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	<p>Govt. of India Office of the Commissioner of Central Excise 'Siddhi Sadan', Plot No. 6776/B-1, Narayan Upadhyay Road, Off Waghawadi Road, Bhavnagar</p>
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F. No. V/15-19/Dem/HQ/2007

Date of Order: 15/02/2012
Date of Issue: 09/03/2012

Passed by

IMAMUDDIN AHMED
Joint Commissioner
Central Excise
Bhavnagar

Order-in-Original No: 19/BVR/Jt.Commr/2012

This copy is granted free of charge for private use of the person(s) to whom it is sent.

Any person(s) deeming himself aggrieved by this Order may appeal against this order to the Commissioner Central Excise(Appeals), Rajkot, Central Excise Bhavan, Race Course Ring Road, Rajkot-360001 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 EA 1 in duplicate, as per the provisions of Section 35(1) of the Central Excise Act, 1944 read with Rule 3 of the Central Excise (Appeals) Rules, 2002. It should be signed by the appellants in accordance with the provisions of sub-rule (2) of Rule 3 of the Central Excise (Appeal) Rules, 2002.

- It should be accompanied with the following:
- Copy of appeal in duplicate

Copies of the order, one of which shall be certified copy **OR** the other must bear a court fee stamp of Rs 2.50/- paise as per Schedule 1 to Article 6 of the Court Fee Stamp Act, 1870.

BY R.P.A.D.

To,
M/s. Gujarat Siddhee Cement Ltd.,
Siddheegram-362 276
Taluka- Sutrapada, Dist:- Junagadh.

Subject: - Show Cause Notice Number F. No. V/15-19/Dem/HQ/2007 dated 27.02.2007 demanding Cenvat Credit of Rs. 5,18,714/- wrongly taken.

BRIEF FACTS OF THE CASE :

1 M/s Gujarat Siddhee Cement Ltd., Siddheegram, Dist-Junagadh (Hereinafter referred to as the "the Noticee") are holding Central Excise Registration for manufacture of Cement and Cement Clinker falling under Chapter 25 of the First Schedule to the Central Excise Tariff Act, 1985 and are availing CENVAT Credit of Central Excise Duty/Service Tax paid on inputs, capital goods and input services under Rule 3 of the Cenvat Credit Rules, 2004 (Hereinafter referred to as CCR-2004).

2 It appeared that in respect of following input services on which the Noticee had taken "Cenvat Credit did not appear to be falling within the purview of "Input Service" as defined under Rule 2 of the Cenvat Credit Rules, 2004 for the period of February 2006.

Sr	Nature of the Service received for which CENVAT Credit Availed by the Noticee	Service Tax Rs.	Education Cess Rs.	Total Rs.
1	Telephone not installed in/installed away from the factory	40,223	804	41,027
2	Sales Commission on finished goods cleared for home consumption	4,68,307	9,380	4,77,687
			Total	5,18,714

3 The "Input service" has been defined under clause (I) of Rule 2 of CENVAT Credit Rules, 2004 which reads as under :

"Input Service" means any service :-

- (i) Used by a provider of taxable service for providing an output service ; or
- (ii) Used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal,

and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage up to the place of removal, procurement of inputs, activities relating to business, such accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry and security, inward transportation of inputs or capital goods and outward transportation up to the place of removal;.

4 The "output service" as referred to in of Rule 2 of the Cenvat Credit Rules, 2004 has been defined in clause (p) of Rule 2 of Cenvat Credit Rules, 2004 as "output service" means any taxable service provided by the provider of taxable service to a customer, client, subscriber, policy holder or any

other person, as the case may be, and the expressions 'provider' and 'provided' shall be construed accordingly.

5 Further, the provisions of Rule 3 of Cenvat Credit Rules, 2004 inter alia, provide that a manufacturer of final products shall be allowed to take credit of specified duties paid on any input service received by the manufacturer of final products on or after 10.09.2004. Thus according to provisions of Rule 3, the services in respect of which credit is taken must be input service within the meaning of definition of "input service" .

6 Further, provisions of sub-rule (6) of Rule 9 of the Cenvat Credit Rules, 2004, inter alia, provides that the burden of proof regarding the admissibility of Cenvat Credit on input services shall lie upon the manufacturer of final products or the provider of output services taking such credit.

