

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.06.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR  
AND  
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.1052 of 2018

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

versus

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/Petitioner

Prayer: Civil Miscellaneous Appeal is filed under Section 35G of Central Excise Act, 1944, read with Section 83 of Finance Act, 1994 against the Final Order No.41584 of 2017 dated 31.07.2017 in Appeal No.ST/41291/2016-DB of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (CESTAT).

For Appellant : Mrs.Aparna Nandakumar  
Sr. Standing Counsel for  
GST, Central Excise, Customs &  
Service Tax.

JUDGMENT

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

Civil Miscellaneous Appeal is directed against the order of the Customs Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (CESTAT) dated 31.07.2017 in Final Order No.41584 of 2017.

2. It is the case of the appellant that M/s.BNP Paribas Sundaram Global Securities Operations Private Limited, Chennai,

respondent is an 100% EOU, engaged in providing Business Auxiliary Service and Business Support Service. Respondent filed refund claim with Assistant Commissioner of Service Tax, Division III, for Rs.71,39,495/- for the service tax paid on input service tax credit taken during the period October 2012 to December 2012 under Rule 5 of the CENVAT Credit Rules, 2004. The adjudicating authority sanctioned a refund of Rs.42,06,199/- 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 the Order-in-Original No.32 of 2015 dated 30.10.2015.

| S.No . | Refund of CENVAT Credit claimed on                                                                                                      | Rejected amount (Rs.) | Reasons for rejection                                        |
|--------|-----------------------------------------------------------------------------------------------------------------------------------------|-----------------------|--------------------------------------------------------------|
| 01     | Event Management Service                                                                                                                | 40417                 | Not an input service as per Rule 2(I) of CENVAT credit Rules |
| 02     | Car Parking Charges                                                                                                                     | 111240                |                                                              |
| 03     | Other services like entertainment, T-Shirt, printing etc.                                                                               | 36144                 |                                                              |
| 04     | Unregistered premises at Mumbai                                                                                                         | 86947                 | The premises were not registered                             |
| 05     | Unregistered premises at Principal Tower, College Road, Chennai                                                                         | 11293                 |                                                              |
| 06     | Services received at 4 <sup>th</sup> and 5 <sup>th</sup> Floor of Menon Eternity, New Door No.165, St.Mary's Road, Alwarpet, Chennai-18 | 1486920               | The premises were not registered at the time of export but   |
| 07     | Services received at International Tech Park Unit No.1 to 4, 11 <sup>th</sup> Floor, Taramani Chennai.                                  | 1144872               | subsequently obtained Registration.                          |

3. Aggrieved by the above orders, the respondent filed an appeal before Commissioner (Appeals). The first appellate authority, Commissioner (Appeals) vide combined Order-in-Appeal No.24/2016 dated 18.02.2016 set aside a portion of the order of the original authority, and allowed refund as detailed above:

| S.No | Services                                                                                                                                  | Sanctioned by Commissioner (Appeals) | Sl.No. As in table at para 2 above. |
|------|-------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------|-------------------------------------|
| 01   | Car Parking charges                                                                                                                       | 111240                               | 2                                   |
| 02   | Services received at 4 <sup>th</sup> and 5 <sup>th</sup> Floor of Menon Eternity, New Door No.165, St.Mary;s Road, Alwarpet, Chennai - 18 | 1486920                              | 6                                   |
| 03   | Services received at International Tech Park Unit No.1 to 4, 11 <sup>th</sup> Floor Taramani Chennai                                      | 1144872                              | 7                                   |

4. In so far as Sl.No.2 and 3 of the above table are concerned, Commissioner (Appeals) observed that the Registration is not mandatory to take credit and to claim refund, held that non-registration of premises cannot be a ground to reject the refund claim. Accordingly, set aside the impugned order to the extent of rejection of part of the refund claim, on the ground of Non-registration, on the services pertaining to the 2<sup>nd</sup> respondent's premises of the 4<sup>th</sup> and 5<sup>th</sup> Floor (Menon Eternity) and premises at Taramani, considering the fact that Registration was obtained subsequently for the above premises. The Commissioner (Appeals) observed that in respect of the premises at Mumbai and College Road, Chennai that the assessee had not produced any Registration Certificate for these premises. Hence, upheld the disallowance of CENVAT credit to these premises.

