(2025) 01 CESTAT CK 1571

In the Customs, Excise And Service Tax Appellate, New Delhi

Case No : Service Tax Appeal No. 50305 of 2017 [DB]

M/s. General Manager, GMTD, BSNL @APPELLANT @Hash Commissioner of CGST, Customs & Central Excise - Dehradun @RESPONDENT

Date of Decision : 24-01-2025

Acts Referred:
Central Excise Act, 1944 — Section 2(f)
Cenvat Credit Rules, 2004 — Rule 2(I), 3, 3(5A), 3(5A)(b), 4(2)(a), 6(3), 9(5), 14

Citation : (2025) 01 CESTAT CK 1571

Hon'ble Judges : Dr. Rachna Gupta, Member (J);Hemambika R. Priya, Member (T)

Bench : Division Bench

Advocate : B.L. Narasimhan, Dhruv Tiwari, Dhruv Anand, Rajeev Kapoor

Final Decision : Allowed

Judgement

Dr. Rachna Gupta, J

1. Present appeal has been filed to assail the Order-in-Original No. 45/2016 dated 18.10.2016. For the purpose of adjudicating this appeal the facts, succinctly, are as follows:

1.1 During the course of the audit of records of the appellant, conducted for the period from October 2010 to September 2012, the departmental audit officers noticed the following discrepancies countered by respective opinion: -

(a) The party had availed credit of Rs. 51,606/- vide Entry No. 19 dated 13.06.12 on gardening services which were not covered in the definition of ‘input services’ under the Rule 2(I) of the Cenvat Credit Rules, 2004 (herein after referred to as the CCR).

Although the party contended that the services were of security, but no documents could be produced by them to substantiate their claim;

(b) During the months of November, 2010, January, 2011, February, 2011, March, 2011, June, 2011, July, 2011 and September, 2011 the party took excess credit totaling to Rs. 1,79,11,286 in violation of the provisions of Rule 9 (5) of the CCR in respect of capital goods. It was noticed that the credit balance shown in the credit register was less whereas while showing the opening balance in the ST-3 returns for the respective months, the party declared a higher opening balance, thus resulting in said excess credit.

Although the party pleaded that the excess credit was related to capital goods which was only taken but was not utilized by them. However they failed to submit any documentary evidence in this regards.

(c) The party received credit on the basis of Advice of Transfer Debit (ATD) issued by the CGMT, Dehradun (Input Service Distributor). It was noticed that out of the total credit of Rs. 95,87,097/-, passed by the ISD vide ATD dated 28.02.11, credit of Rs. 25,81,848/- was passed without any supporting document in violation of Rule 9(5) of the CCR.

Although the party contended that it relates to credit which was not taken by them earlier. However, still no documents were provided by them.

(d) M/s BSNL had also availed credit of Rs. 59,94,339/- on the strength of ATD dated 08.08.11 with reference to Invoice No. 45 dated 15.05.10 of M/s Prithvi Information Solutions Ltd., Hyderabad (M/s PISL, in short) which did not bear any description of the service involved therein. Copy of the said invoice dated 15.05.10 showed that it actually relates to supply of goods such as Terminal, Muxponders, LW Transpondersm, spares, cables etc. and service tax too has been charged thereupon without referring to any service having been provided by M/s PISL to M/s BSNL.

(e) It was noticed that while discharging the liability of Education Cess and Secondary & Higher Education Cess for the period October, 2010 to March, 2011 the party had cross utilized the available credit. Thus, although they could utilize credit of Rs. 5,36,685/- and Rs. 2,68,343/- (Total: Rs. 8,05,028/-) for payment of Ed. Cess and S& H Ed. Cess, respectively, they paid their entire liability of Rs. 14,51,561 from the credit account. This has resulted in short payment of Rs. 6,46,533/- (1451561 – 805028).

