

CORPORATE OFFICE, TAXATION SECTION
1ST FLOOR, BHARAT SANCHAR BHAWAN,
JANPATH, NEW DELHI-110001



BHARAT SANCHAR NIGAM LIMITED
[A Government of India Enterprise]

No.1002-05/2011-12/Taxation/BSNL/ 984

Dated: 31/07/2012

To

The Chief General Managers.

1. All Telecom Circles/ Metro Telephone Districts/Maintenance Regions/ Project Circles,
2. Task Force/ Data Network/ NCES/QA/ T&D/ Telecom Stores/ Telecom Factories/ CPAO (ITI Bills)/ IT Circle. Pune
3. ALTT/BRBRAIT/ NATFM

Sub.: Final order of Customs, Excise & Service Tax Appellate Tribunal (CESTAT), CHENNAI in favour of BSNL for removal of cables from the registered premises for providing the output service and not returned within 180 days as required under Rule 3(5) of Cenvat Credit Rules (CCR), 2004-reg.

Kindly find enclosed herewith a copy of Final Order No. 601.602/12 dated 5.6.2012 passed by the CESTAT, Chennai against the Order –in- Original (O-I-O) No. 77 & 78/ 2009 dated 26.11.2009, passed by the Commissioner of Service Tax, Chennai.


The Commissioner of Service Tax, Chennai had confirmed the demand of Rs.11,79,89,576/- together with interest and penalty of Rs. 3 Crores on BSNL being the Cenvat Credit availed on the **Cables (Capital goods)** on the ground that the cables were removed from the registered premises for providing the output service and not returned within 180 days as required under second proviso to Rule 3(5) of Cenvat Credit Rules, 2004 during the period from Feb 2005 to March 2008. Later on, the second proviso to Rule 3(5) of Cenvat Credit Rules, 2004 was omitted by CBEC, MOF, Government of India, vide notification no. No.10/2008-Central Excise (N.T) dated 01.03.2008 (applicable w.e.f. 01.04.2008).

In the appeal filed by BSNL, Chennai Telephones against the O-I-O of Commissioner of Service Tax, Chennai, CESTAT, Chennai, has passed an order in favour of BSNL which ruled that **there has been no contravention of the 2nd proviso to Rule 3(5) as it existed at the material time. In any case, the amended Rule 3(5) provides that if any inputs or capital goods are removed outside the premises of the provider of output service for providing such service, there is no requirement for any demand of duty or reversal of credit.**

Vide abovementioned final order, CESTAT Chennai has passed an order that Cenvat Credit availed on the Cable (Capital Goods) removed from the premises of Service provider i.e., BSNL, for providing the output service prior to 31.03.2008 is in accordance with Cenvat Credit Rules, 2004. There is no violation of erstwhile second proviso to Rule 3(5).

Hence, CGMs are requested to kindly bring this ruling to the notice of all concerned for information and to produce the same before adjudicating and appellate authorities, as and when required, in similar cases. Status/ outcome of the similar cases, if any, in your Circles may be updated to this office.

Encl.: Annexure A/A


(K. M. Qahungo)
DGM (Taxation)
BSNL C.O.

Copy for information to:

1. PPS to CMD BSNL- for kind information of CMD
2. Director (CM), Director (Ent.), Director (HR), Director (Finance), Director (CFA) of BSNL
3. All EDs of BSNL C.O., New Delhi
4. IFAs of all above mentioned Circles of BSNL.
5. Sr. GM (MM), BSNL C.O., New Delhi.

Note: Enclosures mentioned above are uploaded in the BSNL Intranet Portal in EF & Taxation under, DIR(FINANCE). Kindly download the same.



भारत सरकार
GOVERNMENT OF INDIA
वित्त मंत्रालय,
MINISTRY OF FINANCE,

सेवा कर के आयुक्त का कार्यालय,

OFFICE OF THE COMMISSIONER OF SERVICE TAX,

692, अण्णा सालै , एम एच यू कॉम्प्लेक्स, नंदनम, चेन्नै - 600 035

692, ANNA SALAI, M.H.U. COMPLEX, NANDANAM CHENNAI - 600 035.

