

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 875 of 2012

(Arising out of Order-in-Appeal Nos. 460 to 462/2011 dated 26.12.2011 passed by the Commissioner of Central Excise (Appeals – II), Bangalore)

M/s. Infosys Limited

(formerly Known as Infosys Technologies Limited)
Electronics City, Hosur Road
Bangalore – 560 100.

Appellant(s)

VERSUS

The Commissioner of Service Tax

No.16/1, S.P. Complex, 5th Floor,
Lalbagh Road,
Bangalore.

Respondent(s)

WITH

Service Tax Appeal No. 876 of 2012

(Arising out of Order-in-Appeal Nos. 460 to 462/2011 dated 26.12.2011 passed by the Commissioner of Central Excise (Appeals – II), Bangalore)

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Respondent(s)

APPEARANCE:

Shri N. Anand, Advocate for the Appellant

Shri P. R. V. Ramanan, Special Counsel (AR) for the Respondent

CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER
(TECHNICAL)

Final Order No. 20494 - 20496 /2024

DATE OF HEARING: 29.02.2024

DATE OF DECISION: 14.06.2024

PER : R. BHAGYA DEVI

M/s. Infosys Technologies Limited, the appellants have filed these appeals against Order-in-Appeal No.460-462/2011 dated 26.12.2011.

2. The Appellant is an Information Technology (IT) company and a 100% EOU-STP unit having units in Special Economic Zones (SEZ), engaged in development of software and in providing IT Software services under different categories such as maintenance/repair service (MRS) in relation to software; consulting engineer; Information Technology Software Services (ITSS); Management Consultancy service; Business Support Service (SSBC) and also registered for payment of service tax under reverse charge mechanism in respect of services imported into India. They had filed 3 refund claims under Rule 5 of CENVAT Credit Rules 2004 for the service tax paid on input services used in the services that were exported. These refund claims were rejected on the ground that output services were not exported in accordance with the Export of Services Rules, 2005 and on the ground that nexus between input and output services was not established. The Commissioner (Appeals) in the impugned order after providing detailed justification and relying

on the Board Circular No.111/5/2009-ST dated 24.02.2009 and Board Circular No. 120/1/2010 dated 19.01.2010 rejected all the three (3) refund claims. Aggrieved by this order, the appellant is in appeal before us.

3. The learned counsel submits that the Appellant enters into various agreements with foreign customers including banks and financial institutions for the purpose of providing information technology software services and various other services in relation to "information technology software". In terms of these agreements, the Appellant is contracted to render, provide and execute information technology software services of varied nature including software development, software implementation, consultancy, advice and assistance in relation to information technology software, study, design and programming of IT software, providing right to use IT software, etc. These services are rendered predominantly from the business premises situated in India by employing thousands of employees, software experts, technicians, engineers, etc. In terms of the global agreements with their overseas customers services are rendered from their "offshore development centres" (i.e., from various business premises situated in India as detailed above) and partly "onsite" viz., through Appellant's branches. For the above activities (both offshore and onsite) the Appellant raises invoices/bills on the foreign customers who also make remittance/payments to the Appellant i.e., export proceeds realisation. The global agreements entered by the Appellant are sub-contracted to the Appellant's subsidiary companies located outside India. Insofar as the sub-contracted activities, the overseas subsidiaries of the Appellant would raise invoices on the Appellant and the Appellant would make payments to them. Since these services are in the nature of "import of service" in terms of section 66A of the Finance Act, 1994, the Appellant being the recipient of the services, service tax is paid under Reverse Charge Mechanism (RCM) as per Section 66A read with Rule 2(1)(d) of the Service Tax Rules,

1994. Since these imported services are in the nature of "input services", they avail the benefit of cenvat credit under Cenvat Credit Rules, 2004. Apart from taking Cenvat Credit of service tax paid on RCM under section 66A of the Act, the Appellant also avails cenvat credit of service tax paid on various other "input services" and the Cenvat credit availed is accumulated since they predominantly export their services out of India. Therefore, the accumulated unutilised cenvat credit is claimed as refund in terms of Rule 5 of the Cenvat Credit Rules, 2004 which is an incentive given to any exporter.

3.1 It is further submitted during the period of dispute filed three quarterly refund claims under Rule 5 of the Cenvat Credit Rules read with Notification No. 5/2006-CE (NT) dated 14th March 2006, were filed for which the Department issued 3 show cause notices alleging non-furnishing of invoices copies for taking credit on input services, FIRC's, export invoices, etc. The Appellant furnished all the copies, details and required information and filed their replies to the notices. Subsequently, the CBEC issued a Circular No.120/01/2010-ST dated 19.1.2010 which prescribed the procedures and furnishing of Chartered Accountant (CA) certificate in support of the refund claims in order address the problems of exporters and the CA certificates in terms of the above Circular were also furnished. Thereafter, the Department issued "Addendum" to the respective SCNs requiring the Appellant to furnish some more documents and information and all the details, copies of documents, etc., were furnished. The authorities however rejected all the claims on the following grounds:

- (i) the export invoices do not indicate the classification/description of services exported and in the absence of which "taxability" of the service cannot be determined;
- (ii) nexus between input service and output service could not be established;

(iii) the condition envisaged in Rule 3(2) of Export Services Rules, 2005 was not established.

3.2 The learned counsel submits that the refund claims have been rejected on unsubstantiated and frivolous findings. It is submitted that during the period of dispute the services rendered and exported by them were taxable service in terms of section 65(105) and self-assessed in ST-3 returns were filed with the Department. These returns clearly stated that they were providing and exporting "taxable services" under the categories of ITSS u/s 65(105)(zzzzj) read with Section 65(53a); Management, maintenance or repair of software u/s 65(105)(zzg) read with Section 65(64); Management Consultancy services under Section 65(105)(r) read with Section (65) and technical inspection and certification services under Section 65(105)(zzi) read with Section 65(108) which is an admitted fact. Merely because in the export invoices these services were not mentioned or described does not mean that the services were not taxable services.

3.3 With regard to nexus between the input services and output services it is submitted that it is well settled that every "input services" on which cenvat credit is availed, refund of the unutilised accumulated credit would be allowed under Rule 5 of the Cenvat Credit Rules. Relying on the retrospective amendment made to Notification No.5/2006-CE(NT) dated 14.3.2006 under Section 74 of the Finance Act, 2010 it is claimed that the question of nexus between input services and output service does not arise. He also relies on the Board/CBEC Circular No.120/01/2010-ST dated 19.01.2010 where it was clarified that the correlation and nexus between input services and output service can be certified by the Chartered Accountant and in the instant case their Chartered Accountant certificates have not been considered. The impugned orders are therefore contrary to evidence on record as also contrary to the binding Circulars issued by the Board.