1.2 Based on these observations a Show cause Notice No. 35/2015 Dated 26.08.2015 was served upon the appellants proposing the recovery of:

i) Rs. 2,39,57,231/- (51606 + 17911286 + 5994339), the wrongly availed cenvat credit

ii) short paid service tax amounting to Rs. 1997452/- (13559 + 19,83,893)

iii) An amount of Education cess and S & H Education Cess of Rs. 6,46,533/-

iv) Cenvat credit availed on improper documents for an amount of Rs 25,81,848/-

v) Service Tax not paid for the services rendered prior 01.07.2011 amounting to Rs. 1,37,03,582/-

Proportionate interest and the appropriate penalties were also proposed to be recovered/ imposed. Said proposal has been confirmed vide the order under challenge (O-I-O dated 18.10.2015) for an amount of 1,79,11,286/-. The demand of Cenvat Credit availed on improper documents and service tax for the period prior 01.07.2011 has been set aside. Still being aggrieved the appellant is before this tribunal.

2. We have heard Shri B.L. Narasimhan, Shri Dhruv Tiwar and Shri Dhruv Anand, learned Advocates for the appellant and Shri Rajeev Kapoor, learned Authorized Representative for the department.

3. Ld. Counsel for appellant has submitted that demand of excess cenvat credit of Rs. 1,79,11,286/- service tax is not sustainable. Said demand has been confirmed based on the difference between closing balance of Cenvat credit taken and utilized on inputs and capital goods as mentioned in the credit register and ST-3 returns for the months of November 2010, January 2011, February 2011, March 2011, June 2011, July 2011 and September 2011. It is submitted that the aforesaid difference is due to the fact the Appellant has recorded 100% credit amount on inputs and capital goods under the column of credit taken in ST-3 returns, however has recorded 100% credit amount of inputs and only 50% credit amount of capital goods in its credit register. The same can be corroborated from the ST-3 returns filed and credit register maintained, for the relevant period.

3.1 It is further submitted that the appellant though has taken 100% credit on capital goods in their credit register/books, however, has utilized only 50% thereof in the first year as their eligibility. It has also been informed that the said act is permissible in terms of Rule 4(2)(a) of Cenvat Credit Rules, 2004. Hence the difference as noticed in the credit register and the ST-3 returns is purely because of the said reason. The register showed 100% of Cenvat credit whereas the service tax returns showed 50% thereof based on what was utilized by the appellant. It is impressed upon that Cenvat credit not utilized is as good as Cenvat credit not availed. The decision of Hon’ble High Court of Karnataka in the case of Commissioner of C.Ex. & S.T., Bangalore Vs. Bill Forge Pvt. Ltd. reported as 2012 (26) S.T.R. 204 (Kar.) has been relied upon.

3.2 It is further submitted that the interest also cannot be demanded on the amount of 50% of the Cenvat credit which was never utilized. The decision of the Larger Bench of this Tribunal in the case of J.K. Tyre & Industries Ltd. Vs. Asst. Commissioner of Central Excise – 2016 (340) E.L.T. 193 (Tri.-LB) has been relied upon. Learned counsel further submitted that the demand of reversal of Cenvat credit as has been confirmed by wrongly invoking Rule 3(5A) of Cenvat Credit Rules, 2004 is not sustainable as the said provision was not existing prior 28.02.2013. The decision of this Tribunal in Final Order No. 50307/2019 dated 07.02.2019 in the case titled as in the case of Ericsson India Pvt. Ltd. Vs. CCE, Jaipur has been relied upon. The period in question is prior the said date. Otherwise also, the rule cannot be applied in respect of those capital goods on which the Cenvat credit was not availed. The decision of this Tribunal in the case of SRF Ltd. Vs. Commissioner of C. Ex. & Service Tax, Alwar reported as 2018 (363) ELT 1058 (Tr.-Del.) has been relied upon. It is impressed upon that otherwise also, the burden to prove as to whether the Cenvat credit has been availed or not rests upon the department only. There is no evidence produced by the department to show that the balance 50% of Cenvat credit has been availed by the appellant. Learned counsel also submitted that this Tribunal has held that the Cenvat credit of security services is admissible. Following decisions has been relied upon:

(i) Mangalam Cement Limited Vs. Commissioner, CGST, Udaipur, Final Order No. 50454/2023 dated 10.04.2023, CESTAT New Delhi.

(ii) Saint Gobain Glass India Limited Vs. Commissioner of Central Excise and Service Tax, LTU, Chennai, Final Order No. 41029/2023 dated 10.11.2023, CESTAT Chennai.

