

FAX : 0532-2400149

REGISTERED / AD

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**  
38, MG Marg Civil Lines, Old Red Building, Allahabad-211001  
Regional Branch, Allahabad

Dated: 22/01/2018

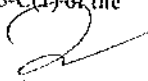
To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70212/2018-EX|DB| dated 19/01/2018

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

  
Asstt. Registrar

| Application | Appeal      | Name and Address of Appellant                                                      |
|-------------|-------------|------------------------------------------------------------------------------------|
| 1           | E/2299/2009 | <b>Hcl Technologies Ltd</b><br>A-10 & 11, Sector-3, Noida.                         |
|             |             | Name and Address of Respondent                                                     |
| 2           |             | C.C. & C.E. & S.T.-NOIDA<br>C-56/42...SECTOR 62,<br>NOIDA,<br>UTTAR PRADESH-201307 |

Copy To

3 Advocate(s) / Consultant(s):

**B. L. Narasimhan, (Advocate) &  
Atul Gupta (Advocate) ALD  
3/1A/3 OPP AUTO SALES, Above the  
Office Of Blue Dart/DHL Courler,  
COLVIN ROAD, LOHIA MARG  
ALLAHABAD-211001**

4 Bar Association, CESTAT, Allahabad

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp ICICI Bank of Defence Colony New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad -- 38

12 The ICFAI society, 52, Nagarjuna Hill, Punjagutta Hyderabad.-500082

13 M/S Knowledge Processing Pvt. Ltd.(taxmanagementindia.com), FF-19, 1st Floor, Cross River Mall, CBD Ground, Near Karkardooma Court, Delhi-110032

14 C.D.R.

15 Office Copy

16 Second Folder Copy

17 Guard File

  
Asstt. Registrar

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,  
REGIONAL BENCH : ALLAHABAD**

**E/2299/2009 (DB)**

Arising out of O/A No.48/Comm/Noida/2008 dated 05.12.2008 passed by  
Commissioner of Central Excise, Noida.

M/s. Hcl Technologies Ltd.

...APPELLANT(S)

VERSUS

CC & CE & ST, Noida

RESPONDENT (S)

APPEARANCE

Shri B.L.Narasimhan (Advocate) & Shri Atul Gupta (Advocate) for the  
Appellant (s)  
Shri Mohd. Altaf (Asstt. Commr.)(A.R.) for the Revenue

**CORAM:**

SHRI ASHOK JINDAL, HON'BLE MEMBER (JUDICIAL)  
SHRI ANIL G. SHAKKARWAR, HON'BLE MEMBER (TECHNICAL)

DATE OF HEARING : 17.01.2018

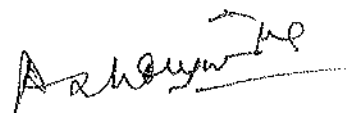
DATE OF DECISION : 19.01.2018

FINAL ORDER NO. 70218/2018

**Per Shri Ashok Jindal :**

The appellant is in appeal against the impugned order. The facts  
of the case are as under:-

The appellant is a service provider engaged in providing  
various taxable services i.e. information technology software  
service, business consultancy service, technical testing and  
analysis service etc. Appellant has taken centralized service tax  
registration at NOIDA in respect of all its taxable service activities  
provided from various locations throughout India.



2. In the financial year 2006-07, appellant opened an "Electro Magnetic Compatibility (EMC) and Durability Test Lab (testing lab) at Chennai from where the appellant started providing product testing & certification service and concept manufacturing services to various customers. This lab offers product compliance testing for various physical parameters such as environmental testing which include thermal shock, rain, dust, temperature cycling, humidity and full European compliance testing and certification. The lab was set up to test durability and robustness of products with electronic hardware such as medical devices, network cables and mobile phones. The services provided from this location are taxable under technical testing and analysis service or technical inspection and certification services and accordingly, appellant has been discharging service tax on the services.

3. During 2006-07, in this testing facility, the appellant procured the following equipments on payment appropriate excise duty.:

FACT-10 Meter RF Shielded EME chamber

Heater with blower & panel with accessories

Clean air management system and prefabricated clean room enclosure.

Infiniti Pro P-IV 3.2 Ghz personal computer

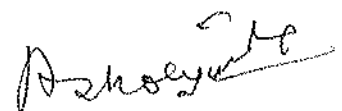
The appellant took CENVAT credit of the duty paid on the above items since the same were used for providing taxable output service.

*Aswathy 21/8*

4. Vide show cause notice dated 31.03.2008, the CENVAT credit taken on the above items was sought to be denied because the classification of the items in question do not figure under any of the headings figuring in the definition of 'capital goods' under Rule 2(a) of CENVAT Credit Rules, 2004. The proceedings culminated in the impugned order dated 8.12.2008 passed by the Commissioner of Central Excise, NOIDA vide which the denial of CENVAT credit of Rs.80,20,528/- was confirmed and penalty of equivalent amount was imposed under Rule 15(1) of CENVAT Credit Rules, 2004.

Against the said order appellant is before us.

2. Ld.Counsel for the appellant submits that although the appellant has shown the goods on which they have taken the Cenvat credit as capital goods if ~~they~~<sup>do not</sup> qualify as capital goods in terms of Rule 2(a) of Cenvat Credit Rules, 2004, the said goods be treated as inputs in terms of Rule 2(k)(ii) of the Cenvat Credit Rules, 2004. Therefore they are entitled to avail Cenvat credit. It was also alleged that value of these inputs have not been formed the part of assessable value. The appellant is not entitled to get Cenvat Credit. It is the contention of the Ld.Counsel that Cenvat Credit Rules nowhere provides that value of inputs or capital goods is to be formed the part of assessable value. It is further submitted that it was also held that the items in question do not have a consuming nature hence they are not admissible for Cenvat Credit as input. It is his contention that this reasoning of the Commissioner is perverse. In fact, item is required to be used in or in relation to the manufacture of final goods or used for providing output



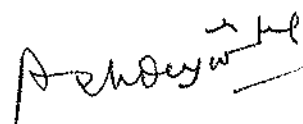
service. He also submits that similar issue came up before this Tribunal in the case of GTL Infrastructure Ltd. v. Commissioner of Service Tax, Mumbai [2015 (37) STR 577 (Tri.-Mumbai)] and after examining the issue this Tribunal allowed the Cenvat Credit.