7 Since, the Noticee is having manufacturing plant for the manufacture of Cement and Clinker at Siddheegram and had availed Cenvat Credit of service tax paid on services which did not qualify as input services on following points :

- (a) the services of telephones installed at the places other than factory premises or at the offices of the Noticee at other places were not utilised in or in relation to manufacture of final products ;
- (b) the services of Commission Agent (Sales Commission) have been utilised after the goods have been cleared from place of removal i.e. factory gate and this service also did not have any nexus with manufacture of goods .

8 Therefore, a Show Cause Notice No. V/15-19/DEM/HQ/2007 dated 27.02.2007 was issued by the joint Commissioner, Central Excise, Bhavnagar to the Noticee proposing the following actions :

- (i) Demand and recovery of Cenvat Credit of Rs. 5,18,714/- (Rs.5,08,530/- Service Tax + Rs. 10,184/- Education Cess) under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11A of the Central Excise Act, 1994 ;
- (ii) Recovery of interest on the above said Cenvat Credit under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AB of the Central Act, 1994 ;
- (iii) Imposition of penalty under the provisions of Rule 15 (3) of the Cenvat Credit Rules, 2004.

DEFENCE REPLY :

9 The Noticee filed a written reply dated 27.03.2007 mainly stating as under :

- (i) The Assistant Commissioner of Central Excise, Junagadh has issued a SCN dated 05.01.2007 on the identical issue and Commissioner of Central

Excise, Bhavnagar has also issued a Show Cause Notice dated 04.01.2007 for the same period as that of the subject SCN which has covered some of the issues covered under the SCN issued by the Assistant Commissioner and enclosed copies of those SCNs ;

(ii) They have submitted a letter dated 06.02.2007 to the Assistant Commissioner, Junagadh with a copy to Commissioner, Bhavnagar requesting that the adjudication of both those SCNs may be combined and adjudicated by the Commissioner in order to avoid multiple adjudication on the same issues in the same Commissionerate and enclosed a copy of their letter dated 06.02.2007.

9.1 M/s Guru and Ram, the Chartered Accountants, Mumbai on behalf of the Noticee filed a reply dated 31.03.2007 stating mainly as under :

(i) Following Show Cause Notices have been issued to the Noticee ;

- (1) No.V/15-72/DEM/HQ/06 dated 04.01.2007 issued by the Commissioner, Central Excise, Bhavnagar.
- (2) No.V/JND/AR-II/VRL/AC-1/2007 dated 05.01.2007 issued by the Assistant Commissioner, Junagadh.
- (3) No.V/15-19/DEM/HQ/2007 dated 27.02.2007 issued by the Joint Commissioner, Central Excise, Bhavnagar.

(ii) They requested that in view of the overlapping and similar/identical issues raised in above SCNs, all these may be taken up for adjudication and personal hearing may be given to the Noticee ;

(iii) That the Honourable Commissioner had passed an Order dated 27.11.2006 and the Noticee have preferred an appeal along with a stay application with CESTAT, WZB, Ahmedabad on 26.03.2007. The Stay application in the above appeal was likely to be taken up for hearing by CESTAT shortly and would be decided ;

(iv) That the Stay application on the same issue has been decided earlier with full waiver of deposit by the Principal Bench in an another party's matter as reported in HEG Limited Vs CCE, Bhopal as reported in 2007 TOIL-100-CESTAT-DEL, it was likely that the Noticee's stay application might be decided in favour of them. That further this identical issue has been decided in party's favour in another two decisions of Commissioner as contained in the decision of Commissioner (A) in the case of NHK Spring India Limited - 2006-204-ELT-189 and also an order of Commissioner (Appeals), Manglore (Order-in-Appeal No. 228/2006 dated 21.07.2006)

(v) Finally, they requested to keep the matter in abeyance till above said appeal/stay application is decided by the Tribunal.

9.2 The Noticee in their further written reply No.GSCL:CEX-2007-08 dated 04.04.2007 mainly submitted as follows :

(i) The issues raised in the subject Show Cause Notice is also covered under the earlier Show Cause Notices referred in the letter dated 27.02.2007

and requested to combine the adjudication of the subject SCN along with the SCN dated 04.01.2007 and 05.01.2007 covering the same issues so that it would avoid different decisions on the same issue in the same Commissionerate and also it would avoid a multiple adjudication and they pointed out guidelines from the Board to this effect.