फा. संख्या / C.No.IV/9/233/2008-STC ADJ

दिनांक /Date:26/11/2009

मूल आदेश सं / ORDER-IN-ORIGINAL NO.77&78/2009

(श्री राज कुमार बड़थवाल, आयुक्त, सेवा कर, चेन्नै द्वारा पारित)

(Passed by Shri Raj Kumar Barthwal, Commissioner of Service Tax, Chennai)

उद्देशिका /PREAMBLE

01. यह प्रति जिस व्यक्ति के लिए जारी किया जाता है उनके निजी उपयोग के लिए निःशुल्क प्रदान किया जाता है ।
This copy is granted free of charge for the Private use of the person to whom it is issued.

02. जो व्यक्ति इस आदेश से अपने को व्यथित मानते हैं वे इस आदेश के खिलाफ शस्त्री भवन, हार्डवोड रोड, चेन्नै 600 006 में स्थित अपीलीय अधिकरण से अपील कर सकते हैं ।
Any person deeming himself aggrieved by this order may appeal against the same to the Customs, Excise and Service Tax Appellate Tribunal at Shastri Bhavan, Haddows Road, Chennai 600006.

03. संबंधित व्यक्ति को इस आदेश सूचित किए गए दिनांक से तीन महीनों के अंदर निर्धारित फार्म में चार प्रतियों में फाइल करना है । इस अपील पर रु4/- का कोर्ट शुल्क स्टाम्प जरूर लगाना है ।
The appeal must be filed in the prescribed form, in quadruplicate, within 3 months from the date of its communication to the person to whom it is addressed. The appeal should bear a court fee stamp of Rs.4/-

04. इस अपील को इस आदेश की चार प्रतियों सहित पेश करना है । उनमें से एक प्रमाणित प्रति होना है और रु4/- का कोर्ट शुल्क स्टाम्प जरूर लगाना है ।
The appeal must be accompanied by four copies of this order one of which should be a certified copy and must bear a court fee stamp of Rs.4/-.

05. अपील के साथ अगर किसी मामले में सेवा कर /ब्याज/जुर्माना से जुड़ी रकम पांच लाख रुपए या उससे कम हो तो रु1000/- (केवल रुपए एक हजार रुपए) को और अगर किसी मामले में सेवा कर/ब्याज/जुर्माना से जुड़ी रकम पांच लाख हो मगर पचास लाख से अधिक न हो तो रु 5000/- (केवल रुपए पांच हजार) को और अगर किसी मामले में सेवा कर/ब्याज/जुर्माना से जुड़ी रकम पचास लाख से अधिक हो तो रुपए 10,000/- (केवल रुपए दस हजार) के लिए शुल्क अधिकरण के बैंक के सहायक रजिस्ट्रार के नाम पर बैंक स्थित जगह के राष्ट्रीकृत बैंकों के किसी एक शाखा पर क्रास ड्राफ्ट काटकर अपील के साथ संलग्न करना है ।

The appeal must be accompanied by a fee of Rs.1000 (Rupees One thousand only) in a case where the amount of Service Tax/interest/penalty involved is rupees five lakh or less, Rs.5000/- (Rupees five thousand only) in a case where the amount of Service Tax/interest/penalty involved is Rupees five lakh but not exceeding Rupees Fifty Lakhs and Rs. 10,000 (Rupees ten thousand only) in a case where the amount of Service Tax/Interest/Penalty involved is more than Rupees Fifty Lakhs through a crossed bank draft drawn in favour of the Assistant Registrar of the Bench of the Tribunal on a branch of any nationalised Bank located at a place where the Bench is situated and the demand draft shall be attached to the form of appeal.

06. जो व्यक्ति इस आदेश के खिलाफ अपील करना चाहते हैं वे अपील निर्णय होने तक, मांगे गए शुल्क को जमा करके उस भुगतान का सबूत अपील के साथ प्रस्तुत करना है ।
Any person desirous of appealing against this order shall, pending appeal, deposit the Service tax/interest/penalty involved therein and produce proof of such payment along with the appeal.

(12)

Sub: Service Tax M/s. BSNL, (Landline Division) Chennai
Wrong availment of CENVAT credit - Orders passed - Reg.

