

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

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 965 of 2011

[Arising out of Order-in-Original No. 76/2010-ST dated 24/11/2010
passed by the Commissioner of Central Excise and Customs, LTU,
Bangalore]

**Dell International Services India
Pvt. Ltd.**

Divyashree Greens, Ground Floor, No.12/1,
12/2A, 13/1A, Challaghatta Village, Varthur
Hobli, Bangalore South, Bangalore - 560 068

Appellant(s)

VERSUS

C.C.E. & S.T.-Bangalore-LTU

100 Ft Ring Road, JSS Towers,
Banashankari-III Stage,
Bangalore – 560 085,
Karnataka

Respondent(s)

Appearance:

Ms Meetika Baghel, Advocate

For the Appellant

Mr. P. Gopakumar, Jt. Commr. (AR)

For the Respondent

Date of Hearing: 18/02/2020

Date of Decision: 06/07/2020

CORAM:

HON'BLE MR. ANIL CHOUDHARY, JUDICIAL MEMBER

HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20369 / 2020

Per : ANIL CHOUDHARY

Dell India Pvt. Ltd. (DIPL) presently known as Dell International Services India Ltd. is a SEZ unit at Sriperumbudur for manufacturing various computer systems. They have got centralized registration under Service Tax under the category 'Management, Maintenance and

Repair Service,’ ‘Erection, Commissioning and Installation Service, Business Auxiliary Service and Information Technology Software Service.

2. Appellant availed service tax credit on several input services during the period 2008-09 and filed a rebate claim in respect of export of taxable service under BAS, stating that they could not utilize the credit availed for payment of service tax, due to the export of services. In response to query appellant further clarified that the input services have been consumed in marketing in pre-sale and support services activities, among others. The summary of input credit availed/utilized was filed along with the rebate claim. The appellant was also engaged in trading and they were following the procedure prescribed under Rule 6(3A) of Cenvat Credit Rules, to determine the ineligible cenvat credit attributable to exempted services. It appeared to Revenue that while calculating the percentage of ineligible credit under Rule 6(3A), appellants have not included the amount of cenvat credit availed on Information Technology and Software Services (ITSS for short) contending that such ITSS is also a taxable output service, which contention appears to be incorrect.

3. On scrutiny of the ST-3 returns for the financial year 2008-09, the tax liability and its payment appeared as follows:

Service rendered	Ass value	Service Tax	Ed Cess	She cess	Total
MRS	131538280	15529995	310600	155300	15995895
CAI	625197180	70910623	1418213	709106	73037942
ITSS (SP)	449303174	53448344	1068967	534483	55051794
ITSS (SR)	548188597	65782632	1315652	657826	67756110
BAS MKT	234142809	27966787	559336	279668	28805791
BAS TECH	115980626	13809001	276180	138090	14223271
TOTAL	2104350666	247447382	4948948	2474473	254870803

The tax liability has been paid by the assessee in the following manner:

	As per original return	As per Return dated 24.7.09
Total amount paid in cash	84160499	84160499
Total amount paid in credit as reflected in the ST3 returns	170614239	170611239
Total tax paid both cash and credit	254771738	257078319
Total credit availed during 08-09	143897308	257705172
Total credit utilized during 08-09	170710292	170611238
Credit Reversed under Rule 6(3) of Cenvat Credit Rules, 2004	-	114759939
Closing Balance as on 31.03.2009	3793891	2844816

4. The appellant also reversed an amount of Rs. 11,47,59,939/- (Rupees Eleven Crores Forty Seven Lakhs Fifty Nine Thousand Nine Hundred and Thirty Nine only) under Rule 6(3) which was not reflected in the original return but only in the revised returns, filed belatedly. The details of the input services on which credit had been availed were enclosed with the rebate claim filed by the appellant for the financial year 2008-09, on the export of services made to 'Dell Asia Pacific' under the head 'Business Auxiliary Service'. The rebate claim was for Rs. 4,30,29,062/- (Rupees Four Crore Thirty Lakhs Twenty Nine Thousand and Sixty Two only). The total amount of input services availed relating to the rebate claim was Rs. 14,38,94,308/- (Rupees Fourteen Crore Thirty Eight Lakhs Ninety Four Thousand Three Hundred and Eight only). Further it appeared that appellants have availed 100% credit on the following services:

