

Customs, Excise & Service Tax Appellate TribunalOld Red Building, 38 M.G. Marg, Civil Lines, Allahabad-211001
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Appeal No. ST/70129,70150/2017

(Arising out of OIO No. 08/Commissioner/ST/Noida/2016-17 dated 25.11.2016,  
OIO No. 10-11/Commissioner/ST/Noida/2016-17 dated 14.12.2016 passed by  
the Commissioner of Service Tax, Noida)

M/s HCL Technologies Limited : Appellant (s)

Vs

Commissioner of Service Tax, Noida : Respondent (s)

**Represented by:**

For Appellant (s) : Shri B. L. Narsimhan, Adv., Shri Utkarsh Malviya, Adv.

For Respondent (s): Shri Shiv Pratap Singh, AR

**CORAM :****Mr. Ashok Jindal, Hon'ble Member (Judicial)****Mr. Anil G. Shakkarwar, Hon'ble Member (Technical)**

Date of Hearing: 28.12.2018

Date of Decision:19.02.2019

**FINAL ORDER No.70312-70313/2019*****Per : Mr. Ashok Jindal***

The appellant filed these appeals against the impugned orders wherein cenvat credit of service tax has been denied to the appellant on 'Errors & Omissions Liability Insurance Policy' obtained by the appellant for themselves as well as to their subsidiaries.

2. The facts of the case are that during the period 2010-2011 and 2014-2015, various show cause notices were issued to the appellant to deny the cenvat credit on 'Errors & Omissions Liability Insurance Policy'. The Appellant is a Global IT Service Company and is engaged in providing taxable service, namely, Information Technology Software Service (ITSS) to its subscribers located in India as well as abroad. The services provided to

the foreign clients is although in the nature of offshore service, however, the same also requires the physical presence of the Appellant's engineers at different locations, hence, in view of the same, the Appellant has set up subsidiaries in India as well as abroad. In regard to the provision of services to its foreign clients, the appellant has entered into master agreements with them to which such foreign subsidiaries are also party. The Appellant has obtained the 'Errors & Omissions Liability Insurance Policy' which covered not just the Appellant itself but also the subsidiaries of the Appellant located abroad as well as in India. The said insurance policy was availed by the Appellant with a view to protect the Appellant and its subsidiaries from any unforeseeable eventuality and against the said activity of procuring insurance policy service, the Appellant is charging proportionate amount of consideration of premium as is attributable to each subsidiary company. During the course of Audit, it was found that the Appellant is availing cenvat credit on the proportionate amount attributable to subsidiary companies for which the appellant is not entitled to cenvat credit as the said service has not been availed by the appellant for their own-self, therefore, the proceedings were initiated against the appellant to deny cenvat credit availed by the appellant to that extent, attributable to the subsidiary companies and ordered for recovery of the same by issuance of the show cause notices. The matter was adjudicated and cenvat credit was denied on the ground that the arrangement between the appellant and the subsidiary companies to charge

proportionate amount from subsidiaries is only a cost sharing arrangement and no taxable service has been provided by the Appellant to the subsidiary companies as the entire transaction did not involve realization of any additional consideration for the activity of procurement of insurance policy and on the ground that the service of insurance policy is not an 'input service' for the Appellant but the same is an input service for its subsidiary companies and hence, the credit for the same cannot be availed by the Appellant. Against the said orders, the appellant is before us.

3. The Ld. Counsel for the appellant submits that the procuring insurance policy on behalf of its subsidiary companies in India, the appellant is discharging service tax on the same. He further submitted that the Appellant has provided the service of procurement of insurance policy on behalf of the subsidiaries and the said procurement of insurance policy on behalf of the subsidiary companies is in the nature of "Business Support Services" (BSS) to the said subsidiary companies. Therefore, the services provided to the subsidiary companies located in India, the same are chargeable to service tax and thereon appellant has paid service tax. The subsidiary Companies located outside, the territory of India shall qualify as export of services in terms of Rule 6A of the Service Tax Rules, 1994 r/w Rule 3 of the Place of Provision of Service Rules, 2012 (POPS Rules). As per the said provisions, in case (a) the recipient of the service is located outside the taxable territory of India, (b) provider of the service is located within the taxable territory of India, (c) the services are not specified in section

