CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.54484 of 2014

(Arising out of Order-in-Appeal No.NOI/EXCUS/000/APPL/08/14 dated 27.01.2014 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Noida)

M/s Samsung India Electronics Pvt. Ltd., ...Appellant
(B-1, Sector-81, Phase-II, Noida)

VERSUS

Commissioner of Central Excise & Service Tax, Noida ....Respondent
(Commissioner C-56/42, Sector-62, Noida)

APPEARANCE:

Shri Atul Gupta, Advocate & Shri Prakhar Shukla, Advocate for the Appellant
Shri Manish Raj, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.- 70010/2024

DATE OF HEARING : 27 September, 2023
DATE OF DECISION : 27 September, 2023

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No. NOI/EXCUS/000/APPL/08/14 dated 27.01.2014 of the Commissioner (Appeals) Central Excise Noida. By the impugned Order-in-Original No.221/R/N-III/2013-14 dated 28.10.2013 holding as follows has been upheld.

"ORDER

(i) I, hereby reject the refund claim of Rs.1,78,50,247/- (Rupees One Crore Seventy Eight Lacs Fifty Thousand Two Hundred and Forty Seven Only) as discussed above.

(ii)I, hereby sanction the refund claim of Rs.2,04,23,418/- (Rupees Two Crore Four Lacs Twenty Three

Thousand Four Hundred and Eighteen Only) to M/s Samsung India Electronics Pvt. Ltd., B-I, Sector-81, NOIDA under Rule 5 of CENVAT Credit Rules, 2004 read with Notification No.27/2012-CE dated 18.06.2012.

However, in exercise of the powers conferred on me by virtue of Section 87 of the Finance Act, 1994, I hereby order to appropriate an amount of Rs.2,04,23,418/- (Rupees Two Crore Four Lacs Twenty Three Thousand Four Hundred and Eighteen Only) [Rs.1,03,65,403.00 as Service Tax + Rs.1,00,58,015.00 as Penalty] so sanctioned to the said M/s Samsung India Electronics Pvt. Ltd., B-I, Sector 81, NOIDA, against the demand confirmed vide Order In Original No.34/Commr/Noida/2012-13 dated 19.10.20122 passed by the Commissioner, Central Excise, Noida."

2.1 The Appellant is having Centralized Registration No. AAACS5123KST026 and is engaged in providing taxable services classifiable as "Management or Business Consultant Services, Consulting Engineer Services, market Research Agency Services, Commercial Training & Coaching Services, Maintenance and Repair Service, Business Support Service, IPR Services other than Copy Right Services, Work Contract Services and Information Technology Software Services.

2.2 During the period April, 2012 to June, 2012 availed credit of the service tax paid on various services received which were used during the relevant period for exporting Information Technology Services, Business Auxiliary Services and Business Support Services.

2.3 They filed a refund claim of Rs.3,82,74,143/- on 19.02.2013 with the Assistant Commissioner of Central Excise, Division-II, Noida in respect of accumulated Cenvat credit of Service Tax paid on such input services in terms

of Rule 5 of the Cenvat Credit Rules, 2004 read with Notification No.27/ 2012-CE(NT) dated 18.06.2012

2.4 A Show Cause Notice dated 23.07.2013 was issued proposing to disallow refund of Cenvat Credit of Rs.1,78,50,725/- availed on various input services by the Appellant under Rule 3 read with Rule 2(l) of the Rules. The SCN proposed to reject the refund claim of Rs.1,70,49,148/ - on the following grounds:

(i)Invoices mentioned at Sr. No.306 and 408 of Annexure were consigned to M/s Samsung India Electronics Pvt. Ltd., Tower-A, 8th Floor, Sector-62, Noida which is not a proper address of the service recipient, therefore, Cenvat credit/refund claim of Rs.478/- involved appears inadmissible to the exporter.

(ii) Invoices mentioned at Sr. No.281, 282, 441, and 442 of the Annexure were issued by the service provider for "Charges of Pantry Boy" The service of Pantry Boy does not appears to be admissible input service, therefore, Cenvat credit/refund claim of Rs.4088/- appears inadmissible to the exporter.

(iii) Invoices mentioned at Sr. No. 984 and 985 of the Annexure were issued by M/s Optiemus Infracom Ltd. for rent of premises located at Plot No.2-A, Technology Zone, Sector-126, Noida whereas as per ST-2 Certificate dated 25.04.2012 of the exporter, the said address is not a registered premise for providing taxable services Since, the credit was availed for payment of rent for a unregistered premise, Cenvat credit/refund claim of Rs.1,09,63,679/- involved appears inadmissible to the exporter.

(iv) Payment of Invoices mentioned at S. No. 109, 110, 111, 122, 336, 337, 338, 339, 340, 341,466, 467. 502, 503, 504, 505, 506, 507, 508, 509, 510, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554,555, 556, 557, 558, 559, 873, 874, 875 and 1092 of the Annexure were made prior to

19.02.2012 whereas the instant refund claim was filed on 19.02.2013, therefore, claim of Rs.54,20,341/- involved, appears time barred as the same was not claimed within one year from the payment thereof

(v) Invoices mentioned at S. No. 980 and 986 of the Annexure pertain to renting of immovable property service but address of the premises in respect of which the rent was paid is not mentioned on the said invoices without which admissibility of Cenvat credit can't be ascertained. Therefore, Cenvat credit/refund claim of Rs.6,60,562/- involved appears inadmissible to the exporter.