Sl. No.	Services	Eligible for 100% credit under the Rule 6(5) of the CCR, 2004
1	Commissioning & Installation	(zzd)
2	Security	(W)
3	Management and Maintenance & Repair Service	(zzg)
4	ITSS (Service provider)	(zzzze) does not form part of the 16 services
5	ITSS (Import payment) Service Recipient	

5. It appeared to Revenue that ITSS service is not covered under Rule 6(5) and the appellants have availed 100% credit both as service

provider and service recipient, which is incorrect and the credit so availed is to be restricted to 5% alone. It further appeared that appellants have availed excess credit in respect of other services.

6. It further appeared that the amount of ineligible cenvat credit attributable to exempted services, the appellants should have applied the percentage of ineligible credit, included under Rule 6(3A) of CCR to the credit availed on ITSS also and paid the said amount along with interest as applicable. Further appellants for computation of value of exempted services, i.e. trading in the instant case, have claimed deduction towards ITSS, treating it as taxable output service, without proper justification for the same. Thus it appeared that appellants have failed to adopt the correct formula in arriving at the percentage of ineligible cenvat credit, in terms of Rule 6(3A)(c) of CCR.

7. It further appeared that cenvat credit availed on some of the input services is irregular as follows:

- (a) Civil Work charges, Commission, Hire charges, Printing Charges, Professional Charges, Rental Charges are not input services under Rule 2(I) of CCR. The payment dates, for service tax credit availed are not mentioned against the invoices, in violation to Rule 4(7) of CCR.
- (b) Maintenance and Repair Services, Commissioning and Installation Services cannot be considered as input service, inasmuch as the appellants are themselves registered for providing this service as output service. The input service and output service are the same, with apparently no value addition, as the jobs are being outsourced by the appellant.
- (c) Appellants have availed credit on invoices addressed to their SEZ, which are exempted from paying service tax. Hence, credit availed on such invoices appeared erroneous.
- (d) Credit is availed on invoices of consultants where service tax have been charged for drafting of A-2 certificate,

reassessment charges, etc which are not related input services.

- (e) Appellant vide their letter dated 13/07/2009 in respect of rebate claim, stated that as per the service agreement dated 24/09/2001 entered with Dell Asia Pacific Sdn (DAP), the location of service recipient is Penang, Malaysia. The marketing support/technical support services provided by appellant to DAP are in the nature of providing information on the development in the Indian Market in connection with the sale and promotion of products of DAP in India, providing prospective customer with information of the products of DAP, Assist DAP with its promotion campaigns in India. The fee for such services are received and deposited in convertible foreign exchange, in appellant's bank account with Citi Bank.
- (f) DIPL had earlier worked out 7:93 as the ratio between the taxable services and the exempted services for the year 2007-08 (previous financial year) and reworked out the quantum of services pertaining to exempted activity for the year 2008-09 @ 95% of the credit availed by them, as pertaining to activities exempted and other than the taxable services and therefore by their own submissions, the credit availed by them to the tune of 95% does not pertain to the taxable services rendered by them. Accordingly, it appeared that out of the total input credit of Rs. 25,77,02,690/- (Rupees Twenty Five Crore Seventy Seven Lakh Two Thousand Six Hundred and Ninety only) taken for the year 2008-09, 95% of the credit or Rs. 20,55,85,446/- (Rupees Twenty Crore Fifty Five Lakhs Eighty Five Thousand Four Hundred and Forty Six only) is ineligible and out of the balance of Rs. 5,21,17,244/- (Rupees Five Crore Twenty One Lakh Seventeen Thousand Two Hundred and Forty Four only) the credit is ineligible as the services do not fall under the purview of 'input services' or the invoices are lacking in one

respect or another. Accordingly, show-cause notice dated 23/10/2009 was issued for the period 2008-09 proposing to disallow and recover cenvat credit of Rs. 25,77,02,690/- (Rupees Twenty Five Crore Seventy Seven Lakhs Two Thousand Six Hundred and Ninety only) with interest under Rule 14 of Cenvat Credit Rules and further demand of Rs. 17,06,11,238/- (Rupees Seventeen Crore Six Lakhs Eleven Thousand Two Hundred and Thirty Eight only) was proposed as service tax short paid/not paid, along with interest and penalty was also proposed under Section 78 read with Rule 15(4) of Cenvat Credit Rules.

