**2012 (25) S.T.R. 385 (Tri. - Del.)**

IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI

[COURT NO. III]

**Ms. Archana Wadhwa, Member (J) and Shri Rakesh Kumar, Member (T)**

**IDEA MOBILE COMMUNICATIONS LTD. Versus COMMISSIONER OF C. EX., MEERUT**

*Final Order No. ST/603/2011(PB), dated 23-11-2011 in Appeal No. ST/268/2007*

REPRESENTED BY :S/Shri B.L. Narsimhan and Udayaditya Banerjee, Advocates, for the Appellant.

Shri Amresh Jain, SDR, for the Respondent.

**[Order per : Rakesh Kumar, Member (T)]. -** The facts giving rise to this appeal are, in brief, as under.

**1.1** The appellants provide telephone services chargeable to service tax. They availed Cenvat credit of Central Excise duty paid on input, and service tax paid on input services used in or in relation to their output services in accordance with the provisions of Cenvat Credit Rules, 2004. On scrutiny of the ST-3 returns filed by them for the period from October 2004 to March 2005 and April 2005 to September 2005, the department raised the following objections -

(a) the appellant have taken Cenvat credit on the basis of the services received and invoices issued prior to 10-9-2004, the date on which the Cenvat Credit Rules, 2004 had been notified,

(b) they have taken capital goods Cenvat credit on the inputs whose description is not mentioned in the ST-3 returns and also the capital goods which were received and installed outside the registered premises,

(c) they have availed Cenvat credit on a number of input services which were not received at the registered premises,

(d) service tax credit has been taken on the basis of invoices which do not bear the date.

**1.2** On the above basis, two show cause notices dated 21-4-2006 and 18-10-2006 were issued for recovery of allegedly wrongly taken Cenvat credit amounting to Rs. 2,00,02,611/- and Rs. 1,73,37,901/- alongwith interest and also for imposition of penalty on them under the provisions of Rule 15 of the Cenvat Credit Rules, 2004. Both the show cause notices were adjudicated by the Commissioner, Central Excise, Meerut - I vide order-in-original dated 31-1-2007 by which -

(a) the Cenvat credit demand of Rs. 1,93,76,003/- in respect of capital goods and input services received outside the registered premises was dropped;

(b) The demand of Cenvat credit of Rs. 1,74,64,509/- availed on the basis of the invoices issued prior to 10-9-2004 and invoices not bearing any date was confirmed alongwith interest; and

(c) penalty of Rs. 10,000/- was imposed on the appellant under Rule 15 (3) of the Cenvat Credit Rules, 2004.

**1.2** Against this order of the Commissioner (Appeals), this appeal has been filed.

**2.** Heard both the sides.

**2.1** Shri B.L. Narsimhan, Advocate, the learned Counsel for the appellant, pleaded that, all the input service invoices bear the date and the department's

allegation that some of the input service invoices do not contain date is factually incorrect, that the bulk of the Cenvat credit demand in the impugned order has been confirmed in respect of the credit availed on the basis of the invoices issued prior to 10-9-2004, that the only basis for the Commissioner's decision is that in terms of Rule 3(1) of Cenvat Credit Rules, 2004, the Cenvat credit of service tax paid on input services received could be taken only in respect of those input services received by a manufacturer of final product or provider of output services which were received on or after 10-9-2004 and the provisions of Rule 11(1) are not applicable, as during the period to 10-9-2004, in terms of Service Tax Credit Rules, 2002, the Cenvat credit was available only when the input and output services were in the same category and, hence, there was no question of the appellant having earned any input service credit during the period prior to 10-9-04, as the input services as mentioned in the invoices and the output services fall in the different category, that this plea of the department is incorrect, as the provisions of Rule 3(1) of Cenvat Credit Rules, 2004 have to be read with the provisions of 11(1) *ibid* and by Notification No. 5/2003-S.T., dated 14-5-2003, the Service Tax Credit Rules, 2002 had been amended so as to provide for Cenvat credit of Service tax paid on the input services which are not in the same category as the output service, that this amendment to the Service Tax Credit Rules, 2002 has not been considered by the Commissioner at all, that the input services in respect of which Cenvat credit has been denied, had been received during the period after the amendment of Service Tax Credit Rules, 2002, that is during the period w.e.f. 14-5-2003, that since in respect of the services, in question, the appellant had earned the Cenvat credit in terms of Service Tax Credit Rules, 2002 during the period prior to 10-9-2004, in terms of the provisions of Rule 11(1) of Cenvat Credit Rules, 2004, the appellant would be entitled for the credit, as this sub-rule provides that any amount of credit earned by the manufacturer under Cenvat Credit Rules, 2002, as the same existed during the period prior to 10-9-2004 or by a provider of output service under Service Tax Credit Rules, 2002 as the same existed during the period prior to 10-9-2004, and remaining unutilised on that day shall be allowed, that in view of this, the impugned order confirming the Cenvat credit demand alongwith interest in respect of the Cenvat credit availed on the basis of the invoices issued during the period prior to 10-9-2004 and imposing penalty on the appellant is not sustainable.

**2.2** Shri Amresh Jain, the learned Senior Departmental Representative, defended the impugned order by reiterating the findings of the Commissioner in it and emphasised that in view of clear provisions of Rule 3(1) of Cenvat Credit Rules, 2004, the Cenvat credit of Service Tax paid on the services received and invoices issued during the period 10-9-04 was not available to the appellant.