5. In respect of Car parking charges, Commissioner (Appeals) 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 the 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 set aside the disallowance of CENVAT credit and upheld the disallowance of CENVAT credit in respect of Event Management service.

6. While the decision of the Commissioner (Appeals) allowing the credit in respect of Car Parking Charges was found acceptable, the decision in respect of credit availed on the inputs received in the premises which was not registered prior to export, but subsequently obtained Registration was found to be not legally correct and hence the Department filed an appeal before CESTAT.

7. Contentions of the appellant herein were not accepted by CESTAT, Madras and vide FO No.40778 dated 22/05/2017 dismissed the appeal, as hereunder:

"2. On 21.07.2017, when the matter came up for hearing, on behalf of the department Ld.AR, Shri K.P.Muralidharan, AC, submits that the Division Bench of the Hon'ble High Court of Madras in the case of CCE, Coimbatore Vs. Sutham Nylocots - 2014 (306) ELT 255 (Mad.) has held that credit accrues only after the date of registration, hence any substantive benefit with regard to credit availed after the date of registration.

3. On the other hand, Ld.Advocate appearing on behalf of the respondent-assessee Shri Joseph Prabhakar submits that in their own case on identical issue, the tribunal vide Final Order No.40773 - 40779/2017 dated 22.05.2017, has held in favour of them by following the judgment of the Hon'ble High Court of Madras in Scionspire Consulting Services (I) Pvt. Ltd.

4. We find that the Ld. Advocate for the respondent assessee is correct in his submission. This tribunal vide Final Order No.40773-40779/2017 dated 22.05.2017, has held as follows:

7.2. From the grounds of appeal and statement of facts at page 17 of the appeal folder, it is seen that Revenue is aggrieved that the Commissioner (Appeals) has not appreciated the judgment of the Hon'ble Madras High Court in the case of Commissioner of Central Excise, Coimbatore Vs. Sutham Nylocots as reported in 2014(306) ELT 255 (Mad.). No doubt, the Hon'ble High Court in the said judgment had ruled that credit accrued can take effect only after the date of registration, however, the Hon'ble High Court in the subsequent judgment passed on 10.4.2017 in the case of Scioinspire Consulting Services, referred to supra, have distinguished the facts contained in Sutham Nylocots observing that the said case was dealing with the provisions of Section 11AB of the Central Excise Act, 1944 and that the only ground rejection of the refund therefor was that the additional building was not registered with the concerned authority. The 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 Pvt. Ltd. Vs. Commissioner of Service Tax, Bangalore [2012(27) STR 134(Kar)], Commissioner of Service Tax, Bangalore Vs. Tavant Technologies India Pvt. Ltd. [[2016] 94 VST 254 (Karn)] and Commissioner of Service Tax Vs. Atrenta India [2016-VIC-713-ALH-ST] has upheld the decision of the Tribunal that refund could be granted to the assessee even if the premises in issue were not registered. In our opinion, the judgment of the jurisdictional Hon'ble High Court is fully applicable to the facts and issue involved in respect of all these appeals before us.

8. In the event, respectfully following the judgment of the Hon'ble High Court of Madras in Sciainspire Consulting Service (India) Pvt. Ltd.(supra), we have no hesitation whatsoever in dismissing all these appeals filed by the department. Ordered accordingly.

5. As there are no new facts and circumstances, that has been pointed out in the present case, we follow the ratio already laid down in the above said final order of the tribunal and dismiss the appeal of the department."

8. Aggrieved over the same, instant Civil Miscellaneous Appeal is filed 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, i.e. 1<sup>st</sup> respondent 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".