(ii) On "input service" as defined under Rule 2 clause 1 (ii), the Noticee stated that under the second limb all activities relating to business has been specifically included and this an all comprehensive term to include the services viz. Input services on mobile phones under the input services. Further there is no evidence adduced to in the SCN nor any plea raised in the SCN, that the mobile phones bill attached in the Annexure does not relate to the business of the Noticee, hence, it is submitted that they have not violated any of applicable rules for availment of the impugned input credit and the same is justified under the explicit definition of input service in CCR 2004 and further in the light of no specific prohibition as prevalent under the provisions of the earlier Rules ;

(iii) The Noticee relied on the decision of CESTAT of WZB on the identical issue which is binding on the Honourable Adjudicating Authority. In the said decision the input credit on mobile phones have been allowed by the Tribunal for the identical period viz under the CCR 2004. The order is a speaking one with full analysis of the legal position. The citation is M/s Indian Rayon and Industries Vs Commissioner of Central Excise, Bhavnagar (2006-(4)STR -79 Trib. Mumbai). They enclosed a copy of this decision ;

(iv) They submitted that the above decision of CESTAT WZB, Mumbai in the case of M/s Indian Rayon and Industries was reaffirmed by another later decision of CESTAT, Principal Bench, New Delhi in the case of M/s Nice Telecommunication Pvt Lld Vs Commissioner of Central Excise, Jaipur (2007-TIOL-335-CESTAT-DEL). Even in that case the input service on account of mobile phones were disallowed on the ground that that mobile phones were not installed in the premises of the appellant, however, Tribunal has allowed the appeal with directions to allow the Cenvat Credit with order of remand. They enclosed a copy of the said final decision dated 15.12.2006 of the Principal Bench of CESTAT, New Delhi ; they submitted that in the light of two decisions of Tribunal of two different Benches (One being the decision of Jurisdictional Bench) and no contrary decision in the issue, judicial discipline mandates that the lower authorities to follow the same. In view of this the charges raised in the SCN cannot survive and merit to be dropped ;

(v) It may also be relevant to point out that the Government had earlier appointed an expert Committee viz., Rustagi Committee to go into the provisions of Service Tax and submit recommendations. The said Committee has submitted a report to the Government recently and one of the points mentioned in the report of the said Committee is that the disallowance of input credit on mobile phones under the existing rules and regulation is not legally sustainable and recommended for suitable legislation to amend the provisions if the Government desires to disallow the input credit on mobile phones.

Sales Commission on finished goods cleared for home consumption.

(vi) Sales Commission is paid in the normal course of trade and this is an activity relating to business and further it acts as an incentive to promote the sales ;

(vii) They submitted that the definition of input service includes the above item as sales promotion is specifically covered under the definition as mentioned above. Further, the definition also covers any activities relating to business and hence there is no ground to disallow the subject item under the Cenvat Credit availment. Further there is no allegation in the SCN that the services relating to this item is not relating to business or sales promotion activities of the Noticee. What has been alleged in the SCN is that the services relating to this item have been utilised after the goods have been cleared from the place of removal i.e. factory gate. Further, it has been alleged that this services did not have any nexus with manufacture of goods. They submitted that but for this service the sale would not have taken place and the question of removal of goods from the factory gate would not have arisen. Further, the SCN wrongly alleged that this service has no nexus with manufacture without appreciating the second limb of the definition under Input service which is as under :

*And includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage up to the place of removal, procurement of input, **activities relating to business**, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry and security, inward transportation of inputs or capital goods and outward transportation up to the place of removal ; (Emphasis supplied)*

(viii) It may be noticed that this limb has no correlation with manufacture. What is to be satisfied is that it should be relatable to any of the criteria mentioned above in the second limb of definition. For example, auditing is included therein which cannot be said to have any nexus with manufacture. Hence the SCN has proceeded on wrong assumptions and without appreciating the implication of the second limb of definition. It is submitted that the above service would be clearly falling within the purview of input service as per definition in CCR 2004 and availment of Cenvat Credit is permissible under the rules ;

In view of above submission they requested that the charges raised in the subject SCN may be dropped and requested for a personal hearing.

