

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 22.12.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

C.M.A.No.3493 of 2017

The Commissioner of GST & Central Excise,
Chennai South Commissionerate
MHU Complex,
No.692, Anna Salai,
Nandanam, Chennai-600 035.

.. Appellant

Vs.

BNP Paribas Sundaram Global Securities
Operations Pvt Ltd,
Centre point II, Plot No.8,
Ekkaduthangal Road,
Thiru Vi Ka Industrial Estate, Guindy,
Chennai - 600 032.

.. Respondent

Prayer: Civil Miscellaneous Appeal filed under Section 35 G of
Central Excise Act, Read With Section 83 of Finance Act, 1944,
against the Final Order No.40778 of 2017, dated 22.05.2017, on
the file of the Customs Excise and Service Tax Appellate
Tribunal, South Zonal Bench, Chennai.

For Appellant : Ms.Aparna Nandakumar

JUDGMENT

(Judgment of this Court was made by S.MANIKUMAR, J.)

Civil Miscellaneous Appeal is filed against the Final Order
No.40778 of 2017, dated 22.05.2017, on the file of the Customs
Excise and Service Tax Appellate Tribunal, South Zone Bench,
Chennai.

2. Short facts leading to the appeal are that, M/s. BNP
Paribas Sundaram Global Securities Operations Private Limited,
Chennai, (hereinafter called 'Respondent') is an 100 % EOU,
engaged in providing Business Auxiliary Service and Business
Support Service. The respondent filed refund claim with the
Assistant Commissioner of Service Tax, Division III, for
Rs.71,36,924/- for the service tax paid, on the input service
tax credit taken, during the period January 2013 to March 2013
under Rule 5 of the CENVAT Credit Rules, 2004. The adjudicating

authority sanctioned refund of Rs.37,25,023/- and rejected the remaining amount on the ground of Non-Registration of premises and ineligible CENVAT credit on Car parking charges. The adjudicating authority rejected refund on CENVAT credit, on the following services, for the reasons stated, in the following Table, in Order-in-Original No.05/2016 dated 27.01.2016.

S.No .	Refund of CENVAT credit claimed on	Rejected amount (Rs.)	Reasons for rejection
01.	Car Parking Charges	1557	Not an input service as per Rule 2(I) of CENVAT credit Rules
02.	Challan for payment under reverse charges not submitted	17072	
03	Service Tax amount not mentioned in invoices	60486	
04.	Unregistered premises at Principal Tower, College Road, Chennai	17721	The premises were not registered.
05.	Services received at 4th and 5th Floor of Menon Eternity, New Door No.165, St.Mary's Road, Alwarpet, Chennai-18.	1668253	The premises were not registered at the time of export but subsequently obtained Registration.
06.	Services received at International Tech Part Unit No.1 to 4, 11th Floor Taramani Chennai.	1357366	
		3122455	

3. The respondent also filed a refund claim with Assistant Commissioner of Service Tax, Division III, for Rs.65,02,602/- for the service tax paid, on input service tax credit taken, during the period April 2013 to June 2013 under Rule 5 of the CENVAT Credit Rules, 2004. The adjudicating authority sanctioned refund of Rs.33,01,688/- and rejected the remaining amount, on the ground of Non-Registration of premises and ineligible CENVAT credit on Car parking charges. The adjudicating authority rejected refund of CENVAT credit, on the following services for the reasons stated in the following table, in the Order-in-Original No.12/2016 dated 17.02.2016:

S.No.	Refund of CENVAT credit claimed on	Rejected amount (Rs.)	Reasons for rejection
1.	Unregistered Premises at Mumbai	30282	Not an input service as per Rule 2(I) of CENVAT credit Rules
2.	Translation of exit clearance documents for employees	99	
3.	Rental charges for scrubbing machine	1548	
4.	Services received at 4th and 5th Floor of Menon Eternity, New Door No.165, St.Mary's Road, Alwarpet, Chennai-18.	1596745	The premises were not registered at the time of export but subsequently obtained Registration.
5.	Services received at International Tech Park Unit No.1 to 4, 11th Floor Taramani Chennai.	1241139	
		2869813	

4.1. Aggrieved by the above orders, the respondent filed appeal before Commissioner (Appeals), viz., the first appellate authority. Commissioners (Appeals). Vide combined Order-in-Appeal No.51 and 52/2016 dated 26.04.2016, the first appellate authority set aside a portion of the order of the original authority, and allowed refund, as detailed below:

