THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

<u>C.E.A. Nos.93, 99, 100 and 105 of 2015</u>

<u>COMMON JUDGMENT</u>: (*Per Hon'ble Sri Justice U.Durga Prasad Rao*)

The batch of C.E.A. Nos.93, 99, 100 and 105 of 2015 are filed by the appellant aggrieved by the final order Nos.20870-20881/2014 dt.21.05.2014 in Appeal Nos.ST/2837/2011-DB; ST/2832/2011-DB; ST/2831/2011-DB and ST/2838/2011-DB respectively passed by the Customs, Excise and Service Tax Appellate Tribunal (for short "CESTAT"), South Zonal Bench, Bangalore.

2) The common factual matrix of all the appeals is thus:

a) The respondent/assessee—M/s.Hyundai Motor India Engineering Private Limited is a 100% Export Oriented Unit (EOU) registered under the Software Technology Parks of India (STPI) for export of computer software and ITES under the category of consulting engineering service. Its basic area of work is providing product designs, modeling and analysis in car engineering etc. The assessee entered into agreements with two car manufacturers in South Korea for providing design and analysis services. The assessee filed 13 refund claims under Section 11B of Central Excise Act, 1944 (for short "Excise Act") in respect of unutilized service tax paid on various input services under Rule 5 of Cenvat Credit Rules, 2004 r/w Notification No.5/2006-CE(NT) dated 14.03.2006. The adjudicating authority i.e. Deputy Commissioner, Service Tax, Hyderabad-IV sofaras the claims covered by batch of present appeals are concerned, in his order dt.18.05.2011 in original(R) Nos.6 and 8 of 2011 partly allowed the refund claims while disallowing the major part of the claims and in original (R) No.13 and 14 of 2011 disallowed the total refund claim.

b) Aggrieved, the assessee preferred batch of Appeal Nos.16 to 28 of 2011 before the Commissioner, Appeals-II, Hyderabad. Those 13 appeals were dismissed by the learned Commissioner, Appeals-II in his common order dated 22.07.2011.

c) Aggrieved by the above dismissals, the assessee preferred batch of appeals—ST/2827/2011-DB to ST/2838/2011-DB before the CESTAT. Learned CESTAT formulated three points in the batch of appeals viz.

> *I. Whether relevant date specified under Section 11B of Central Excise Act 1944 is relevant for refunds under Rule 5 of the CENVAT Credit Rules, 2004 read with Notification 5/2006-C.E. (N.T.) dated 14.03.2006?*
>
> *II. Eligibility of services as input services for grant of refund.*
>
> *III. Whether CENVAT credit availed on the input services before payments for the services received?*

4 a) The first issue is concerned, relying on the judgment in the case of ***Commissioner of Central Excise, Pune-I vs. Eaton Industries Private Limited***[[1]], the CESTAT held that relevant date for filing the refund application under Section 11B of Excise Act would be the date of receipt of consideration for services rendered and not the date when the services were provided. Thus, the CESTAT held that the refund claims were within time if the date of receipt of consideration is taken into account.

b) Then as regards admissibility of CENVAT credit on construction services, CESTAT relied upon the decision of ***INFOSYS Limited vs. Commissioner of Service Tax, Bangalore***[[2]] wherein the definition of input services has been considered and admissibility of CENVAT credit in respect of various services and the rationale to take such view has been discussed. Basing on the aforesaid judgment and on the prayer of the counsel for assessee that the matter may be remanded for calculating the refund, the CESTAT held that in respect of construction services credit would be admissible and in respect of other services the original adjudicating authority should consider each service separately in the light of decision in ***Infosys Ltd.'s*** case (2 supra)**.** Accordingly the CESTAT had set aside the impugned orders and remanded the matters to the original adjudicating authority to consider the refund claims afresh in respect of other claims, except for construction services and determine the admissible refundable amount in accordance with law.

c) Aggrieved by the final orders of CESTAT, Bangalore, the Commissioner of Customs, Central Excise and Service Tax, Hyderabad-IV filed the batch of appeals.

5) Heard.

6) The points that arise for consideration in this batch of appeals are:

> 1) *Whether the CESTAT is correct in holding that the assessee was within time in claiming refund without discussing the Sec.11B relevant for refunds under Rule 5 of CCR, 2004 read with Notification No.05/2006-CE(NT) dt.14.3.06 and merely relying on the decision of Hon'ble CESTAT, Mumbai in the case of* ***CCE, Pune-I vs. Eaton Industries Pvt. Ltd. (2011(22) STR 223 (Tri-Mumbai)****?*
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> 2) *Whether CESTAT is correct in holding that the assessee is eligible to claim of refund of CENVAT credit on construction service relying on case of* ***Infosys Ltd. (2014 TIOL 409 CESTAT BANG)****?*
>
> 3) *Whether the Tribunal is correct in remanding the matter with regard to the claim of refund of CENVAT credit on other services such as courier service, repair or maintenance services, telephone service, rent-a-cab service, management consultant service, chartered accountant service etc, since the said services are not having nexus with their output services i.e Consulting Engineering Service which was exported online?*

