

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.04.2017

Coram

The Honourable **Mr.JUSTICE RAJIV SHAKDHER**
And

The Honourable **Mr.JUSTICE R.SURESH KUMAR**

C.M.A.No.860 of 2017

Commissioner of Service Tax-III,
"Newry Towers", 12th Main Road,
2nd Avenue, Anna Nagar,
Chennai – 600 040.

... Appellant

-Vs-

1. Customs, Excise & Service Tax Appellate Tribunal,
No.26, Sashtri Bhavan Annexe Building,
Haddows Road,
Chennai – 600 006.

2. M/s. SCIOinspire Consulting Services (India) Pvt Ltd,
TVH Belicia Tower 1, Level 6,
Block 94, MRC Nagar,
Chennai – 600 028.

... Respondents

Prayer:

Appeal filed under Section 35 G of the Central Excise Act, 1944,
against the order dated 05.07.2016 passed in Final Order No.41373 of
2016, by the Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Chennai.

For Appellant
For Respondents

: Mr.N.Senthil Kumar
: Mr.G.Natarajan for R2
R1 – Tribunal

J U D G M E N T

(Judgment of the Court was made by Rajiv Shakdher, J.)

1.This is an appeal preferred by the Revenue against the judgment and order dated 05.07.2016 passed by the Customs, Excise and Service Tax Appellate Tribunal (in short, the 'Tribunal').

1.1.The Revenue has referred following questions of law for our consideration:

"1. Whether the decision of CESTAT i.e. Respondent No.1 in allowing refund of Cenvat credit even without registration is correct?

2. Whether CESTAT i.e. Respondent No.1 is correct in not considering the safe guards, conditions and limitations as stipulated in the Appendix to Notification No.05/2006-CE (NT) dated 14.03.2006?

3. Whether CESTAT i.e. Respondent No.1 is correct in applying the ratio of the judgment of the Hon'ble Karnataka High Court in the case of M/s. mPortal Wireless Solutions Private Limited when the said judgment was not accepted on merits but due to low revenue effect?"

2. In order to adjudicate upon the appeal, the following brief facts are required to be noticed:

2.1. The respondent, hereafter referred to as the Assessee, is in the business of providing IT and Business Support Services.

2.2. The Assessee, admittedly, is registered with the Department, and accordingly, registration was accorded to it, in the first instance, on 23.01.2009, which was later on, amended, on 11.07.2013.

3. It appears, that the Assessee, filed a refund claim dated 31.10.2013, which was received in the office of the concerned Authority on the very same date. The refund claim was made by the Assessee, for a sum of Rs.4,56,924/-.

3.1. To be noted, the refund claim pertained to the period from October, 2012 to December, 2012.

4. The Assessee, in effect, sought input service tax credit qua services used in export of output services.

4.1. The Assistant Commissioner, Division - V, however, vide order dated 15.07.2015, partially allowed the refund claim, albeit, to the extent of Rs.86,457/-.

4.2.The balance amount, for which, refund was sought, was rejected by the said Authority, on two grounds: first, non-registration of the premises in issue, and second, on account of limitation.

4.3.Being aggrieved, the Assessee, preferred an appeal with the Commissioner of Service Tax (Appeals - II) (in short, the 'Commissioner').

4.4.The Commissioner, vide order dated 28.12.2015, reversed the order-in-original, in respect of the aforesaid aspects.

4.5.The Revenue, being aggrieved by the order passed by the Commissioner, preferred an appeal to the Tribunal.

4.6.The Tribunal, rejected the appeal of the Revenue, by virtue of the impugned judgment and order.

5.In so far as the issue, with regard to rejection of a part of the refund claimed, by the original Authority, i.e., Assistant Commissioner of Service Tax is concerned, the Tribunal followed the judgment of the Karnataka High Court in **mPortal India Wireless Solutions (P) Ltd. Vs. Commissioner of Service Tax, Bangalore, 2012 (27) S.T.R. 134 (Kar.)**.

5.1.The Tribunal, in fact, noted that the very same judgment had been followed by it, in its order dated 09.06.2016 [ST/40887 to

40892/2015], in the matter of ***KLA Tencor Software India Private Ltd. Vs. CST Chennai-III.***

5.2. Accordingly, the Tribunal, came to the conclusion that in the absence of a statutory provision, prescribing that, registration of the premises was mandatory for availing input service tax credit, the Assessee could not be denied refund of unutilized input credit on input services.