3.4 The learned Counsel further submits that for the period from May 2008 to September 2008 they had filed refund claim under Rule 5 of the Cenvat Credit Rules, 2008 a show-cause notice dated 12.01.2009 was issued on similar grounds which was adjudicated vide OIO No.141/2009 ST dated 26.03.2009. On appeal, the first Appellant Authority vide Order-in-Appeal No.254/2010 dated 06.09.2010 allowed the appeal wherein the above Order-in-Original was modified and remanded back for re-examination of the eligibility to refund. The Assistant Commissioner, Central Tax vide *de novo* Order No.38/2019-20 REF SD-8 dated 20.11.2019 specifically recorded findings that the Appellant has exported their services and has fulfilled all the criteria as per Rule 6A of the Service Tax Rules, 1994 and the above order has not been challenged in further appeal by the Revenue and has attained finality. For the subsequent periods viz., July 2009 to September 2009; October 2009 to December 2009 and January 2010 to March 2010, on very similar set of facts, with absolutely no change in its business model, and with similar service agreements with global customers etc., (which fact is also admitted in the orders) the refund claims under Rule 5 of the Cenvat Credit Rules, 2004 have been sanctioned. The very same adjudicating authority had passed three Orders-in-Original vide 575/2011 and 576/2011 both dated 9.9.2011 and No.136/2012 dated 6.2.2012, had allowed refund and no refund claims were rejected on the ground that conditions envisaged in Rule 3(2) of the Export of Services Rules, 2005 were not fulfilled. These Orders-in-Original were not challenged in further appeals by the revenue and hence have attained finality. Thus, it is claimed that for the prior period (i.e., May 2008 to September 2008) and for the subsequent periods (i.e., July 2009 to December 2010), the revenue allowed the refund holding that the Appellant had fulfilled the conditions in Rule 3(2) of the Export of Service Rules, 2005 and Rule 6A of the Service Tax Rules, 1994. It is only for the in-between period i.e., period of dispute in the present appeals from October 2008 to June 2009, the refunds have been rejected in the impugned orders *inter alia*

on the ground of non-fulfillment of conditions in Rule 3(2) of the Export of Services Rules. It is well settled principle that when the facts have not undergone any change and there is also no change in the applicable law, the revenue cannot adopt two diametrical opposite views. When the revenue allowed the refund claim for the prior period and the subsequent periods, then it cannot reject the refund claims for the intervening period and relies on the following decisions.

- *Marsons Fan Industries v. CCE*, 2008 (225) ELT 334 (SC);
- *Jayaswals Neco Ltd v. CCE*, 2007 (8) STR 305 (SC);
- *Birla Corporation Ltd v. CCE*, 2005 (186) ELT 266 (SC);
- *Lakshmi Engineering Works v. CCE*, 2017 (7) GSTL 459 (Tri-Bang.);
- *CCE v. Mehra Traders*, 2004 (172) ELT 195 (Tri-Kol.) and *Hindustan Coca Cola Beverages Pvt Ltd v. CCE*, 2012 (284) ELT 254 (Tri-Kol.).

3.5 The Appellant further submits that the lower authorities have traversed beyond the parameters of the show cause notice and have recorded findings on Rule 3(2) of the Export of Services Rules, 2005 which were never alleged or never brought to the notice of the Appellant. In para-6.2 of the impugned order, the First Appellate Authority has recorded that "*...the outsourced service earns foreign exchange of around 90-95% of the contract amount for the respective country of the subsidiary company as per the sub-contracting agreements and not to India...*". These findings are not corroborated by any evidence. It is submitted that in terms of the agreements with the foreign customers, the Appellant provides substantial portion from India through various premises situated across India and it is only a small portion of the services are provided "onsite" in overseas customer locations. Further, the Appellant sub-contracts to its overseas subsidiaries and the services received from them by the Appellant are subject to service through RCM which is evident from the Profit & Loss Account and Consolidated Profit & Loss Account of the Appellant. It is further submitted that for the year ended March 31, 2009, the total "Software Development Expenses" incurred by the Appellant is Rs.11,145.00 crores. Out

of this, the total expenses on "Salaries and bonus including overseas staff expenses" was Rs.8,583 crores and whereas the Expenses on "Technical Sub-Contractors-Subsidiaries" was just Rs.861 crores. These financials which are audited by the Statutory auditors clearly disprove the findings in the impugned orders. It is submitted that the substantial portion of the services and/or activities are rendered/provided from India by the Appellant. Further, in a business world, it is impossible and also many times it is imperative for various business reasons that a portion of the activities is outsourced or sub-contracted. Even in respect of outsourced and/or sub-contracted activities the Appellant is the main service provider and the Appellant is answerable and accountable for anything relating to quality of the service. Besides in respect of sub-contracted activities and the consideration paid therefor, the Appellant has been paying service tax under section 66A under RCM and these are nothing but "input services" since the sub-contracted activities are used for the purpose of "exported services only". There is absolute nexus between the sub-contracted activities and the export of services by the Appellant. Therefore, factually, the Appellant has provided taxable services from India and they have fulfilled the condition envisaged in rule 3(2) of the Export of Services Rules, 2005 and even the nexus between input services and the export services are also established. The impugned orders are therefore untenable in law in holding that the Appellant has not fulfilled the conditions of Rule 3(2) of the Export of Services Rules, 2005.

3.6 The learned counsel for the appellant submits that the impugned orders are also opposed to Hon'ble Finance Minister's Budget Speech for the year 2010 read with TRU Circular No.334/1/2010-TRU dated 26.02.2010 as also Circular No.120/01/2010-ST dated 19.01.2010.

4. The learned Special Counsel on behalf of the Revenue made the following submissions:

- a. The appellant had entered into contracts with their clients abroad, under which the appellant had the primary

responsibility to provide the services to their clients. To exclude the contracts, they had entered into subcontracting agreements with the subsidiaries in the respective countries and the services were provided by the subsidiaries. The subsidiaries raised the invoices on the appellant reflecting their charges for providing the services and be paid by the appellant. The services received from the subsidiaries were taken as import of service any appropriate service tax was paid by the appellant on reverse charge mechanism. In addition, services were provided to foreign clients by the appellant to their onshore and on-site teams of professionals. With regard to the payments under your charge mechanism the learned counsel submits that the agreements read as follows "whereas customer is engaged in the business of providing information technology services, business and information technology consulting and business process outsourcing services and is desirous of obtaining certain information technology services, business and information technology consulting and business process outsourcing services from vendor in Australia either for itself for its clients, and whereas when there is engaged in the business of providing information technology services, business and information technology consulting and business process outsourcing services and is agreeable to providing the customer with required services in Australia"

- b. The expression customer refers to the appellant and the expression vendor refers to Infosys technologies Australia private limited. It is submitted that the objective of the appellant was to obtain from the vendor the specified services either for itself or for its clients in Australia. This indicates that the intention was to obtain the services in Australia not elsewhere. Further such services were not exclusively for itself. Besides the vendor had agreed to provide the required services in Australia. There is no averment on behalf of the appellant that they obtained any services from the vendor in Australia. The obvious conclusion is that the vendor provided

the said services in Australia only to the clients not to the appellant. Thus, the specified services were provided by the vendor Incorporated and located in Australia. These services are provided in Australia and the recipient were also in Australia therefore by no stretch of imagination it can be said that the services were exported from India.

