

OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX,
PLOT NO 6776 B-1, "SIDDIH SADAN" BUILDING,
NARAYAN UPADHYAY MARG,
BHAVNAGAR - 364 001.

F. No. V/15-69/Dem-ST/HQ/2012-13

Date of order: 21.01.2013

Date of Issue: 22.01.2013

Passed by Shri Harcharan Singh, Additional Commissioner.

ORDER-IN-ORIGINAL NO. 37/ADC/BVR/2012-13

Any person(s) deeming himself aggrieved by this order may appeal against this order to the Commissioner, Central Excise (Appeals), Central Excise Bhavan, Race Course road, Rajkot 364 001 within 60 days from the date of its communication. The appeal should bear a Court Fee stamp of Rs. 2.50 paise only .

The appeal should be filed in Form ST-4 in duplicate as per the provisions of Section 85 of the Finance Act, 1994 read with Rule 8 of the Service Tax Rules, 1994.

- It should be accompanied with the following :
- Copy of appeal in duplicate.
- Copies of the order, one of which shall be certified copy of the order must bear a Court Fee stamp of Rs. 2.50 paise as per Schedule I to the Article of the Court Fee Stamp Act, 1870.
- Proof of payment of Service Tax, penalty, interest etc.

Sub: - Show Cause Notice No.V/15-69/DEM-ST/HQ/2012-13 dated 22.10.2012.

Brief facts :

1. M/s Bharat Sanchar Nigam Limited, GMTD, 1st floor, Telephone Exchange Building, Amreli 365 601 (hereinafter referred to as the "Noticee") are registered for providing taxable services in the category of 'Telephone Services' under Section 69 of the Finance Act, 1994 under Service Tax , Rural Range, Service Tax Division, Bhavnagar with registration No AABCB5576GST295.

2. During the course of audit of the records of the M/s Bharat Sanchar Nigam Ltd. DGM, MTCE (WTR), C.G. Road Ahmedabad 380 006 conducted by the Audit officers of Service Tax, Audit Section, Ahmedabad it was observed in Revenue para 2 of Audit Report No. 62/2010-11-Service Tax dated 07.09.2010 in summary trial balance in the Schedule head of Account No 105 and 106 that they had accounted their Capital assets (fixed assets) received from their another Section i.e. Project Department.

3. On further investigation by the Audit officers in the matter it came to notice that the BSNL Ahmedabad had transferred total Cenvat Credit of Rs. 12,73,24,688/- to their Circle office at Khanpur, Ahmedabad which was confirmed by their Accounts Office letter No TP/GJ/AM/S-TAX/Corr/2009-10 dated 18.01.2010. Further BSNL Circle office, Khanpur, Ahmedabad also confirmed in their letter No TAC/10-04/Diff-Cir/OW/0910/11 dated 05.02.2010 that they had received total Cenvat credit of Rs 12,73,24,688/- from Project department and it was also directed by the Project Department to transfer the said Cenvat credit to their different SSA/units which were specified by WTP through ATD.

4. Deputy Commissioner, Service Tax, Division-I, Ahmedabad vide letter No SD-01/4-123/Audit BSNL/10-11 (62/10-11) dated 17.09.2012 addressed to Assistant Commissioner, Service Tax, Division, Bhavnagar informed that total amount of Cenvat credit of Rs 12,26,136/- has been transferred during the period 09.02.2007 to 31.03.2009 to the said Noticee through ATD, further a duly certified sheet "List of ATD issued for availing Cenvat credit to CGMT Gujarat Circle for the year 2007-08 has been provided which has been prepared on the basis

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details furnished through various Annexure by Accounts Officer (Cash), Office of the Additional General Manager, Western Telecom Project, Gujarat Area, Ahmedabad vide letter No TP/GJ/AM/Service Tax/2011-12/84 dated 17.09.2012, the Assistant Commissioner, Service Tax Division, Bhavnagar further asked the Superintendent, Service Tax, Rural Range, Bhavnagar vide letter No V/19-11/STAX/DIV/12-13- Audit dated 15.10.2012 to take proper action in the matter. Accordingly, Superintendent, Service Tax, Rural Range, Bhavnagar vide letter No BVN/ST/RRL/68/12-13 dated 17.10.2012 requested the Noticee to confirm whether the said Cenvat credit had been availed by them or not and also requested to provide the information related to availment of similar credit during the period 01.04.2009 to 31.03.2012.

