

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.01.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

CMA No.57 of 2018

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

Prayer:-

Civil Miscellaneous Appeal filed under Section 35G(2) of the Central Excise Act, 1944) read with Section 83 of Finance Act, 1944, praying to consider the substantial questions of law raised by the appellant and set aside the Final Order No.40779 dated 22.05.2017 passed in Appeal No.ST/42307/2016 passed by the Hon'ble Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai. against the order in Appeal No.51 & 52 of 2016 (STA-II), dated 26.04.2016, by the commissioner of service tax (Appellas - II) Chennai-40. against the order in original No.12 of 2016 (R) (C.No.IV/16/104/2013 SU 0301 RF), dated 17.02.2016 (April 2013 to June 2013), and order in original No.5/2016 (R) (C.No.IV/16/417/2013 SU 0301 RF), dated 27.01.2016 (January 2013 to March 2013), by the Assistant Commissioner of Service Tax, Chennai-40.

For Appellant : Mrs.Aparna Nandakumar

JUDGMENT

(Order of the Court was delivered by S.MANIKUMAR, J)

Civil Miscellaneous Appeal is filed against the Final Order No.40779 dated 22.05.2017 passed in Appeal No.ST/42307/2016, on the file of the CESTAT, Chennai, 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"

2. Short facts leading to the filing of the appeal are as follows:

(a) M/s.BNP Paribad Sundaram Global Securities Operations Private Limited, Chennai, respondent an 100% EOU is engaged in providing Business Auxiliary Service and Business Support Service.

(b) The respondent filed refund claim with Assistant Commissioner of Service Tax, Division III, for Rs.71,36,924/- for the service tax paid on 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 a refund of Rs.37,25,023/- and rejected the remaining amount on the ground of non-registration of the premises and ineligible CENVAT credit on car parking charges. The adjudicating authority rejected the 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.

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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 Park Unit No.1 to 4, 11th Floor Taramani, Chennai	1357366	
		3122455	

(c) The respondent also filed refund claim with the 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 a 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 the refund of CENVAT credit on the following services for the reasons stated in the following table in order-in-original No.12/2016 dated 17.02.2016.

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S.No .	Refund of CENVAT credit claimed on	Rejected amount (Rs.)	Reasons for rejection
01.	Unregistered premises at Mumbai	30282	Not an input service as per Rule 2(I) of CENVAT credit Rules
02.	Translation of exit clearance documents for employees	99	
03.	Rental charges for scrubbing machine	1548	
04.	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.
05.	Services received at international Tech Park Unit No.1 to 4, 11th Floor Taramani, Chennai	1241139	
		2869813	

(d) Aggrieved by the above orders, the respondent filed the appeal before Commissioner (Appeals) viz., the first appellate authority. Commissioner (Appeals), vide combined order-in-appeal No.51 & 52 of 2016 dated 26.04.2016 set aside a portion of the order of the original authority and allowed the refund as detailed above.

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

(e) As far as Sl.No.3 and 4 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 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) observed that in respect of the premises at Mumbai and at College Road, Chennai that the respondent had not produced any Registration Certificate for these premises. Hence, upheld the disallowance of CENVAT credit to these premises.

(f) 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. Also held that once, 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.

(g) In respect of rental charges paid for scrubbing machine, Commissioner (Appeals) observed that the 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 service qualified as input service for taking CENVAT credit as per the definition of the input service and set aside the disallowance of CENVAT credit.

(h) 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 was not registered prior to export but subsequently obtained Registration was found to be not legally correct and hence the Revenue filed an appeal before CESTAT.

(i) The CESTAT vide FO No.40773-40779 dated 22.05.2017 has 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.Scionispire 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 issued involved in respect of the impugned appeals.

Accordingly, CESTAT has dismissed the appeals filed by the Department. Being aggrieved, the Department has filed the instant appeal on the substantial questions of law stated supra.

3. On this day, when Civil Miscellaneous Appeal came up for admission, attention of this Court was invited to a decision of this Court, in Commissioner of Service Tax-III Vs. Customs, Excise & Service Tax Appellate Tribunal, Chennai & Another, reported in 2017(3) GST L 45(mad) : 2017 (4) TMI 943.

4. Questions of law considered by a Hon'ble Division Bench of this Court in CMA No.860 of 2017 dated 10.04.2017, are extracted

"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?" सत्यमेव जयते

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

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."

6. 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.

