc. are not mentioned.

1.2 Against this order of the Commissioner Appeal No. E/ST/817/2008 has been filed.

1.3 The Commissioner vide order-in-original dated 27.08. 2008 confirmed the service tax demand of Rs.19,46,796/- and Cenvat Credit demand of

Rs.3,25,487/- against the appellant along with interest and imposed penalties under Section 76 and Section 77 on the ground that:-

(a) during the period from July, 2004 to September, 2004, their service tax liability on the basis of the amount realized for the value of the taxable

services provided worked out to Rs.1,39,16,720/-, against which they have paid only an amount of Rs.1,20,64,134/- and, thus, there is short payment of

Rs.18,52,586/- and besides the service tax, education cess of Rs.94,210/- is also leviable; and

(b) The Cenvat Credit of Rs.3,25,487/- has been availed against the invoices, which do not have the service tax registration, description of input

services etc. 1.4 Against this order of the Commissioner, the Appeal No.ST/817/2008 has been filed.

2. Heard both the sides.

3. Sh. Alok Mahajan, Advocate, the leaned counsel for the appellant, pleaded that service tax demand of Rs.18,52,586/- conformed by the order-in-

original dt. 27.08.2008 passed by the Commissioner is on the basis that in the ST-3 Return for the period from 01.04.2004 to 30.09.2004, while the

service tax payable, on the basis of the amount of Rs.16,21,17,485/- realized works out to Rs.1,39,16,720/- the appellant have paid service tax of only

Rs.1,20,64,134/-, that this demand is totally incorrect as amount of Rs.16,21,17,485/- realized by the appellant from period 01.01.2004 to 30.09.2004

also includes inter interconnect usage charges (IUC) on which no service tax was payable, that though this plea had been made before the

Commissioner, the same has been totally ignored and hence this demand is not sustainable, that as regards demand of Education Cess amounting to

Rs.94,210/- confirmed vide order-in-original dt. 27.08.2008, the same has been demanded in respect of bills raised by the Appellant during period prior to 10.09.2004 when there was no Education Cess, that though this plea had been made before the Commissioner, the same has been ignored and no

finding has been given on the same and in view of this the Education Cess demand of Rs.94,210/- is also not sustainable, that as regards the Cenvat

Credit demand of Rs.3,25,487/- confirmed by the Commissioner vide order in-original dt.27.08.08, the same has been confirmed on the ground that

invoices on the basis on which this credit has been taken do not have certain relevant particulars like services providers registration number, nature of

service provided etc., that the ground on which the Cenvat Credit has been denied is in-correct and in fact the same has been denied without

considering the appellantâ??s submissions, that in view of the above submissions, the impugned order dt. 27.08.08 passed by the Commissioner

confirming the service tax demand of Rs.18,52,586/-, Education Cess demand of Rs.94,210/- and Cenvat Credit demand of Rs.3,25,887/- along with

interest and imposition of penalty on the appellant is not sustainable, that as regards the order-in-original dt. 01.09.08 passed by the Commissioner by

which the service tax demand of Rs.7,63,100/- and Cenvat Credit demand of Rs.4,66,918/- has been confirmed along with interest, the same is

incorrect and has been passed without considering the Appellantâ??s submissions, that service tax demand of Rs.7,63,100/- confirmed by the

Commissioner pertains to Oct.03, Dec.03 and Feb.04 and the same has been confirmed on the ground that the service tax paid during these months is

less than the service tax payable on the basis of the amounts realized, that this difference is for the reason that the amounts realized mentioned in the

ST-3 returns also include interconnect usage charges (IUC) on which no service tax is chargeable, that this plea had been made before the

Commissioner but no findings has been given on the same, that as regards the Cenvat Credit demand of Rs.4,66,918/- the same has been dis-allowed

on the ground that the invoices of the service providers on the basis of this credit has been taken, do not contain the relevant particulars like service

provider registration number, nature of the service provided etc, that the ground on which this credit has been dis-allowed is in-correct and that in view

of the above submissions the impugned orders are not correct.

4. Sh. Jayant Sahay, learned DR, defended the impugned order by reiterating the findings of the Commissioner.

5. We have considered the submissions from both the sides and perused the records. In both the appeals, the service tax demands of Rs.7,63,100/-

and Rs.18,52,856/- have been confirmed on the ground that during the period for which these demands have been confirmed, the service tax payable

on the basis of the amount realized was more than the service tax actually paid. The appellantâ??s contention is that the amounts realized as

reflected in the respective ST-3 returns also include interconnect usage charges, which during the period of dispute were not taxable and for this

reason only, service tax on the amounts realized against IUC, had not been paid and that though this plea had been made before the Commissioner no

finding has been given. We find in these cases that this plea has been made and the same has not been considered. Therefore the service tax

demands of Rs.7,63,100/- and Rs.18,52,856/- have to be set aside and remanded to the Commissioner for de-novo adjudication after considering the

appellantâ??s plea that the amounts realized as mentioned in the respective ST-3 return also included amounts realized for providing interconnection

which was not taxable and if this plea of the appellant is correct, these demands would not be sustainable.

6. As regards the demand of Education Cess amounting to Rs.94,210/- confirmed vide order-in-original dt. 28.08.08, the contention of the appellant is

that this Education Cess demand pertains to period prior to 10.09.04 i.e. in respect of the bills raised for the period prior to 10.09.04, while Education

Cess has become payable w.e.f. 10.09.04 and hence in respect of the bill raised during the period prior to 10/09/04, no Education Cess would be

payable. We find that this plea had been made before the Commissioner but no findings have been given on it by the Commissioner and if this plea is

correct, this demand also would not be sustainable, as Education Cess which had become leviable w.e.f. 10.09.04, would not be chargeable in respect

of the service provided during the period prior to 10.09.04, even if the payment in respect of the service had been received during period w.e.f.

10.09.04. Therefore the demand for education cess has to be set aside and has to be remanded for de-novo adjudication after ascertaining the facts.

7. As regards the demands of Cenvat Credit confirmed by the Commissioner in these two orders, the appellantâ??s plea is that while the

Commissioner has confirmed the demands on the ground that invoices on the basis of which this credit has been taken, are not valid invoices, as the same do not contain the relevant details, this is not so. In our view, this matter would have to be remanded for de-novo decision after considering this

plea of the appellant after examining each of the disputed invoices. If the invoices contain the relevant details as required in terms of the Provisions of

Service Tax Rules, 1994, Cenvat Credit would be admissible.

8. In view of the above discussion, the impugned orders are set aside and the matters are remanded to the Commissioner of de-novo adjudication in

terms of our directions in this order.