5. Under Section 69 of the Finance Act, 1994 read with Notification No 26/2005-ST dated 07.06.2005 an input Service Distributor is required to take a separate registration under the provisions of Service Tax. In the instant, case as per the Audit Report, it is established that neither BSNL Western Project Department, Ahmedabad nor the BSNL Circle Office, Khanpur, Ahmedabad have registered themselves under Section 69 of the Finance Act, 1994.

6. As per Rule 2 (m) of Cenvat Credit Rules, 2004, "Input Service Distributor" means an office of the manufacturer or producer of final products or provider of output service which receives invoices issued under Rule 4A of the Service Tax Rules, 1994 towards purchase of input services and issues invoice, bill or as the case may be, challans for the purposes of distributing the credit of Service Tax paid on the services to such manufacturer or producer or provider as the case may be.

7. Rule 4A and 4B of the Service Tax Rules, 1994 prescribes about the details contained in the documents of various services with provisos and explanation. Relevant portion of the said Rule is as under: -

Rule 4A. Taxable service to be provided or credit to be distributed on invoice, bill or challans:

(1) Every person providing taxable service shall, not later than fourteen days from the date of compliance of such taxable service or receipt of any payment towards the value of such taxable service, whichever is earlier, issue an invoice, a bill or, as the case may be a challan signed by such person or a person authorised by him in respect of taxable service provided or to be provided and such invoice, bill or, as the case may be challan shall be serially numbered and shall contain the following, namely:

- (i) the name, address and the registration number of such person;
- (ii) the name and address of the person receiving taxable service;
- (iii) description, classification and value of taxable service provided or to be provided ;
and
- (iv) the service tax payable thereon.

Provided that in case the provider of taxable service is a banking company or a financial institution...

Provided further that in case the provider of taxable service is a goods transport agency, providing service to any person, in relation to transport of goods by road in a goods carriage, an invoice, a bill or, as the case may be, a challan shall include any document, by whatever name called which shall contain the details of the consignment note number and date, gross weight of the consignment and also contain other information s required under this sub-rule.

Rule 4B. Issue of consignment note.- Any goods transport agency which provides service in relation to transport of goods by road in a goods carriage shall issue a consignment note to the recipient of service.

Provided that where any taxable service in relation to transport of goods by road in a goods carriage is wholly exempted under Section 93 of the Act, the goods transport agency shall not be required the issue the consignment note.

Explanation.- For the purposes of this rule and the second proviso to rule 4A. "consignment note" means a document, issued by a goods transport agency against the receipt of goods for the purpose of goods by road in a goods carriage which is serially numbered and contains the name of the consignor and consignee, registration number of the goods carriage in which the goods are transported, details of the goods transported, details of the place of origin and destination, person liable for paying service tax whether consignor, consignee or the goods transport agency.

8. It appeared that project Department, Ahmedabad and BSNL, Circle Office, Khanpur, Ahmedabad have not followed the provisions of Rule 2(m) of the Cenvat Credit Rules, 2004 read with the provisions of Rule 4A of the Service Tax Rules, 1994 by not issuing invoice, bill or a challan as the case might be for the purpose of distributing the credit of Service Tax paid but had transferred the said Cenvat credit on a simple Advice Note called as ATD (Advice of Transfer Debit) which was not correct. Further, the said ATD did not come within the purview of "Consignment Note" as mentioned in Rule 4B of Service Tax Rules, 1994. Therefore, it appeared that the Cenvat credit of Rs 12,73,24, 688/- passed on by the BSNL Western Project Department, Ahmedabad to BSNL Circle Office, Khanpur, Ahmedabad who had subsequently forwarded the said credit to their different SSA/Units was not admissible.