(vi) The exporter have shown total exporter turnover of Rs.96,66,04,676/- and total domestic turnover of Rs.3,79,37,242/- in their ST-3 Return for the period from April'12 to June`12. On the basis of total irregular Cenvat credit as detailed above and as per formula prescribed under Notification No.27/2012- CE (NT) dated 18.06.2012, refund of Rs.1,78,50,725/- is liable for rejection

2.5 The Show Cause Notice was adjudicated by the Ld. Assistant Commissioner vide Order-in-Original dated 28.10.2013. Aggrieved by the Order-in-Original, the Appellant filed an Appeal before the Ld. Commissioner(Appeals) bearing No.279/ST/2013 dated 24.12.2013.

2.6 The said Appeal was disposed of by the Ld. Commissioner(Appeals) vide the Impugned Order.

3.1 We have heard Shri Atul Gupta and Shri Prakhar Shukla Advocates for the Appellant and Shri Manish Raj, Authorized Representative for the Revenue.

3.2 Arguing for the Appellant, learned counsels submit,-

- the Department has not issued any Show Cause Notice under Rule 14 of the Cenvat Credit Rules, 2004 for denial of Cenvat Credit taken wrongly. It is disputing the availment of credit at the stage when the Appellant has

filed refund application under Rule 5 of the Credit Rules. Since, the credit has not been denied under Rule 14, therefore the same is available in the books of the Appellant. Thus, the refund of the same is to be allowed under Rule 5 of the CCR, 2004. Reliance is placed on the following case laws-

- HCL Comnet Systems and Services Ltd. [Final Order No. A/70877/2016-SM (BR) dated 10.08.2016 passed by Hon'ble CESTAT, Allahabad].
- Free Scale Semiconductors India (P.) Ltd., [Final Order No. A/70385/2017-EX(DB) dated 10.04.2017 passed by the Hon'ble CESTAT, Allahabad].
- Indo Solar Ltd. [2017 (357) E.L.T 915 (Tri. - All.)]

- The Appellant Is Entitled To Avail Cenvat Credit On The Services Of Manpower Supply In Relation To Pantry Boys. Reliance is placed on the decision in Reitzel India Ltd. [2016 (46) S.T.R. 581 (Tri.-Bang.)] wherein it was held that recruitment of manpower for maintenance of mess is clearly an activity relating to the business of the Appellants.
- The Input Services are Qua the Output Service Provider and not Qua the Premises of an Output Service Provider. Situs of Receipt of Service is not Relevant for Availment of Cenvat Credit. Reliance is placed on the following decisions:
  - Commissioner of Service Tax-III, Chennai v. Cestat, Chennai, [2017 (3) G.S.T.L.45 (Mad.)]
  - Commissioner of Service Tax, Noida v. Samsung India Electronics Pvt. Ltd., Final Order passed by the Hon'ble Allahabad High Court in CEA No. 85-87 of 2017
  - Cararo Technologies India Pvt. Ltd.[2015 (39) STR 673 (T- Mum)]
  - Vamona Developers Pvt. Ltd.[2016 (42) S.T.R. 277 (Tri-Mumbai)]

- EXL Service.com India Pvt. Ltd. [2016 (43) S.T.R. 294 (Tri. - All.)]

- The Refund Claim of Rs.54,30,341/- is Not Bared by Limitation and shall be Allowed. The whole basis of rejection of refund claim of Rs.54,20,341/- is that the same pertains to the invoices of input services issued prior to one year before the date of filing of refund claim on 19.02.2013, i.e., 19.02.2012 and, thus, the refund claim pertaining to this amount is time barred.
- The time limit governs the filing of the refund claim and the same shall be filed within one year from the relevant date, i.e. the relevant date for purposes of deciding the time limit for consideration of refund claims under Rule 5 of the CCR may be taken as the end of the quarter in which the FIRC is received. However, this time limit, in no way, governs or relates to the availment of credit by an assessee. The assessee has availed credit in compliance of the provisions of the Credit Rules during a relevant quarter, the refund thereof shall be admissible to him provided the claim of refund is filed within one year from the relevant date. As no one to one co-relation is required, once the credit is admissible, the appellants are eligible for refund. Further, refund of Cenvat should not be linked to Cenvat taken in a particular period only [D.O.F. No.334/1/2010-TRU, dated 26-2-2010].
- In Transatlantic Packaging Private Limited, 2012 (28) STR 102 (Tri-Ahmd), it was held that when the admissibility of credit is not under dispute, the refund of such accumulated credit shall be allowed
- Reliance is further placed on the following decisions:
  - Virtusa India Pvt. Ltd., 2017 (3) G.S.T.L. 359 (Tri. - Hyd.)
  - Morgan Stanley Investment Mgmt. Pvt. Ltd., 2018 (363) E.L.T. 1158 (Tri.- Mumbai)

- Contata Solutions Pot. Ltd. [2017 (51) S.T.R. 423 (Tri. - All.)]
- Commissioner of Service Tax-III, Chennai vs. Cestat, Chennai, 2017 (3) G.S.T.L. 45 (Mad.)
- Sai Advantium Pharma Ltd. [2016 (45) S.T.R. 185 (Tri.- Bang.)]