S.No.	Services	Allowed by Commissioner (Appeals)	
		OIO No.05/2016	OIO NO.12/2016
01.	Car Parking Charges	1557	0
02.	Rental Charges for scrubbing machine	0	1548
03.	Services received at 4th and 5th Floor of Menon Eternity, New Door No.165, St.Mary's Road, Alwarpet, Chennai-18	1668253	1596745
04.	Services received at International Tech Park Unit No.1 to 4, 11th Floor Taramani Chennai.	1357366	1241139

4.2 In so far as SI.No.3 and 4 of the above table are concerned, the Commissioner (Appeals) observed that Registration is not mandatory to take credit and to claim refund, and held that non-registration of premises cannot be a ground to reject refund claim. Accordingly, he set aside the impugned order to the extent of rejection of the portion of the refund claim, done on the ground of Non-registration, on the services pertaining to the respondent premises of the 4th and 5th Floor (Menon Eternity) and the premises at Taramani, considering the fact that Registration was obtained subsequently for the above premises. The Commissioner (Appeals) further observed that in respect of the premises at Mumbai and at College Road, Chennai, the respondent had not produced any Registration Certificate for these premises. Hence, upheld disallowance of CENVAT credit to these premises.

4.3 In respect of Car Parking charges, Commissioner(Appeals) has observed that the parking area cannot be considered as a separate area and it is a part of the premises occupied by the respondent. He also held that once, service tax paid on the rental charges is eligible for CENVAT credit, then service tax paid on the car parking charges is equally eligible for CENVAT credit and thus set aside the disallowance of CENVAT credit.

4.4 In respect of rental charges paid for scrubbing machine, Commissioner (Appeals) observed that scrubbing machine was used for cleaning the office of the respondent and it has nexus with the provision of their output service and thus the said service, is qualified as input service, for taking CENVAT credit, as per the definition of the input service and set aside disallowance of CENVAT credit.

4.5 While the Commissioner (Appeals) decision allowing the credit in respect of Car Parking Charges and Rental charges for scrubbing machine was found acceptable, the decision in respect of credit availed on the inputs received, in the premises which were not registered, prior to export, but subsequently obtained Registration was found to be not legally correct, on the above finding the respondent filed an appeal before CESTAT.

5. CESTAT, Madras, vide FO No.40778 dated 22/05/2017 held inter alia that:

(i) Revenue is aggrieved that the Commissioner (Appeals) has not appreciated the judgment of Hon'ble High Court in the case of Sutham Nylocots as reported in 2014 (306) ELT 255 (Mad.)

(ii) Hon'ble High Court in the subsequent judgment passed on 10/04/2017 in the case of M/s Scioinspire Consulting Services has distinguished the facts contained in Sutham Nylocots.

(iii) Hon'ble High Court agreeing with the views on identical issue of law taken by the Hon'ble High courts of Karnataka and Allahabad in mPortal India Wireless Solutions P Ltd., Tavant Technologies I P Ltd. & Atrenta India has upheld the decision of the Tribunal that refund could be granted to the assessee even if the premises in issue were not registered. (iv) The judgment of the jurisdictional Hon'ble High Court is fully applicable to the facts and issue involved in respect of the impugned appeals. By holding the above, the Hon'ble CESTAT has dismissed the appeals filed by the Department."

6. Final order of CESTAT, Madras, No.40778 of 2017 dated 22.05.2017, is assailed on the following substantial questions of law :-

- "1. Whether the decision of Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai (CESTAT for Short) in Allowing refund of Cenvat credit even without registration is correct?
2. Whether CESTAT is erred in not considering the safeguards, conditions and limitations as stipulated in the Appendix to the Notification No.27/2012-CE(NT), dated 18.06.2016."

7. Supporting the prayer, Ms.Aparna Nandakumar, learned counsel for the appellant submitted that registration is an act by which every manufacturer/assessee/service provider, comes under the ambit of Central Excise Act, 1944 / Finance Act, 1994. In order to avail any substantive benefit, like, CENVAT Credit available under the statute, registration of premises from which the taxable service is rendered is a pre-requisite. Therefore, when registration has not been done as per Section 69 of the Act, the respondent is not entitled for refund of CENVAT read with rule 4(1) of the Rules which render them ineligible for CENVAT credit on input services accumulated prior to registration.

8. Learned counsel for the appellant further submitted that the respondent is not entitled for refund of CENVAT credit in respect of input or input service used, in export of service, without payment of service tax, prior to the date of their being registered with service tax department. According to her, the issue involved in these appeals, is not a mere technical lapse. In order to derive any substantive benefit of any Act/Rule, the person claiming such substantive benefit has to strictly follow the conditions and procedures stipulated. CESTAT, Madras, has failed to consider the safeguards and conditions stipulated in Appendix to Notification No.5/2006-CE(NT), dated 14.03.2006

{condition Na.3(b)} wherein, it is stated that refund of CENVAT credit shall be allowed only in respect of the registered premises of the service provider from where the output services are exported.