66D of the Finance Act and (d) the payment for the said services have been received by the Appellant in convertible foreign exchange and the said foreign subsidiaries are distinct legal person. In the event that all the said conditions stand satisfied then the services of procurement of insurance policy on behalf of the subsidiaries shall be treated as export of service. Therefore, the service received from the insurance company is an Input Service for providing output service (BSS) to the subsidiaries. Hence, the appellant is entitled to avail cenvat credit.

4. Alternatively, it was contended by the Ld. Counsel that the service tax was not payable on the premium attributable to the subsidiaries as the same was not taxable and hence the availment of Cenvat credit is nothing but a refund. It is his submission that if the service of insurance was provided by the insurance company to the foreign subsidiaries, in that case, the said service is provided was entirely outside the taxable territory of India and the same is not taxable. As the appellant has discharged service tax on the said insurance policy and hence the Cenvat credit of such service tax is nothing but a refund of the service tax erroneously discharged by the appellant. In the event, if the said Cenvat credit is denied to the Appellant, the Department would be unjustly enriched. To support their contention of the appellant relied on the decision of the Hon'ble Tribunal in the case of ***Bajaj Allianz General Insurance Co. Ltd. v Commissioner of Central Excise, Pune-III reported at 2015 (37) STR 316 (Tri-Mum)***.

5. Further, in alternate, it is his submission that the said impugned service would qualify as an input service for the appellant. It is the contention of the Ld. Counsel that the appellant being a Global IT service provider, the Appellant has entered into master agreements with the customers located abroad and the said fact has been acknowledged by the Adjudicating Authority. For the provision of services to the said foreign based customers, the Appellant has established subsidiaries in different countries which provide Information Technology Software Services on behalf of the Appellant. The activity of availment of insurance policy covering such foreign subsidiaries is with a view that the provision of the IT services to the foreign customers continues seamlessly and the same is not hindered or shut because of any untoward incident occurring in the premises of the subsidiaries of the Appellant. In case of any risk arising upon the subsidiaries due to their involvement in the services provided by the Appellant then in that case the entire cost shall be borne by the insurance company, therefore, the same would not affect the provision of the services of the Appellant in other parts of the world because, otherwise, such risk if borne by the Appellant himself would have resulted in huge capital loss to the Appellant, maybe at the cost of affecting operations. The fact that the said subsidiaries are different legal entities is totally irrelevant as there is no bar on a separate person to provide services on behalf of another. He further submitted that the interest is not payable

by the appellant as during the impugned period there was a sufficient balance in their cenvat credit account remained unutilized. He further submitted that the show cause notices dated 21.04.2015 and 23.03.2016, the show cause notice prior to period was already issued, hence, the element of suppression cannot be invoked, therefore, in the light of the decision of the Hon'ble Supreme Court in the case of ***Nizam Sugar Factory vs. Collector of Central Excise reported at 2006 (197) ELT 465 (SC)***, the penalty is not imposable as there is no suppression. He further submitted that the penalty is also not imposable under Rule 15 as non-mentioning of specific sub-rule as held by the Hon'ble Apex Court in the case of ***Amrit Foods vs. Commissioner of Central Excise reported at 2005 (190) ELT 433 (SC)***. Therefore, the impugned orders are to be set-aside.

6. On the other hand, the Ld. AR for the Revenue supported the impugned orders.

7. Heard the parties and considered the submissions.

8. On careful consideration of the arguments advanced by the both sides and records placed before us, the short issue involved in the matter is that whether the appellant is entitled to avail cenvat credit on the service of Errors and Omissions Liability Insurance Policy or not?