M/s. BSNL (Landline Division), Canal Road, Chennai 600002 (For short "The Assessee") are engaged in providing Landline Telephone Connections, Broadband Internet Services and Leased circuit to their customers. They are registered with the Service Tax Commissionerate, Chennai vide Registration Number AABCB5576GST023.

2. The Officers of the Internal Audit Branch of the Service tax Commissionerate, Chennai, conducted the audit of accounts of the assessee and noticed that the assessee, during February 2005 to September 2007, availed CENVAT credit of duty paid on capital goods, i.e., Polyethylene Insulated Jelly Filled Cables (PIJF) and removed the same as such from their premises with out reversal of the CENVAT Credit taken. As the assessee removed the capital goods with out reversal of the CENVAT credit taken on the capital goods, following Show Cause Notice No. 196/2008 dated 12.08.2008 was issued to the assessee.

M/s Bharat Sanchar Nigam Limited, Landline Division, Canal Road, Chennai 600002 (hereinafter referred to as BSNL) are engaged in the business of providing Land Line telephone connections, Broadband Internet services and Leased Circuit to their subscribers located in Chennai and its surrounding locations. They also sell India Telephone Cards (ITC) to their subscribers. They were registered with the Department vide Registration No. AABCB5576GST023 and had started paying service tax since July 1994.

2. Prior to December 2006, BSNL was registered with the Department for providing Telephone Services indicating their Chief General Manager's Office situated at 78, Purasawalkam High Road, Chennai-10 covering their Landline Division situated at 10, Dams Road, Chennai-2 and their Mobile Division (GSM Unit) situated at 238, R.K.Mutt Road, Mandaveli, Chennai-28 under a single registration (Registration No.TSU/CHENNAI/001/STC). The Landline Division obtained a separate registration with the Department on 18-12-2006

3. A special audit of the accounts of BSNL was conducted during the month of February 2008 by the Officers of Internal Audit wing, Service Tax Commissionerate, Chennai. During verification of the accounts, certain discrepancies were noticed by the officers which are discussed below.

3.1 BSNL avail credit of excise duty paid on indigenous capital goods and credit of service tax paid on input services. BSNL have availed Cenvat credit of duty paid on capital goods i.e Polyethylene Insulated Jelly Filled Cables (PIJF Cables) purchased from various vendors like M.P Telelinks, Malanpur, Shakti Enterprises, Bhopal, Vindhya Telelinks Ltd., Rewa, BPL, Bali Industries, Serval Udyog P Ltd.,

Okhla, Birla Ericsson, Rewa, TF Mumbai Finolex Cables, Goa, Golconda Engg and other parties.

3.2 BSNL provide telecommunication services to their subscribers using Polythelene Insulated Jelly Filled Cables (PIJF Cables) or optic fibre cables which are laid underground along the length and breadth of the country and also overseas. Since the above cables were classified under chapter 85 of the First Schedule to the Excise Tariff Act, BSNL availed the Cenvat credit of Excise duty paid on such optic fibre cable under the category of Capital Goods.

3.3 As per Rule 3(1) of the Rules, a provider of taxable service shall be allowed to take Cenvat credit of specified duty paid on any input or capital goods received in the premises of the provider of output service on or after 10-09-2004. As per Rule 3(5) of the Cenvat Credit Rules, (as it stood upto 29-02-2008) when capital goods, on which Cenvat credit has been taken, are removed as such from the premises of the provider of output service, the provider of output service shall pay an amount equal to the credit availed in respect of such removal and such removal shall be made under the cover of invoice, provided that such payment shall not be required to be made when the capital goods are removed outside the premises of the provider of output service for providing the output service are brought back to the premises within 180 days, or such extended period not exceeding 180 days as may be permitted by the jurisdictional DC/AC.