PERSONAL HEARING :

10 A personal hearing was fixed on 14.02.2012, however, Shri A. Jankiraman, C.A., Shri P. Balakrishna, Consultant and Shri Paveen Kavadia, General Manager (Accounts) of the Noticee appeared before the adjudicating authority on 08.02.2012 and stated that the reply to the SCN has already been filed vide their letter dated 04.04.2007. They reiterated the same. Further, they cited following judgements in support of their submission that

credit of Service Tax paid is available in respect of telephones installed outside the factory and sales commissions:

- (i) 2009 (239) ELT 334 AHD M/s Alidhra Textool Engineers Pvt Ltd Vs CCE ;
- (ii) 2010 (10) STR-431 M/s Nilkamal Crates & Bins;
- (iii) 2010 (20) STR-514 M/s Ambika Overseas,

They further submitted that the input service definition covers the activities relating to business and they requested to drop the proceedings.

DISCUSSION AND FINDINGS :

11 I have carefully gone through the Notice, records of the case and the submissions made by the Noticee.

12 The Noticee have submitted that the following Show Cause Notices have been issued to them :

- (1) No.V/15-72/DEM/HQ/06 dated 04.01.2007 issued by the Commissioner, Central Excise, Bhavnagar ;
- (2) No.V/JND/AR-II/VRL/A/AC-1/2007 dated 05.01.2007 issued by the Assistant Commissioner, Junagadh ;
- (3) No.V/15-19/DEM/HQ/2007 dated 27.02.2007 issued by the Joint Commissioner, Central Excise, Bhavnagar.

In this context, I find that the Show Cause Notice No.V/15-72/DEM/HQ/06 dated 04.01.2007 has been issued by the Commissioner, Central Excise, Bhavnagar for denial of Cenvat Credit of Rs. 56.63 lacs on input services availed on GTA-Outward Transportation for the period from December 2005 to February 2006.

Similarly, Show Cause Notice No.V/JND/AR-II/VRL/AC-1/2007 has been issued by the Assistant Commissioner, Central Excise Division, Junagadh for denial of Cenvat Credit of Rs.2.54 lacs on input services availed on GTA-Outward Transportation.

Since, above two Show Cause Notices have been issued for proposing recovery of Cenvat Credit availed on GTA-Outward Transportation which are processed separately, however, the instant Show Cause Notice dated 27.02.2007 issued by the Joint Commissioner, Central Excise, Bhavnagar is for proposing the recovery of Cenvat Credit of Rs.5.18 lacs on input services availed on (i) Mobile/Telephone services and (ii) Sales Commission on finished goods cleared for home consumption for the period of February 2006.

The Noticee have also drawn attention that the Commissioner had passed an Order dated 27.11.2006 and the Noticee have preferred an appeal along with stay application before CESTAT, WZB, Ahmedabad and the stay application was likely to be taken up for hearing shortly. For this I find that Commissioner, Central Excise, Bhavnagar has passed an OIO No.

31/BVR/2006 dated 27.11.2006 wherein issue of GTA, Stevedoring, Transportation of finished goods meant for export was decided. Thus, this case has no relevance to the issue covered in the instant Notice. I therefore, take up the same for deciding the issue covered in Show Cause Notice dated 27.02.2007.

12 The impugned Notice demands recovery of CENVAT credit availed on Service Tax paid on the telephones not installed / installed away from the factory and Sales Commission on finished goods cleared for home consumption considering that these services are not falling within the purview of "Input services" as defined under Rule 2(1) of the Cenvat Credit Rules, 2004 for the month of February 2006 on the following points.

- (a) The services of telephones installed at places other than factory premises or at offices of the Noticee at other places are not utilised in or in relation to manufacture of final product ;
- (b) The services of Commission Agent (Sales Commission) have been utilised after the goods have been cleared from the place of removal i.e. factory gate and this service also does not have any nexus with manufacture of goods.