3.3 Finally submitting about invocation of extended period of limitation while issuing the impugned show cause notice, it is submitted that the burden to prove mala fide lies with the department which has not been discharged. All material facts were already in the knowledge of the department. Hence, suppression/mis-representation has wrongly been alleged against the appellant. It is further submitted that non-disclosure of information which was not required to be disclosed under the law does not amount to suppression. The extended period has therefore wrongly been invoked while issuing the impugned show cause notice. The appellant is otherwise a public sector undertaking. The mala fide can never be presumed against the PSUs. The decision in appellant's own case vide Final Order No. 40505/2024 dated 30.04.2024, CESTAT Chennai has been relied upon. Following decisions have also been relied upon:

(i) Mahanagar Telephone Nigam Ltd. Vs. Union of India reported as 2023 (73) GSTL 310 (Del.)

(ii) GD Goenka Private Limited Vs. Commissioner of Central Goods and Service Tax, Delhi South, Final Order No. 51088/2023 dated 21.08.2023, CESTAT New Delhi

(iii) Omega Biotech Ltd. Vs. Commissioner of CGST, Dehradun, Final Order No. 51548/2023 dated 14.11.2023, CESTAT New Delhi

(iv) Ajay Mishra Vs. Commissioner of Service Tax, Delhi-III, 2023 (386) ELT 310 (Tri.-Del.)

(v) Hero MotoCorp Limited Vs. Commissioner (Appeals), Central Excise and CGST, Jaipur, Final Order No. 55631-55632/2024 dated 25.04.2024, CESTAT New Delhi

With these submissions the order under challenge while confirming the major portion of the demand proposed in the impugned show cause notice is prayed to be set aside and the appeal is prayed to be allwed.

4. While rebutting these submissions learned Departmental Representative foremost reiterated the findings as arrived at by the adjudicating authority below in the impugned order. It is submitted that the Cenvat credit has rightly been denied for the input services as those, do not qualified to be called as eligible input services. The findings in the order under challenge are being reimpressed. It is further submitted that the onus was on the appellant itself to prove the basis of difference in their credit record and the ST-3 return filed by them. Resultantly, the burden shifts upon the appellant only to prove the noticed difference. The said burden has not been discharged by the appellant, hence, there is no infirmity in the findings arrived at by the adjudicating authority.

4.1 Learned Departmental Representative further submitted that there is no provision for payment of amount on clearance of capital goods as waste and scrap by the service provider. Hence, the demand made on the amount required to be paid in terms of Rule 3(5A) of Cenvat Credit Rules for capital goods cleared on the products of being scrap has no infirmity. The appellant has not produced any evidence to prove that the capital goods cleared were actually not the used capital goods but the scrap. The decision of this Tribunal in the case of Bharti infratel Limited Vs. Additional Director General, DGCEI, New Delhi dated 31.01.2022 in Service Tax Appeal No. 53095 of 2016 is relied upon.

4.2 Finally it is submitted that the appellant irrespective being a PSU has intentionally wrongly declared the capital goods as scrap and has intentionally shown only 50% of the Cenvat Credit availed in their ST-3 returns despite availing 100% thereof in the credit register, the acts are sufficiently the positive acts amounting to suppression of relevant facts. Hence, no error has been committed when the extended period has been invoked by the department while issuing the impugned show cause notice. Impressing upon no infirmity in the order under challenge, the present appeal is prayed to be dismissed.

5. Having heard the rival contentions of both the parties, perusing the entire records including the order under challenge, we observe that following demands proposed in the show cause notice dated 26.08.2015 have been confirmed:

Para of the SCN

Issue Involved

Demand Proposed

Demand Proposed

2(a)

Inadmissible credit on gardening services

51,606

51,606

2(b)

Excess availment of credit on capital goods

1,79,11,286

1,79,11,286

2(d)

Inadmissible credit without any detail of input service

59,94,339

59,94,339

2(e)

Short payment of Cess amounts

6,46,533

6,46,533

2(f)

Interest on late payment of Service tax for September 2011

2,959

2,959

2(g)

Short payment of Service tax during the period from April 2012 to June 2012

9,376

9,376

2(h)

Non-payment of amount under Rule 6(3) of the Credit Rules related to exempted village panchayat telephones

