IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.07.2018

C O R A M

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

C.M.A.No.1526 of 2018

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

Vs.

M/s.Flextronics Technologies India Pvt Ltd
4,5,6,7,8, RMZ Millennia Business Park
No.143, Dr.M.G.R. Road, Kandanchavadi
Taramani, Chennai
Tamil Nadu - 600 096. ..Respondent

Prayer: Civil Miscellaneous Appeal is filed under Section 35 G of Central Excise Act, 1944, read with Section 83 of Finance Act, 1944, against the Final Order No.43510 of 2017, dated 18.12.2017,
which was received by the office of Chennai South Commissionerate on 26.04.2018 in Appeal No.ST/349/2012-DB, passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For appellant ... Mr.V.Sundareswaran

For Respondent ... Mrs.Hema Muralikrishnan

J U D G M E N T

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

Civil Miscellaneous Appeal is filed against the Final Order No. 43510 of 2017, dated 18.12.2017, which was received by the office of Chennai South Commissionerate on 26.04.2018 in Appeal No.ST/349/2012-DB, passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

2. Short facts leading to the appeal are that, M/s.Flextronics Technologies India Pvt. Ltd., Chennai/respondent herein, themselves registered with the Service Tax Department on 18.09.2007, under the categories of 'Business Auxiliary Service', "Business Support Service",

"Commercial Training and Coaching" and "Manpower Recruitment Agency" service. They are mainly providing "Business Auxiliary Service". The respondent has filed 3 refund claims for Rs.74,51,913/- for the period July 2007 to March 2008, under Rule 5 of the Cenvat Credit Rules, 2004, read with Notification No.5/2006 CE(NT), dated 14.03.2006, towards, rendering the Business Auxiliary Service.

3. Vide order dated 27.09.2011, in Order-in-Original No.193/2011, the Assistant Commissioner of Service Tax, Service Tax III Division, Chennai, sanctioned refund of Rs.41,36,550/- and rejected the refund claim of Rs.33,15,363/-, on the grounds that,

> "(a) refund claim pertains to the period before taking registration-Rs.27,88,984/-
>
> (b) Credit availed on Rent-a-cab and Outdoor services consumed for providing output services - Rs.3,27,608/-
>
> (c) Non-production of input service invoice - Rs.1,87,279/-."

4. On appeal by the respondent, Commissioner of Central Excise (Appeals), vide, impugned order in Orders-in-Appeal Nos.52 to 55 of 2012, dated 15.03.2012, allowed the appeals.

5. Being aggrieved and challenging the order of the Commissioner of Appeals, the department has filed an appeal, before the CESTAT. Vide, Final Order Nos.43508-43510/2017, dated 18.12.2017, CESTAT, Chennai, dismissed the appeals filed by the revenue and that the same is extracted hereunder:-

> "5. We have heard both sides and perused the appeal records.
>
> 6. We note that the grounds of appeal by the Revenue cannot be legally sustained. No contrary decision of higher forum has been placed on record. In fact, we note that Hon'ble Madras High Court in a similar matter in an order dated 10.04.2014 in CMA No.860 of 2017 upheld the view of the Tribunal that in the absence of 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 credit on input services. Relying on the decision of Hon'ble Karnataka High Court in the case of mPortal India Wireless Solutions Pvt. Ltd. Vs. Commissioner of Service Tax Bangalore reported in 2012 (27) S.T.R.134 (Kar) and Hon'ble Allahabad High Court in Atrenta India Pvt. Ltd. reported in 2017 (2) ADJ 590, the Hon'ble Madras High Court held in favour of the assessee claiming refund.

> 7. In view of the above settled legal position, we find no merit in the appeal filed by the Revenue. The same are dismissed."

6. Final Order of CESTAT, 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) given vide Final Order No.43510/2017 dated 18.12.2017 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.5/2006 CE(NT) dated 14.03.2016".

7. Supporting the prayer, Mr.V.Sundareswaran, learned counsel for the appellant submitted that registration is an act by which every manufacturer/respondent/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 the premises from which the taxable service, is rendered is a pre-requisite. Therefore, by not obtaining registration, as per Section 69 of the Act, in this case, the respondent is not entitled for refund of CENVAT read with rule 4(1) of the Rules and thus the respondent is ineligible to claim 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 registration with the service tax department. According to him, the issue involved in this appeal, 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.

9. Learned counsel for the appellant submitted that CESTAT, has failed to consider the safeguards and conditions stipulated in Appendix to Notification No.5/2006-CE(NT), dated 14/3/2006 {condition N0.3(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.

10. Learned counsel for the appellant also submitted that registration is a pre-requisite to claim refund under Rule 5 of CENVAT Credit Rules, 2004. However, 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 has categorically stated that:

> "Modvat law has codified procedure far 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"

11. Learned counsel for the appellant further submitted that Rule 4 Export of Service Rules, 2005, permits 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.

12. Learned counsel for the appellant further submitted that in terms of the safeguards, conditions and limitations, as stipulated in the Appendix to the Notification No.05/2006-CE(N.T.) dated 14.03.2006 (condition No.3) and as per Rule 5 of the Service Tax Rules, 1994,

> (a) The manufacturer or provider of output service, as the case may be, submits an application in Form A annexed to the 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.

Thus, one of the safeguards, conditions and limitations stipulated is that the Central Government vide the Notification cited, directed that refund of CENVAT credit shall be allowed only in respect of the registered premises of the service providers from which the output services are exported is situated. In the light of the above, it is clear that the Respondent is not eligible for refund of unutilized credit availed on the input services pertains to period prior to registration and input services related to unregistered premises.

13. 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.

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

15. 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 have been 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?"

16. 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 10/4/2017, instant Civil Miscellaneous Appeal No.1526 of 2018, filed by the revenue, on the same substantial questions of law is liable to be dismissed.

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

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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

+ 1 cc to MR. V. Sundaraswaran, Advocate Sr.49910
+ 1 cc to Mr. Lakshmikumaran, Advocate Sr.499099

C.M.A.No.1526 of 2018

RSV(CO)
EU(27/11/2018)