- There are no domestic clearances by the Noticee from the premises for which refund was filed. Thus, the export turnover of the Noticee is the total turnover and the basis of denial of refund of Rs.8,01,577 / - is legally incorrect
- Without prejudice to the above factual position, assuming that the Noticee has made domestic clearances taking into consideration other premises, even then the Cenvat credit of Rs.8,01,577 / - is admissible to the Noticee. For this reason, the credit per se availed by the Noticee will not lapse. That the credit availed by the Noticee is legally admissible even when the Noticee is not entitled for the refund of such credit under Rule 5 of the Rules and the same can be utilised by it for payment of service tax/ excise duty towards its domestic clearances.
- Interest for delayed refund may also be allowed as per law.
- The amount which was appropriated against the demand raised vide Order-in-Original No.34/Commissioner/Noida/2012-13 dated 19.10. 2012 has been refunded after the said Order-in-Original was set aside by the Hon'ble CESTAT vide Final Order No.71673-71674/2018 dated 13.07.2018. Hence this part is not pressed further in this appeal.

3.3 Arguing for the revenue learned authorized representative reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Impugned order records as follows for upholding the rejection of refund claim for an amount of Rs.1,78,50,247/-.

"5.3 It is further observed that a part of the claim of refund of service tax amounting to Rs.4088/- paid on the charges of Pantry Boys has been rejected under the impugned order. While rejecting this amount of refund of service tax the adjudicating authority has observed that this service is for the convenience of the employees and is no way connected to providing to output service. The appellants contested hat they are engaged in the business of providing IT services and for providing such a service the appellants are required to set up an office and refreshment to its clients as well as employees. For this purpose a pantry has been set up in the office and thus services provided by the pantry boys are necessary for the provision of output service of the appellants; and the same has been utilised in relation to business which qualify as input service as defined under the input service. Before discussing the issue 1 will check whether such service has been included in the definition of the input service. The definition of the input service is reproduced below:

(l) "input service" means any service,-

(i) used by a provider of output service for providing an output service; or

(ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal,

and includes services used in relation to modernisation, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and

outward transportation upto the place of removal; but excludes

(A) service portion in the execution of a works contract and construction services including service listed under clause (b) of section 66E of the Finance Act (hereinafter referred as specified services) in so far as they are used for-

(a) construction or execution of works contract of a building or a civil structure or a part thereof; or

(b) laying of foundation or making of structures for support of capital goods,

except for the provision of one or more of the specified services or

(B) services provided by way of renting of a motor vehicle, in so far as they relate to a motor vehicle which is not a capital goods; or

(BA) service of general insurance business, servicing, repair and maintenance, in so far as they relate to a motor vehicle which is not a capital goods except when used by-

(a) a manufacturer of a motor vehicle in respect of a motor vehicle manufactured by such person; or

(b) an insurance company in respect of a motor vehicle insured or reinsured by such person; or

(C) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee;"

5.4 I find that Para C of the definition clearly excludes services which are for the use or consumption of individual employees. In their appeal the appellants detailed the working of the Pantry Boys, which are for the individuals. Further, I am of the opinion

that the serving of water, tea/coffee to an individual is no way essential when water dispensers and tea/coffee vending machines are available in all major office. Therefore, I agree with the findings of the adjudicating authority, hence I uphold the rejection of refund amounting to Rs.4,088/-. I observe that facts of the cases relied upon the appellants are different from the appellants case therefore the ratio of the judgments of the relied case laws is not applicable in the present case

5.5 With regard to rejection of the a part of refund claim of Rs.1,09,63,679/- under the impugned order, on the ground that the invoices on which credit was availed were not addressed to their registered premises and thus the credit was not admissible under Rule 9 of the CRR, 2004 read with Rule 4 of the Service Tax Rules 1994, the appellants pleaded that there is no dispute that the service qualify as input service and the service in question has been received by the appellants, the appellants have received service of renting of the premises at Plot No. 2A Technology Zone, Sector-126 from M/s. Optiemus Infracom Ltd; and the agreement meant for the purpose clearly states that the premises will be used by the appellants for the purpose of software development and information technology enabled activities and ancillary purposes; that the invoices in question contain the name and address of the appellants and hence are satisfying conditions provided under Rule 9 of CCR, 2004 read with Rule, 4A of the Service Tax Rules, 1994.A perusal of the copies of the invoices submitted by the appellants reveals that these invoices have been issued in the name of address of M/s Samsung India Electronics Pvt. Ltd. Tower A 8-10 Floor, Plot C-28/29, Sector-62, Noida. I find that the appellants have not rebutted the findings of the adjudicating authority that the invoices, in question were not addressed to their registered premises. In view of above facts and circumstances am of the opinion that the invoices in question do not satisfy the provisions laid down under Rule 9 of the CCR, 2004 read with Rule 4A of the Service Tax Rules, 1994. In view of above facts, I agree with the findings of adjudicating authority that the appellants are not

eligible to avail CENVAT credit and refund thereof on the strength of invoices in question which were not addressed to appellants' registered premises and therefore uphold these findings o he adjudicating authority

