

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**

REGIONAL BENCH – COURT NO.1

Service Tax Appeal No 77372 of 2019

(Arising out of Order-in-Appeal No...232/KOL-NORTH/KOL/2019 dated 29.07.2019 passed by Commissioner of CGST & CX, Kolkata)

M/s. Indian Coal Agency,
14, Bentick Street, Kolkata-700001.

Appellant

VERSUS

Commissioner of CGST & CX, Kolkata
180, Shantipally, Rajdanga Main Road, Kolkata-700 107.

Respondent

APPEARANCE :

Shri Tarun Chatterjee & Shri Raju Mondal & Ms. Sneha Das, Advocates for the Appellant

Shri S.K.Dikshit, Authorized Representative for the Respondent

CORAM:

HON'BLE MR.R.MURALIDHAR, MEMBER (JUDICIAL)

HON'BLE MR.K.ANPZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO...75911./2026.

DATE OF HEARING : 16.07.2026

DATE OF DECISION : 21.07.2026

Per R.Muralidhar :

The appellant had taken Cenvat Credit for the services rendered by the service providers on the basis of the supplementary invoice issued by them. The cenvat credit has taken in the year 2015-16. On the ground that the service provider had not discharged the service liability from 2010-11 to 2014-15. On the ground that they have discharged the Service Tax liability with interest and penalty after investigation was taken up during the February 2016, the Show Cause Notice was issued to the appellant that the Cenvat Credit taken by them based on the supplementary invoice is ineligible in terms of Rule 9 (1)(bb) of CCR 2004. The demand of Rs. 94,61,626/- was made on 14.09.2017 by way of the Show Cause Notice. After due process, the lower authorities have confirmed the demand. Therefore, the appellants are before the Tribunal.

2. The Ld. Counsel appearing on behalf of the appellant submits that in the entire Show Cause Notice there is nothing to show that any proceedings were initiated against the service provider alleging suppression and any demand of Service Tax from them. Therefore, he submits that in the absence of such documentary evidence the appellant cannot be denied the Cenvat Credit on the allegation of applicability of Rule 9(1)(bb) of the CCR 2004. He relies on the case laws of Kirloskar Ferrous Industries Ltd. He prays that the appeal may be allowed.

3. The Ld. Authorized Representative reiterates the findings of the lower authorities.

4. After going through the factual details of the case, we find that some investigation was taken up in February, 2016 against the service provider. Consequently, they have paid the demand along with penalty. Thereafter they have issued a supplementary invoice in 2016 and the appellant has taken the cenvat credit on 30.03.2016.

5. The Rule 9 (1) (bb) of the Cenvat Credit Rules 2004, reads as under:

(bb) a supplementary invoice, bill or challan issued by a provider of output service, in terms of the provisions of Service Tax Rules, 1994 except where the additional amount of tax became recoverable from the provider of service on account of non-levy or non-payment or short-levy or short-payment by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Finance Act or of the rules made thereunder with the intent to evade payment of service tax;

6. From the above Rule it can be seen that the embargo to the take Cenvat Credit in respect of any short payment or non-payment on account of suppression etc. would be applicable where the tax in

question has become 'recoverable'. This means that the demand of Service Tax on account of suppression / misstatement should have been confirmed after the Show Cause Notice is issued and no further appeal should be pending before the higher authorities. Even if the confirmed amount is being contested at the higher level by the service provider, it cannot be held as recoverable demand. In the present case there is nothing to show that even a Show Cause Notice was issued against the service provider, let alone the existence of "recoverable demand". Therefore, we find that the Revenue has not made out any case towards present demand against the appellant.