3.4 Thus on a plain reading of the above Cenvat Credit Rules 2004, it can be inferred that

- (i) as per Rule 3(1), the capital goods have to be received in the premises of output service provider;
- (ii) as per Rule 3(5), if the capital goods are removed from the premises of output service provider, they have to pay an amount equivalent to the cenvat credit availed and
- (iii) such payment is not required when the capital goods are removed for providing output service and brought back within 180 days or such extended period specified by the jurisdictional DC/AC

3.5 The optic fibre cables purchased by the company are laid underground so as to provide connectivity to their subscribers. The cables received in their premises are laid at various places permanently for providing the landline service and hence cannot be brought back within 180 days and no permission can be given by DC/AC as the same is not capable of being brought back to their premises. Hence as per Rule 3(5) of the Cenvat Credit Rules 2004 as it stood prior to 01-03-2008, when the cables removed from their premises were not brought back within the time stipulated thereon, BSNL have to pay an amount equivalent to the cenvat credit availed. Moreover, as per the proviso to Rule 3(5), such payment is not required to be made only when the inputs are removed outside their premises for providing the output service and it is not applicable to the capital goods which are removed outside their premises for providing output service. Thus, as per Cenvat Credit Rules, when such capital goods are removed from their premises and are laid permanently underground which run at various places, amount equivalent to the cenvat credit availed by BSNL has to be paid.

3.6 BSNL availed credit on such cables to the extent of 50% during the financial year it was received and the balance 50% in the subsequent financial year. The total credit availed in respect of cables for the period from February 2005 to September 2006 is Rs. 7,13,13,658, and from October 2006 to March 2007 is

Rs. 84,92,166/- and for the period from April 2007 to September 2007 is Rs. 2,25,17,291/-. The total credit availed from February, 2005 to September, 2007 is Rs. 10,23,23,115/-

4. From the foregoing it appears that BSNL have contravened the provision to Rule 3(5) of Cenvat Credit Rules, 2004 in as much as BSNL after availment of Cenvat Credit of duty paid on Capital goods, removed the optic fibre cables from their premises and have not brought back the same within the stipulated period. Thus, it appears that BSNL have wrongly availed the Cenvat credit of duty paid on Capital Goods which requires to be recovered along with interest under Rule 14 of Cenvat credit Rules 2004, read with Section 73 of the Finance Act, 1994.

5. It further appears that BSNL have not disclosed the facts to the department about removal of Capital goods outside their premises after availing the duty paid on capital goods and also about its nature of not returning to their premises. The above facts have come to the notice of the department only during special audit. Therefore, it appears that BSNL have contravened the provisions of Rule 3(5) of Cenvat Credit Rules 2004 and suppressed the facts with willful intent to evade payment of Service Tax, Education Cess and SHE cess.

6. In view of the above, it appears that the extended period of time limit prescribed under proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004 is to be invoked for recovery of Cenvat Credit of duty paid on capital goods wrongly availed by BSNL. It further appears that BSNL are liable to pay interest on the wrong availment of service tax, education cess & SHE under Section 75 of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules 2004 and are also liable to penal action under Rule 15(1) of the Cenvat Credit Rules, 2004.

7. Therefore, BSNL are called upon to show cause to the Commissioner of Service Tax, MHU Complex, No.692, Anna Salai, Chennai 600035 within 30 days of receipt of this notice, as to why -

- i Cenvat Credit of duty paid on Capital goods to the tune of **Rs.10,23,23,115/-** (Rupees Ten crores twenty three lakhs twenty three thousand one hundred and fifteen only) wrongly availed by them should not be recovered under Rule 14 of Cenvat Credit Rules, 2004 read with proviso to Section 73(1) of the Finance Act, 1994;
- ii Interest at applicable rates should not be demanded under **Section 75** of the Finance Act, 1994 read with Rule 14 of Cenvat credit Rules, 2004;
- iii Penalty under **Rule 15(1)** of Cenvat Credit Rule, 2004 should not be imposed on them for the contravention mentioned supra.

8. BSNL are required to produce all the evidence, which they intend to rely upon in support of their defence at the time of showing cause. They are also required to state in their written reply as to whether they wish to be heard in person before the case is adjudicated. If no mention is made about this in their reply, it would be presumed that they do not desire a personal hearing.