6. In so far as the aspect concerning limitation was concerned, the Tribunal, remanded the matter to the adjudicating Authority, with a direction to verify the date of receipt of foreign exchange, in India, to determine the relevant date of export.

6.1. It is against that part of the order, whereby, the Tribunal has held that the refund could be granted to the Assessee, even, if, the premises in issue were not registered, which has led to the institution of the present appeal by the Revenue.

6.2. This aspect of the matter also emerges upon a perusal of the questions of law, which have been articulated by the Revenue, in its appeal, filed before us.

6.3. Furthermore, learned counsel for the Revenue also affirms before us, that the aspect of limitation has not been raised in the

present appeal.

7. In so far as Question No.2 is concerned, it has not been pressed before us and rightly so, as it does not arise out of the impugned judgement and order. Though, it was not pressed before us during the course of arguments, we have, in any event, also examined the said notification bearing No.05/2006-CE (NT), dated 14.03.2006, as it forms part of grounds of appeal.

7.1. To our minds, a bare perusal of the said notification would show that it only sets out the procedure for claiming refund of unutilized input service credit. The only clause of the notification, which, perhaps, the Department could have relied upon, is Clause 3, which, to our minds, has no bearing on the issue arising in the instant case. For the sake of convenience, the relevant part of the said notification is extracted hereafter :

"Notification No.05/2006-Central Excise (N.T.)

14th March 2006

G.S.R. (E) In exercise of the powers conferred by rule 5 of the CENVAT Credit Rules, 2004 (hereinafter referred to as the said rules), and in supercession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.11/2002 - Central Excise (NT), dated 1st March, 2002, published in the Gazette of

India Extraordinary, vide number G.S.R.No.150(E), dated 1st March 2002, the Central Government hereby directs that refund of CENVAT credit shall be allowed in respect of :

(a) input or input service used in the manufacture of final product which is cleared for export under bond or letter of undertaking;

(b) input or input service used in providing output service which has been exported without payment of service tax, subject to safeguards, conditions and limitations, set out in the Appendix to this notification.

1. xxxxx

2. xxxxx

Provided that xxxxx

(a) xxxxx

(b) xxxxx

3. The manufacturer or provider of output service, as the case may be, submits an application in Form A annexed to this notification to the Deputy Commissioner of Central Excise or the Assistant commissioner of Central Excise, as the case may be, in whose jurisdiction-

(a) the factory from which the final products are exported is situated, along with the Shipping Bill or Bill of Export, duly certified by the officer of customs to the effect that goods have in fact been exported ; or

(b) the registered premises of the service provider from which output services are exported is situated, along with a copy of the invoice and a certificate from the bank

certifying realization of export proceeds."

7.2. A bare perusal of the clause would show that in so far as the provider of output services is concerned, for making an application for refund of CENVAT Credit, he is required to file an application in the prescribed form, i.e., Form A, which is annexed to the notification, and the said application is required to be made to the Deputy Commissioner of Central Excise, or, the Assistant Commissioner of Central Excise, as the case may be. In so far as the jurisdiction of the concerned Officer is concerned, the same is fixed, in consonance with the location of the registered premises of the service provider, from which, the output service are exported. Furthermore, the application is required to be accompanied with a copy of the relevant invoices and a certificate from the bank, indicating therein, the realization of export proceeds.

7.3. Apart from the aforesaid, there is no limitation. Clearly, the notification does not prohibit the grant of CENVAT credit, even, if, the premises are not registered. The fixation of jurisdiction of the concerned officer, to whom, an application is to be made, by correlating it, with the location of the registered premises, cannot, to our minds, by implication, be read in a manner that it obliterates the

rights of the exporter of output services, to claim refund of CENVAT credit.

7.4. Restriction, if any, is provided in clause 5 of the said notification, which states that refund of unutilised input credit will be restricted to the extent of the ratio of export turnover to the total turnover for the given period, to which, the claim relates. For the sake of convenience, relevant part of the clause 5 of the notification is extracted hereafter :

"5. The refund of unutilised input service credit will be restricted to the extent of the ratio of export turnover to the total turnover for the given period to which the claim relates, i.e., $\text{Maximum refund} = \frac{\text{total CENVAT credit taken on input services during the given period} \times \text{export turnover}}{\text{Total turnover}} \dots\dots\dots$ "

7.5. Therefore, there is no merit in the submission advanced on behalf of the Revenue that the said notification would disentitle the claim of the Assessee qua refund of CENVAT credit.