9. Rule 3 of the Cenvat Credit Rules, 2004 permits a provider of taxable service shall be allowed to take Cenvat credit on input service, whereas Rule 9(1) of the said Rules prescribes a provider of output service shall take Cenvat credit on the basis of prescribed documents and according to Rule 9(2) of the said Rules, no Cenvat credit under sub-rule (1) shall be taken unless all the particulars as prescribed under the Central Excise Rules, 2002 or the Service Tax Rules, 1994 as the case may be are contained in the said documents. Therefore, it appeared that the Noticee had wrongly availed the Cenvat credit during the period from 09.02.2007 to 31.03.2009 and Cenvat credit during the period from 01.04.2009 to 31.03.2012 which was transferred to them by BSNL Circle Office, Khanpur, Ahmedabad on the basis of simple Advice Notes called as ATD. Therefore, this Cenvat credit is required to be recovered under the provisions of Section 73(1) of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004 by invoking the extended period of five years.

10. From the evidence it appeared that the Noticee had not disclosed their taxable activity to the department i.e. they were taking and utilizing Cenvat credit wrongly transferred / distributed through invalid/improper documents by the unregistered assessee for providing the taxable service under the category of "Telephone Service" without taking reasonable steps to ensure that Cenvat credit taken by them was on the strength of valid and proper documents as per statutory provisions of Cenvat Credit Rules, 2004 thereby they have suppressed the material facts with intent to take Cenvat credit wrongly and utilised it to discharge the service tax liability. Therefore, the Noticee have rendered themselves liable to penal action as provided under the provisions of Section 78 of the Finance Act, 1994 for suppression of taxable service with intent to evade payment of service tax. In view of above, the Noticee have contravened the provisions of Rule 3 of the Cenvat Credit Rules, 2004 read with Rule 9 (1) and 9 (2) of the Cenvat Credit Rules, 2004 and have suppressed the material facts with intention to wrongly avail and utilize said Cenvat credit along with interest under the provisions of Section 75 of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004.

11. Therefore, Additional Commissioner, Central Excise Commissionerate, Bhavnagar issued a show cause notice No V/15-69/Dem-ST/HQ/2012-13 dated 22.10.2012 to the Noticee proposing following actions: -

- (i) Recovery of Cenvat credit amounting to Rs 12,26,136/- availed during the period 09.02.2007 to 31.03.2009 and Cenvat credit (to be quantified later) during the period 01.04.2009 to 31.03.2012 wrongly availed under the provisions of Section 73 of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004;
- (ii) Recovery of interest at the prescribed rate on the Cenvat credit under Section 75 of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004;

- (iii) Imposition of penalty under Section 78 of the Finance Act, 1994 read with rule 15(3) of the Cenvat Credit Rules, 2004.

12. Defence reply and personal hearing :

12.1 Noticee filed their written reply dated nil received in office on 26.11.2012 mainly stating as under :

(i) For para 12 of the show cause notice they submitted that it was their fault (PGMTD ATD Ahmedabad) but they had shown all details in their return and had provided to Audit department therefore, it is unjustified to blame that GMTD, Amreli had suppressed the material facts with intent to take Cenvat credit wrongly and have utilised the same to discharge the service tax liability;

(ii) As per proviso to Rule 9(2) of the Cenvat Credit Rules, 2004 if document for availing Cenvat credit does not contain all the particulars but contains the details of duty or service tax payable, description of the goods or taxable service, assessable value, central excise duty or service tax registration number of person issuing the invoice, name and address of the factory or ware house or premises or provider of taxable service and the Deputy commissioner of Central Excise or the Assistant Commissioner of Central Excise as the case may be is satisfied that the goods or the service covered by the said document have been received and accounted for in the books of account of the receiver, he may allow the Cenvat credit. Therefore, they requested to grant Cenvat credit on the basis of proviso to Rule 9(2) of the Cenvat Credit Rules, 2004 and submitted not to make demand with interest from them under the provision of Rule 14 of Cenvat Credit Rules, 2004;