3. Ld.Counsel further submitted that the extended period of limitation is not invocable as all the necessary details were reflected in their Cenvat Credit account and dispute arose because of an audit objection. There was no malafide intention of the appellant on the issue and this is purely case of benefit of interpretation of provisions of Cenvat Credit Rules, 2004. In these terms he prayed that impugned order is to be set aside.

4. On the other hand the Id.AR submits that all the goods in question merit classification under chapter heading 73089080 and the said classification do not cover as capital goods. Further the appellant has taken Cenvat Credit on the said goods as capital goods which do not qualify as capital goods as per Rule 2(a) of Cenvat Credit Rules, 2004 therefore Cenvat Credit is rightly denied to the appellant.

5. Heard the parties and considered the submissions.

6. The short issue involved in the matter is that whether on the items in question appellant is entitled to avail Cenvat credit on not. We find that the appellant has taken Cenvat credit as capital goods on the goods in question. Although they do not qualify as capital goods as per Rule 2(a) of Cenvat Credit Rules, 2004, but in alternate it is the claim of the appellant that these goods be treated as inputs in terms of rule 2(k)(ii) of Cenvat Credit Rules, 2004. For better appreciation Rule 2(k) is reproduced below:-



## RULE 2. ....

## (k) "input" means –

(i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production;

(ii) all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service;

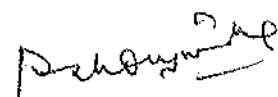
7. As per the said rule any goods used for providing output service is entitled for Cenvat credit. Admittedly the goods in question has been used for providing the output service by the appellant. This fact is not in dispute. The question raised by the Id.Commissioner in the impugned order is that the appellant has not shown these goods as inputs or they have added value of said goods in the value of taxable service provided by them. In fact the terminology of rule 2(k)(ii) is very clear and that does not bar or give qualification on adding value of said goods in the taxable service. Therefore said reasoning of the Id.Commissioner in the impugned order is not convincing. Further the another reasoning given by the Id.Commissioner in the impugned order is that the said goods have not been consumed while providing output service. We find that the language of the statute is very clear. All inputs used for providing output service. We fail to understand from where the term consumed has been brought by the Id.Commissioner in the impugned order. In fact the input is required to be used for providing output service.

*5*  
*Ashwani Me*

Admittedly these inputs have been used by the appellant for providing output service. The similar issue came up before the Tribunal in the case of GTL Infrastructure Ltd. (supra) wherein this Tribunal has observed as under:-

"8. On going through the above said provision of Rule 2(k)(i) *ibid*, we find it deals with manufacturing activity. Admittedly, the appellants are providing output service, therefore, Rule 2k(ii) *ibid*, is relevant to the facts of the case in hand, wherein, it has been said that "all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service". The adjudicating authority has heavily relied on Explanation-2 to the said Rules as same has been discussed by the Tribunal in the case of *Bharati Airtel Ltd.* (supra). In fact, the explanation also clarified that inputs includes goods used in manufacture of capital goods which are further used in the factory of the manufacturer. But in the case in hand, the appellant is a service provider. Therefore, the said explanations has no relevance to the facts of this case. As per Rule 2(k)(ii) of the Cenvat Credit Rules, 2004 all goods are entitled for Cenvat Credit which are used for providing any output service. In this case nowhere it is disputed by any of the parties that the tower/BTS cabins were not used by the appellant for providing service namely 'Business Auxiliary Service.' Therefore, the Cenvat Credit cannot be denied. These facts have not been appreciated by the adjudicating authority and the adjudicating authority heavily relied on the definition of inputs as per Rule 2(k)(i) and Explanation-II to the said Rule. We also find that before discharging their Service Tax liability, the appellant narrated activity undertaken by them to the Revenue and Revenue directed the appellant to pay Service Tax under the category of 'Business Auxiliary Service' on the said activity. In that case the Cenvat Credit taken on the inputs for providing that service is entitled for Cenvat Credit as per Rule 2(k)(ii) of the Cenvat Credit Rules, 2004. Further, we find that the adjudicating authority has heavily relied upon the decision of *Bharti Airtel Ltd.* (supra); in the said case the facts are totally different to the facts of the case in hand. In fact in that case appellant was engaged in providing cellular telephone service and as per Board Circular No. 137/315/2007-CX-4, dated 26-2-2008, it is clarified that no Cenvat Credit on towers and BTS cabin is permissible for Cellular Phone Service Provider. In the instant case, the towers and the cabins are used by the appellant as Passive Telecom Infrastructure for providing output service namely 'Business Auxiliary Service' as declared by the appellant to the department in 2005 and agreed to by the department in their reply dated 20-9-2005.

9. We further find that in this case the intention of the



8. In view of the above analysis we hold that appellant has correctly availed the Cenvat Credit on the goods in question and same may be treated as input for providing output service. Therefore we set aside the impugned order and allow the appeal with consequential relief. As we have decided the issue on merit, therefore we are not going into the issue of limitation.

32. 39.00.000, KODUMBUR-211001  
39. M. G. MANGALLAHABAD-211001