5.6 It is observed that the appellants have contested rejection of refund of CENVAT credit of Rs.54,20,341/- The adjudicating authority has rejected the said part of refund on the ground of limitation as being not claimed within one year from the payment thereof. While rejecting the refund of CENVAT credit of service tax the adjudicating authority observed that the invoices on which the credit was availed and sought as refund pertains to the period prior to the quarter for which the instant refund pertains and thus these services were not utilized during the quarter of which the appellants claimed refund. The appellants contested that in terms of Rule 4(7) of the Rules (CCR 2004), a manufacturer or a service provider can avail the credit of input services after payment of the value of taxable service along with the service tax; the appellants hence took the credit as per the Rules during the relevant period, i.e. April, 2012 to June, 2012; and therefore, the refund could be claimed only during the relevant quarter. The provisions of these Rules do not provide for any time limit on taking of the credit. In this regard the appellants placed reliance on the Central Excise Manual issued by CBEC where it has been clarified that the credit may be taken immediately on the receipt of inputs in the factory, however the assessee would not be denied the credit if it is not taken immediately on the receipt of inputs. I find that the refund claim has been sought in terms of Rule 5 of CCR read with Notification No.27/2012-CE dated 18.06.2012. The para 3 (b) of the said notification is read as under:

"(b) The application in the Form A along with the documents specified therein and enclosures relating to the quarter for which refund is being claimed shall be filed by the claimant, before the expiry of the period specified in section 11B of the Central Excise Act, 1944 (1 of 1944).”

To find the period specified, the Section 11 B of the Central Excise Act, Act, 1944 is reproduced below.:

SECTION [11B. Claim for refund of [duty and interest, if any, paid on such duty]. - (1) Any person claiming refund of any [duty of excise and interest, if any, paid on such duty] may make an application for refund of such [duty and interest, if any, paid on such duty] to the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] before the expiry of [one year] [from the relevant datel [[in manner] as may be prescribed and the such form and application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of [duty of excise and interest, if any, paid on such duty] in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such [duty and interest, if any, paid on such duty] had not been passed on by him to any other person:"

5.7 A study of Section 11B (1) divulge that stipulate time limit for seeking refund is one year. In view of above facts, I concur in the opinion of the adjudicating authority that this part-of the refund claim of the appellants is hit by limitation of time as provided under the legal provisions as described herein above and the appellants are not entitled for such part of refund of Rs.54,20,341/-

5.8 Now, I come to the issue of denial, of refund of credit of service tax 5.8 amounting to Rs.6,60,562/- in the impugned order, on the ground that the invoices on which credit of service tax was availed by the appellants do not contain address of the premises in respect of which the rent was paid and in the absence of such address of the premises on the concerned invoices it cannot be ascertained that the said service was utilised for providing output service. The appellants contested that they have received service of renting of premises at Stellar IT Park, Sector 62, Noida from M/s. Fact Sofware P. Ltd. in respect of which they had submitted sample copy of invoices and

lease agreement, and the agreement clearly states that appellants have been given 2 conference halls and 4 meeting rooms for providing Information Technology enabled services; that all the engineers of the appellants are working from its registered premises in Tower A, 4'h to 10'h floor, Sector 62, Noida, however due to paucity of space, the appellants hired new premises at Stellar IT Park, Sector- 62, from where some engineers started working. Thus, the new premises is also used by the appellants for provision of its output service, i..., information technology software service, hence, the said services received by the appellants duly qualify the definition of input service. It is noticed that the appellants observed they do not invoices and lease agreement. From the submitted copies of relevant contain address of premises to which invoices it is they pertain. The copy of lease agreement, submitted by the appellants reveals that 2 conference halls and 4 meeting rooms situated at Steller Crest Business Centre, 1st Floor, C-25, Stellar IT Park, Sector 62, Noida (UP) were taken on rent by the appellants. 1 find that the copies of invoices and lease agreement collectively do not deduce that the premises were used for providing output service by the appellants. If the appellants had utilised that premises, taken on rent, for providing their output service, then, such premises should have been get incorporated in their registration. I am therefore, of the view that the adjudicating authority's findings that it cannot be ascertained that the premises in question was used for providing output upheld,. In the relied service, are correct, and therefore the same are judgment in the case of One Advertising and Communication P. Ltd. v. CCE- 2012 (27) STR 344 (Tri-Ahmd.) Hotel services have been availed for stay of their Chief Executive for the purpose of business and meeting the clients But in the instant case the premises is claimed to be taken on rent for providing output service and in this regard there is legal provision to get the premises registered or incorporated in the registration. Therefore, the decision of Hon'ble Tribunal in the said case is distinguishable from the present case. I, thus hold

that the appellants are not entitled for the refund of Rs.6,60,562/- availed against such invoices