(iii) For para 18 of the show cause notice they submitted that they had not suppressed the material fact with intent to take Cenvat credit wrongly and utilised the said credit to discharge the service tax liability, so there is no need to apply proviso of Section 73(1) of Finance Act, 1994 and invoke five years' period of limitation;

(iv) For para 19 of the show cause notice, they requested no to apply Rule 15(1) of Cenvat Credit Rules, 2004 for levy of penalty;

(v) For para 20.1 of the show cause notice they submitted that they had not suppressed the material fact with intent to take Cenvat credit wrongly and had utilised the said credit taken to discharge the service tax liabilities, therefore, there is no need to apply proviso of Section 73(1) of the Finance Act, 1994;

(vi) For para 20.2 of the show cause notice, they requested to grant Cenvat credit on the basis of proviso to Rule 9(2) of Cenvat Credit Rules, 2004 and not to make demand with interest from them under the provision of Rule 14 of the Cenvat Credit Rules, 2004;

(vii) For para 20.3 of the show cause notice, they requested not to apply Rule 15(1) of Cenvat Credit Rules, 2004 for levy of penalty;

(viii) And finally for para 21 of the show cause notice they requested for personal hearing before adjudication of their case.

Noticee also submitted a letter dated nil received in office on 08.01.2012 stating that they had submitted a written reply which is true and final from them and there was nothing more to produce before the Service tax authority at this stage as all the points related to policy matter of their Head office.

12.2 A personal hearing was fixed on 14.01.2012 wherein Shri D. R. Jiwani, Section Supervisor (Legal) in the office of GMT, Amreli appeared before the adjudicating authority on 15.01.2012 and reiterated the contents of their letters dated 22.12.2012, 31.12.2012 and 02.01.2012 (not received) .

12.3 Discussion and findings :

12.4 I have carefully gone through the facts of the case, defence reply filed by the Noticee and all the relevant documents placed in the file. On going through the facts of the case, I find that the Department has issued a show cause notice dated 22.10.2012 to the Noticee proposing to recover the Cenvat credit amounting to Rs 12,26,136/- and Cenvat credit to be quantified later wrongly availed on the strength of invalid and improper Cenvat documents issued by the unauthorised/unregistered assessee and have also utilised towards payment of Service Tax liability for the period from 09.02.2007 to 31.03.2009 and 01.04.2009 to 31.03.2012 under the provision of Section 73 of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004. The show cause notice also proposes recovery of interest under Section 75 of the Finance Act, 1994 read with Rule 14 and penalty under Section 78 of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules, 2004.

12.5 I observe that the Noticee are registered with Service Tax, Rural Range, Service Tax Division, Bhavnagar for providing taxable services in the category of 'Telephone Services' under Section 69 of the Finance Act, 1994 having Registration No AABCB5576GST295. It was observed by the Audit officers of Service Tax, Audit Section, Ahmedabad in their Audit Report No 62/2010-11-Service Tax dated 07.09.2011 that M/s Bharat Sanchar Nigam Ltd. (BSNL), D.G.M. MTCE (WTR), Ahmedabad had accounted their Capital Assets (fixed assets) received from their Project Department and BSNL Western Project Department, Ahmedabad had transferred total Cenvat credit of Rs 12,73,24,688/- to their Circle office at Khanpur, Ahmedabad who had transferred the Cenvat credit through Advice of Transfer Debit (ATD) to their different SSA/ Units specified by WTP. An amount of Rs 12,26,136/- pertaining to period 09.02.2007 to 31.03.2009 Cenvat credit (amount to be quantified) for the period 01.04.2009 to 31.03.2012 was transferred to the Noticee through ATDs and the Noticee had availed Cenvat credit on the strength of ADTs.