13,559

13,559

(appropriated) and interest demand confirmed

2(i)

Non-payment of amount under Rule 3(5A)(b) of the Credit Rules on sale of capital goods as scrap

19,83,893

19,83,893

2(k)

Non-payment of interest due to date of tax liability as per the POT Rules

4,952

4,952

and following two demands have been dropped:

Para of SCN

Issue Involved

Demand Proposed

Demand Proposed

2(C)

In-admissible credit without producing documents

25,81,848/-

Demand dropped

2(J)

Non-payment of service tax attributable to services rendered prior to 01.07.2011

1,37,03,582/-

Demand dropped

The department is not in appeal against the dropping of these two demand, hence the present order to that extent stands attained finality.

6. With respect to the amount of service tax confirmed, we observe that it is on 3 counts as follows:

(i) On the basis of the difference noticed in the ST-3 returns and the Cenvat Credit Register.

(ii) The input services including the security services are not the eligible input services.

(iii) The Cenvat credit availed on capital goods was required to be reversed in terms of Rule 3(5A) of Cevat Credit Rules, 2004.

7. The issue wise findings are as follows:

7.1 Issue No. 1

7.1.1 The difference between the amount of Cenvat credit availed as reflected in the Cenvat Credit Register than the one recorded in the ST-3 returns is an admitted fact, however, the contention of appellant is that the Cenvat Credit Register shows that 100% credit was taken by the appellant during the period in dispute in their credit register but only 50% thereof as has been utilized is reflected in their ST-3 returns. The difference is due to the balance 50% of the amount which was not utilized and therefore was not shown in the ST-3 returns. We have perused Rule 4(2)(a) of Cenvat Credit Rules, 2004 as has relied upon by the appellant. The Rule reads as follows:

"The Cenvat Credit in respect of capital goods received in a factory or in the premises of the provider of output services on any point of time in a given financial year shall be taken only for an amount not existing 50% of the duty paid on such capital goods in the same Financial year."

The perusal makes it clear abundantly that it was the statutory mandate on the appellant-assessee to utilize only 50% of the Cenvat credit availed on the capital goods. The department has not produced any evidence to falsify the same.

7.1.2 We further observe that the issue of unutilized Cenvat credit has already been dealt with by Hon'ble Supreme Court in the case of Ind-Swift Laboratories Ltd. reported as 2011 (265) ELT 3 (SC) and the decision was considered by the Hon?ble High Courts and co-ordinate Benches of the Tribunal in the following decisions among others:-

(i) Commissioner of Central Excise and Service Tax, LTU, Bangalore Vs. Bill Forge Pvt. Ltd. [2012 (279) ELT 209 (Kar.)]

(ii) M/s. SAIL Vs. Commissioner of GST and Central Excise, Bolpur [E/78557 of 2018 dated 20.09.2019]

7.1.3 The relevant portion of the judgment of the Hon?ble High Court of Karnataka in the case of Bill Forge Pvt. Ltd. (supra) is extracted below:-

"7. In the light of the aforesaid material on record and rival contentions, the substantial question of law that arises for consideration in this appeal is as under :

"The words "Cenvat Credit has been taken", does it mean making an entry in the account books showing the entitlement of the said credit? or does it mean the said credit found in the account books actually taken while clearing the finished products.?"

20. From the aforesaid discussion what emerges is that the credit of excise duty in the register maintained for the said purpose is only a book entry. It might be utilised later for payment of excise duty on the excisable product. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. It matures when the excisable product is received from the factory and the stage for payment of excise duty is reached. Actually, the credit is taken, at the time of the removal of the excisable product. It is in the nature of a set off or an adjustment. The assessee uses the credit to make payment of

excise duty on excisable product. Instead of paying excise duty, the cenvat credit is utilized, thereby it is adjusted or set off against the duty payable and a debit entry is made in the register. Therefore, this is a procedure whereby the manufacturers can utilise the credit to make payment of duty to discharge his liability. Before utilization of such credit, the entry has been reversed, it amounts to not taking credit. Reversal of cenvat credit amounts to non-taking of credit on the inputs.