- c. As per the payment terms Vendor in Australia shall receive 93% of the contract value as per the agreement between the appellant and the client. The contract value is expressed as hourly on-site rate in the case of Time and Material projects and the proportionate value of work executed in Australia in the case of fixed-price projects. Thus, the payment terms are with respect to the work executed that is service provided in Australia. As the amount attributable to appellant's own services exported abroad the original authority observed that the appellant has not furnished the exact quantum of such exports and linking the input and output services was not possible based on export invoices produced by the appellant.
- d. Whether the appellant has fulfilled the conditions of Rule 3(2) of Export of Service Rules, 2005, the observations of the Commissioner are *"Mere documentation would not facilitate the appellant to avail the export incentive, as the facts this entitled them from the export benefits towards service rendered by service providers located in countries other than India. It is therefore apparent from the records, mandatory requirement of output service being performed by the service provided from India to fetch convertible foreign exchange to India is not satisfied. The appellant's have neither disputed the findings of the respondent of having received remittances for the output services that were rendered by establishment situated outside India, remittance instructions for depositing in Bank of America, Chicago and the Deutsche Bank Amsterdam, Mumbai etc."* Therefore, the output services corresponding to input services on which service tax was paid on RCM do not satisfy the condition that the same have been

exported from India, hence the claim of refund of cenvat credit of tax paid on RCM is not admissible.

- e. It is further submitted that the Commissioner observed that the export invoices did not indicate the classification/description of services exported by the appellant. It is an undisputed fact the invoices merely showed the details of reimbursements/payments indicating the names of employees and there was no clarity as to whether the services were partly or fully performed outside India or whether only manpower was supplied to the client. In the absence of description and classification of services it was not possible to categorize the services and thus the nexus between input services and output services was not established in terms of Cenvat Credit Rules.
- f. The Learned Counsel additionally submits that matching of invoices pertaining to input services and output services need to be established and the matter made need to be remanded for fresh consideration for refund claims other than services rendered by the subsidiaries. He also submits that the refund claim which relates to services rendered by the subsidiaries of the appellant company the output services provided by the subsidiaries in the respective countries would not qualify to be called as output services exported from India.
- g. The Learned Counsel admitting that the earlier orders had attained finality but the claim of the appellant that the rejection of refund only for the intervening period is not legally sustainable cannot be accepted because the earlier orders did not consider the aspect of Rule 3(2) as is discussed in detail in the impugned order. The earlier orders failed to consider the vital point that affected the grant of refund. The fact that the same have not been appealed against cannot be held against the impugned order in as much as there is no reason to reject the basic principle flowing from para 6.2 of the impugned order.
- h. It is further submitted that in respect of services rendered by the subsidiaries of the appellant, there is no dispute the said

services were provided and received in the respective countries, the same could not have been imported into India. The appellant has only through documentation tried to prove that the output services have been exported from India whereas physically the services were rendered and received in the respective countries. Accordingly, payment of service tax on services provided by the subsidiaries by RCM is itself not legally correct and proper. The amount so paid cannot be regarded as service tax since they paid without the authority of law hence taking credit of the same under the cenvat credit and grant of refund the same is without the authority of law. The Revenue to substantiate this argument relies on the observations of the Tribunal in the case of **KPIT Cummins Infosystems Ltd. vs. CCE, Pune: 2014 (33) STR 105 (Tri.-Mum.)** wherein it was held that the services were provided abroad, received and consumed abroad, therefore no services are provided and received in India; hence, the provisions of Section 66A are not at all attracted.

5. The learned counsel for the appellant in his rejoinder submitted that the submissions of the Revenue reflect non-appreciation of facts in perspective including Sub-contracting Agreement and the statutory provisions. As per the recitals of the Sub-contracting Agreement, the Appellant (who is referred as "Customer" in the said agreement) is engaged in the business of providing IT services and other services and is desirous of obtaining certain IT services from Vendor (i.e. Infosys Technologies Australia Pvt. Ltd) either for itself or for its clients. Thus, this Recital in the Sub-contracting Agreement is clear that the above foreign company (i.e., Infosys Technologies Australia Pvt. Ltd) is to render specified IT services to the Appellant for its own consumption or to the Appellant's clients. The expression "client" is defined in the above agreement to mean *Customer's client with whom Customer has a separate agreement for providing IT services and other specified services*. Thus, it is the Appellant who has entered into main Agreement with its customers for rendering IT and other specified services and the

Appellant has entered into Sub-contracting agreement to receive sub-contracted services to the Appellant or for Appellant's clients. Further, the expression "services" is defined *to mean the tasks to be performed by Vendor for Customer, which would be specified from time to time by the Customer and which shall be governed the Agreement*". "Source Deliverable" *means the human readable source code that the Vendor is required to produce and deliver to the Customer as part of Services*. This clearly establishes that the above foreign company is rendering services directly to the Appellant for its own consumption or for the clients of the Appellant. Further, as per Clause-2.1 of the Sub-Contracting Agreement it is agreed that – "All services to be performed and any related deliverables and other materials to be supplied by the Vendor (i.e. Infosys Technologies Australia Pvt. Ltd) shall be in accordance with the project requirements and directions given by Customer's (i.e. the Appellant) authorized representatives from time to time". From this Clause, it is clear that above foreign company has agreed to render in accordance with project requirements and directions of the Appellant. Also, as per Clauses 3 & 4, the foreign company shall raise an invoice on the Appellant and the Appellant shall pay the foreign company for the services rendered by it as per rates agreed between the parties. Therefore, the foreign company viz., Infosys Technologies Australia Pvt. Ltd has rendered services to the Appellant, has raised invoice on the Appellant at the agreed rates and the Appellant has to pay the invoiced amount. Since the foreign company (i.e., Infosys Technologies Australia Pvt. Ltd) has rendered IT services (which is one of the specified taxable service as per section 65(105) of the Finance Act, 1994 and the Appellant is the recipient of the said service and the provisions of section 66A read with Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 gets attracted and accordingly discharged service tax under RCM basis in respect of import of services (i.e., sub-contract services) received from Infosys Technologies Australia Pvt. Ltd. Since the payment of service tax under RCM basis under section

66A of the Act read with rule 3(iii) of the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 made by the Appellant and duly self-assessed in the returns filed by the Appellant in ST3 returns has been accepted by the Department and no dispute whatsoever was ever raised by the revenue, the Revenue cannot question the payment of service tax on RCM basis in respect of sub-contract services received by the Appellant from its subsidiaries at this juncture.

5.1 The learned counsel further submits that the submissions made by the Revenue are contrary to the facts on record and cannot be accepted at this juncture since it tantamount to traversing beyond the scope / parameters of show-cause notice and the impugned order. It is submitted that the Department did not make any allegations in the show-cause notice nor is there any findings to the effect that the services rendered by foreign companies and received by the Appellant was not liable for payment of service tax on RCM basis and that the service tax so paid on RCM basis under Section 66A was not liable for payment of service tax and no refund was allowable for the said reasons. It is well settled that the Department is not permitted to make out a new case at the appellate stage which is beyond the scope or parameters of show-cause notice as held in *CC v. Toyo Engineering India Ltd*, 2006 (201) ELT 513 (SC); *Gujarat State Fertilizers Co v. CCE*, 1997 (91) ELT 3 (SC); *Hindustan Polymers Co Ltd v. CCE*, 1999 (106) ELT 12 (SC); *Saci Allied Products Ltd v. CCE*, 2005 (183) ELT 225 (SC); *Reckitt & Colman of India Ltd v. CCE*, 1996 (88) ELT 641 (SC); *CCE v. Sanghi Threads*, 2015 (321) ELT 180 (SC); *CCE v. Sun Pharmaceuticals Inds. Ltd*, 2015 (326) ELT 3 (SC).