12.6 According to Section 69 of the Finance Act, 1994 read with Notification No 26/2005-ST dated 07.06.2005, an Input Service Distributor is required to take a separate registration under the provisions of service tax. I find that as per Audit report No 62/2010-11 service tax dated 07.09.2010 neither BSNL, Western Project Department, Ahmedabad nor BSNL, Circle Office, Khanpur, Ahmedabad have registered themselves with the Service Tax Department.

12.7 Further, as per Rule 2(m) of the Cenvat Credit Rules, 2004, 'Input Service Distributor' means an office of the manufacturer or producer of final products or provider of output service who receives invoices issued under Rule 4A of the Service Tax Rules, 1994 towards purchases of input services and issues invoice, bill or as the case may be, challan for the purposes of distributing the credit of Service Tax paid on the said services to such manufacturer or producers or provider.

For better appreciation Rule 4A and Rule 4B are reproduced as under:

Rule 4A. Taxable service to be provided or credit to be distributed on invoice, bill or challan:

(1) Every person providing taxable service shall, not later than fourteen days from the date of compliance of such taxable service or receipt of any payment towards the value of such taxable service, whichever is earlier issue an invoice, a bill or, as the case may be a challan signed by such person or a person authorised by him in respect of taxable service provided or to be provided and such invoice, bill or, as the case may be challan shall be serially numbered and shall contain the following, namely:

- (i) the name, address and the registration number of such person;
- (ii) the name and address of the person receiving taxable service;
- (iii) description, classification and value of taxable service provided or to be provided ;
and
- (iv) the service tax payable thereon.

Provided that in case the provider of taxable service is a banking company or a financial institution..."

Provided further that in case the provider of taxable service is a goods transport agency, providing service to any person, in relation to transport of goods by road in a goods carriage, an invoice, a bill or, as the case may be, a challan shall include any document, by whatever name called which shall contain the details of the consignment note number and date, gross weight of the consignment and also contain other information s required under this sub-rule.

Rule 4B. Issue of consignment note.- Any goods transport agency which provides service in relation to transport of gods by road in a goods carriage shall issue a consignment note to the recipient of service.

Provided that where any taxable service in relation to transport of goods by road in a goods carriage is wholly exempted under Section 93 of the Act, the goods transport agency shall not be required the issue the consignment note.

Explanation.- For the purposes of this rule and the second proviso to rule 4A. "consignment note" means a document, issued by a goods transport agency against the receipt of goods for the purpose of goods by road in a goods carriage which is serially numbered and contains the name of the consignor and consignee, registration number of the goods carriage in which the goods are transported, details of the goods transported, details of the place of origin and destination, person liable for paying service tax whether consigner, consignee or the goods transport agency.

From the reading of the Rule 4A and 4B of Cenvat Credit Rules, 2004, I find that neither the Project Department nor the Head office (Circle office) has obtained service tax registration and they have not followed the provisions of Rule 4A of the Service Tax Rules, 2004 inasmuch as they have not issued prescribed documents i.e. bill or invoice or a challan and have transferred the amount of said Cenvat credit on a simple advice note called Advance Transfer Debits (ATDs) which is not a prescribed/valid document according to the provisions of Rule 9(1) of the Cenvat Credit Rules, 2004.

12.8 Further, I find that Rule 3 of the Cenvat Credit Rules, 2004 permits a provider of taxable service shall be allowed to take Cenvat credit on input service and Rule 9(1) of the said Rules prescribes that a provider output service shall take Cenvat credit on the basis of prescribed documents and according to Rule 9(2), no Cenvat credit under sub-rule (1) shall be taken unless all the particulars as prescribed under Central Excise Rules, 2002 or the Service Tax Rules, 2004 are contained in the said documents. I find in this case that the Noticee have not followed the proper procedure as prescribed in Rule 3 of the Cenvat Credit Rules, 2004 or Central Excise Rules, 2002 inasmuch as the Noticee have availed Cenvat credit on the strength of Advance Transfer Debits (ATDs) which is not a prescribed document under the above Rules. I also find that the Noticee had not approached the concerned Deputy Commissioner or Assistant Commissioner of Central Excise under provisions of Rule 9(2) of the Cenvat Credit Rules, 2004 for availment of Cenvat credit but the Noticee have availed Cenvat credit suo moto on the strength of documents called Advance Transfer Debits. Therefore, I find that the Noticee have contravened the provision of Rule 3 of the Cenvat Credit Rules, 2004 read with Rule 9 (1) and 9 (2) of the Cenvat Credit Rules, 2004 and they have suppressed the facts with intention of wrong availment and utilisation of Cenvat credit of Rs 12,26,136/- during the period 09.02.2007 to 31.03.2009 and Cenvat credit to be quantified during the period from 01.04.2009 to 31.03.2012 for which the show cause notice has rightly invoked the extended period of limitation under the provisions of Section 73 of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004 for recovery of Cenvat credit for the above said periods.