Mobile phones and landline Telephones :

13 In the facts of the case, it is not in dispute that the services of mobile phones were utilised by the Noticee and the Service Tax paid thereon and the Credit thereof has been availed. There is nothing on the record to indicate that the activities carried out by the user of Mobile services are not relatable to the business of manufacturing activities carried out by the Noticee. The Relevant Rule 2 of Cenvat Credit Rules, 2004 reads as under :

"Input service" means any service, -

- (i) used by a provider of taxable service for providing an output service, or
- (ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal,

And includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage up to the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, training, computer networking, credit rating, share registry and security, inward transportation of inputs or capital goods and outward transportation up to the place of removal ;"

14 On a plain reading of Rule 2(1)(i), "input service" means any service used by a provider of taxable service for providing an output service, or any service used by the manufacturer whether directly or indirectly in or in relation to the manufacture of final products and clearance of final products

from the place of removal and includes services used in relation to setting up, modernization etc. advertisement or sales promotion, procurement of inputs, accounting, auditing etc., including computer networking etc. The definition of the term "Output service" under Rule 2 (p) of the Cenvat Credit Rules, 2004 means any taxable service provided by the provider of taxable service to a customer, client, subscriber etc. The explanation to the said clause makes it clear that if a person liable for paying Service Tax does not provide any taxable service or does not manufacture final products, the service for which he is liable to pay service tax shall be deemed to be the output service. Similarly, the definition of the phrase provider of taxable service appearing in Rule 2 (r) includes a person liable for paying Service Tax.

15 Therefore, on a conjoin reading of the aforesaid provisions, it is apparent that the mobile service provider who is liable to pay Service Tax and recovers the same by adding such "Service Tax in his bill is the person providing taxable service and is rendering "output service" so as to constitute "Input service" in the hands of the Noticee. The same holds true and good for Landline Telephones. This view finds support from the decisions delivered by Tribunal, Mumbai in case of M/s Indian Rayon and Industries Limited reported in 2006 (4) STR 79 (Tri. - Mumbai) and by Tribunal, New Delhi, Principal Bench in case of M/s Nice Telecommunication Pvt Ltd. Vs CCE, Jaipur as reported in 2007-TIOL-335-CESTAT-DEL. The Tribunal, New Delhi has held the same view in respect of input services of Telephone service and Mobile phone service in case of CCE, Raipur Vs HEG Ltd., as reported in 2010 (18) STR 446 (Tri.- Del).

Sales commission on finished goods cleared for home consumption :


16 Sales Commission is paid in the normal course of trade and this is an activity relating to business and it acts as an incentive to promote the Sales. On this point, I find that the definition of "input service" as provided under Rule 2(l) of the Cenvat Credit Rules, 2004 includes the sales commission as sales promotion is specifically covered under the said definition. The said definition also covers any activity relating to business and hence there is no ground to disallow the credit of Service Tax paid thereon under the Cenvat Credit Rules, 2004. I find that there is no allegation in the Show Cause Notice that the service relating to this item is not relating to business or sales promotion activities of the Noticee. It is alleged in the Show Cause Notice that the services relating to Sales Commission have been utilised after the goods have been cleared from the place of removal i.e. factory gate and that this service does not have any nexus with the manufacture of goods. In this context, I find that the definition of "input service" as referred above under Rule 2(l) (ii) of the Cenvat Credit Rules, 2004 covers activity of sales promotion and it is an activity relating to business and Cenvat Credit thereon is eligible for availment under the said Rules. For this view I rely on the decision of Tribunal, New Delhi in case of CCE, Raipur Vs HEG Ltd., as reported in 2010 (18) STR 446 (Tri.- Del) wherein it is held that the sales commission clearly relatable to sales promotion and is covered under definition of input services which specifically includes sales promotion and

credit thereon is admissible under Rule 2(l) and 3 of Cenvat Credit Rules, 2004.

17 In view of above discussion, I pass the following order.

ORDER

18 I hereby drop the proceedings initiated in Show Cause Notice No.V/15-19/DEM/HQ/2007 dated 27.02.2007 issued to M/s Gujarat Siddhee Cement Limited, Siddheeegram, Sutrapada, Dist-Junagadh.


(IMAMUDDIN AHMED)
Joint Commissioner,
Central Excise
Bhavnagar

F.No.V/15-19/DEM/HQ/2007

Date : 03.2012

To

M/s Gujarat Siddhee Cement Ltd.,
Siddheeegram-362 276
Taluka- Sutrapada, Dist-Junagadh.

Copy to :

- (1) The Commissioner, Central Excise, Bhavnagar (RRA)
- (2) The Assistant Commissioner, Central Excise, Junagadh
- (3) The Superintendent of Central Excise, AR-II, Veraval
- ✓ (4) Guard file.