CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/21059/2016-SM, ST/21060/2016-SM, ST/21061/2016-SM, ST/21261/2016-SM, ST/21262/2016-SM, ST/21263/2016-SM

[Arising out of Order-in-Appeal No. 470-479/2016 dated 15/04/2016 passed by the Commissioner of Service Tax, Bangalore]

Cypress Semiconductor Technology India Private Limited 65/2, Bagmane Tech Park, Block-C Bagmane Laurel, C.V Raman Nagar B Bangalore – 560 094 Karnataka	**Appellant(s)**
Principal Commissioner of Service Tax, Bangalore Service Tax-II 4th Floor, T.T.M.C.-B.M.T.C. Bus Stand Building, Old Airport Road Bangalore – 560 071	**Appellant(s)**

Versus

Commissioner of Service Tax Bangalore Service Tax- I 1st To 5th Floor, TTMC Building, Above BMTC Bus Stand, Domlur Bangalore – 560 071 Karnataka	**Respondent(s)**
Commissioner of Service Tax Cypress Semiconductor Technology India Pvt. Ltd. No. 65/2, Bagmane Laurel C Block Bagmane Tech Park C V Raman Nagar Bangalore	**Respondent(s)**

Appearance:

Shri Sandeep Huilgol, Advocate 48,Levelle Road, Bangalore – 560 001 Karnataka	For the Appellant

Shri Pakshirajan, AR For the Respondent

Date of Hearing: 26/02/2018
Date of Decision: 26/02/2018

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER

Final Order Nos. 20476 - 20481 / 2018

Per : S.S GARG

This order will dispose of six appeals three filed by the assessee against the common impugned order dated 15.04.2016 and three appeals filed by the Revenue against the same impugned order. Briefly the facts of the case are that the assessee is engaged in the software design and development activities for its parent company located at P.O. Box No. 219, first Home Tower, British American Centre, George Town, Grand Cayman, Cayman Islands. The appellant is also registered under STPI scheme as 100% EOU during the impugned period and they have received various input services for providing output services which were exported without payment of duty and they filed the refund claim of unutilized credit under Rule 5 of Cenvat Credit Rules 2004 read with Notification 5/2006 for various periods. Thereafter show-cause notice was issued to the appellant and after following the due process, the partly refund claim was sanctioned and partly it was rejected. Aggrieved by the Order-in-Original assessee filed appeal before the Commissioner and the Commissioner (Appeals) remanded the matter on the ground that the original authority has not specifically discussed as to how there is absence of nexus or otherwise between the input services and the output services exported. With regard to limitation the Commissioner (Appeals) has held that the appellant has filed the refund claim by clubbing the quarters, which is entirely the discretion of the client to club the quarters and filed the refund claim for all these quarters and in such a situation time limit has to be calculated from the last date of the quarter which should be the relevant date for the purpose of computing the claim. As per the stand of the Revenue this finding of the Commissioner (Appeals) is not sustainable. Further as per the Revenue the relevant date as per Section 11B of the Central Excise Act 1944 means one year from the date of export of services/date of raising the first export invoice in that particular quarter. After considering the submissions of both the parties and perusal of the material on record, I find that as far as assessee's appeals are concerned, the assessee has challenged the impugned order mainly on the power of the Commissioner to remand the matter to the original authority. Learned counsel for the assessee has submitted that the power to remand by the Commissioner (Appeals) has been taken away by imposing Section 35A of the Central Excise Act 1944 w.e.f 11.05.2011 under the Finance Act 2001. In support of his submission, he further relied upon the Board's instruction F.No. 275/34/2006 CX dated 18.02.2010 applicable to Section 85 of the Finance Act 1994 and has also relied upon the decision of the Tribunal in the case of ***Commissioner of Service Tax Vs. Bahubali Internation Ltd. reported in 2011 (24) S.T.R. 473*** wherein it was held that the Commissioner does not have power to remand the matter. This issue is now no more *res integra* and has been settled by the High Court of Gujarat in the case of ***Commissioner of Service Tax Vs. Associated Hotels Ltd. reported in 2015 (37) S.T.R. 723*** wherein the Hon'ble High Court in para 15 has held as under:

> *"15. We, however, cannot accept the argument of Ms. Mandavia that by virtue of sub-section (5) of Section 85, the same limitation on the*

> *Commissioner (Appeals) to remand a proceeding contained in Section 35A(3) of the Central Excise Act, 1944 must apply in the appeals under Section 85 of the Finance Act, 1994 also. This is so because, sub-section (5) of Section 85 though requires the Commissioner (Appeals) to follow the same procedure and exercise same powers in making orders under Section 85, as he does in the Central Excise Act, 1944 in appeals, this sub-section itself starts with the expression "subject to the provisions of this Chapter". Sub-section (4) of Section 85 itself contains the width of the power of the Commissioner (Appeals) in hearing the proceedings of appeal under Section 85. The scope of such powers flowing from sub-section 85(4) therefore cannot be curtailed by any reference to sub-section (5) of Section 85 of the Finance Act, 1994."*

In view of the judgment of the Gujarat High Court holding that the Commissioner (Appeals) has the power to remand the case back to the original authority for de novo adjudication, by following the ratio of the above cited decision, I am of the view that there is no infirmity in the impugned order remanding the case back to the original authority and consequently all the three appeals of the assessee are dismissed.

2. As far as Revenue's appeals are concerned, the Revenue has raised the issue that the relevant date as per Section 11B of the Central Excise Act means one year from the date of export of the service/date of receiving the first export invoice in that particular quarter. Whereas the Commissioner (Appeals) has held that the time limit has to be computed from the last date of the quarter which should be the relevant date for the purpose of computing the claim. This issue is no more *res integra* and has been settled

by the Larger Bench of this Tribunal in the case of ***CCE & CST, Bangalore Vs. Span Infotech (India) Pvt. Ltd. vide Interim Order 4/2018 dated 09.02.2018*** wherein the Larger Bench has held that the relevant date for the purpose of deciding the time limit for consideration of refund claims under Rule 5 of Cenvat Credit Rules can be taken as the end of the quarter in which the FIRC's received in cases where refund claims are filed on a quarterly basis. Therefore, by following the ratio of the Larger Bench decision cited supra, I am of the opinion that there is no infirmity in the impugned order and consequently all the three appeals filed by the Revenue are dismissed.

(Operative portion of the Order was pronounced
in Open Court on **26/02/2018**)

(S.S GARG)
JUDICIAL MEMBER

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