12.9 The show cause notice has proposed recovery of interest on the wrongly availed Cenvat credit under the provisions of Section 75 of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004. I have concluded in para supra that the wrongly availed Cenvat credit is recoverable under the provisions of Section 73 of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004 for the period 09.02.2007 to 31.03.2009 and 01.04.2009 to 31.03.2012, I hold that the Noticee are liable to pay interest on the wrongly availed Cenvat credit for the above said periods under the provisions of Section 75 of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004.

12.10 The show cause notice also proposed imposition of penalty under the Section 78 of the Finance Act, 1994 read with Rule 15(3) of Cenvat Credit Rules, 2004 for contravention of provisions of Rule 3 read with Rule 9(1) and 9 (2) of the Cenvat Credit Rules, 2004. I find that the Noticee have availed Cenvat credit on the strength of Advance Transfer Debits (ATDs) which is not a prescribed document under the provision of Rule 9(1) of the Cenvat Credit Rules, 2004. I also find that the supplier of the goods / input service distributor i. e BSNL Western Project Department, Ahmedabad nor the BSNL Circle Office, Khanpur, Ahmedabad have obtained registration under the provisions of Section 69 of the Finance Act, 1994 read with Notification No 26/2005-ST dated 07.06.2005. I, therefore, conclude that the Noticee have contravened the provisions of Rule 3 and Rule 9(1) of the Cenvat Credit Rules, 2004 and therefore they are liable for penalty under the provisions of Section 78 of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules, 2004.

In view of the facts, evidence, discussion and findings, I pass the following orders.

ORDER

1. I confirm the recovery of Cenvat credit amounting to Rs 12,26,136/- (Rupees twelve lacs, twenty six thousand, one hundred and thirty six only) for the period 09.02.2007 to 31.03.2009 and Cenvat credit (to be quantified) for the period from 01.04.2009 to 31.03.2012 under the provision of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 73 of the Finance Act, 1994.
2. I order recovery of interest at the applicable rate under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 75 of the Finance Act, 1994 on the amount of Cenvat determined in para 1 above.
3. I impose penalty of Rs 12,26,136/- (Rupees twelve lacs, twenty six thousand, one hundred and thirty six only) for the period from 09.02.2007 to 31.03.2009 and penalty equal to the amount of Cenvat determined for the period from 01.04.2009 to 31.03.2012 under Section 78 of the Finance Act, 1994 read with rule 15(3) of Cenvat Credit Rules, 2004.

Sd/-

(HARCHARAN SINGH)
ADDL. COMMISSIONER

By registered Post A.D.

To,
M/s Bharat Sanchar Nigam Limited,
GMTD,
Telephone Exchange Building, 1st Floor,
Amreli - 365 601.

Copy to:-

1. Commissioner, Central Excise and Service Tax, Bhavnagar.
2. Assistant Commissioner (Audit), Service Tax, Ahmedabad.
3. Deputy Commissioner, Service Tax, Division-I, Ahmedabad.
4. Assistant Commissioner, Service Tax, Division, Bhavnagar.
5. Superintendent, Service Tax, City Ranger, Bhavnagar.
- ✓ 6. Guard File.


22/11/2013
ADDL. COMMISSIONER