9. *If no reply is received to this notice within the stipulated period of time as above, or if they do not appear for a personal hearing on the said date and time, then it shall be construed that they do not have anything to state in their defence and the case will be decided ex parte based on the material available on records, without any further notice / intimation to them.*

3.0 Reply to the Show Cause Notice:

3.1 The assessee in their reply dated 31.10.2008 stated that during the period February 2005 to September 2007 they availed CENVAT Credit of duty paid on cables; that Polyethylene Insulated Jelly Filled (PIJF) Cables are laid underground between the telephone exchange and the subscriber's premises through distribution point boxes; that these cables are analog cables which carry voice frequency and broad band connections are also given through these cables; that the optic fibre cables are laid underground between two exchanges and these are digital cables and meant for high speed transmission; that both the cables are essential for providing output service by them; that the fact of availing CENVAT credit on the duty paid on cables is intimated to the Department through ST-3 Returns along with which print outs of CENVAT Registers for the relevant half year period were enclosed and these print outs mention "cables" by name; that as per Rule 2(a) of CENVAT Credit Rules, 2004, there is no restriction for a output service provider to use capital goods outside the registered premises as against a manufacturer who is required to use the capital goods in his factory; that as per the proviso to Rule 3(5) of CENVAT Credit Rules, 2004, as it stood prior to 01.04.2008. when Capital goods are removed from the premises of the provider of output service for providing the output service, the Capital goods should be brought back within 180 days; that this proviso was amended w.e.f. 01.04.2008 (by Notification No.10/2008-CE (NT) dt.1 .3.2008) to remove the restriction for capital goods; that the amendment dt. 1.3.2008 by Notification No. 10/2008 has to be held as clarificatory of Rule 3(5) as it stood even prior to 1 .4.08; that Rule 3(5) of CENVAT Credit Rules 2004, as it stood prior to 01.04.2008 will apply only for job work and will not apply in the present case where capital goods are used for providing output service; that in para 3.5. of Show Cause Notice, it is admitted that Sub Rule 3(5) as it stood prior to 01.04.2008 cannot be implemented.

3.2 The assessee further submitted that the fact of availing credit on cables was known to the department and the fact of such cables being laid underground outside the registered premises was also known to the department; that they availed credit on cables as Capital goods at least

15 times in a month and on each occasion the Excise Invoice number together with the description of the capital good as "optical fibre cables/cables" was shown in the CENVAT Register; that there are also other capital goods like batteries and main frame and all these capital goods are either installed in the exchanges or laid underground or otherwise, from the exchanges to the subscriber's premises; that all these capital goods though laid outside the registered premises continue to belong to them notwithstanding leased/rented to the subscriber; that it is common knowledge that cables are used outside the registered premises, that is to say from the exchanges to the subscriber's premises and therefore the department has knowledge of CENVAT credit being taken on cables which are used outside the registered premises; that Extracts of CENVAT registers are sent to the service tax department along with every 5T3 return and Special Audit parties of the Service Tax Department have verified each credit entry with the relevant excise invoice and hence the demand is hit by limitation of time. In fine they requested to hold on merits that that cables on which CENVAT Credit taken can be used outside their registered premises in view of Rule 2(a) of CENVAT Credit Rules, 2004 and to hold that the demand is time barred. They also requested for a personal hearing.

3.3 Subsequently, another Show Cause Notice No. 198/2009 dated 21.04.2009, on the same issue, covering the period from October 2007 to March 2008 was issued to the assessee, demanding Service Tax of Rs. 1,56,66,461/-. The assessee filed their reply to the said Show Cause Notice on 16.05.2009 in which they reiterated the points already made in their reply dated 31.10.2008 and further stated that when the service provider is not undertaking any manufacturing activity, then the service provider need not use the capital goods in his factory or office and it would suffice if he shows that capital goods are used for providing output service which fact has been overlooked while issuing the Show Cause Notice. They also relied on the following case laws in support of their defence.

1. M/s. TNT India Pvt. Ltd vs. Commissioner of Service Tax, Bangalore -2007(7) STR 142
2. M/s. BSNL vs. CCE, Salem 2008(12) STR 139 (Tri- Chennai)

4.0 Submissions in Personal Hearing:

4.1 Shri. S. Ignatius, Advocate and Shrimathi. Rani Kalavathy, A.O., (TR), BSNL Landline, attended the hearing and submitted that the issue involved in this case relates to demand for reversal of CENVAT Credit

availed on capital goods which are alleged to have been removed from the premises; that the whole case is made out on the wrong premise; that there is no restriction/condition in service tax unlike provided in Central Excise manufacturing unit or job work, that in the context of Service Tax, capital goods can be utilised anywhere in so far as they are required to provide output service; that the invocation of Rule 3(5) of the CENVAT Credit Rules is not relevant since from 01.04.2008 and the matter has been clarified and hence demand does not sustain. He requested to drop the proceedings. They also filed a written submission in which the reply already furnished was reiterated in a nutshell.

