

(2012) 04 RAJ CK 0144

In the Rajasthan High Court

Case No : Central Excise (Service Tax) Appeal No. 48 of 2011

Vodafone Digilink Ltd.

APPELLANT

Vs

Commissioner of Central Excise, Jaipur-II

RESPONDENT

Date of Decision : 30-04-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 35G
Finance Act, 1994 — Section 68, 73, 75, 76, 78

Citation : (2013) 29 STR 229 : (2012) 53 VST 139

Hon'ble Judges : Arun Mishra, C.J.; Mahesh Bhagwati, J

Bench : Division Bench

Advocate : M.R. Devnath with Sameer Jain, for the Appellant;

Final Decision : Dismissed

Judgement

1. Appeal has been preferred u/s 35G of the Central Excise Act, 1944 as against order dated 28-6-2011 passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi (in short, "the Tribunal") in Appeal No. ST/246/2008-CU[DB] [2011 (24) S.T.R. 562]. Appellant was inter alia engaged in providing cellular telephone service in Jaipur Circle. It was registered and paying service tax under "telephone services". Appellant was receiving various input services and availing Service Tax credit on the same in terms of Service Tax Credit Rules, 2002 (hereinafter referred to as "the Rules of 2002"). The appellant was also receiving roaming (National & International) charges from other telecom operators. Roaming charges were paid by the home operator (telecom operator with whom the subscriber is registered) to the service operator (telecom operator whose network the subscriber of the home operator is visiting). Thus, the appellant has received roaming charges from various other operators towards roaming facility provided by the former to the subscribers of the latter while on visit to Jaipur Circle. The appellant was not paying service tax on roaming charges received from other operators during the period of dispute i.e. May 2003 to August 2004. The appellant was of the view that Rule 3(5) of the Rules of 2002 was not

applicable to it because the appellant was not providing exempted service or non-taxable service. Thus, the appellant was utilizing the Service Tax credit availed on various input services for payment of service tax on output telephone service without any restriction of 35% specified in Rule 3(5) of the Rules of 2002.

2. A show cause notice was issued on 21-8-2006 proposing to recover service tax of Rs. 39,41,384/- on the ground that the appellant should have restricted utilization of Cenvat credit towards payment of output service tax in terms of Rule 3(3)/3(5) of the Rules of 2002. Reply to the show cause notice was given on 22-11-2006. Appellant appeared before the Additional Commissioner for personal hearing. The Additional Commissioner passed order on 3-4-2007 confirming the demand of service tax of Rs. 35,99,882/- for the aforesaid period on the ground that the roaming charges were received by the appellant for providing non-taxable service. The Additional Commissioner has also imposed penalties and ordered for recovery of interest. Appeal was preferred as against the order before the Commissioner (Appeals). Commissioner (Appeals) confirmed the order passed by Additional Commissioner. Aggrieved thereby, appeal was filed before the Tribunal. The Tribunal has remanded the case to the original authority for re-quantification of demand after considering the excess/short utilization of credit in each half yearly return period, instead of monthly basis. So far as restriction of Cenvat credit to the extent of 35% was concerned, it was not disputed being covered by virtue of decision of the Tribunal in (2009) 17 STJ 294 . Visiting network service is exempted for which admissibility of Cenvat credit shall be limited to 35% in respect of each return period when Cenvat credit is claimed for set off. Accordingly, liability of the appellant was ordered to be recalculated giving set off on Cenvat credit limiting to 35% in respect of each return period. The Tribunal accordingly held that the adjudication shall end in re-computing service tax demand. The Tribunal has relied upon the decision in Idea Cellular Ltd. case (supra). However for the issue of extended period along with interest and penalty, the Tribunal has confirmed the invocation of extended period of limitation and upheld the penalty imposed u/s 76 of the Finance Act, 1994 (hereinafter referred to as "the Act of 1994") and so far penalty u/s 78 of the Act of 1994 is concerned, that has been ordered to be limited to the quantum of tax payable upon re-computation as directed by the Tribunal. However, the authority was directed to examine whether concession in penalty is permissible under second proviso to Section 78 of the Act of 1994. Appeal has been allowed to the aforesaid extent.

3. Learned counsel appearing on behalf of the appellant has submitted that in the instant case provision of limitation as contained in proviso to sub-section (1) of Section 73 could not have been invoked. It could not be said to be a case of deliberate suppression; mere omission to give correct information is not suppression of fact unless it was deliberate to stop the payment of duty. "Suppression" means failure to disclose full information with the intent to evade payment of duty. Hence, penalty could not have been imposed. Thus, the impugned order is bad in law. However, learned counsel has submitted that the

issue of taxability in the instant case stands settled by the decision of the Tribunal in the case of Idea Cellular Ltd. (supra), that part of the order has not been questioned; penalty part has been questioned.