**3.** We have carefully considered the submissions from both the sides and perused the records.

**4.** The Cenvat credit of Rs. 1,74,64,509/- has been denied on the ground that in some cases the invoices do not bear any date and in other cases the invoices had been issued prior to 10-9-2004.

**5.** As regards, the first ground for denial of Cenvat credit, the appellant's plea is that this finding of the Commissioner is factually incorrect as all the invoices bear the date. However, this aspect can be checked only by the original Adjudicating Authority for which this matter would have to be remanded.

**6.** The second ground and which is the main ground for denial of Cenvat credit, is that in the cases where the invoices bear the date, those invoices had

been issued prior to 10-9-2004 and in terms of the provisions of Rule 3(1) of Cenvat Credit Rules, 2004, the Cenvat credit in respect of such invoices cannot be allowed. The department is also of the view that the benefit of the provisions of Rule 11(1) of Cenvat Credit Rules, 2004 would also not be available to the appellants in such cases, as during the period to 10-9-2004 service tax credit was available only under the provisions of Service Tax Credit Rules, 2002 under which the Cenvat credit was available only in respect of those input services which were of the same category as that of output service, while the input services, in question, fall in different category and, hence, there was not question of the appellant having earned any service tax credit during the period prior to 10-9-2004.

**6.1** Rule 3(1) of Cenvat Credit Rules, 2004 provides for Cenvat credit of Central Excise duty, education cess and other specified duties paid on inputs and capital goods and service tax and education cess paid on input services received by a manufacturer of final product or provider of output services on or after 10-9-2004. However, this sub-rule has to be readwith the transitional provisions of sub-rule (1) of Rule 11 which are reproduced below :-

> ‘‘any amount of credit earned by a manufacturer under Cenvat Credit Rules, 2002, as they existed prior to 10-9-2004 or by a provider of output services under Service Tax Credit Rules, 2002, as they existed prior to 10-9-2004, and remaining unutilised on that day shall be allowed as Cenvat credit to such manufacturer or provider of output services under these rules and allowed to be utilised in accordance with these rules.”

Thus while sub-rule (1) of Rule 3 provides for availment of credit of service tax, Central Excise Duty and other specified duties paid on the input services and inputs received on or after 10-9-2004, sub-Rule (1) of Rule 11 provides for availment and utilisation of the Cenvat credit earned during the period prior to 10-9-2004 in respect of inputs/capital goods received, under Cenvat Credit Rules, 2002 and the service tax credit earned under Service Tax Credit Rules, 2002, as the same existed during the period prior to 10/9/04, and which is lying unutilised. The Commissioner’s findings that in view of the provisions of Rule 3(1) of Cenvat Credit Rules, 2004 the service tax credit cannot be allowed on the basis of the invoices issued prior to 10-9-2004 is incorrect as an assessee may have earned some service tax credit during period prior to 10-9-2004 under Service Tax Credit Rules, 2002, which may be lying unutilised as on 11-9-2004 and this credit has to be allowed under Rule 11(1) of Cenvat Credit Rules, 2002.

**6.2** The Commissioner’s finding that during the period prior to 10-9-2004, in terms of Service Tax Credit Rules, 2002, the Cenvat credit was available only in respect of those input services which were of the same category as that of output service is factually incorrect as these rules had been amended w.e.f. 14-5-2003 by Notification No. 5/2003-S.T. so as to permit Cenvat credit even in respect of those input services which were not falling in the same category as that of output service. In this regard, Rule 3(1) of Service Tax Credit Rules, 2002 as amended by Notification No. 5/2003-S.T., dated 14-5-2003 is reproduced below :-

> “**Service Tax credit**
>
> 3. [(1) An output service provider shall be allowed to take credit (hereinafter referred to as service tax credit) of the service tax paid on input service in the following manner, namely :-

(a) where the input service falls in the same category of taxable service as that of output service, service tax credit shall be allowed to be taken on such input service for which invoice or bill or challan is issued on or after the sixteenth day of August, 2002.

(b) in any other case, service tax credit shall be allowed to be taken on such input service for which invoice or bill or challan is issued on or after the fourteenth day of May, 2003 :

**Provided** that the output service provider shall be allowed to take such credit, on or after the day on which he makes payment of the value of input service and the service tax paid or payable as indicated in invoice or bill or challan referred to in sub-rule (1) of rule 5.]"

**6.3** Thus in terms of the provisions of Rule 3(1) of Service Tax Credit Rules, 2002 as the same existed during the period w.e.f. 14-5-2003, in the case where the input and output service did not fall in the same category, the service tax credit was permissible on input services for which the invoice or bill or challan had been issued on or after 14-5-2003. Therefore, in this case, if the invoices/bills/challans had been issued on or after 14-5-2003, the Cenvat credit in respect of the same would be admissible and if appellant had not availed the same, at that time, the same would be admissible to the appellant in terms of transitional provisions of Rule 11(1) of Cenvat Credit Rules, 2004.

**7.** Since, the Commissioner in the impugned order has not considered the amendment to Service Tax Credit Rules, 2002 by Notification No. 5/2003-S.T., dated 14-5-2003 and has proceeded on the assumption that during the period prior to 10-9-2004 service tax credit was available only in respect of those input services which fall in the same category of taxable service as that of output service, the impugned order is not sustainable. The matter, however, has to be remanded for ascertaining as to whether the input service invoices of period prior to 10-9-2004, when the input service and output service was not of same category, had been issued on or after 14-5-2003.

**8.** The impugned order is, therefore, set aside and the matter is remanded to the Commissioner for *de novo* adjudication in terms of our directions and observations in this order.

(Order pronounced in the open court on 23-11-2011)

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