7. We also find in the case of **Kirloskar Ferrous Industries Ltd. Versus Commr. of C.T. & C.Ex., Belgaum, 2021 (48) G.S.T.L. 261 (Tri.-Bang.)**, the Tribunal has held as under:

2. Briefly the facts of the present case are that the appellant is a manufacturer of pig iron and un-machined castings falling under Chapters 72 and 73 of the First Schedule to Central Excise Act, 1985 and has been availing Cenvat credit on inputs, capital goods and input services under provisions of Cenvat Credit Rules, 2004. During the course of audit by the departmental officer, it was observed that the appellant have availed Cenvat credit of service tax paid by Shri K. Basavaraj under the category of Cargo Handling Services during the period March, 2016 on the basis of supplementary invoices issued by the service provider but verification conducted by the department revealed that the service provider Shri K. Basavaraj did not charge and collect service tax and filed nil return. Thereafter, on the advice of the jurisdictional Superintendent, Shri K. Basavaraj issued four supplementary invoices dated 4-3-2016 for collecting service tax of Rs. 25,54,522/- for the service provided during the period 1-4-2013 to 30-10-2015. Thereafter, the appellant paid the service tax as per the supplementary invoices dated 4-3-2016 for the service received during the period 1-4-2013 to 30-10-2015. The service provider has remitted the service tax along with interest as due. The department entertained a view that the credit availed by the appellant is ineligible in terms of Rule 9(1)(bb) of Cenvat Credit Rules, 2004 and consequently, issued show cause notice dated 16-2-2017 demanding Cenvat credit of Rs. 25,54,522/- along with interest and also proposed penalty. After following the due process, the original authority confirmed the demand along with interest and imposed equal penalty. Aggrieved by the said order, appellant filed appeal before the Commissioner (A), and Commissioner (A) upheld the Order-in-Original and rejected the appeal filed by the appellant. Hence,

the present appeal.

6. After considering the submissions of both the parties and perusal of the material on record I find that admittedly in the present case, no proceedings have been initiated against the service provider Shri K. Basavaraj by issuing any notice and there is no adjudication order against the service provider who paid the service tax on the advice of the jurisdictional Superintendent and issued the supplementary invoices dated 4-3-2016 and the appellant on the basis of the said supplementary invoices has taken the Cenvat credit. Further, I find that as per Rule 9 of Cenvat Credit Rules, 2004, supplementary invoices issued by the service provider is a valid and prescribed document for taking Cenvat credit and the only embargo for taking Cenvat credit is when the amounts as contained in the supplementary invoices become recoverable from the provider of service on account of non-levy or non-payment or short-payment or short-levy by reason of fraud, collusion, wilful mis-statement or suppression of facts and contravention of any of the provisions of the Finance Act, 1994 or Rules made thereunder with intention to evade payment of service tax as specified in Clause 9(1)(bb) of Cenvat Credit Rules, 2004. Further, I find that the show-cause notice, adjudication order and the Order-in-Appeal have not mentioned anything regarding the issuance of show-cause notice by the Proper Officer for recovery of service tax from the service provider Shri K. Basavaraj by invoking the proviso to Section 73(1) of the Finance Act, 1994. Further, in view of the judgment of Hon'ble Apex Court in the case of Metal Forgings v. UOI cited supra wherein it has been held that it is necessary under law to issue a show-cause notice specifically indicating the amount demanded and calls upon the assessee to show-cause any objection for such demand, but the same has not been followed in the present case. Further, I find that it has been consistently held by the Tribunal in the various decisions cited supra that in the absence of show-cause notice and determination that the additional amount of duty or tax become recoverable, the tax amounts paid by the service provider cannot be denied on the ground that provisions of Rule 9(1)(bb) of Cenvat Credit Rules, 2004 are attracted.

7. In view of my discussion above, I am of the considered opinion that the Cenvat credit of Rs. 25,54,522/- paid voluntarily by the service provider on the strength of supplementary invoices is admissible to the appellant as credit in terms of Rule 9(1)(bb) of Cenvat Credit Rules, 2004. Hence, I set aside the impugned order and allow the appeal of the appellant."

4. As per the factual details, statutory provisions and case law discussed above, we set aside the impugned order and allow the appeal.

5. The appellant would be eligible for consequential relief, if any, as per law.

(Dictated and pronounced in open court on ...21.07.2026.)

(R.Muralidhar)
Member (Judicial)

(K.Anpazhakan)
Member (Technical)

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