8. The show-cause notice was adjudicated on contest confirming the disallowance of the cenvat credit of Rs. 25,77,02,690/- (Rupees Twenty Five Crore Seventy Seven Lakhs Two Thousand Six Hundred and Ninety only) with order of appropriation for an amount of Rs. 11,38,10,862/- (Rupees Eleven Crore Thirty Eight Lakhs Ten Thousand Eight Hundred and Sixty Two only) (reversed under Rule 6(3A) and reflected in ST-3 Returns). Further appropriation was ordered for Rs. 9,49,076/- (Rupees Nine Lakhs Forty Nine Thousand and Seventy Six only) and also an amount of Rs. 14,98,469/- (Rupees Fourteen Lakhs Ninety Eight Thousand Four Hundred and Sixty Nine only) as deposited vide GAR 7 dated 04/07/2009 and reflected in the ST-3 returns.

9. It was further ordered that in the event service tax credit of Rs. 14,14,46,763/- (ST+EC+SHEC) (i.e. Rs. 25,77,05,170/- minus (Rs. 11,38,10,862/- plus Rs. 24,47,545/-) reversed/paid under the provisions of Rule 6 (3A) which is held as irregular/inadmissible is utilized for payment of service tax, an amount to the extent of such utilization that would not be otherwise available on the last day of the month for payment of service tax, shall be paid by M/s. DIPL in cash, in view of the proviso to Rule 3(4) of the Cenvat Credit Rules, 2004;

- 9.1 Appropriation of an amount of Rs. 71,28,730/-, Rs. 14,04,394/- and Rs. 71,74,996/-, totally amounting to Rs. 1,57,08,120/- paid in cash by M/s. DIPL vide GAR 7 challans no. 10010, 10012 and 10011 all dated 24/12/2009 was ordered, being the amounts of service tax credit taken in the month of March, 2009 and utilized wrongly towards the service tax liabilities for the months of December, 2008, January, 2009 and February, 2009;
- 9.2 An amount of Rs. 17,06,11,238/- (ST+EC+SHEC) was demanded by treating the same as short payment/non-payment of service tax towards 'management, maintenance or repair' service, 'erection, commissioning or installation' service and 'business auxiliary' service for the year 2008-09 since it was ordered that in the event service tax credit of Rs. 14,14,46,763/- (ST+EC+SHEC) which is held as irregular/inadmissible, is utilized for payment of service tax, an amount to the extent of the utilization of irregular/inadmissible service tax credits shall be recovered from M/s. DIPL by cash, in view of the proviso to Rule 3(4) of the Cenvat Credit Rules, 2004;
- 9.3 Demanded interest at applicable rates on amount of Rs. 14,14,46,763/- [service tax + education cess + secondary & higher education cess] from M/s. Dell India Private Limited under the provisions of Rule 14 read with Section 75 of the Finance Act, 1994;
- 9.4 Imposed a penalty of Rs. 14,14,46,763/- (Fourteen Crore Fourteen Lakh Forty Six Thousand Seven Hundred and Sixty Three) only on M/s. Dell India Private Limited under the provisions of Rule 15(4) of the Cenvat Credit Rules read with Section 78 of the Finance Act, 1994 for the irregular service tax credits taken by them and
- 9.5 Further, taking recourse to Section 80 of the Finance Act, 1994, penalty was not imposed under the provisions of Section 78 of

the Finance Act, 1994, for non-payment/short payment of service tax on 'management, maintenance or repair' service, 'erection, commissioning or installation' service, 'information technology software' service and 'business auxiliary' service."

Being aggrieved, the appellant is before this Tribunal.