5.2 Further, the reliance placed on the decision in the case of *KPIT Cummins Infosystems Ltd v. CCE* (supra) is misconceived and factually different since the facts involved in the above decision was alleged service between Head Office vis-à-vis its foreign branches and the services between different companies

i.e. holding Indian company and foreign subsidiary company was not involved in the above decision. It is stated that the claims cannot be accepted in view of the judgment of the Hon'ble Supreme Court in the case of *Mohinder Singh Gill v. Chief Election Commission*, AIR 1978 SC 851, 858 wherein it was observed thus – **"When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may by the time it comes to court on account of a challenge, get validated by additional grounds later brought out"**.

6. Heard both sides. The issues before us are:

- (i) Whether the appellant has satisfied the conditions of Rule 5 of the Cenvat Credit Rules 2004 read with the Export of Service Rules, 2005.
- (ii) Whether the refunds for earlier period and later period being sanctioned can it be rejected for the interim period.
- (iii) Whether the Order-in-Original was beyond the scope of the show-cause notice.

7. The appellant filed the following refunds claims .

Appeal Nos.	Period Involved	OIO Ref.	Refund claimed	Refund Sanctioned	Refund Rejected	Remarks
	May 2008 to Sep. 2008	38/2019-20 dtd.20.11.19	61,66,31,143/-	50,96,37,783/-	10,69,93,360/-	Refund allowed.
ST/877/2012	October 2008 to Dec.2008	684/2010 dtd.29.11.10	42,49,06,881/-	0	42,49,06,881/-	Refund Rejected and appeals filed before this Tribunal
ST/875/2012	January 2009 to March 2009	205/2011 dtd.7.4.11	38,18,52,758/-	0	38,18,52,758/-	
ST/876/2012	April 2009 to June 2009	206/2011 dtd.7.4.11	35,84,71,431/-	0	35,84,71,431/-	
	July 2009 to September 2009	575/2011 dtd.9.9.11	35,13,61,916/-	13,44,02,352/-	21,69,59,564/-	Refunds allowed
	January 2010 to March 2010	136/2012 dtd.9.2.12	43,53,73,507/-	40,60,56,276/-	2,93,17,231/-	
	April 2010 to June 2010	01/2012 dtd.5.1.12	47,16,73,772/-	18,54,23,181/-	28,62,50,591/-	
	July 2010 to September 2010	811/2012 dtd.17.9.12	44,50,22,275/-	43,34,96,747/-	1,15,25,528/-	
	October 2010 to December 2010	52/2013 dtd.23.1.13	48,71,81,583/-	20,02,37,974/-	28,69,43,609/-	
	Oct. 2009 to Dec. 2009	576/2011 dtd.9.9.11	47,89,62,451/-	21,92,28,267/-	25,97,34,184	

8. The first issue is whether the Order-in-Original has traversed beyond the show-cause notice. The appellant filed a refund claim on 24.0.2009 for Rs.35,84,74,431/- being the unutilised CENVAT credit under Rule 5 of CENVAT Credit Rules, 2004, without the relevant documents to be filed along with the claims. Hence, the notice dated 15.12.2009 was issued calling for the following documents.

- Details of services exported and used outside India
- FIRC certified by the Bank
- Invoice for input services
- Export invoices, etc.

8.1 In response to this notice, the appellant had filed the following documents for processing the refund claim.

- Details of export turnover
- Details of CENVAT credit
- Service tax paid under reverse charge mechanism
- Sample copies of FIRCs
- Copies of softtex forms and connected invoices

8.2 Based on the above documents filed, the refund claims were rejected on various grounds. The notice was issued calling for all the relevant documents that were to be filed along with the Rule 5 Refund claims and only after receipt of the above document the officers concerned could verify the eligibility of the claims based on which the original authority issued the order. The original authority has rightly observed that the Order-in-Original has not traversed beyond the scope of show-cause notice as apparently the essential facts required to process the refund claims were not produced and admittedly due to very high volume of transactions covering about 45,000 export invoices, equal number of input invoices and certified copies of FIRCs were not filed along with the claim and filed only along with their reply to the notice. Therefore, the order issued cannot be held as having traversed beyond the notice.

9. The second issue is whether the appellant satisfied the conditions of Rule 5 of the Cenvat Credit Rules, 2004 read with the Export Service Rules, 2005. Rule 5 of the Cenvat Credit Rules, 2004 reads as under: -

"RULE 5. Refund of Cenvat credit. - Where any input or input service is used in the final products which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export, or used in providing output service which is exported, the CENVAT credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer or provider of output service towards payment of,

- (i) duty of excise on any final products cleared for home consumption or for export on payment of duty; or
- (ii) service tax on output service,

and where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification:

Provided 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 Drawback Rules, 1995, or claims a rebate of duty under the Central Excise Rules, 2002, in respect of such duty:

Provided further that no credit of the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, as amended by clause 72 of the Finance Bill, 2005, the clause which has, by virtue of the declaration made in the said Finance Bill, under the Provisional Collection of Taxes Act, 1931, the force of law, shall be utilized for payment of service tax on any output service.

Explanation: For the purposes of this rule, the words 'output service which are exported' means any output service in respect of which payment is received in India in convertible foreign exchange and the same is not repatriated from, or sent outside, India.

Provided that the CENVAT credit or inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule."

9.1 Thus, a perusal of this Rule indicates that where any input or input service is used in the final product, which is cleared for export etc., or used in the intermediate product cleared for

export or used for providing output service which is exported, then, the Cenvat credit in respect of the input or input service so used shall be allowed to be utilised by the manufacturer or provider of output service towards payment of duty of excise on any final product cleared for home consumption or for export on payment of duty or service tax on output service. Whether for any reason, such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitation as may be specified by the Central Government by a Notification. The Notification reproduced below clearly spells out the conditions to be satisfied and the procedures to be followed in filing the refund claim.

Notification No. 05/2006 - Central Excise (N.T.) G.S.R. (E) dated 14th March 2006

In exercise of the powers conferred by rule 5 of the CENVAT Credit Rules, 2004 (hereinafter referred to as the 'said rules'), and in supersession 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. 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. (Emphasis supplied)

Appendix 1

The final product or the output service is exported in accordance with the procedure laid down in the Central Excise Rules, 2002, or the Export of Services Rules, 2005, as the case may be.

2. The claims for such refund are submitted not more than once for any quarter in a calendar year Provided that where,

(a) the average export clearances of final products or the output services in value terms is fifty percent or more of the total clearances of final products or output services, as the case may be, in the preceding quarter; or

(b) the claim is filed by Export Oriented Unit, the claim for such refund may be submitted for each calendar month.

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.

4. The refund is allowed only in those circumstances where a manufacturer or provider of output service is not in a position to utilize the input credit or input service credit allowed under rule 3 of the said rules against goods exported during the quarter or month to which the claim relates (hereinafter referred to as 'the given period').