7.1.4 The Hon?ble Madras High Court in the case of Commissioner of Central Excise Vs. M/s. Strategic Engineering (P) Ltd. [2014-TIOL-466-HC-MAD-CX], has held:-

"11. It is an admitted fact that Rule 14 of the Cenvat Credit Rules as been subsequently amended, wherein it has been clearly stated as "taken and utilised". Therefore, it is quite clear that mere taking itself would not compel the assessee to pay interest as well as penalty. Further, as pointed out earlier, the subsequent amendment has given befitting answer to all doubts existed earlier. Since, the subsequent amendment has cleared all doubts existed earlier in respect of Rule 14 of the said Rules, it is needless to say that the argument advanced by the learned counsel appearing for the appellant/Department is erroneous, whereas the argument advanced on the side of the respondent is really having merit and the substantial questions of law settled in the present Civil Miscellaneous Appeal are not having substance and altogether the present Civil Miscellaneous Appeal deserves to be dismissed."

7.1.5 In the case of J.K. Tyre and Industries Ltd. Vs. Assistant Commissioner of Central Excise, Mysore [2016 (340) ELT 193 (Tri.–LB)], Tribunal Large Bench has come to the conclusion that interest liability would not arise when the assessee had merely availed credit and had reversed the same before utilizing the availed credit for remittance of duty.

7.1.6 In the light of entire above discussion, we hold that the noticed difference was statutorily permissible and has been denied to be ground for raising the demand of reversal. The unutilized credit has clearly been held as good as the non availed Cenvat credit. In the light of this discussion, we do not find any justification when the demand is confirmed based on the noticed difference in ST-3 returns than to the credit register. The demand of excess Cenvat credit of Rs.1,79,11,286/- is therefore set aside.

7.2 Issue No. 2

7.2.1 For this purpose, we foremost look into the definition of input services given under Rule 2(l) of Cenvat Credit Rules. The definition has undergone tremendous change. We find that the definition of input services prior to 01.04.2011 had two parts i.e. a main part of the definition and an inclusive part of the definition. After 01.04.201, the definition got 3 parts i.e. main part, an inclusive part and an exclusive part also. For a service to qualify as 'input service' under Cenvat Credit Rules, 2004 post 2011, the service in question need not be covered by the very wide definition of manufacture under Section 2(f) of the Central Excise Act but under two clauses of said definition other than the exclusion clause. Any service which is used not only in manufacture but also 'in relation to' manufacture will also qualify as input service. The scope of input service is further enlarged with the expression whether directly or indirectly used in the definition of input service. Thus, there are:

7.2.2 Hence, the services which are not expressly covered under the exclusion clause shall all to be considered as input services eligible for availment of Cenvat credit.

7.2.3 We observe from Para 14 and 15 of the order under challenge that the availment of Cenvat credit on the input services has been denied for the reason that there is no mention of supply of any security services on the invoices based whereupon the Cenvat credit has been availed and no evidence about supply of skilled manpower. However, in the light of the discussion about definition of eligible input services, we hold that the difference of supply of unskilled and skilled labour has wrongly been created by the adjudicating authority below as the same is not relevant to decided as to whether the service provided shall qualify for input service or not. It appears to be an admitted fact that manpower was supplied by the service provider to M/s. BSNL for being deployed at various offices of BSNL/appellant. The work power irrespective skilled or unskilled was meant to facilitate M/s. BSNL to render their output telephonic services. We therefore hold that the service provided is eligible input service. Hence, denial of availment of Cenvat credit on the eligible input services is wrong. The findings in the order under challenge are liable to be set aside to this extent as well. The demand of Cenvat credit amounting to Rs.59,94,339/- is therefore set aside.

7.3 Issue No. 3

7.3.1 We observe that the demand of Rs.19,83,893/- has been confirmed in respect of sale of capital goods as scrap during the period from April 2010 to September 2012 by invoking Rule 3(5A) of the Cenvat Credit Rules, 2004. We find that Rule 3(5A) got substituted vide Notification No. 3/2013 dated 01.03.2013 to take effect from the date of notification itself. This perusal makes it clear that during the said relevant period, the recovery provision for the amount of sale of capital goods as scrap was not in existence. Thus, in the absence of any such provision during the period of dispute, the confirmation of demand invoking such provision is held to have wrongly been confirmed against the appellant. We find no reason to differ from the decision relied upon by the appellant in the case of Ericsson India Pvt. Ltd. (supra).