8. In so far as Questions No.1 and 3 are concerned, Mr.G.Senthil Kumar, who appears for the Revenue, in the course of his submissions, relied upon Rule 5 of the Cenvat Credit Rules, 2004, (in short, 2004

Rules), and Rule 4(2) and 4(3) of the Service Tax Rules, 1994 (in short, 1994 Rules).

8.1. For the sake of convenience, the necessary extracts of Rule 4 of the 1994 Rules, as also, the relevant parts of Rule 5 of 2004 Rules, are set forth below:

"1994 Rules:

4. Registration - (1) Every person liable for paying the service tax shall make an application to the concerned Superintendent of Central Excise in Form ST-1 for registration within a period of thirty days from the date on which the service tax under section 66B of the Finance Act, 1994 (32 of 1994) is levied:

Provided that where a person commences the business of providing a taxable service after such service has been levied, he shall make an application for registration within a period of thirty days from the date of such commencement :

Provided further that a person liable for paying the service tax in the case of taxable services referred to in sub-section (4) or sub-section (5) of section 66 of the Finance Act, 1994 (32 of 1994) may make an application for registration on or before the 31st day of December, 1998:

Provided also that a person liable for paying the service tax in the case of taxable services referred to in sub-clause (zzp) of clause (105) of Section 65 of the Act

may make an application for registration on or before the 31st day of March, 2005.

(1A) for the purposes of sub-rule (1), the Central Board of Excise and Customs may, by an order specify the documents which are to be submitted by the assessee along with the application within such period, as may be specified in the said order.

(2)Where a person, liable for paying service tax on taxable service,-

- (i) provides such service from more than one premises or offices; or*
- (ii) receives such service in more than one premises or offices; or*
- (iii) is having more than one premises or offices, which are engaged in relation to such service in any other manner, making such person liable for paying service tax, and has centralised billing system or centralised accounting system in respect of such service, and such centralised billing or centralized accounting systems are located in one or more premises, he may, at his option, register such premises or offices from where centralized billing or centralized accounting systems are located.*

(3) The registration under sub-rule (2), shall be granted by the Commissioner of Central Excise in whose jurisdiction the premises or offices, from where

centralised billing or centralised accounting is done, are located:

Provided that xxxxx

....."

2004 Rules:

5. Refund of CENVAT credit

(1) A manufacturer who clears a final product or an intermediate product for export without payment of duty under bond or letter of undertaking, or a service provider who provides an output service which is exported without payment of service tax, shall be allowed refund of CENVAT credit as determined by the following formula subject to procedure, safeguards, conditions and limitations, as may be specified by the board by notification in the Official Gazette :

Refund amount=

(Export turnover of goods +Export turnover of services

_____ X Net CENVAT credit

Total turnover

Where,___

(A) "Refund amount" means xxxxx

(B) "Net CENVAT credit" means xxxxx

(C) "Export turnover of goods" means xxxxx

(D) "Export turnover of services" means xxxx

Export turnover of services = payments received during the relevant period for export services + export services whose provision....

(E) "Total turnover" means xxxxx

(a) xxxxx

(b) xxxxx

(c) xxxxx

(2) xxxxx

PROVIDED xxxxx

PROVIDED FURTHER xxxxx

Explanation 1: xxxxx

(1) "export service" means xxxxx

(2) "relevant period" means xxxxx

Explanation 2: xxxxx

....."

8.2. Mere perusal of Rule 5 of the 2004 Rules, would, *inter alia*, show that where a service provider, provides an output service, which is exported, without payment of service tax, he would be entitled to refund of cenvat credit, as determined by the formula provided in the Rule.

8.3. The formula is not relevant for our purposes of adjudication of the issue raised in the instant appeal.

8.4. What is relevant to note is that Rule 5 of the 2004 Rules does not stipulate registration of premises as a necessary prerequisite for claiming a refund.

8.5. In so far as the Assessee in this case, is concerned, it had obtained registration of its premises way back on 23.01.2009. The

record shows that allegation of non-registration of premises relates to another building, which was taken on lease by the Assessee and is located in Alwarpet, Chennai. Concededly, services were exported to a overseas Company, from this building which was not registered. Similarly, Rule 4 of the 1994 Rules, *inter alia*, provides that in case where a person is liable for paying service tax on a taxable services, who provides for such services from more than one premises, he may at his option register one or more premises or offices from where centralized billing or accounting is done. Once, the Assessee conveys his option to the concerned Authority, registration under Rule 4(2) of the 1994 Rules is granted by the Commissioner of Central Excise, within whose jurisdiction, such premises or offices are located.

8.6.A perusal of the Sub Rules(2) and (3)of Rule 4 of the 1994 Rules, on which, reliance is placed by the learned counsel for the Revenue, does not bring to fore any limitation, with regard to grant of refund, for unutilized cenvat credit, qua, export services, merely on the ground that the premises are not registered.

8.7.As a matter of fact, in this particular case, only the “additional building, which was taken on lease and was located at Alwarpet, Chennai”, was not registered.

9.The view that has been articulated above, is also taken by the Karnataka High Court in ***mPortal India Wireless Solutions (P) Ltd. Vs. Commissioner of Service Tax, Bangalore, 2012 (27) S.T.R. 134 (Kar.)*** and in ***Commissioner of Service-Tax Vs. Tavant Technologies India Pvt. Ltd., 2016 (3) TMI 353.***

10.Furthermore, the Allahabad High Court, vide its judgment in the case of: ***Commissioner, Service Tax Commissionerate V. Atrenta India Pvt. Ltd., 2017 (2) ADJ 590***, has taken the same view.

11.For the sake of convenience, the relevant observations made in ***mPortal India Wireless Solutions (P) Ltd. Vs. Commissioner of Service Tax, Bangalore***, are extracted hereafter:

"6. The assessee is a 100 per cent export oriented unit. The export of software at the relevant point of time was not a taxable service. However, the assessee had paid input tax on various service. According to the assessee a sum of Rs.4,36,985/- is accumulated Cenvat credit. The Tribunal has categorically held that even though the export of software is not a taxable service but still the assessee cannot be denied the cenvat credit. The assessee is entitled to the

refund of the Cenvat credit. Similarly insofar as refund of Cenvat credit is concerned, the limitation under section 11B does not apply for refund of accumulated cenvat credit. Therefore, bar of limitation cannot be a ground to refuse cenvat credit to the assessee.

7. Insofar as requirement of registration with the department as a condition precedent for claiming Cenvat credit is concerned, learned counsel appearing for both parties were unable to point out any provision in the Cenvat Credit Rules which impose such restriction. In the absence of a statutory provision which prescribed that registration is mandatory and that if such a registration is not made the assessee is not entitled to the benefit of refund, the three authorities committed a serious error in rejecting the claim for refund on the ground which is not existence in law. Therefore, said finding recorded by the Tribunal as well as by the lower authorities cannot be sustained. Accordingly, it is set aside."

12. Since, this view, as indicated above, has been reiterated by the Karnataka High Court in the judgment rendered in the case of ***Commissioner of Service-Tax Versus Tavant Technologies India Pvt Ltd***, to avoid prolixity, the observation made in the said case are not extracted.

13. However, the same view has been taken by the Allahabad High Court in its judgment in the case of: ***Commissioner, Service Tax Commissionerate V. Atrenta India Pvt. Ltd., 2017 (2) ADJ 590***, passed in Central Excise Appeal No.214 of 2016. The relevant portions of which, for the sake of convenience, are extracted hereafter:

"12. Learned counsel for appellant has placed before us the rules made for refund of Cenvat Credit vide Notification:5/2006-C.E(N.T) dated 14.3.2006. The aforesaid rules have been framed in exercise of powers conferred by rule 5 of CENVAT Credit Rules 2004 and in supersession of earlier Notification. It provides that refund of Cenvat Credit shall be allowed in respect of:

.....

13. Rule 2 & 3 state that claim for refund would be submitted not once for any quarter in a calendar year and by manufacturer or provider of out put service by submitting an application in Form-A. The said rules are quoted as under:

"(2) The claims for such refund are submitted not more than once for any quarter that where, -

(a) The average export clearances of final products or the output services in value terms is fifty percent or more of the total clearances of final products or output services, as the case may be, in the preceding quarter; or

(b) The claim is filed by Export Oriented Unit, the claim for such refund may be submitted for each calendar month.

(3).....

14. Rule 4 provides that refund is allowed only in those circumstances where a manufacturer or provider of output service is not in a position to utilize the input credit or input service credit allowed under rule 3 of said rules against goods exported during the quarter or month to which the claim relates.

15. We do not find anything in the aforesaid rules which require registration as a condition or eligibility to claim refund. Even Form-A no where suggests

that any such condition must be observed.

20. The judgment of Madras High Court therefore, was clearly rendered in the facts of that case. Be that as it may, we are inclined to accept the view taken by Karnataka High Court considering the fact that in the rules of refund of Cenvat credit, we do not find any such requirement of registration as a condition precedent or eligibility condition for claiming refund."

14. We may, only indicate that the learned counsel for the Revenue has relied upon the judgment of a Division Bench of this Court, in the matter of ***Commissioner of Central Excise, Coimbatore Versus Sutham Nylocots, 2014 (306) E.L.T. 255 (Mad.)***; the relevant portion of which, for the sake of convenience, is extracted hereafter:

"17. Learned counsel for the assessee placed reliance on the decision of Formica India Division (cited supra). The said decision was also pressed into service before the First Appellate Authority and the First Appellate Authority while considering the aspect went into the factual issue and

pointed out that the assessee had not obtained Central Excise Registration Certificate while manufacturing industrial fabrics and had not followed any Central Excise procedural formalities while clearing such industrial fabrics and this aspect was not disputed by the assessee. Therefore the First Appellate Authority held that the assessee had not fulfilled the several conditions stipulated statutorily such as duty paid nature of the inputs, use of the duty paid inputs in the manufacture of dutiable finished goods to substantiate their claim for Cenvat credit. After taking note of the decision in the case of Formica India Division (cited supra), the First Appellate Authority pointed out that the assessee had not satisfactorily explained before the original authority or substantiated before the First Appellate Authority that they are entitled to the claim for Cenvat Credit. This finding of the fact recorded by the First Appellate Authority has not been set at naught by the Tribunal rather no reasons have been given by the Tribunal for permitting the credit to be availed by the assessee."

(emphasis is ours)

14.1. According to us, the said judgment is distinguishable on facts.

14.2. The Court, in the said case, was dealing with the provisions of Section 11AB of the Central Excise Act, 1944.

14.3. Furthermore, as is clearly evident from the observations made in paragraph 17, refund was denied, as findings of fact had been returned against the Assessee by the First Appellate Authority, to the effect, that proof of fulfillment of conditions statutorily stipulated for claiming refund, such as, duty paid, nature of inputs, use of duty paid inputs, in the manufacture of dutiable finished goods, was not provided, in order to substantiate the claim for cenvat credit.

14.4. In the present case, there is no dispute that the Assessee, has to its credit unutilized cenvat credit. Therefore, unlike, the facts obtaining in **Sutham Nylocots**, there is no dispute *inter-se* parties with regard to the details required to process the Assessee's claim for grant of refund.

14.5. The only ground, on which, refund claim made by the Assessee, was rejected, was that, the additional building taken on lease was not registered with the concerned Authority.

14.6. Therefore, according to us, no error can be found, in the approach adopted by the Tribunal.

15. In our view, Questions No.2 and 3 seeks to raise an issue of law, which, already stands covered against the Revenue. We are, in respectful agreement, with the views taken by the Karnataka and Allahabad High Courts, as articulated in their respective judgments to which reference is made hereinabove.

16.1. Accordingly, the appeal is dismissed.

16.2. However, there shall be no order as to costs.

17. Since, similar question of law arises for our consideration, in other matters, i.e., C.M.A.Nos.2333 and 2334 of 2015, the Registry will place the said matters for consideration.

(R.S.A, J.) (R.S.K, J.)
10.04.2017

Speaking Order/ Non Speaking Order
Index: Yes/No
Internet: Yes/No
asi/sli/pri

Note:

1. Issue order copy on or before 17.04.2017.
2. Since similar question of law arises for our consideration, in other matters, i.e., C.M.A.Nos.2333 and 2334 of 2015, the Registry will place the said matters for consideration.

To

Customs, Excise & Service Tax Appellate Tribunal,
No.26, Sashtri Bhavan Annexe Building,
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**RAJIV SHAKDHER, J.
And
R.SURESH KUMAR, J.**

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C.M.A. No.860 of 2017

10.04.2017