5. The refund of unutilized 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. $\text{Maximum refund} = \frac{\text{Total CENVAT credit taken on input services during the given period} \times \text{export turnover}}{\text{Total turnover}}$

Illustration : If total credit taken on input services for a quarter = Rs. 100 Export turnover during the quarter = Rs 250 Total Turnover during the quarter = Rs 500 Refund of input service credit under Rule 5 of the CENVAT Credit Rule, during the quarter $100 \times 250 / 500$ i.e. Rs 50
Explanation: For the purposes of condition no.5, 1. "Export turnover" shall mean the sum total of the value of final products and output services exported during the given period in respect of which the exporter claims the facility of refund under this rule.

2. (a) (b) (c) "Total turnover" means the sum total of the value of, all output services and exempted services provided, including value of services exported; all excisable and non-excisable goods cleared, including the value of goods exported; The value of bought out goods sold, during the given period.

6. The application in Form A, along with the prescribed enclosures and the relevant extracts of the records maintained under the Central Excise Rules, 2002, CENVAT Credit Rules, 2004, or the Service Tax Rules, 1994, in original, are filed with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, before the expiry of the period specified in section 11B of the Central Excise Act, 1944(1 of 1944).

7. The refund of excise duty or service tax is allowed by the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be.

ANNEXURE FORM 'A' (See paragraph 3 of the Appendix)
Application for refund of CENVAT credit under rule 5 of the CENVAT Credit Rules, 2004 (Refund relating to the given period i.e. quarter or month _____)

To

The Deputy Commissioner / Assistant Commissioner of Central Excise,

Sir, I/We have exported, the final products or output services of under-mentioned description, value, quantity to _____ during the given period.

I/We am/are not in a position to utilize the CENVAT credit of duty/service tax taken,

(a) on inputs or input services used in the manufacture of final products cleared for export under bond or letter of undertaking;

(b) on input or input services used in providing output services exported without payment of service tax, and such credit being allowed under rule 3 of the CENVAT Credit Rules, 2004, for payment of duty in respect of final products cleared for home consumption or for export on payment of duty or for payment of service tax on output services during the given period.

I/We request that refund of such credit for the given period may be granted.

The following particulars/enclosures are being provided/enclosed by me/us for this purpose. (A) Particulars Of Final Products or Output Services Exported During The Given Period:

- (i) Description: (a) Final Products _____ (b) Output Services _____
- (ii) Quantity (in units) in case of final products _____
- (iii) Value: (a) Final products _____ (b) Output Services _____

(B) Particulars Of Inputs Or Input Services Used In The Manufacture Of Final Products Or Used In Providing Output Services During The Given Period:

- (i) Description: (a) Inputs _____ (b) Input Services _____
- (ii) Quantity (in units) in case of inputs _____
- (iv) Amount of credit taken on: (a) Inputs _____ (b) Input Services _____

(C) Total Turnover During The Given Period:

(i) The value of al output services and exempted services provided, including value of services exported:

(ii) (iii) The value of al excisable and non-excisable goods cleared, including the value of goods exported: The value of bought out goods sold:

(D) ENCLOSURES: (i) Copy of the relevant Shipping Bills or Bills of Export duly certified by the officer of customs to the effect that the goods have in fact been exported (in case of final products).

(ii) (iii) (iv) Copy of invoices. Certificate from the bank certifying realization of export proceeds (in case of export of output services). Relevant extracts of the records maintained under the Central Excise Rules, 2002, the CENVAT Credit Rules, 2004, or the Service Tax Rules, 1994, as the case may be, evidencing taking of CENVAT credit, utilization of such credit in payment of excise duty or service tax and the balance unutilized credit during the given period.

(E) Amount Of Refund Claimed: Rs (in figures and in words)

9.2 From the above Rules and the Notification, it is clear that **the output service is exported in accordance with the procedure laid down in the Export of Services Rules, 2005,** and the input credit used in these exported services have to be clearly accounted for. Therefore, its necessary to examine whether the services exported were in accordance with the Export of Services Rules, 2005.

9.3. The Commissioner (Appeals) in the impugned order observes *"The main contention of the appellant is that service is ultimately rendered to the customer outside India for which payment is received by them in convertible foreign exchange. I find that it is true that services have been provided to a foreign based client but at the same time it is also true that majority of the said services were not provided from Indian territory by the appellant but by their subsidiaries elsewhere. Further to avail the benefit of exemption of export of services under 'Export of Services Rules' 2005 it has been stipulated in clear terms that the following 2 conditions that is a b have to be satisfied. It is an*

undisputed fact that in this case the payment of said services have been received by the appellant but reimbursed to the respective subsidiary units as per their subcontracting agreements. The outsource service earns foreign exchange off around 92-95% of the contract amount for the respective country of the subsidiary company as per the subcontracting agreements and not to India. Mere documentation would not facilitate the appellant to avail the export incentive as the facts disentitled them from the export benefits towards service rendered by service providers located in countries other than India. It is therefore apparent from the records the mandatory requirement of output service being performed by the service provider from India to fetch convertible foreign exchange to India is not satisfied. The appellants have neither disputed the findings of the respondent of having received remittances for the output services that were rendered by establishments situated outside India, remittance instructions for depositing in Bank of America, Chicago and the Deutsche Bank Amsterdam, Mumbai etc; and also of such instances wherein as per the softex copies the service is claimed to be rendered by Infosys Pune whereas the services are not rendered/exported from India nor substantiated their claim with any evidence to show that the services are rendered from India as required under Rule 3(2) of ESR 2005."

9.4 Let's examine these contracts.

- (i) Infosys consulting Inc. USA the agreement is entered between the appellant and Infosys Consulting Inc USA vendor and is effective from 1st April 2004.
- (ii) Subcontracting agreement between Infosys Technologies Ltd. India and Infosys Technologies Shanghai company limited China with effect from 1st October 2005.
- (iii) Subcontracting agreement between Infosys Technologies Ltd. India and Infosys Technologies Australia Pvt. Ltd. Australia with effect from 1st April 2004.

9.5 We have examined one of the agreements between Infosys Technologies Ltd., India and Infosys Technologies Pvt. Ltd., Australia which is effective from 1st April 2004. As per this Agreement, services include the tasks to be performed by the vendor for the customer here the and the vendor is Infosys Technologies Pvt. Ltd., Australia while the customer is Infosys Technologies Pvt. Ltd., India. Infosys India enters into an agreement with the client situated abroad for providing information technology services and these services are provided by the vendor to the client who is also outside India. Thus, there is no dispute that though the agreement is between the customer (Infosys India) and the client is situated abroad, the services are actually rendered by the vendor (Infosys Australia) to the client abroad, that is services are rendered outside India and the recipient is also outside India. Hence, these services under no circumstances can be termed as Export of Services as per Rule 3(2) of Export of Service Rules, 2005. Coming to the payments, at Para 4.1 of the above Agreement, it states that the vendor will raise all the invoices in electronic form and payment shall be made by the customer in accordance with the instructions provided on vendor's advice. At para 4.3 of the Agreement, it says that the vendor shall receive 93% of the contract value as per the Agreement between customer and client. Similarly, the subcontracting agreement between Infosys India and Infosys China which is entered into on 1st October 2005, at para 2 states that all services to be performed and any related deliverables and other materials to be supplied by vendor shall be in accordance with the project requirements and directions given by the customers' authorised representatives from time to time. At Para 4.4, it says that the vendor shall raise all the invoices in electronic form and payment shall be made by the customer in accordance with the instructions provided on vendor's invoice. At paragraph 4.3, it says that the vendor shall receive 90% of the contract value as per the agreement between customer and its client. Therefore, the Commissioner has rightly observed that the services are rendered outside India and

received outside India and the payments to the extent of 90% to 95% have been received by the vendor was located outside India. Therefore, in this context it becomes relevant and significant to notify the breakup of the invoices of payments directly received by the vendor and the payments actually made by the customer to the vendor. In other words, the services have not satisfied the conditions laid down in the "Export of Service Rules, 2005". The Export of Service Rules 2005 are reproduced below:

Notification No. 9/2005-Service Tax dated 3rd March, 2005

In exercise of the powers conferred by sub-section (1) and sub-section (2) of section 94 of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the following rules, namely: -

1. Short title and commencement. - (1) These rules may be called the Export of Services Rules, 2005.
(2) They shall come into force on the 15th day of March, 2005.

2. Definitions. - In these rules, unless the context otherwise requires, -

- (a) "Act" means the Finance Act, 1994 (32 of 1994);
- (b) "input" shall have the meaning assigned to it in clause (k) of rule 2 of the CENVAT Credit Rules, 2004;
- (c) "input service" shall have the meaning assigned to it in clause (l) of rule 2 of the CENVAT Credit Rules, 2004.

3. Export of taxable service.- The export of taxable service shall mean,-

(1) in relation to taxable services specified in sub-clauses (d), (p), (q), (v) and (zzq) of clause (105) of section 65 of the Act, such taxable services as are provided in relation to an immoveable property which is situated outside India;

(2) in relation to taxable services specified in sub-clauses (a), (f), (h), (i), (j), (l), (m), (n), (o), (s), (t), (u), (w), (x), (y), (z), (zb), (zc), (zi), (zj), (zn), (zo), (zq), (zr), (zt), (zu), (zv), (zw), (zza), (zzc), (zdd), (zzf), (zzg), (zzh), (zzi), (zzj), (zzl), (zzm), (zzn), (zzo), (zzp), (zzs), (zzt), (zzv), (zzw), (zzx) and (zzy) of clause (105) of section 65 of the Act, such services as are performed outside India:

Provided that if such a taxable service is partly performed outside India, it shall be considered to have been performed outside India;

(3) in relation to taxable services, other than,-
(i) the taxable services specified in sub-clauses (a), (f), (h), (i), (j), (l), (m), (n), (o), (p), (q), (s), (t), (u), (v), (w), (x),

(y), (z), (zb), (zc), (zi), (zj), (zn), (zo), (zq), (zr), (zt), (zu), (zv), (zw), (zza), (zzc), (zdz), (zzf), (zzg), (zzh), (zzi), (zzj), (zzl), (zzm), (zzn), (zzo), (zzp), (zzq), (zzs), (zzt), (zzv), (zzw), (zzx) and (zzy); and

(ii) the taxable service specified in sub-clause (d) as are provided in relation to an immoveable property, of clause (105) of section 65 of the Act,-

(i) such taxable services which are provided and used in or in relation to commerce or industry and the recipient of such services is located outside India:

Provided that if such recipient has any commercial or industrial establishment or any office relating thereto, in India, such taxable services provided shall be treated as export of services only if-

(a) order for provision of such service is made by the recipient of such service from any of his commercial or industrial establishment or any office located outside India;

(b) service so ordered is delivered outside India and used in business outside India; and

(c) payment for such service provided is received by the service provider in convertible foreign exchange;

(ii) such taxable services which are provided and used, other than in or in relation to commerce or industry, if the recipient of the taxable service is located outside India at the time when such services are received.

Explanation.- For the purposes of this rule "India" includes the designated areas in the Continental Shelf and Exclusive Economic Zone of India as declared by the notifications of the Government of India in the Ministry of External Affairs Nos.

S.O.429(E), dated the 18th July, 1986 and S.O.643(E), dated the 19th September 1996.

4. Export without payment of service tax.-Any service, which is taxable under clause (105) of section 65 of the Act, may be exported without payment of service tax.

5. Rebate of service tax.- Where any taxable service is exported, the Central Government may, by notification, grant rebate of service tax paid on such taxable service or service tax or duty paid on input services or inputs, as the case may be, used in providing such taxable service and the rebate shall be subject to such conditions or limitations, if any, and fulfilment of such procedure, as may be specified in the notification.

F. No. B2/4/2004-TRU

V. Sivasubramanian
Deputy Secretary to the Government of India

Notification No. 2/2007-Service Tax New Delhi, the 1st March, 2007

G.S.R. (E).- In exercise of the powers conferred by sections 93 and 94 of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the following rules further to amend the Export of Services Rules, 2005, namely :-

1. (1) These rules may be called the Export of Services (Amendment) Rules, 2007.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Export of Services Rules, 2005, in rule 3, for sub-rule (2), the following sub-rule shall be substituted, namely:-

'(2) The provision of any taxable service specified in sub-rule (1) shall be treated as export of service when the following conditions are satisfied, namely:-

(a) such service is provided from India and used outside India; and

(b) payment for such service provided outside India is received by the service provider in convertible foreign exchange.

Explanation.- For the purposes of this rule "India" includes the designated areas in the continental shelf and Exclusive Economic Zone of India as declared by the notifications of the Government of India in the Ministry of External Affairs numbers S.O. 429(E), dated the 18th July, 1986 and S.O.643(E), dated the 19th September, 1996.'

9.6 As seen from the above amended rules the services to be qualified as export services have to be necessarily provided from India and used outside India as seen from the amended rules **'(2) The provision of any taxable service specified in sub-rule (1) shall be treated as export of service when the following conditions are satisfied, namely:- (a) such service is provided from India and used outside India; and**

9.7 In the instant case, admittedly, the services are not provided from India but are provided from their subsidiary units situated in Australia, USA and China. Even with regard to the payments, the Commissioner (Appeals) has observed that the remittances for the output services that were rendered by establishments situated outside India, remittance instructions for depositing in Bank of America, Chicago and the Deutsche Bank Amsterdam, which has not been disputed by the appellants.

Therefore, having not satisfied the conditions laid down in the Export of Service Rules, 2005, the appellants cannot claim that they have exported the services for the period October 2008 to June 2009.