10. The learned counsel for the appellant urges that cenvat credit of service tax paid amounting to Rs. 6,22,33,589/- (Rupees Six Crore Twenty Two Lakhs Thirty Three Thousand Five Hundred and Eighty Nine only) pertaining to various 'common services' used by them for trading and taxable activities, the appellant is eligible for proportionate credit, which bears to the taxable activity and the credit availed is in terms of the Cenvat Credit Rules.

10.1 Further the learned Commissioner have not considered the input credit register submitted with reply to the show-cause notice and have determined the amount of Rs. 6,22,33,589/- (Rupees Six Crore Twenty Two Lakhs Thirty Three Thousand Five Hundred and Eighty Nine only) from the details annexed to the rebate claim, which is incorrect.

10.2. So far cenvat credit on ITSS is concerned, appellant imports such service and also procures from the domestic area. Such procurement of software is wholly towards provision of taxable service under the head ITSS. Further appellants have maintained proper/separate record for purchase and sale of software and ITSS, and such credit is wholly availed against taxable ITSS service, as an output service. The said disallowance of availment and utilization of credit for ITSS is erroneous and fit to be set aside.

10.3 Further urged that learned Commissioner have erred in taking proportionate credit of common input service, specified in Rule 6(5) of

Cenvat Credit Rules. The only condition specified in Rule 6(5) is that the specific service should not be exclusively used in or in relation to manufacture of exempted goods or providing of exempted services. Thus the amount of Rs. 4,97,59,337/- (Rupees Four Crore Ninety Seven Lakhs Fifty Nine Thousand Three Hundred and Thirty Seven only) being cenvat credit taken for specified input services under Rule 6(5) of Cenvat Credit Rules, is fully allowable and learned Commissioner have erred in making proportionate disallowance.

10.4. It is further urged that learned Commissioner have erred in determining the amount of Rs. 18,77,40,992/- (Rupees Eighteen Crore Seventy Seven Lakhs Forty Thousand Nine Hundred and Ninety Two only) as common input tax credit from the details annexed to the rebate claims, ignoring the cenvat credit register produced along with the reply to show-cause notice, has led to erroneous conclusion. Further the show-cause notice proposed to disallow 95% of the cenvat credit on the allegation that trading is non-taxable/exempted service. However, in the impugned order learned Commissioner has altogether taken a different stand, travelling beyond the show-cause notice.

10.5. So far the finding in the impugned order as to 'invalid document', 40 invoices is concerned, it is urged that the appellant is assessed to service tax for last several years and the audit team of the Department have already conducted the audit in review and verified the accounts, and process being followed by appellant for availing the cenvat credit. The audit team did not report any material deviation as to details maintained by appellant. Further as regards discrepancies in the invoices in a few instances, the appellants have reversed the credit with interest, under intimation to the Department. In spite of requests made by the appellant to learned Commissioner to provide a list of invoices objected to by Revenue, so as to clarify the objections but no such list was ever provided. The show-cause notice was also silent as to the particulars of invoices which are

defective and such allegations are only by way of a vague and passing allegation.

10.6. He further urged that under the facts and circumstances, the appellants have properly followed the provisions of the Service Tax Law with Rules read thereunder and there is no case of any deliberate default, penalties imposed are fit to be set aside.

10.7. Further the appellant relies on the ruling in the case of **IBM India Private Limited Vs. CCE, ST & Cus., Bangalore** being Appeal No. ST/20741/2014-DB, wherein this Tribunal has held as follows:

“2. The learned counsel submits that Cenvat credit has been denied and demanded on the basis of calculations made by the Revenue. While making the calculations, the effort is to arrive at the amount to be reversed attributable to the trading activity of the noticee in respect of which cenvat credit is not admissible. While doing so, the services which have been used exclusively in providing dutiable services alone also have been taken into account for the purpose of calculation of the amount to be reversed. This is incorrect. If services were identifiable to have been used only for providing dutiable services exclusively, there is no need to reverse any portion of the credit on the basis of proportion of trading activity to the total turnover, or even for exempted services.”

The order of Tribunal has been accepted by the Department.