9. Learned counsel for the appellant also submitted that a Larger Bench of CESTAT, New Delhi in the case of Steel Strips vs CCE, Ludhiana - 2011 (269) ELT (Tri-Del) vide para 5.16 held as follows:

"Modvat law has codified procedure for adjustment of duty liability against Modvat Account. That is required to be carried out in accordance with law and unadjusted amount is not expressly permitted to be refunded. In absence of express provision to grant refund, that is difficult to entertain except in the case of export. There cannot be presumption that in the absence of debarment to make refund, in other cases that is permissible. Refund results in outflow from treasury, which needs sanction of law and an order of refund for such purpose is sine qua non. Law has only recognized the event of export of goods for refund of Modvat credit as has been rightly pleaded by Revenue and present reference is neither the case of "otherwise due" of the refund nor the case of exported goods. Similarly absence of express grant in statute does not imply ipso facto entitlement to refund. So also absence of express grant is an implied bar for refund. When right to refund does not accrue under law, claim thereof is inconceivable. Therefore, present reference is to be answered negatively and in favour of Revenue since refund of unutilized credit is only permissible in case of export of goods and for no other reason whatsoever that may be"

10. Learned counsel for the appellant submitted that CESTAT, Madras, erred by stating that the respondent was entitled to credit and refund, in view of non-taxability of export service. This is for the reason that Rule 4 of Export of Service Rules, 2005 permitted a service provider to export services, without payment of service tax, and there is liability to pay service tax, on export of service, but for this rule. Hence, for export of service by a service provider, registration is a sine qua non for procedural and substantive compliance. The judgment of this Court, in the case of Commissioner of Service Tax, Chennai -III Vs. M/s Scioinspire Consulting Services (India) P Ltd., applied by CESTAT, Madras, for deciding the appeal in favour of the respondent, was accepted by the department due to monetary limit and not on merits, and therefore, learned counsel for the

appellant submitted that the ratio of the said judgment, should not have been taken as a binding precedent, in view of Section 35R (3) of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994. The subsequent decision of CESTAT, Madras, vide FO No. 42500/2016 dated 20/12/2016 in the case of the same party viz., M/s Scioinspire Consulting Services (India) P Ltd. was also appealed in this Hon'ble Court, by the department vide CMA. Sr. No.54980 of 2017.

11. Learned counsel for the appellant further submitted that a Hon'ble Division Bench of this Court, in the case of Commissioner of Central Excise, Coimbatore Vs Sutham Nylocots, vide final order in CMA No.926/2006, dated 09.01.2014, reported in 2014 (306) E.L.T. 255 (Mad) held that 'if at all the assessee is entitled to any credit it would accrue only subsequently to the date of the registration with the Department'. Hence, refund of unutilized input CENVAT credit taken towards rendering the input services availed and used in providing taxable output services exported would not arise, prior to the date of registration.

12. We have heard learned counsel for the appellant and perused the materials available on record.

13. On same set of facts, namely, in the matter of Commissioner of Services Tax-III, Chennai Vs. M/s. Scioinspire Consulting Services India Private Limited, Chennai and another, in C.M.A.No.860 of 2017, the following substantial questions of law were framed:-

"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 effects?"

14. After considering the provisions, relevant notifications and decisions in M/s.mPortal India Wireless Solutions Private Limited V. Commissioner of Service Tax, Bangalore, reported in 2012 (27) S.T.R.134 (Kar.); in Commissioner of Service Tax V. Tavant Technologies India Private Limited, reported in 2016 (3) TMI 535; in Commissioner, Service Tax Commissionerate V. Atrenta

India Private Limited, reported in 2017 (2) ADJ 590; and in Commissioner of Central Excise, Coimbatore Vs. Sutham Nylocots, reported in 2014 (306) E.L.T. 255 (Mad), a Hon'ble Division Bench, answered the above said substantial questions of law, raised therein, against the revenue. Following the decision in C.M.A.No.860 of 2017, dated 10.04.2017, instant Civil Miscellaneous Appeal No.3493 of 2017, filed by the revenue, on the same substantial questions of law is liable to be dismissed.

15. Accordingly, Civil Miscellaneous Appeal is dismissed. No Costs. The facts and circumstances of the substantial questions of law are answered against the revenue.

s/d-

Assistant Registrar (CS VII)

True Copy

Sub-Assistant Registrar

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To

The Commissioner of GST & Central Excise,
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+1 CC to Ms. Aparna Nandakumar, Advocate sr 92184.

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C.M.A.No.3493 of 2017

BR (CO)
SP (08/02/2018)

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