10. The learned Special Counsel on behalf of the Revenue has submitted that the appellant is not liable to pay service tax under 66A and any tax that is paid is without authority of law and therefore credit inadmissible and hence refund to be rejected and relied on the **KPIT Cummins Infosystems Ltd. vs. CCE, Pune** (supra) With regard to this issue whether the appellant is liable to pay Service Tax under Section 66A of the Finance Act, 1994 under the reverse charge mechanism, in the appellant's own case Infosys Ltd. Versus Commissioner of Service Tax, Bangalore 2015 (37) S.T.R. 862 (Tri. - Bang.) dated 26-2-2014 the Tribunal has observed as follows:

"7.1 *The next issue is whether appellant is liable to pay Service Tax in respect of information technology software services received from overseas sub-contractors to overseas branches of the appellant. The following points were submitted on behalf of the appellant:*

- a. *the foreign branches of the appellants received the service abroad, consumed the service abroad, which was provided abroad, and thus Section 66A has no application.*
- b. *the foreign service providers have charged local taxes, such as VAT, as evidenced by the invoices raised by them for the foreign service delivered, provided and rendered by them to the branches of the appellant.*
- c. *the branches of the appellant are sustained, maintained and funded out of the appellant HO in India, and the branches survive from the money sent to them, and payment made by the branches to the service providers abroad for overseas services, if taxed would amount to taxing fund transfers and is not Service Tax at all, and loses its character, and pith and substance. The demand is untenable.*
- d. *the foreign sub-contractors who rendered service have direct nexus with the branches abroad for the reason that the contracts were entered into by the overseas branches, purchase orders placed by the branches and invoices raised by the service providers on the respective service receiving overseas branches, thereby not rendering the overseas transactions liable to tax in India.*
- e. *Section 64 of the Finance Act, 1994 makes it clear that the Act applies to India. Foreign territories cannot be brought under the taxable jurisdiction of the Indian Government, by*

virtue of the above mandate read with the provisions of the Indian Constitution.

- f. A foreign branch is treated as a separate legal entity by Section 66A itself, which is in tune with Section 64, and this being the position, services consumed by and rendered to such a separate entity outside of India jurisdiction, cannot be subjected to tax in India, for mere fund transfers made to such separate entity by the HO which is treated as a different/separate legal entity by the very mandate of Section 66A. The Order-in-Original and show cause notice have in fact brought out the separateness aspect in law, but ignored the legal effect thereof.*
- g. The impugned orders are wrong in assuming that the branches have rendered services to the HO, whereas the branch merely performs the same activity at the behest of the HO, and the HO instead of exporting from India, has an extended arm in the form of branches to perform on-site activities which cannot be taxed in India, the same being outside the territory of India.*
- h. There is no consideration paid to the branches to assume that there is a contract of service for performance by the branch so as to warrant receipt of service by the HO.*

7.2 *Before proceeding to consider various submissions, it would be appropriate to see on what basis the adjudicating authority has come to the conclusion that appellant is liable to pay Service Tax. Para 71 of the impugned order is reproduced herein below :-*

"71. I find from the records placed before me that, the noticee has incurred foreign exchange expenditure towards receipt of sub-contract services from overseas sub-contractor. The noticee has overseas branches and in case the clients of the noticee are in a country close to where these branches are located, the noticee gets the job done through these branches. The branches in turn use the service of sub-contractors and get the job done. The payments to the sub-contractors are done by the noticee through their EEFC account in foreign currency. It is evident from the trail of transaction that services are received by the noticee from the sub-contractors through their overseas branches and payments have been made by the noticee to the overseas sub-contractors. Hence services have been received by the noticee through their overseas branches and payments for such services have been made by the assessee which is evident from the expenditure incurred to the tune of Rs. 259,08,53,512/- for the period from 16-5-2008 to 31-3-2009. Further, as per the provisions of Section 66A(2) the overseas branch will be a separate person for the purpose of charging Service Tax under import of services. The noticee has received some sub-contracting services from overseas sub-contractor and the same is chargeable to tax under Import of Service under the category of Information Technology Software Service from 16-5-2008 onwards, as per the provisions of Section 65(105)(zzzze) of the Finance Act, 1994.

The most important evidence for identifying a service recipient is the agreement between the parties where it is available, invoices raised by the service provider to the service recipient and details of evidence relating to the nature of the service provided if any. As

can be seen the observations of the Commissioner that these aspects have not at all been considered. The conclusion of the Commissioner about the liability has arisen on two grounds viz. the appellant has incurred foreign exchange expenditure towards services received by sub-contractors/ branches and the payments made by the appellant directly or through branches can be said to have been made for services received. He has observed that services have been received by the appellant from the sub-contractors through their branches only on the ground or on the basis of payments in foreign exchange made.

7.3 We considered a sub-contracting agreement between AG Tech USA Inc. and branch office of the appellant at Plano, TX 6100 Tennyson Parkway Suite 200 Plano TX 75024 dated 1st January, 2009. In this agreement, the definition of 'services' means the 'services' provided to the appellant's branch. Appellant also produced a sample invoice issued by AG Tech. The invoice dated 2-2-2010 shows that it has been issued by AG Tech to Infosys Technologies Ltd. Branch Office at Plano and heading is US sub-contractor payments. The charges made are towards consultancy charges in relation to DBA support for SAP Basis. Another invoice in relation to Purchase Order dated 31-12-2009 also is similarly made on the branch office of Infosys.

7.4 Another sub-contracting agreement considered by us is between Brainhunter Inc. and the branch office of Infosys at Toronto, Ontario 5140 Yonge Street, Suite 1400, Toronto, Ontario M2N 6L7. Here also the definition of service is the same as in the case of AG Tech USA and the invoice also has been addressed to the branch office of the appellant.

7.5 If the service has been rendered in USA or Canada received by the branch office of the appellant in USA or Canada and utilised by the branch office at USA or Canada and paid for out of the foreign exchange earned, unless the Revenue is able to show that the service has been received in India, or the benefit of service rendered abroad has been received in India, the tax, in our opinion, would not be payable.

7.6 The taxable event when Service Tax is paid by the service receiver under reverse charge mechanism is the receipt of service and of course their liability would arise when payment is made. Unlike the case of avilment of Cenvat credit where the receipt of service is required to be proved and shown to the Department by the assessee, in the case of determination of liability for Service Tax in the hands of receiver or provider, it is for the Department to show that taxable event has taken place. This issue is no longer res integra and there are several decisions in the case of Central Excise matters and Customs matters wherein it has been held that taxable even has to be proved by the Revenue. In the case of Central Excise duty, it is for the Revenue to show that manufacture has taken place and if the Revenue cannot show it, no liability arises. Therefore in this case the observation of the Commissioner that payment has been made by Infosys and when the payment is made by the branch, it has been made by Infosys through their branch and therefore obviously service has been received cannot be a conclusion and especially in this case when such an allegation is made and is rebutted, such rebuttal will have to be properly considered and evidence shown to show why such rebuttal is not accepted which, in our opinion, has not been admitted even.

7.7 *It is not the case of the appellant that money was not paid. It is the case of the appellant that whatever consideration is received for services rendered by them abroad goes into EEFC account and the appellant is entitled to spend 75% of such receipts in EEFC account for payments abroad. Therefore the fact that appellants have made payment from EEFC account and not from funds in the hands of Infosys in India would go to show that whatever payments were made were made from export earnings only. This would mean that services were paid for by the earnings abroad. In a similar case in the case of KPIT Cummins Infosystems Ltd. v. CCE, Pune-I in the Final Order No. A/676/2013/CSTB/C-I, dated 6-3-2013 [2014 (33) S.T.R. 105 (Tri.-Mum.)], the Tribunal had taken the view that in such cases there will be no liability of Service Tax on the assessee in India as a receiver of service. In that case in Para 5.1 the Tribunal observed as follows :-*

5.1 The provisions of Section 66A are attracted only when services are received in India by a person situated in India even if such persons may have permanent establishment abroad. In the present case, the appellant has provided services through their branches abroad to customer located abroad. Therefore, it is not a case of the appellant receiving the services but it is a question of rendering services abroad. Further, the appellant has not made any payments for the receipt of any services whereas on the other hand, the appellant has received proceeds of the service rendered abroad by their branches, after deduction of expenditure incurred for rendering of services abroad. Therefore, prima facie, we are of the view that the provisions of Section 66A are not at all attracted.