10.8 Reliance has also placed on the ruling in **Superpacks Vs. CCE, ST and Cus., Bangalore (Final Order Nos. 22383-22388/2017)** wherein this Tribunal has interpreted the provisions of Rule 6(5) of Cenvat Credit Rules as follows:

“7.2. As regards the cenvat credit of the Service Tax paid on Management Consultancy Services, it is covered under Section 65(105)(r) of the Finance Act, 1994, I find that the provisions of Rule 6(5) of the Cenvat Credit Rules, 2004 are very clear which needs reproduction:

“(5) Notwithstanding anything contained in sub-rules (1), (2) and (3), credit of whole service tax paid on taxable service as specified in sub clause (g), (p), (q), (r), (v), (w), (za), (zm), (zp), (zy), (zzd), (zzg), (zzh), (zzi), (zzk), (zzq) and (zzr) of clause (105) of Section 65 of the Finance Act, shall be allowed unless such service is used exclusively in or in relation to the manufacture of exempted goods or providing exempted services.”

It can be seen from the reproduced provision that the said sub rule starts with a non-obstante clause which would mean that this sub-rule has to be read independently and it provides for availment of entire cenvat credit even if the same is used for manufacturing of dutiable and exempted goods and or providing taxable and exempted services. In my view, appellants have made out a case for availment of the entire cenvat credit of service tax paid on Management Consultancy Services as per the above reproduced sub-rule. To that extent the appeal filed by the appellant is allowed and the demands raised on this ground, the question of interest does not arise.”

10.9. Learned counsel further states that on similar allegations for the period 2015-16, the show-cause notice was issued which have been adjudicated vide O-I-O No. 30/2018 dated 28/03/2018 wherein the learned Commissioner have dropped the proceedings following the ruling of this Tribunal in **IBM India (Pvt.) Ltd.** (supra). Particularly mentioning in para 25.5, that this order in IBM of this Tribunal have been accepted in review by the Department on 03/07/2015. Learned Commissioner also took notice of the Notification No. 13/2016 dated 01/03/2016 where Rule 6 of Cenvat Credit Rules was re-drafted, particularly Rule 6(iii) which is as follows:

"(i) No credit of inputs or input services used exclusively in manufacture of exempted goods or for provision of exempted services shall be available;

(ii) Full credit of input or input services used exclusively in final products excluding exempted goods or output services excluding exempted services shall be available;

(iii) Credit left thereafter is common credit and shall be attributed towards exempted goods and exempted services by multiplying the common credit with the ratio of value of exempted goods manufactured or exempted services provided to the total turnover of exempted and non-exempted goods and exempted and non-exempted services in the previous financial year"

10.10 It is categorically held by the learned Commissioner that on a cogent reading of sub-rule (ii) and (iii) above, it is clear that input credit attributable to ITSS (which is a taxable output service) is not to be included in the formula of determining credit attributable towards exempted goods and exempted services. Learned Commissioner also observed that in view of the Budget Circular vide D.O.F No. 334/08/2016-TRU, stating that Rule 6 has been re-drafted with the intention of simplifying and rationalizing the Rule, without altering the already established principles of reversal of such credit, this only means that amendment to Rule 6 is clarificatory in nature and is retrospective in effect.

11. Learned AR for the Revenue has relied on the impugned order.

12. After considering the rival contentions, we find that the allegations in the present case for the period 2008-09 are similar to the allegations for the earlier period 2015-16, and further taking notice that now Revenue, taking notice of the substitution of Rule 6

vide Notification No. 13/2016, which is by way of clarification and ease of doing business and also in view of the ruling of this Tribunal in **IBM India Pvt. Ltd.** (supra), we hold that the issue is no more *res integra* and the same is held in favour of the appellant. Accordingly, we allow this appeal and set aside the impugned order. The appellant shall be entitled to consequential benefits including disposal of the rebate claim in accordance with law, if the same is still pending. In the alternative, if the rebate claims have been disposed of, the same shall be reconsidered, as required by way of consequential benefit to the appellant.

(Order Pronounced in Open Court on **06/07/2020**)

(ANIL CHOUDHARY)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

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