5.9 The appellants has argued that while calculating the admissibility of refund by applying formula prescribed under Notification 27/2012-CE (NT) dated 18.6.2012 an amount of Rs.8,01,577/- has been denied on the ground that it pertains to domestic clearances whereas there were no domestic clearances; hence claimed the impugned order to be non-speaking. The appellants contested that there were no domestic clearance from the present premises and export turnover was the total turnover, therefore, the basis of denial of refund of Rs.8,01,577/- is legally incorrect. The appellants further pleaded that even when it is assumed that the appellants has made domestic clearances, even then CENVAT credit of Rs.8,01,500/- is admissible to them for the reason that credit per se availed by the appellants will not lapse. Here, I notice that the appellants have neither disputed that the calculation is as per formula prescribed under the said Notification No.27/2012-CE (NT) dated 18.6.2012 nor the correctness of calculation by applying such formula. The appellants disputed only the domestic turnover, of Rs.3,79,37,242/- taken by the adjudicating authority for calculation of admissibility of refund in accordance with the formula prescribed under said notification. The appellants claimed their domestic clearance during the relevant quarter to be NIL. To examine the appellants claim, I have gone through the ST-3 Return for the concerned quarter from April to June 2012 submitted by the appellants as Annexure -12. The said ST 3 Return divulge following domestic clearances

SI. No.	*Category of Service*	*Value of services provided in DTA*
1	*BAS*	*1646405*
2	*BSS*	*0*
3	*Commercial Training*	*0*
4	*Consulting Engg*	*0*
5	*IT Software*	*0*
6	*IPR*	*0*
7	*Maintenance & Repair*	*30926545*
8	*Management Consultants*	*0*

9	*Market Research Agency*	*0*
10	*Renting of Immoveable Property*	*1518140*
11	*Sponsorship Service*	*0*
12	*GTA*	*0*
13	*Work Contract*	*3846152*
	Total	*37937242*

Thus, I find that the adjudicating authority has taken correct value of services provided by the appellants in DTA and the amount of refund has been ascertained in accordance with the formula prescribed under the said Notification for the purpose. find that the appellants claim is false. The appellants are hereby warned not to plead such false claim contrary to the facts and the figures available in their record."

4.3 From the above it is observed that refund claim filed by the appellant for the amount of Rs.3,82,74,143/- has been modified by the original authority to the extent of allowing the Refund for Rs.2,04,23,418/- and rejecting the refund for the amount of Rs.1,78,50,247/-. No appeal has been filed by the revenue for the refund amount held admissible to the appellant. From the impugned order it is evident that refund of

- Rs.4088/- + Rs.1,09,63,679/- + Rs.6,60562/- = Rs.1,16,28,329/- has been disallowed holding that the credit in respect of these was not admissible to them for the reasons stated in the impugned order.
- Rs.54,20,341/- has been disallowed holding that the claim is barred by limitation;
- Rs.8,01,577/- has been disallowed holding that appellants had made certain domestic clearances which were to be taken into account for determining the amount of refund admissible.

4.4 It is observed that impugned orders have gone beyond the scope of Rule 5 of CENVAT Credit Rules, 2004, which provide for the refund of the accumulated credit in respect of export of the goods and services. This rule do not provide for denial of any credit while examining the refund claim filed under this Rule. If any credit was to be denied it could have been done in an

appropriate proceedings that were to be initiated under Rule 14 of the CENVAT Credit Rules, 2004. We do not find any proceedings initiated against the appellant in terms of the denial of the credit held as in admissible under the said Rule 14. Tribunal/ Courts have constantly held that denial of refund claim mad in terms of Rule 5 without initiating any proceedings under Rule 14 is no tenable. Reference is made to the decision in the case of HCL Comnet Systems and Service Ltd. [2017 (49) S.T.R. 310 (Tri. - All.)] wherein tribunal has held as follows:

"3.*From a perusal of the show cause notice dated 26-12-2013, it is evident that the appellant have applied for refund of Cenvat credit for the period October, 2012 to December, 2012 on 13-9-2013 pursuant to which the show cause notice was issued for disallowing part of the refund claim amounting to Rs.2,61,059/-. I further find that neither Section 73 nor Rule 14 of CCR, 2004 have been invoked. As such, I find the show cause notice to be vague and wanting in necessary particulars. Accordingly, I hold that there is no valid show cause notice issued upon the appellant. As such, I set aside the impugned order so far it has upheld the disallowance of Cenvat credit amounting to Rs.2,61,059/-. The appellant-assessee will be entitled to consequential benefits, if any. Accordingly, the Adjudicating Authority is directed to grant refund of this amount of Rs.2,61,059/- with interest as per Rules."*

In case of Deloitte Global Financial Advisory India Pvt. Ltd. [2023 (73) G.S.T.L. 231 (Tri. - Mumbai)] following has been held:

4.*It is from Rule 3 of Cenvat Credit Rules, 2004, subject to Rule 4 therein, that a central excise or service tax assessee gets to appropriate credit of tax charged on procurement of goods and services which is reported to the jurisdictional authorities in the prescribed returns who are, then, enabled to recover credit that, according to them, is not within entitlement under the authority of Rule 14 of Cenvat Credit Rules, 2004. One of the determinants of entitlement is utilization of procured goods or services in the manufacture of dutiable goods or rendering of*

taxable services and it may not always be possible for manufacturers and service providers to be able to segregate so at the threshold, or account for at the time of consumption, the ultimate deployment of, particularly, services and, in acknowledgement thereof, Rule 6 of Cenvat Credit Rules, 2004 offers different avenues for reversal on actual, or mathematically approximate, segregation on their own initiative. Failure to voluntarily reverse empowers invoking of Rule 14 of Cenvat Credit Rules, 2004 by jurisdictional authorities. It is, thus, patently obvious that Rule 14 of Cenvat Credit Rules, 2004 is the sole route available for erasure of credit taken at the threshold, or continued thereafter, but is, or has been, rendered ineligible.

5.*'Nexus', as it is generally known, goes beyond the obvious entitlement or disentitlement and is a corollary of intangibility of services that hampers certainty of utilization in the output/output service sought to be circumscribed by deployment of 'includes' and 'business activities such as' to isolate manifest connection. Such 'nexus' should, logically, be a threshold adjudgment owing to irrelevance for manufacture or rendering of service in toto. And, yet, the lower authorities found no reason to hesitate in subjecting the appellant to the test only upon claim for monetizing of credit; it would appear that the rejection is premised on objection to monetizing and not to availment itself.*

6.*From perusal of Rule 5 of Cenvat Credit Rules, 2004, it is seen that it is not the utilization of input/input service in exports that has prompted this attractive neutralization scheme but the restricted scope for utilization of credit legitimately availed towards discharge of duty or tax liability. Though referred to as refund, it is also not refund in the true sense that the claimant is not 'person liable to pay tax or duty' having had to pay such duty or tax despite lack of authority of law; the discharge of tax liability by the provider of service, and in accordance with authority of law, is not in question at all. The intent is to neutralize the taxes included, thereby, in the value of goods manufactured or service so that taxes are not exported too. The*

limited remit of the sanctioning authority, subject to procedural prescription separately notified, is spelt out in the rule itself to limit denial, if any, only to such contingencies and disallowance, if at all, is restricted to the ascertainment of proportion in accordance with that borne by exports to total turnover as mathematical attribution.

7.*This has been held by the Tribunal in KKR India Advisors Pvt. Ltd. v. Commissioner of CGST, Mumbai Central [2018 (6) TMI 797-CESTAT MUMBAI] thus :*

'7…… I also observe that the adjudicating authority, without issuance of show cause notice as regards the admissibility of the input service, rejected the refund which is not permissible, but the Revenue is of the view that the credit is not admissible. The first step is to a show cause notice invoking Rule 14 of the Cenvat Credit Rules, 2004 for denial of the Cenvat credit. Then only the refund can be rejected which was not done. Obviously the refund claim cannot be rejected by disputing the admissibility of the input services as held by this Tribunal in Warburg Pincus India Pvt. Ltd. v. CST-I, Mumbai - 2018-TIOL-1229-CESTAT-MUM.

8.*Similar stand was adopted by the Tribunal in Commissioner of CGST, Mumbai v. Citicorp Services India Pvt. Ltd. thus :*

'4.4. ……. Further, the correctness of availment of Cenvat Credit at the stage of filing of refund claim cannot be questioned, since the statute deals with the situation differently.'

It is seen from the impugned order that no such notice was issued to the appellant herein. The preliminary objections to the refund limited itself to a few objections that appear to have been responded to and none of those have proposed that the said amount of credit was to be recovered. In the absence of this critical requirement to comply with principles of natural justice, the denial of credit is without authority of law and impugned order is set aside."

In case of Responsibility India Business Advisors Pvt. Ltd. [2023 (69) G.S.T.L. 90 (Tri. - Mumbai)] following has been held-

7.*The scheme of Rule 5 of Cenvat Credit Rules, 2004 is abundantly clear. To the extent of eligibility, the assessee cannot be denied refund and the disallowed portion, if any, remains in the credit of the assessee for debit of future tax/duty liability. Therefore, denial of refund does not extinguish the credit but restores it in the account. In the impugned order, there is no finding of disallowance and, on the contrary, the denial has been on the ground of ineligibility for Cenvat credit which is permissible to be ordered only in proceedings initiated under Rule 14 of Cenvat Credit Rules, 2004 after issuing notice to the assessee. Neither of the two is evident in the records.*

Similar view has been expressed by the tribunal in series of decisions which we do not intend to reproduce. Suffice to say that without initiating the proceedings in terms of Rule 14 of CENVAT Credit Rules, 2004 read with Section 73 of the Finance Act, 1994, CENVAT credit cannot be denied during the refund proceedings under Rule 5 ibid.