The observations made by the Tribunal in the case of KPIT are similar to the one which we have also made above. There also there was no evidence to show that KPIT had received some services. In that case also, they had paid. The only difference being in that case, there was evidence to show that the appellants had received payments for the services provided abroad and the payments made were much less than the amounts received. In our opinion, when payments are made from EEFC account, it would automatically mean that the amount received for services provided are much more than the amount payable. In any case, the appellants have produced evidence to show that according to agreements and the invoices, the payments were received for services rendered abroad, utilised abroad and paid from funds received abroad. That being the position, concrete evidence to show that the payments made by the appellants either directly or through their branches to the sub-contractors in different countries has to be linked with service received in India and in the absence of any evidence to show that such receipt of service in India, the demand for Service Tax in the hands of receiver cannot be sustained.

7.8 *At this juncture, it has to be noted that in paragraph 20 of the impugned order, it has been stated that the appellant had enclosed the sub-contracting agreement with Brainhunter Inc. which is the same one we have considered. We also find that many of the points which were urged before us had been urged before the original authority also.*

7.9 *There is also another interesting fact that was found when we were considering the adjudication order impugned before us. We have already reproduced paragraph 71 earlier as part of our discussion. The corresponding paragraph 5 in the show cause*

notice is reproduced below :-

"5. During the course of verification of financial records it is noticed that, the assessee has incurred foreign exchange expenditure towards receipt of sub-contract services from overseas sub-contractor. The assessee has overseas branches and in case the clients of the assessee are in a country close to where these branches are located the assessee gets the job done through these branches. The branches in turn use the service of sub-contractors and get the job done. The payments to the sub-contractors are done by the assessee through their EEFC account in foreign currency. It is evident from the trail of transaction that services are received by the assessee from the sub-contractors through their overseas branches and payments have been made by the assessee to the overseas sub-contractors. Hence services have been received by the assessee through their overseas branches and payments for such services have been made by the assessee which is evident from the expenditure incurred to the tune of Rs. 259,08,53,512/- for the period from 16-5-2008 to 31-3-2009."

When this is compared with paragraph 71, it can be seen that except omission of some words which does not affect the contents and substance at all, the same is reproduced as findings. This is the reason why there is no discussion about the agreement or invoice or the taxable event in the impugned order. Again in paragraph 75, the conclusion has been reached after reproducing statutory provisions and the conclusion is the reproduction of a portion of subsequent continuation of Para 5 which we have reproduced earlier. Paragraph 75 and relevant portions of paragraph 5 are reproduced below to show this aspect :-

Para 5.

"Whereas, as per Section 66A of the Finance Act, 1994, where any service specified in clause (105) of Section 65 is, -

(a) Provided or to be provided by a person who has established a business or has fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and

(b) Received by a person (herein referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India, such service shall, for the purpose of this section, taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India,"

"75. In terms of Section 66A read with Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 and Rule 3(iii) of the Import of Service Rules, 2006, the service provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and received by a person/recipient who has his place of

business, fixed establishment, permanent address or usual place of residence, in India, such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India."

The above conclusion has been reached on the ground that a branch office also has to be treated as a separate person for the purpose of Section 66A. If the branch office has to be treated as a separate person for the purpose of Section 66A, when the invoice is raised on the branch office for service rendered and contract is entered into between the branch office and the service provider, it cannot be said that such contract has been entered into by the company located in India. This is because for the purpose of levy of Service Tax in the hands of receiver, the branch office is treated as a separate person but for the purpose of determining as to who has received the service, the branch office is treated as part of the appellant. This, in our opinion, is not correct.

7.10 *In view of the above observations and discussions, we find that Revenue has not been able to show that ITSS has been received through their branch office in India and in the absence of receipt of service, in our opinion, there is no taxable event and therefore there is no liability on the receiver to pay tax. Therefore, the entire demand of Rs. 132,35,71,266/- cannot be sustained and has to be set aside and is set aside."*

10.1 The Tribunal with regard to payment of Service Tax at para 7.5 observed that: **"If the service has been rendered in USA or Canada received by the branch office of the appellant in USA or Canada and utilised by the branch office at USA or Canada and paid for out of the foreign exchange earned, unless the Revenue is able to show that the service has been received in India, or the benefit of service rendered abroad has been received in India, the tax, in our opinion, would not be payable"**. On the same analogy, Infosys India and Infosys Australia are two different entities independent of each other and the services rendered by Infosys Australia cannot be deemed to have rendered from Infosys India when the payments for such services are also received by Infosys Australia and not by Infosys India. The intention of the legislature to refund the unutilised credit is to compensate the industry that brings in more foreign exchange and hence, in this case, it is abundantly clear that foreign exchange in the guise of payments of services rendered by their subsidiary unit is being diverted and to that extent the foreign remittances have been reduced. The appellant for levy of service

tax claims that they are independent entities and for refund, they want to say that the services are rendered by their subsidiaries is equivalent to having been rendered by them, only because the agreement is between them and the foreign client, cannot be accepted. The Commissioner has therefore has rightly observe that mere documentation will not make the services as export services when these services are rendered and provided outside India. The reliance placed by the Special Counsel for the Revenue on decision of the Tribunal in the case of KPIT Cummins Infosystems Ltd. (supra) which has been followed by the Tribunal in the appellant's own case as referred above, cannot be ignored.

11. With regard to correlation between the inputs and output services, the Board vide Circular dated 19.1.2019 suggested that in Budget 2009, the scheme was simplified by making a self-certification whereunder an Exporter or its Chartered Accountant is required to certify the invoices about correlation and the nexus between the inputs/input services and the exports. The Board had directed to be liberal and accept the correlation as certified by the Chartered Accountant as above even in cases of Rule 5 refund claims. The question of correlation arises only when the accumulation of input credit is on account of export of services. In the instant case, since the services rendered by the appellant cannot be considered as export of services as discussed above at paragraphs 9.7 and 10.1, the question of correlation becomes immaterial.

12. The appellant has also claimed that earlier refund was sanctioned accepting their export of services; however, as seen from the order No.38/2019 dated 20.11.2019 at para 21.5 of the order, the Commissioner's finding is *'the services have been rendered by the claimant from their premises in India during the claim period.'* In view of this finding, the question of denying the benefit does not arise. For the claims July 2009 to December 2009, the Export of Service Rules was amended with

effect from 27.2.2010 where clause (a) of Rule 3 (2) of Export of Service Rules, 2005 was omitted, which categorically stated such services provided from India and used outside India. Therefore, the refund orders issued after this amendment also are not relevant.

13. In view of the above discussions, the impugned order is upheld and the appeals are rejected.

(Order pronounced in Open Court on 14.06.2024.)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

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