5.0 Discussions and Findings:

5.1 I have carefully gone through the records of the cases, replies to the Show Cause Notices, submissions made and additional replies furnished at the time of personal hearing and the case laws relied on by the assessee in support of their defence. Following issues arise for consideration.

- (i) Whether the assessee are liable to pay the wrongly availed CENVAT Credit on capital goods?
- (ii) Whether the extended time limit as provided under Section 73(1) of the Finance Act, 1994 can be invoked for demanding the wrongly availed CENVAT credit?
- (iii) Whether Penalty can be imposed and interest can be demanded for the contraventions as alleged in the Show Cause Notice?

6.0 Whether the assessee are liable to pay the wrongly availed CENVAT Credit on capital goods?

6.1 The assessee argued that the cables are laid underground by them between two exchanges and between exchange and customer's premises and as per the definition of Rule 2(a) of CENVAT Credit Rules, 2004,

Capital goods means.

(A) the following goods namely"

(i) all goods falling.....

(ii) to (vii)

used

(1) in the factory of theused in an office or

(2) for providing output service

and there is no restriction for a output service provider to use capital goods outside the registered premises and further argued that as per the proviso to Rule 3(5) of CENVAT Credit Rules, 2004, as it stood prior to 01.04.2008. when Capital goods are removed from the premises of the provider of output service for providing the output service, the Capital goods should be brought back within 180 days which proviso was amended w.e.f. 01.04.2008 (by Notification No.10/2008-CE (NT)

dt.1.3.2008) to remove the restriction for capital goods and hence that the amendment dt. 1.3.2008 by Notification No. 10/2008 has to be held as clarificatory of Rule 3(5) as it stood even prior to 01.04.08. They also added that the Rule 3(5) of CENVAT Credit Rules 2004, as it stood prior to 01.04.2008 will apply only for job work and will not apply in their case where capital goods are used for providing output service.

6.2 The assessee relied on the definition of Capital Goods as defined in Rule 2(a) of CENVAT Credit Rules, 2004, to stress the point that they are eligible to avail the credit on the capital goods (cables) since the same are used for providing output service. The averment of the assessee is not acceptable for the reason that if such a credit was admissible then same could have been provided in the Statute itself. For example in the case of Motor vehicles which are also capital good, in Rule 2(a) of the CENVAT Credit Rules, 2004 same has been provided. It reads:

(B) Motor vehicles registered in the name of provider of output service for providing taxable service as specified in sub-clauses (j),(n),(o), (zr),(zrp),(zrz),(zrw) of clause 105 of Section 65 of the Finance Act.

Thus it is clear from the above, that, if the government had any such intention to allow the service provider to use the capital goods outside the premises of the service provider, they provide for the same in the definition itself but no such exclusion was provided in the definition in respect of Cables used by any of the service provider away from the registered premises. Hence, it is clear that there is no intention on the part of the government to allow the credit in respect of the capital goods used outside the registered premises except for the motor vehicles used for providing the services specified in Rule 2(a)(B) of the CENVAT Credit Rules, 2004. Hence, the arguments of the assessee that they are eligible for the CENVAT Credit on cables and the Notification No. 10/2008-CE (NT) dt.1.3.2008 is clarificatory in nature are not acceptable. Moreover, any notification issued will have prospective effect only and if there is any intention to give retrospective effect, the same will be incorporated in the notification itself. Also, Rule 3(5) of the CENVAT Credit Rules, 2004 is very clear that the capital goods on which CENVAT credit has been taken are removed as such from the premises of the provider of output service for providing the output service, the Capital goods should be brought back within 180 days or the service provider is shall pay an amount equal to the credit availed in respect of such capital goods. So the arguments of the assessee are not acceptable and I hold that the assessee is liable to pay the wrongly availed CENVAT Credit on the capital goods.