7.3.2 Above all, we are of the opinion that the Rule 3(5A) cannot apply in a situation where Cenvat credit has not been availed on capital goods. In the present case, the appellant's plea is that the scrap material in question pertains to those capital goods on which the appellant had not availed the Cenvat credit, as majority of those capital goods were purchased prior to 2004 i.e. prior the enactment of Cenvat Credit Rules. The details of those capital goods were duly been provided by the appellants. The onus was of the department to prove that the appellant has availed the Cenvat credit on the capital goods which later got cleared as scrap but there is no such evidence produce. Hence, there is no rebuttal to the said contention of the appellant. We draw our support from the decision of Hon'ble Apex Court in the case of Commr. of C. Ex., Chandigarh Vs. Khalsa Charan Singh and Sons, 2010 (255) ELT 379 (P&H), wherein it was held that the burden of proof, on which deemed modvat credit is claimed are duty paid, was on Revenue and not on assessee. Hon'ble Apex Court also in the case of Commr. of Customs Vs. Auto Ignition Ltd. reported as 2008 (226) ELT 14 (SC) had already approved the view that the onus of proof on availment of credit of duty paid character, is on the Revenue and not on the assessee. The law laid down in these decisions is applicable to the present issue as well. Above all Rule 3(5A) of Cenvat Credit Rules should have been read along with the entire Rule 3 which enables availment of Cenvat credit on inputs/capital goods/input services. The entire Rule 3 is in regard to availment of Cenvat credit and therefore, sub-rules therein should only be read in conjunction, rather than in isolation with the main Rule. We draw our support to the department's own Circular No. 267141/2009-Cx.8 dated 07.12.2009 which clarifies that Rule 3(5A) is applicable in respect of those capital goods on which Cenvat credit has been taken and waste/scrap has been cleared after a period of 10 years.

7.3. The sale of capital goods as waste in the impugned show cause notice is with respect to those capital goods on which the appellant had not availed the Cenvat credit. The confirmation of demand is therefore not sustainable. We draw our support from the decision relied upon by the appellant including the decision in the case of SRF Ltd. Vs. Commissioner of C. Ex. & Service Tax, Alwar reported as 2018 (363) ELT 1058 (Tr.-Del.). The issue under discussion was otherwise being already decided in appellant's own case by this Tribunal, Chennai Bench, vide Final Order No. 40505/2024 dated 30.04.2024.

8. Finally coming to the issue of invocation of extended period, we observe that demand for the period from April 2010 to September 2012 has been raised vide Show Cause Notice dated 26.08.2015 stands wholly set aside (partially by Commissioner (Appeals) and remaining in light of above discussion). The above discussion hold appellant entitled for the availment of the Cenvat credit and the utilization thereof or the discharge of their future liability vis-à-vis service tax and even Education Cess and Secondary Higher Education Cess. The appellant had been regularly filing its ST-3 returns and its records were being regularly audited by the department. Thus, the entire material was already to the notice of the department. In such circumstances, the appellant cannot be held accountable for not disclosing the activity of making provision made by it, specifically, when the same was not required in the law. We hold that suppression of facts has wrongly been alleged against the appellant. We rely upon the decision of Anand Nishikawa Co. Ltd. Vs. CCE, Meerut reported as 2005 (188) ELT 149 (SC).

9. Above all, the appellant is a public undertaking unit. This Tribunal in the case of Indian Oil Corporation Vs. Comm. of Central Excise, Ahmedabad reported as 2013 (291) ELT 449 (Tri.-Ahmd.) held that PSU cannot have mala fide intentions for non-disharge of duty and there cannot be an allegations of intention to evade duty. Hon’ble High Court of Punjab & Haryana in the case of Markted Refined oil & Allied Indus held that once the assessee is government organization, it is not easy to infer any evasion of duty much less its intention to do so.

10. In the light of above discussion on three of the above issues based whereupon the original adjudicating authority had confirmed the demand, we hereby set aside the order under challenge confirming demand for the reasons recorded above under the respective issue. Consequent thereto, the appeal is allowed with a consequential benefit.

[Order pronounced in the open court on 24.01.2025]