7. After considering the decisions in mPortal India Wireless Solutions (P) Ltd. Vs. Commissioner of Service Tax, Bangalore, reported in 2012 (27) S.T.R. 134 (Kar.), Commissioner of Service-Tax Vs. Tavant Technologies India Pvt. Ltd., reported in 2016 (3) TMI 353, Commissioner, Service Tax Commissionerate V. Atrenta India Pvt. Ltd., reported in 2017 (2) ADJ 590 and Commissioner of Central Excise, Coimbatore Versus Sutham Nylocots, reported in 2014 (306) E.L.T. 255 (Mad.), the relevant rules, facts of the case therein that the additional

building taken on lease was not registered with the concerned authority and while agreeing with the view taken by Karnataka and Allahabad High Courts, ultimately held that there was no error, in the order of the tribunal, and accordingly answered the substantial questions of law, against the revenue. Decision made in CMA No.860 of 2017, dated 10.04.2017, is proximate, and applicable to the instant appeal.

8. In the light of the above decision, substantial questions of law raised are answered in the negative, as against the revenue. The Civil Miscellaneous Appeal is dismissed. No Costs.

Sd/-
Assistant Registrar(CS VI)

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Sub Assistant Registrar

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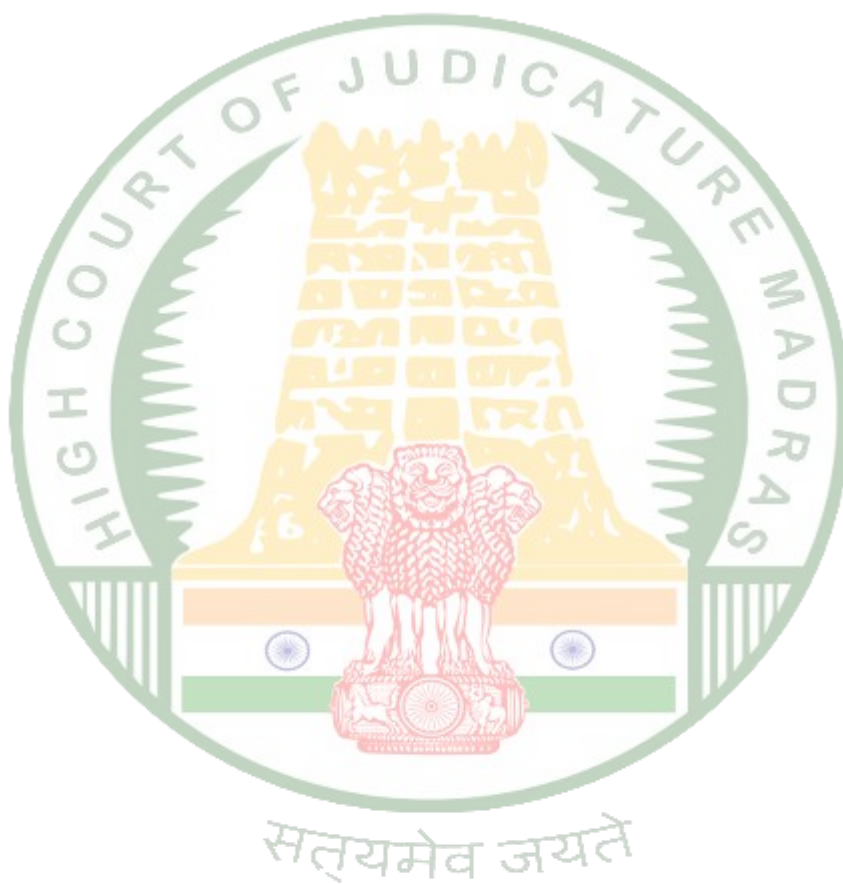
To

1. The Customs,
Excise & Service Tax Appellate,
Tribunal, South Zonal Bench,
Chennai.
2. The Commissioner of GST & Central Excise,
Chennai South Commissionerate,
MHU Complex,
No.692, Anna Salai,
Nandanam, Chennai - 600 035.
3. The Commissioner of Service Tax (Appeals - II)
3rd Floor, Plot No.2054,
I Block, Chennai-40
4. The Assistant Commissioner of Service Tax,
III Division, Service Tax II Commissionerate,
Newry Tower 2nd Floor,
Plot No.2054, 1st Block,
12th Main Road, II Avenue,
Anna Nagar, Chennai-40.

+1cc to Mrs.Aparna Nandakumar, Advocate, S.R.No.4372

CMA No.57 of 2018

MR (Co)
CS/09/03/18



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