7.0 Whether the extended time limit as provided under Section 73(1) of the Finance Act, 1994 can be invoked for demanding the wrongly availed CENVAT credit?

7.1 The assessee argues that the Show Cause Notice is time barred since the availing of credit by them is known to the department and on each occasion, the Excise Invoice No. together with the description of capital goods as "Optical Fibre Cables/Cables" was shown in the CENVAT Register and extracts of the CENVAT Credit was sent to the Service Tax department alongwith every ST 3 returns. The averments of the assessee are not acceptable for the reason that the assessee has at no point of time declared to the department that they are removing the capital goods(cables) on which credit has been taken form their premises and the above fact has come to the knowledge of the department only at the time of special audit conducted at the assessee's premises. But for the verifications of the records made by the department, the removal of the capital goods (cables) on which credit has been taken would not have been detected. The assessee, though filed ST3 returns alongwith the copies of the CENVAT registers, at no point of time declared that the capital goods(cables) on which credit availed has been removed as such and willfully suppressed material facts of removal of capital goods and consequently the extended time limit as provided under the proviso to Section 73(1) is rightly invocable for demand of service tax.

7.2 The assessee relied on two case laws in support of their defence and I have gone through them. In the case of M/s. TNT Indian Private Limited, it has been held by the tribunal that in the case of Courier Agency Service, Motor Vehicles which were used for providing output service, outside the registered premises will not bar the service provider from availing CENVAT credit on such motor vehicles. This has been provided in the definition itself, as discussed earlier in this order. In case of the other case law., i.e., M/s. BSNL, the said order is a stay order only which has not attained finality. Hence, the case laws cited by the assessee are not relevant with the facts of this case and are of no help in granting them any significant relief.

8.0 Whether Penalty can be imposed and interest can be demanded for the contraventions as alleged in the Show Cause Notice?

8.1 The assessee argues that as they are eligible to avail the CENVAT Credit on the capital goods (cables), they are not liable for payment of interest and also not liable for payment of penalty. The Assessee's omissions and commissions as discussed in foregoing paras clearly

establish the suppression of facts with a malafide intention to avail the credit in respect of capital goods and thus they rendered themselves liable for penal action under Rule 15(1) of the CENVAT Credit Rules, 2004 for contravention of Rule 3(5) of the CENVAT Credit Rules, 2004. Also, the assessee is liable to pay interest under Section 75 of the Finance Act, 1994 read with Rule 14 of CENVAT Credit Rules, 2004 on the service tax not paid

9. In view of the foregoing, I pass the following order.

ORDER

10.1 I demand an amount of Rs. 11,79,89,576/- (Rupees Eleven Crores seventy nine lakhs eighty nine thousand five hundred and seventy six only) being the CENVAT Credit wrongly taken on capital goods for the period from February 2005 to March 2008 from M/s. BSNL, (Landline Division), Chennai under Rule 14 of the CENVAT Credit Rules, 2004 read with proviso to Section 73(1) of the Finance Act, 1994 and Section 73(2) of the Act.

10.2 I demand interest from M/s. BSNL, (Landline Division), Chennai in terms of Rule 14 of the CENVAT Credit Rules, 2004 read with Section 75 of the Act on the CENVAT credit wrongly taken and demanded above.

10.3 I impose a penalty of Rs.3,00,00,000/- (Rupees three crores only) on M/s. BSNL, Landline Division under Rule 15(1) of the CENVAT Credit Rules, 2004 for the contravention of Rule 3(5) of the CENVAT Credit Rules, 2004.

(Raj Kumar Barthwal)
COMMISSIONER

To
M/s. Bharat Sanchar Nigam Ltd.,
Land Line Division,
Chennai Telephones,
VI Floor, Anna Road Telephone Exchange,
No.10 - Dams Road,
Chennai- 600 002.

// BY SPEED POST WITH ACK. //

Copy to:

1. The Assistant Commissioner of Service Tax, III Division, Chennai.
2. P.S. To Commissioner / Master file / Spare

Rabman

R. BALASUBRAMANIAM
Chief Accounts Officer (TR.MQ)
BSNL - Chennai Telephones
Anna Road Tel. Exch. Bldg., 6th Floor,
10, Dams Road, Chennai-600 002.