4.5 On the second issue we observe that during the relevant period Rule 5 of CENVAT Credit Rules, 2004 read as follows:

"5. Refund of CENVAT Credit. –

(1) A manufacturer who clears a final product or an intermediate product for export without payment of duty under bond or letter of undertaking, or a service provider who provides an output service which is exported without payment of service tax, shall be allowed refund of CENVAT credit as determined by the following formula subject to procedure, safeguards, conditions and limitations, as may be specified by the Board by notification in the Official Gazette:

Refund amount = (Export turnover of goods+ Export turnover of services) x Net CENVAT credit
Total turnover

Where,-

(A) "Refund amount" means the maximum refund that is admissible;

(B) "Net CENVAT credit" means total CENVAT credit availed on inputs and input services by the manufacturer or the output service provider reduced by the amount reversed in terms of sub-rule (5C) of rule 3, during the relevant period;

(C) "Export turnover of goods" means the value of final products and intermediate products cleared during the relevant period and exported without payment of Central Excise duty under bon d or letter of undertaking;

(D)"Export turnover of services" means the value of the export service calculated in the following manner, namely:-

Export turnover of services = payments received during the relevant period for export services + export services whose provision has been completed for which payment had been received in advance in any period prior to the relevant period –advances received for export services for which the provision of service has not been completed during the relevant period;

(E) "Total turnover" means sum total of the value of –

(a) all excisable goods cleared during the relevant period including exempted goods, dutiable goods and excisable goods exported;

(b) export turnover of services determined in terms of clause (D) of sub-rule (1) above and the value of all other services, during the relevant period; and

(c) all inputs removed as such under sub-rule (5) of rule 3 against an invoice, during the period for which the claim is filed.

(2) This rule shall apply to exports made on or after the 1st April, 2012:

Provided that the refund may be claimed under this rule, as existing, prior to the commencement of the CENVAT Credit (Third Amendment) Rules, 2012, within a period of one year from such commencement:

Provided further that no refund of credit shall be allowed if the manufacturer or provider of output service avails of drawback allowed under the Customs and Central Excise Duties and Service Tax Drawback Rules, 1995, or claims rebate of duty under the Central Excise Rules, 2002, in respect of such duty; or claims rebate of service tax under the Export of Services Rules, 2005 in respect of such tax.

Explanation 1.-For the purposes of this rule,-

(1) "export service" means a service which is provided as per the provisions of Export of Services Rules, 2005, whether the payment is received or not;

(2) "relevant period" means the period for which the claim is filed.

Explanation 2.-For the purposes of this rule, the value of services, shall be determined in the same manner as the value for the purposes of sub-rule (3) and (3A) of rule 6 is determined."

Notification No.27/2012-CE (NT) read as follows:

"2.0 Safeguards, conditions and limitations.- Refund of CENVAT Credit under rule 5 of the said rules, shall be subjected to the following safeguards, conditions and limitations, namely:-

(a) the manufacturer or provider of output service shall submit not more than one claim of refund under this rule for every quarter: provided that a person exporting goods and service simultaneously, may submit two refund claims one in respect of goods exported and other in respect of the export of services every quarter.

(b) in this notification quarter means a period of three consecutive months with the first quarter beginning from 1st April of every year, second quarter from 1st July, third quarter from 1st October and fourth quarter from 1st January of every year.

(g) the amount of refund claimed shall not be more than the amount lying in balance at the end of quarter for which refund claim is being made or at the time of filing of the refund claim, whichever is less.

(h) the amount that is claimed as refund under rule 5 of the said rules shall be debited by the claimant from his CENVAT credit account at the time of making the claim.

(i) In case the amount of refund sanctioned is less than the amount of refund claimed, then the claimant may take back the credit of the difference between the amount claimed and amount sanctioned.

3.0 Procedure for filing the refund claim. –

(a) The manufacturer or provider of output service, as the case may be, shall submit an application in Form A annexed to the notification, to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, in whose jurisdiction,-

(i) the factory from which the final products are exported is situated.

(ii) the registered premises of the provider of service from which output services are exported is situated.

(b) The application in the Form A along with the documents specified therein and enclosures relating to the quarter for which refund is being claimed shall be filed by the claimant, before the expiry of the period specified in section 11B of the Central Excise Act, 1944 (1 of 1944).

Rule 5 defines Net Cenvat credit to mean total Cenvat credit availed on inputs and input services by the manufacturer or the output service provider reduced by the amount reversed in terms of sub-rule (5C) of Rule 3, during the relevant period Thus, the Cenvat credit availed on inputs and input services during the relevant period, i.e., the subject quarter for which refund is claimed, as reduced by the amount reversed under Rule 3(5C) of the Rules is considered as 'Net Cenvat credit It is, thus, the total Cenvat credit availed during the particular quarter which is to be considered for determining the amount of refund

In terms of the provisions of Rule 5 read with Notification No.27/ 2012-CE(NT), the whole credit availed during the relevant period shall be taken into consideration without regard to the fact whether it pertains to the services received earlier or invoices received earlier. This is not restricted to the services received during the relevant period. The provisions do not refer to the services received but only the credit availed during the relevant period irrespective of the time of receipt of services or the time of issuance of invoices to which it pertains. Thus, all the credit which has been availed during the relevant period shall form part for determining the 'Net Cenvat Credit" on the basis of which the refund claim is made, irrespective of the fact that the same pertains to the invoices which were issued earlier.