9. Supporting the prayer sought for, Ms.Aparna Nandakumar, learned counsel for the revenue submitted that:

(i)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 given under the statute, registration of premises from which the taxable service is rendered is a pre-requisite. Therefore, by not obtaining registration as per Sec.69 of the Act in

this case, the respondent is not entitled for refund of CENVAT read with rule 4(1) of the Rules had rendered them ineligible for CENVAT credit on input services accumulated prior to registration.

(ii) In this case, 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.

(iii) 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 or prescribed therein. CESTAT failed to consider the safeguards and conditions stipulated in Appendix to Notification No.5/2006-CE(NT) dated 14.03.2006 {Condition No.3(b)} where in 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.

(iv) It has been held that registration was not a pre-requisite to claim refund under Rule 5 of CENVAT Credit Rules, 2004. However, the Larger Bench of CESTAT, New Delhi in the case of Steel Strips Vs. CCE, Ludhiana - 2011 (269) ELT (Tri-Del) vide para 5.16 has categorically stated that

"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".

From the above, it may be seen that the facts of the above case, ie. absence of express grant in statute does not imply ipso facto entitlement to refund applies to the present case also.

(v) The Hon'ble CESTAT, had fallen into error 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 thus, 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.

(vi) The judgment of the Hon'ble High Court of Madras in the case of Commissioner of Service Tax, Chennai-III Vs. M/s.Scionispire Consulting Services (India) P Ltd., applied by CESTAT for deciding the appeal in favour of the respondent was accepted by the department due to monetary limit and not on merits, and therefore, it is humbly 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, 1944.

(vii) The subsequent decision of CESTAT issued 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 against in this Hon'ble Court. In respect of the said case, this Hon'ble Court, has admitted Civil Miscellaneous Appeals filed by the department vide CMA No.54980 of 2017.

(viii) Department has gone on appeal to Hon'ble High Court of Madras against the earlier order passed by CESTAT against the same assessee and on the same issue, i.e. FO No.40773-40779/2017 dated 22/05/2017 of CESTAT passed against the impugned assessee, i.e.M/s.BNP Paribas and the said appeal has been numbered as S.R.No.96295/2017 dated 06/12/2017.

(ix) The Hon'ble High Court of Madras 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) ELT 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, the refund of unutilized input CENVAT credit taken towards rendering the input services availed and used in providing the taxable output services exported, would not arise prior to the date of registration.

10. Heard Ms.Aparna Nandakumar, learned senior counsel for the revenue and perused the materials available on record.

11. Going through the material on record, and advertent to the submissions duly supported by the grounds of challenge, we are of the view that the issue is no longer res integra and is covered by a decision of this Court in Commissioner of Services Tax-III, Chennai Vs. M/s. Sciainspire Consulting Services India Private Limited, Chennai and another, in C.M.A.No.860 of 2017, wherein 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?"

12. While dealing with Question No.2, the Hon'ble Division Bench, in CMA No.860 of 2017 dated 10.04.2017, ordered as hereunder:

"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.,  $\frac{\text{Maximum refund} \times \text{total CENVAT credit taken on input services during the given period}}{\text{export turnover} / \text{Total turnover}}$  ....."

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."

13. On Questions of Law 1 and 3, the Hon'ble Division Bench, at paragraph Nos.8.4 to 8.7, considered thus

"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.

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.

15. As facts and grounds of challenge are duly covered by the abovesaid decision, we have no hesitation in dismissing the instant Civil Miscellaneous Appeal, holding the substantial questions of law against the revenue. Civil Miscellaneous Appeal is dismissed. No Costs.

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Sd/-

Assistant Registrar(co)

//True Copy//

Sub Assistant Registrar

To

1. The Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (CESTAT).
2. The Commissioner of GST & Central Excise-Chennai South Commissioner, MHU Complex, No.692, Annasalai, Nandanam.

+lcc to Mr.Aparna Nandakumar, Advocate Sr.No.34595

KK(CO)

sm:19.6.2018

C.M.A.No.1052 of 2018

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