Application No
Appeal No

Regd/AD
ST/S/133,157/2010
S1/229,277/2010

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, SHASTRI BHAWAN ANNEXE, 1ST FLOOR
26 HADDOWS ROAD, CHENNAI-600 006

Telephone No 04428252306 Fax No 044-28234293

To

Date 08.06.12

M/s. Bharat Sanchar Nigam Ltd.,
Chennai Telephones, O/o. GM (Landline
Division), No.10 Dams Road,
Chennai - 600 002

vs

Applicant
Respondent

CST Chennai

I am directed to send herewith a certified copy of the

Final Order No 601, 602/12
Stay Order No 409, 410/12
Misc. Order No

dated 05.06.12 passed by this Tribunal.

Copy forwarded to:-


Asst. Registrar

- 1 The Commissioner CE/ ST/ LTU CST Chennai
- 2 The CCE/CC (Appeals) Chennai
- 3 The JCDR CESTAT Chennai
- 4 Indirect Taxes Bar Association, CESTAT Chennai
- 5 Centax Publication P Ltd New Delhi
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- 10 Lawcruz Advisors P Ltd Faridabad
- 11 Guard File

Mr. Velayutham Pichaiya, Adv
406 New Additional Law Chambers,
High Court Buildings,
Chennai -600104

IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

ST/S/133/2010 & ST/229/2010
ST/S/157/2010 & ST/277/2010

(Arising out of Order-in-Original No. 77 & 78/2009 dated 26.11.2009,
passed by the Commissioner of Service Tax, Chennai).

For approval and signature

Hon'ble Dr. CHITTARANJAN SATAPATHY, Technical Member
Hon'ble Shri D.N. PANDA, Judicial Member

-
1. Whether Press Reporters may be allowed to see the order for Publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : Yes
 2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : No
 3. Whether the Hon'ble Member wishes to see the fair copy of the Order. : Seen
 4. Whether order is to be circulated to the Departmental Authorities? : Yes
-

M/s. BSNL : Appellants

Vs.

CCF, CST, Chennai : Respondent

Appearance

Shri J. Shankar Raman, Adv., for the appellants
Shri V.V. Hariharan, JCDR, for the respondents



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CORAM

Hon'ble Dr. CHITTARANJAN SATAPATHY, Technical Member
Hon'ble Shri D.N. PANDA, Judicial Member

Date of Hearing : 05.06.2012
Date of Decision: 05.06.2012

Final order no. 409, 410/12 }
ORDER No. 601, 602/12 } dt 5/6/12

Per: Dr. Chittaranjan Satapatthy

Heard both sides. The issue involved in both these appeals is similar. The main demand has been made against M/s. BSNL, a Public Sector Telephone Company, on the ground of violation of 2nd proviso to Rule 3 (5) of the Cenvat Credit Rules, 2004, as it stood prior to amendment of the said Rule on 01.04.2008, for the reason that the telephone cables in respect of which credit has been taken by the appellants were removed outside the premises and not brought back within 180 days.

2. The Ld. Advocate appearing for the appellants states that these telephone cables were not removed outside as such but, they were laid underground between telephone exchanges and between telephone exchange and the premises of the customers. There is no dispute regarding the actual position that these cables were laid underground which was essential for providing the output service viz., telephone services. There cannot be any question of bringing

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back these cables to the premises of M/s. BSNL, as such a step would disrupt telephone services.

3. In view of the foregoing, we are of the view that there has been no contravention of the 2nd proviso to Rule 3(5) as it existed at the material time. In any case, the amended Rule 3(5) provides that if any inputs or capital goods are removed outside the premises of the provider of output service for providing such service, there is no requirement for any demand of duty or reversal of credit.

Hence, the impugned order is set aside and the appeals are allowed.

Both the stay petitions also stand disposed of.
(Order dictated and pronounced in the open Court)

Judicial
5/6/2012
(D.N. PANDA)
JUDICIAL MEMBER

Chittaranjan
16/12
(Dr. CHITTARANJAN SATAPATHY)
TECHNICAL MEMBER

BB