9. It is an admitted fact that the subsidiary companies are different and they are having separate registration. Moreover, the certain subsidiary companies are located in outside India providing output service to the foreign clients. It is also a fact on record that the appellant has debited the

proportionate amount of insurance policy in the account of subsidiaries on cost basis, in that circumstances, whatever amount attributable to the said apportionment to the subsidiary companies, the appellant has not received the services, therefore, not entitled to take cenvat credit in terms of Rule 3 of CENVAT Credit Rules, 2004. Admittedly, the amount of insurance policy paid by the appellant is not wholly utilized by the appellant but the same includes proportionate amount paid by the appellant on behalf of the subsidiaries. It is also a fact on record that the amount attributable to the local subsidiaries, the appellant has paid service tax which shows that the appellant was having considered view that the proportionate amount attributable to the subsidiaries, the appellant is not entitled to take cenvat credit, therefore, the appellant charged amount of service tax from the subsidiaries located within India.

10. Further, the contention of the Ld. Counsel for the appellant is that the appellant is providing Business Support Service to their subsidiary companies is not acceptable as the insurance policy has been obtained by the appellant as a global policy for their subsidiaries located in India as well as outside India and appellant is only recovering the consideration attributable to those subsidiaries by issuance of the debit notes on cost basis and charging service tax for the subsidiaries located in India. In that circumstances, it cannot be said that the appellant is provided any business support service to their subsidiaries. Therefore, the said contention of the appellant is not acceptable.

11. In alternate, the Ld. Counsel for the appellant submits that if the service has been obtained from the insurance company by the subsidiaries located outside India is not taxable service, hence, whatever service tax paid by the appellant taking cenvat credit amounts refund of the same. We take a note of the fact that this is not the fact before us in this case, the contention of the appellant is that the service tax is not payable by the appellant for the services provided by them to their foreign subsidiaries. In fact, the appellant has availed cenvat credit for the policies obtained on behalf of the foreign entities which appellant was not entitled to in terms of Rule 3 of the Cenvat Credit Rules, 2004, therefore, the only issue is before us whether the appellant is entitled to avail cenvat credit or not? Admittedly, answer is 'No'. Therefore, we hold that the appellant is not entitled to avail cenvat credit for the consideration recovered from the foreign subsidiaries on account of insurance policy in terms of Rule 3 of the Cenvat Credit Rules, 2004.

12. The last contention raised by the Ld. Counsel that there foreign entities and the appellant are same, therefore, they are entitled to take cenvat credit. If the said contention is taken to be correct, in that circumstances, why the appellant has recovered proportionate amount of consideration form their subsidiaries. If the appellant is recovering any amount attributable to their subsidiaries, therefore, the appellant itself is considering their subsidiaries are all together different from the appellant. In that circumstances, also the appellant is not entitled to take cenvat

credit for the services availed by third party. In that circumstances, we hold that the appellant is not entitled to avail cenvat credit on the proportionate consideration of the amount on Errors & Omissions Liability Insurance Policy attributable to their foreign entities, therefore, the same is required to be reversed by the appellant.

13 We further take a note of the fact that the appellant has taken the cenvat credit in the guise of export of services which was well within the knowledge of the appellant that for the services which has been provided by Insurance Company on account of third party, the appellant is not entitled to take cenvat credit. Therefore, the extended period of limitation is rightly invoked. Consequently, the penalty on the appellant is imposable. In these terms, we hold that the penalty on the appellant is rightly imposed.

14. In these terms, we do not find any infirmity in the impugned orders qua demand on account of reversal of cenvat credit and imposition of penalty.

15. We further take a note of the fact that if the appellant is maintaining sufficient balance in their cenvat credit account during the intervening period, the appellant is not liable to pay interest.

16. In view of above, the following order is passed.

a) The appellant is not entitled to avail cenvat credit on the amount attributable to foreign subsidiaries for "Errors & Omissions Liability Insurance Service" as input services.

- b) Penalties are rightly imposed.
  - c) If the appellant is maintaining sufficient balance in their cenvat credit account during the intervening period, the appellant is not entitled to pay interest otherwise the appellant has to pay interest also.
17. With these observations, the appeals are disposed off.

*(Order Pronounced on-19.02.2019)*

**(Anil G. Shakkarwar)**  
Member (Technical)

G.Y.

**(Ashok Jindal)**  
Member (Judicial)