7) **<u>POINT No.1</u>:** As stated supra, the CESTAT Bangalore, relying on the judgment in ***Eaton***'s case (1 supra), held that the relevant date for filing the refund application under

Sec.11B of the Excise Act would be the date of receipt of consideration for service rendered and not the date when the services were provided. This finding of the CESTAT is challenged in the appeals on the main plank of argument that there is a contrary decision reported in ***M/s.Affinity Express India Pvt. Limited vs. Commissioner of Central Excise, Pune-I***[3]. Hence the point is whether ***M/s.Affinity***'s case (3 supra) will have any impact on the present appeals.

a) In ***Eaton***'s case (1 supra), a learned Single Member of Mumbai Tribunal held that in case of export of service, the relevant date is the date when the assessee has received the payment of service exported and within one year from that date, the assessee is required to file the refund claim. In a subsequent decision in ***M/s.Affinity***'s case(3 supra) relied upon by the appellant, another learned single Member of Mumbai Tribunal took a contra view to the effect that the relevant date for determining the period of limitation will be the date of export of services or the date when the invoices are raised. Thus both the above decisions rendered by Single Members are contrary to each other. However, the matter was not ended there. In ***Business Process Outsourcing India Private Limited vs. C.C & S.T, Bangalore***[4]**,** a learned Single Member of the Bangalore Tribunal expressed the view that the date on which consideration was received was relevant for making refund claim. Thereafter in ***Commissioner of Service Tax, Goa vs. Ratio Pharma India Private Limited***[5], a single Member of the Tribunal-Mumbai, having found the dichotomy between ***M/s.Affinity***'s case (3 supra) and ***Business Process Pvt. Ltd.***'s case (4 supra) referred the matter to a larger Bench. The Larger Bench of CESTAT, West Zonal Bench, Mumbai having noticed the decision of a Division Bench of Tribunal, Delhi in ***Bechtel India Pvt. Ltd. vs. Commissioner of Central Excise, Delhi***[6] to the effect that the refund can be claimed after foreign exchange was received in India in respect of export of service, held that in view of the Division Bench decision and as no contrary decision was brought to its notice, no reference lies to the larger Bench. Thus in essence, the decision in ***Bechtel***'s case (6 supra) being a decision rendered by Division Bench was approved and held to prevail over the decision in ***M/s.Affinity***'s case (3 supra) relied upon by the appellant. As such, the decision in ***M/s.Affinity***'s case (3 supra) will not have any impact on the present appeals.

8) **POINT No.2**: This point is concerned, the CESTAT, Bangalore relying upon the decision of ***Infosys Ltd.'s*** case (2 supra) wherein the decision of input services has been considered and admissibility of CENVAT Credit in respect of various services and the rationale to take such view has been discussed, held that the assessee is entitled to the

CENVAT Credit on construction services. With regard to the other claims, the CESTAT remanded the matter to the original adjudicating authority to consider the refund claims afresh. It should be noted that the appellant in the Grounds of Appeal mentioned that as against the ***Infosys Ltd.'s*** case (2 supra), the department filed appeal before the Hon'ble Apex Court and the same is pending but failed to produce copy of the Grounds of Appeal or any stay order granted by Hon'ble Apex Court staying the judgment in ***Infosys Ltd.'s*** case (2 supra). It is also not known whether a final order is passed by the Apex Court in the said alleged appeal. In these circumstances, we can only uphold the decision of the CESTAT, Bangalore relying on ***Infosys Ltd.'s*** case (2 supra). This point is accordingly answered against the appellant.

9) **<u>POINT No.3</u>**: This point is concerned, the CESTAT, Bangalore only remanded the matter to the original adjudicating authority to consider the other refund claims afresh. As such, we do not find any infirmity or irregularity therein. The appellant can put-forth its objections if any with regard to those claims and the original adjudicating authority can pass an order on merits with regard to the other claims. Accordingly this point is answered.

10) In the result, in view of the above findings, we do not find any merits in the batch of appeals and accordingly, the appeals are dismissed. No costs.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

SANJAY KUMAR, J

U. DURGA PRASAD RAO, J

Date: 22.07.2016
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[1] 2011 (22) S.T.R. 223 (Tri.-Mumbai)
[2] 2015 (37) S.T.R. 862 (Tri.-Bang)
[3] 2015 (37) S.T.R. 321 (Tribunal)
[4] 2014 (34) S.T.R 364 (Tri.-Bang)
[5] 2015 (39) S.T.R. 31 (Tri.-Larger Bench)
[6] 2014 (34) S.T.R. 437 (Tri.- Del)