4. After hearing learned counsel for the appellant at length, it is clear that in case the service provider opts not to maintain separate accounts of inputs service meant for consumption in relation to rendering of such services which are chargeable to service tax as well as exempted services or non-taxable services, he shall be allowed to utilize service tax credit for payment of service tax on any output service only to the extent of an amount not exceeding 35% of the amount of service tax payable on such output service. Since the appellant was providing taxable as well as non-taxable services, utilization of service tax credit was thus restricted to 35% of service tax payable. The adjudicating authority has reduced the demand of service tax of Rs. 3,41,502/- as interconnecting usage charges were not taxable for the period August 2002 to April 2003. During the period 16-8-2002 to 13-5-2003, interconnecting usage charges were not exempted service and the appellant was eligible for utilizing Cenvat credit without restriction of 35%. The plea of appellant is not sustainable for the remaining period. It is apparent that the appellant has wilfully suppressed the facts of availment of Cenvat credit in respect of exempted service in excess of the prescribed limit. When limit was prescribed, facts ought to have been mentioned clearly. When exempted service was availed in excess of the prescribed limit, it was incumbent upon the appellant to disclose it. The appellant is a professionally managed corporate. Thus, it has been rightly held that the case is covered under proviso to sub-section (1) of Section 73 of the Act of 1994 which provides that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of (a) fraud; or (b) collusion; or (c) wilful mis-statement; or (d) suppression of facts; or (e) contravention of any of the provisions of the Chapter or of the Rules made thereunder with intent to evade payment of service tax, by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "one year", the words "five years" had been substituted, so as to initiate the proceedings to pay the amount specified in a notice. Thus, service of notice within five years from the relevant date is sustainable in law. It is apparent that excess credit was utilized by the appellant to the extent of Rs. 35,99,882/- from May 2003 to August 2004. Finding has been recorded by the Additional Commissioner that the assessee has contravened the provisions of Section 68 of the Act read with Rule 6 of Service Tax Rules, 1994 and Rules 3 and 4 of the Rules of 2002 by such wrongful availment and utilization of Cenvat credit. Therefore, the assessee is liable for penalty under Sections 76 and 78 of the Act of 1994 read with Rule 6 of the Rules of 2002 for fraudulent/wrongful availment and utilization of CENVAT credit.

5. Rule 3(5) of the Rules of 2002, as existed during the relevant period, provided that, "in case the service provider, opts not to maintain separate accounts of inputs service meant for consumption in relation to rendering of such output

services which are chargeable to service tax as well as exempted services or non-taxable services, he shall be allowed to utilize service tax credit for payment of service tax on any output service only to the extent of an amount not exceeding thirty five per cent of the amount of service tax payable on such output service". The appellant was providing taxable and non-taxable services, therefore the utilization of credit was restricted to 35% of the service tax payable. It is apparent that the assessee has suppressed the facts of availment of Cenvat credit for exempted or non-taxable services. It is clear that the case is covered by Rule 3(5) of the Rules of 2002. Finding recorded by the Additional Commissioner as to wilful suppression has been confirmed by the Commissioner (Appeals) as well as the Tribunal. On facts, it appears to be a case of suppression.

6. It is apparent that Cenvat credit of higher amount was unduly claimed; it was nowhere disclosed in the return. There was failure to make disclosure of the availment of the credit in excess and entire facts were not mentioned in various returns. Thus, it has been held to be a case of wilful suppression. Finding recorded by the Tribunal in para 7 of its order is quoted below:

7. So far as levy of penalty is concerned the case of the appellant is that Cenvat credit of a higher amount was unduly claimed. Sample copy of the return is available in appeal folder at page 23 of the paper book. That nowhere discloses bona fide of the appellant. Had the appellant disclosed that it was under bona fide belief that service provided by the appellants as visiting network, service provider was exempt and not taxable, the appellant would have clearly guided the department to understand its claim on set off Cenvat credit. Failure to make such disclosure in return or submitting entire fact by any letter accompanying its return appears to be a case of wilful suppression. Suppression does not vanish by mere passage of time to issue of show cause notice and contravention of law gets no immunity from penal consequences. Suppression corroborated by an untrue declaration in the return filed calls for levy of penalty. When the return contains a declaration as to the self assessment particulars stating that the assessee had paid service tax correctly in terms of provisions of the Act and Rules made thereunder such declaration becomes faulty in absence of bona fide statement either on the return or made through a letter accompanying the return. Once the appellant has claimed that service tax has been paid in accordance with the law and this is not paid, that imputes the appellant to the charge. Such view brings harmony in construction of law and for effective implementation thereof in respect of self assessment procedure. The act of false declaration can be remedied by levy of penalty. Thus penalty levied u/s 76 is confirmed and so far as penalty u/s 78 is concerned that shall be limited to the quantum of tax payable upon re-computation as directed aforesaid. However, the authority shall examine whether concession in penalty is permissible under second proviso to section 78 of the Act. Interest as required u/s 75 shall be payable on the tax due.

7. We agree with the aforesaid findings recorded as to suppression of facts.

8. Counsel for the appellant has relied upon decision of Hon"ble Supreme Court in Continental Foundation Joint Venture Sholding, Nathpa H.P. Vs. Commissioner of Central Excise, Chandigarh-I, . in which expression "suppression" has been considered thus:

10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as "fraud" or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty, when the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation u/s 11A the burden is cast upon it to prove suppression of fact, An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.

9. It was not a case of mere omission to give correct information; it was devised deliberately so to evade tax liability. The limit of exemption was known and provisions of Rule 3(5) of the Rules of 2002 are clear. Thus, it was deliberate suppression of facts. Even testing on the anvil of the aforesaid decision, we find the finding of suppression which has been recorded by the Additional Commissioner and confirmed by Commissioner (Appeals) as well as the Tribunal call for no interference. We find that five years" period of limitation has been rightly invoked in the instant case. We thus find no ground to interfere in the impugned orders. No substantial question of law is involved in the appeal. Resultantly, the appeal is hereby dismissed.