Following has been held in the case of Dagger Forst Tools Limited [2013 (30) S.T.R. 206 (Tri- Mum)],

"6.2 *…. There is no restriction under the Cenvat Credit Rules, 2004, with regard to the period for availing Cenvat credit of Service Tax paid. In other words, a manufacturer/input service provider can avail Cenvat credit of the Service Tax paid irrespective of any time limitation. The only condition to be satisfied is that they should have paid the Service Tax prior to availing the credit. So long as this condition is satisfied, there is no time-limit prescribed in the Rule within which the Cenvat credit has to be taken. …".*

Even if the contention of the revenue was to be accepted then also the credit should have been denied by initiating the proceedings under Rule 14 and not in proceedings of refund under Rule 5 of CENVAT Credit Rules, 2004.

4.6 Thus we do not find any merits in the impugned order to the extent it has sought to disallow the CENVAT Credit to the extent of Rs.4088/- + Rs.1,09,63,679/- + Rs.6,60562/- + Rs.54,20,341/- = Rs.1,70,48,670/- for determining the "Net Cenvat Credit", in the formula prescribed under Rule 5 of the CENVAT Credit Rules, 2004. Thus the Net Cenvat Credit for the application of this formula should have been Rs.3,82,73,665/- and eligibility to refund determined ACCORDINGLY.

4.7 For determining the eligibility to refund revenue has observed that appellant had exported services of Rs.96,66,04,676/- during the relevant period and the total domestic turnover of the Appellant is Rs.3,79,37,242/ -Further, in terms of formula prescribed under Notification No.05/2006-CE(NT) dated 14.03.2006, the refund admissible to the Appellant is as per the impugned order is

Refund of Cenvat Credit = Export Turnover X Total admissible credit
Total Turnover

= 966604676 x 21224995 = Rs.2,04,23,418/-
1004541918

However in terms of value of Net Cenvat Credit, determined above the eligibility to refund shall be as follows:

Refund of Cenvat Credit = Export Turnover X Total admissible credit
Total Turnover

= 966604676 x 38273665 = Rs.3,68,28,233/-
1004541918

We do not agree with the contention of the appellant to the effect that for computing the total turnover, only turnover from the specific premises from where the services have been exported is to be considered. It is the contrary to the contention of the appellant themselves that for determining the Net Cenvat

Credit, the Credit admissible in respect of the services received at any of premises should be taken into account. In our view in case of Centralized registration the term Total Turn Over in Rule 5 of CENVAT Credit Rules, 2004 refers to the total turnover of the registrant. To this extent we do not find any fault in the impugned order.

4.8 However we find that Notification No.27/2012-CE (NT) dated 18.06.2012 reproduced earlier at (h) provides that the appellant should have at the time of filing the refund claim should have reversed the credit equivalent to the amount claimed as refund. At (i) it is provided that if the refund allowed is less than the credit reversed than the difference of the credit reversed and refund allowed shall be credited back to the CENVAT account of the appellant. That being so what so ever amount of refund was sought to be denied the same should have been allowed as credit in the book of accounts of the Appellant. Revenue authorities could not have denied the credit in the proceedings of refund under Rule 5. This is in line with the view expressed by the Mumbai bench in case of Responsibility India Business Advisors Pvt. Ltd. referred earlier by us. In view of the above any amount which is not allowed as refund under Rue 5, is to be credited back to CENVAT account of the appellant. Adjudicating authority has in para 11 of the order in original, recorded as follows:

"11. The amount equal to refund claimed i.e. Rs.3,82,74,143/- is debited by the exporter from his CENVAT Credit Account on 19.02.2013."

Thus the difference of the amount allowed as refund and the amount debited from the CENVAT Account on 19.02.2013 should be allowed as credit in the account books of the appellant. Adjudicating authority should have allowed back the credit of entire amount of refund denied, to the appellant by his order and the appellant could have utilized the same for his domestic clearances. Having not done so adjudicating authority has gone

beyond the provisions of CENVAT Credit Rules and Notification No.27/2012-CE (NT) dated 18.06.2012.

4.9 With effect from 01.07.2017, with the introduction of GST regime the scheme of CENVAT Credit has terminated and Section 142 of the CGST Act, 2014, provides as follows:

"(8) (a) ……;

(b) where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day, under the existing law, any amount of tax, interest, fine or penalty becomes refundable to the taxable person, the same shall be refunded to him in cash under the said law, notwithstanding anything to the contrary contained in the said law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 (1 of 1944) and the amount rejected, if any, shall not be admissible as input tax credit under this Act."

4.10 Thus in our view as the law exists now the entire amount which was debited by the appellant at the time of filing this refund claim should be allowed as cash refund to the appellant in terms of the above provisions of CGST Act, 2017.

5.1 Appeal is thus allowed in above terms.

(Operative part of the order pronounced in open court)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS