

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

**Service Tax Appeal No.1847 Of 2011**

[Arising out of OIA No.406/BK/GGN/2011 dated 27.09.2011 passed by the Commissioner of Central Excise, Delhi-III, Gurgaon]

**M/s Agilent Technologies Private Limited** : **Appellant**  
Plot No.CP-11, Sector-8, Technology Park,  
IMT Manesar, Gurgaon, Haryana-122051

*VERSUS*

**The Commissioner of Service Tax, Delhi** : **Respondent**  
17-B.I.A.E.A. House, M.G. Road,  
I.P. Estate, New Delhi-110002

**APPEARANCE:**

Ms. Krati Singh and Ms. Shreya Khunteta, Advocates for the Appellant  
Shri Nikhil Kumar Singh and Shri Narinder Singh, Authorised Representatives  
for the Respondent

**CORAM:HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)**  
**HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

**FINAL ORDER No.60152/2024**

DATE OF HEARING: 15.12.2023  
DATE OF DECISION: 28.03.2024

***PER: P. ANJANI KUMAR***

The appellant M/s Agilent Technologies (International) Pvt. Ltd. challenge the order dated 27/09/2011 passed by the learned Commissioner (Appeals), Gurgaon.

2. The appellants are engaged in provision /export or services like 'Business Auxiliary Services', 'Consulting Engineer Services', 'Scientific and Technical Consultancy Services', 'Business Support Services' etc.; The appellant filed four refund claims for the four quarters during October 2007 to December 2008. Deputy Commissioner of Service Tax Gurgaon,

vide order dated 05/08/2010, sanctioned a refund of Rs.2,70,28,608/- out of Rs.6,40,72,994/- claimed by the appellants which was upheld by the Commissioner (appeals) vide impugned order. The grounds of rejection of part of the refund were that:

- the services claimed to have been exported to M/s Agilent Technologies, Singapore does not qualify to be an export in terms of Rule 3(1)(iii), of Export of Service Rules, 2005 for the reasons that the service receiver and the appellant are same group companies and the agreement did not provide for services related to Information Technology (ITSS).
- the appellant has availed CENVAT Credit on Diesel generator on which their supplier paid Service Tax even though it was not payable.
- there was a mismatch between the refund claims and ST/3 returns.

3. Ms. Krati Singh, Learned Counsel for the appellants submits that the impugned order erred in holding that the appellant was a commercial establishment of M/s Agilent (Singapore); ITSS services rendered by the appellant do not qualify as export under proviso to Rule 3 of Export of Service Rules, 2005, as the order is placed by, M/s Agilent (Singapore); The appellant is not a commercial establishment of M/s Agilent (Singapore); Both Agilent (Singapore) and the appellant are separate independent legal entities, incorporated as per law in Singapore and India; The appellant is an independent contractor and not an agent of M/s Agilent (Singapore); This is clear from Clause 10.1 of R&D agreement; The proviso to Rule 3 of Export of Service Rules, 2005 is not applicable. She places reliance on the following:

- Linde Engineering India Pvt. Ltd. Versus Union of India 2022 (57) G.S.T.L. 358 (Guj.)
- L & T Sargent & Lundy Limited Versus C.C.E. & S.T. - Vadodara-I2021 (11) TMI 69 - CESTAT Ahmedabad
- Celtic Systems Private Limited Versus C.C.E. & S.T. - Vadodara-1 2022 (6) TMI 306-CESTAT Ahmedabad

4. Learned counsel further submits that Commissioner denied the refund of CENVAT Credit on the ground that ITSS Services rendered by the appellant are not in terms of the agreement and hence, do not qualify to be considered as export of service; However, no demand was raised on the ITSS Services raised by the department; It was held in the following cases that benefit of export cannot be denied when no notice was given to recover Service Tax on the very same services;

- M/s Black Rock Services India Private Limited Versus Commissioner of CGST, Gurugram 2022 (8) TMI 874 - CESTAT Chandigarh
- JFE Steel India Pvt Ltd. Versus Commissioner of CGST, Gurugram 2020 (3) TMI 1342-CESTAT Chandigarh.
- M/S. Watson Pharma Private Ltd. Versus Commissioner, Service Tax-V, Mumbai 2023 (5) TMI 300-CESTAT Mumbai

5. Learned counsel submits also that refund for the period prior to 16/05/2018 cannot be denied as no refund of ITSS Services was claimed and the claim was pertaining to BSS Services for the period October 2007 to December 2007 and January 2008 to March 2008; Therefore, refund of Rs.2,81,87,493/- could not have been rejected. She submits further that the development of Software Services was linked to the R&D agreement as evidenced by the undertaking given by M/s Agilent (Singapore); Clause 2.1 and 1.2 of the R&D Agreement included Research and Development Services and the same is restated by the addendum to the agreement dated 01/11/2008.

6. Learned Counsel submits in addition that Service Tax paid by the supplier of the generator cannot be denied as no action was taken at the supplier's end. She relies on the following:

- CCE&C, Surat-III Vs Creative Enterprises 2008 (7) TMI 311 - Gujarat High Court (affirmed by SC in 2009 (7) TMI 1206 - SC )
- CCE Pune, Pune Vs Ajinkya Enterprises 2012 (7) TMI 141 - Bombay High Court
- M/S. Lanxess India Pvt Ltd Vs CCE, Thane- I 2022 (12) TMI 1187 CESTAT Mumbai
- The Joint Commissioner of Commercial Taxes (Appeals) -6, Bengaluru., The Deputy Commissioner of Commercial Taxes (Audit) 6, 7, Bengaluru Vs. Rajshree Impex, 2021 (7) TMI 307 - Karnataka High Court.
- CCE, East Singhbhum Vs Tata Motors Ltd. [2013 (294) E.L.T. 394 (Jhar.)]

7. Learned Counsel submits further that in any way Service Tax paid on generator under 'Supply of Tangible Goods Services" could not be denied after 16/05/2008. She also submits that credit cannot be denied because of mismatch of entries in ST3 Returns. She relies on the following:

- M/s Temenos India Private Limited Vs CST, Chennai 2020 (2) TMI 354 - CESTAT Chennai
- Broadcom Research Pvt Ltd [2016 (42) STR 79 (T-Bang)] affirmed at [2016 (43) STR 321 (Kar.)]

8. Shri Nikhil Kumar Singh, assisted by Shri Narinder Singh, learned Authorised Representatives, submits that the issue involved is non-fulfilment of the condition under First proviso to Rule 3(1)(iii), of Export of Service Rules, 2005 and the appellant wrongly relies on the case law relating to explanation 3(B) of Section 65(B)(44) of the Finance Act 1994; the refund claimed has been rightly rejected; The appellant relies on a certificate dated 06/12/2010 and the amendment dated

01/11/2008, to claim that they have provided ITSS Services; during the relevant period the amendment was not in place.

9. Learned Authorised Representative submits that the appellants' contention that credit is admissible even when their supplier paid the tax which was not due; the cases relied upon by the appellants deal with excisable goods whereas, the present issue is about Service Tax. He submits that in case CENVAT Credit has not been taken in ST-3, the same can be allowed if the appellant can demonstrate from the records maintained that the services were utilised for export of service; the matter needs to be demanded for a practical verification.

10. Heard both sides and perused the records of the case.

11. Brief issues that require consideration in the impugned case are as to whether the appellants are eligible for claiming refund on the ITSS Services claimed to have been rendered to M/s Agilent Technologies, Singapore; whether the appellants are eligible to avail CENVAT credit when the supplier of services pays service tax on a mistaken notion of law and whether the credit can be denied for the difference in the ST-3 Returns and CENVAT credit Register.

12. Coming to the first issue as to whether the services rendered by the appellants can be considered as export of service for the purposes of Rule 3 of the Exports of Service Rules 2005, we find that the appellants submits that the learned Commissioner wrongly invoked proviso to Rule 3

of the Exports of Service Rules 2005; the said proviso to Rule 3(iii) in dispute reads as under:

“Provided that where such recipient has commercial establishment or any office relating thereto, in India, such taxable services provided shall be treated as export of service only when order for provision of such service is made from any of his commercial establishment or office located outside India”.

13. We find that though the learned Commissioner mentions that first proviso to Rule 3(1)(iii) provides that if the recipient of the taxable service has any commercial establishment or any office relating thereto in India, such taxable service shall be treated as export only if the orders of provision of such service is made by the recipient of such service from any office commercial establishment or any office located outside India; however, we find that learned Commissioner has not given any finding on this issue. We find that as contended by the appellants, the appellants M/s Agilent Technologies (International) Pvt. Ltd. and M/s Agilent Technologies, Singapore though are group companies belonging to M/s Agilent Technologies, U.S.A, they are independent entities incorporated/registered in the respective countries. Therefore, it cannot be held that the appellants are commercial establishment or any office of M/s Agilent Technologies, Singapore, in India. To this extent, we are in agreement with the submissions of learned Counsel for the appellants and are of considered opinion; the proposition cannot be a reason to consider the service provided by the appellants as not an export to M/s Agilent Technologies, Singapore.

14. However, we find that learned Authorized Representative submits that there was no specific order given by M/s Agilent Technologies,

Singapore for provision of ITSS Service by the appellant during the relevant period so as to satisfy the condition under the same proviso to Rule 3(1)(iii) of Export of Service Rules 2005. In this regard, learned Commissioner finds that: "Therefore, for treating this ITSS as export provided by the appellant to their own company abroad, the order for provision of such service must come from their own company located abroad. However, when the above agreement specifically does not evince that Services of R & D would relate to development of Software, the services of Research & Development of Software provided to the parent company by the appellant cannot linked to the said Service Agreement of Research & Development. Further also vide their additional submissions dated 7<sup>th</sup> June 2011 the appellant could not conclusively prove their point of view."

15. We find that the refund claims involve the period October 2007 to December 2008. The ITSS Services became taxable w.e.f. 16.05.2008. The appellants have entered into an agreement titled "Research & Development Services Agreement" on 01.08.2004 with M/s Agilent Technologies, Singapore; it was amended and restated w.e.f November 1, 2008; a certificate dated 06.12.2010 issued by M/s Agilent Technologies, Singapore was placed on record to claim that ITSS Services were rendered; an addendum to the agreement was issued on 02.12.2010. It is the case of the Department that the proviso to Rule 3(1)(iii) is not satisfied as no order for provision of ITSS Services was in place during the relevant period.

16. The appellant submits that the order need not be a written one but can be oral also and that the scope of services provided included ITSS Services as it is made clear from the addendum. We find that the Research & Development Services Agreement mentions the framework provided to consist of but not limited to the following:

- Product portfolio objectives
- Target Markets
- Target Customers
- Competition
- Ideal solutions
- Technological Partnerships

17. On going through the agreement, one gets understanding that the same are not in the field of ITSS. An addendum of a later date cannot be construed to be an order valid during the relevant period. Therefore, we find that there was no specific order placed by M/s Agilent Technologies, Singapore, on the appellant, for providing ITSS Services during the relevant period. We find that the addendum and the certificate issued much later than the impugned period that to after rejection of the refund cannot take place of an "Order" as envisaged in the proviso to Rule 3(1)(iii) of Export of Service Rules, 2005. We find that the argument of the appellants that development of Software Services rendered by the appellants is linked to the R & D Agreement is not acceptable. We find that the case laws relied upon by the appellants in this regard is not applicable as the facts of the cases are different.

18. Learned Counsel for the appellants also submits that refund of CENVAT credit cannot be denied without raising the demand of service tax on the appellants; they would submit that in case the ITSS Service rendered by them to M/s Agilent Technologies, Singapore was not to be considered as export of service, Department should have raised a demand for provision of the said services. We find that Tribunal held in a number of cases that refund of CENVAT credit on export of services cannot be denied holding that the said provision does not merit to be termed an export of service unless a commensurate demand has been raised on the provider of such services. We find that this Bench in the case of Black Rock Services (India) Pvt. Ltd. (supra) held that:

7. Admittedly the refund claimshave been filed by the appellants under Rule 5 ibid r/w Notification No. 27/2012 dated 18/06/2012. The said rule provides for refund of accumulated Cenvat Credit in respect of goods and services exported under bond or undertaking. This rule is very specific and lays down how to determine the quantum of admissible refund from the accumulated Cenvat credit. It cannot be considered to be a proceeding for denial of Cenvat Credit available in the account of the claimant and therefore even if the refund is denied then also the amount continues to remain in the Cenvat account of the claimant. If the Revenue is not in agreement with the claims of the appellants and if, according to Revenue, the services in issue do not fall within the ambit of export of service then the Revenue ought to have initiated the proceedings against the appellants for demanding the Service Tax in respect of taxable service provided by the appellants. Admittedly no such proceedings have been initiated by the Revenue as borne out from the records of the case and therefore in a way Revenue itself has allowed this taxable service provided by appellants as export of service. If that is so then in the proceeding under Rule 5 ibid revenue cannot deny refund by treating the service provided not to be export of service. Same principal has been followed by the Tribunal in the matter of JFE Steel India Pvt. Ltd. v/s Commissioner CGST, Gurugram; 2021

(44) GSTL-292 (Tri Chan.) and also in Final Order No. 60959-60960/2021 dated 07/10/2021 in Service Tax appeal Nos. 60024-25 of 2020; Macquarie Global Service Pvt. Ltd v/s Commissioner C.E. & ST, Gudgaon-1. On somewhat similar issue while interpreting similar terms of agreement the Authority of Advanced Rulings (AAR) in the matters of Inre Go Daddy India Service Pvt Ltd; 2016-TIOL 08-AAR-ST and Inre Universal Service India Pvt. Ltd; 2016 (42) STR 585 (AAR) held that the Place of Provision of Service will be outside India and therefore Rule 3 of Place of Provision of Service Rules are held to be applicable. The Hon'ble High Court of Judicature at Bombay in the matter of Bombay Flying Club v/s CST; 2015 (37) STRJ129 has held that the ruling given by Advance Ruling Authority cannot be ignored. We also find force in the submission of learned Counsel about applicability of Rule 3 of Place of Provision of Services Rules, 2012 which provides that generally the place of provision of service is the location of service recipient therefore since in the instant case the location of service receiver M/s. HLX is located outside India i.e. USA therefore the place of provision of service is outside India and hence the service in issue qualify export of services in terms of Rule 6A of Service Tax Rules, 1994.

8. In view of the discussions and findings recorded in the preceding paragraph, we are of the considered view that the orders of lower authorities denying Cenvat credit on impugned services are not sustainable in law and therefore the appeals filed by the appellant deserve to be allowed. The appeals are accordingly allowed subject to calculation of refund of un-utilised Cenvat credit by the adjudication authority on the basis of the documents submitted by the appellants and for this limited purpose these appeals are remanded to the original authority. The said authority is directed to dispose of the refund claim within a period of three months from the date of receipt of this order, after giving proper opportunity to the appellants.

19. However, we find that the appellants have also taken the plea that prior to 16.05.2008, they have claimed refund of Business Support Services and not in respect of ITSS Services and thus, partial refund claim was wrongly rejected to the tune of Rs.2,81,87,493/-. We find that this claim needs to be verified from the records by the Adjudicating

Authority. Though, we hold that during the relevant period, the appellants are not entitled to refund of CENVAT credit on services utilized for ITSS Services, they would be eligible for the refund of CENVAT credit on services utilized for other services, if otherwise, applicable. For this reason, we find that the matter requires to go back to the Original Authority.

20. Coming to the second issue, we find that Revenue seeks to deny credit on the ground that their supplier has paid service tax on the generators supplied under the head "Supply of Tangible Goods Services" before the same became taxable w.e.f. 16.05.2008. We are in agreement with the argument of the learned Counsel for the appellants that service tax being paid, credit cannot be denied. We find that M/s Lanxes India Pvt. Ltd. (supra) has held as under:

"4.3 We find that the contention as raised by the Revenue that the activities undertaken by the appellant do not amount to manufacture, but still undisputedly the appellant has paid the duty in respect of the finished goods. Having accepted the payment of duty, Revenue could not have denied the Cenvat credit availed by the appellant. Hon'ble Bombay High Court has in the case of Ajinkya Enterprises [2013 (294) ELT 203 (Bom.)] held as follows:-

"10. Apart from the above, in the present case, the assessment on decoiled HR/CR coils cleared from the factory of the assessee on payment of duty has neither been reversed nor it is held that the assessee is entitled to refund of duty paid at the time of clearing the decoiled HR/CR coils. In these circumstances, the CESTAT following its decision in the case of Ashok Enterprises - 2008 (221) E.L.T. 586 559 (T), Super Forgings - 2007 (217) E.L.T. (T), S.A.I.L. - 2007 (220) E.L.T. 520 640 (T) = 2009 (15) S.T.R. (Tribunal), M.P. Telelinks Limited - 2004 (178) E.L.T. 167 (T) and a decision of the Gujarat High Court in the case of CCE v. Creative Enterprises reported in 2009 (235) E.L.T. 785 (Guj.) has held that once the duty on final products has been accepted by the department, CENVAT credit availed

need not be reversed even if the activity does not amount to manufacture. Admittedly, similar view taken by the Gujarat High Court in the case of Creative Enterprises has been upheld by the Apex Court [see 2009 (243) E.L.T. A121] by dismissing the SLP filed by the Revenue.”

21. In view of the above, we find that as there is no dispute regarding the fact of duty being paid on the generator, credit cannot be disallowed at the service receiver’s end. Learned Authorized Representative for the Department submits that all the cases cited by the appellant are in the realm of Central Excise and therefore, not applicable to the issue of service tax. We are not inclined to accept this proposition. The basic principle of CENVAT credit being same under Central Excise & Service Tax regime, any differentiation in this regard would be artificial.

22. Coming to the third issue of rejection of refund for the reason that the ST-3 Returns do not tally with the CENVAT credit Register, we find, as submitted by the appellants, that learned Commissioner has not given any findings on the same. We find that in the case of M/s Temenos India Pvt. Ltd. (supra), the Tribunal held as follows:

10. With regard to the issue of non-disclosure of CENVAT Credit in the ST-3 returns, we find that the appellant had contended that the credits were included in the CENVAT Credit Register, which fact has not at all been denied by the authorities below. In this regard, we find the decision in M/s. Target Corporation India Pvt. Ltd. (supra) to be very much apt wherein, the co-ordinate Bangalore Bench has inter alia ruled that the denial of refund only on the basis of non-disclosure of CENVAT Credit in ST-3 return was not legally sustainable, in the following words:

“5. After considering the submissions of both the parties and perusal of the material on record, I find that the only ground for which refund has been rejected is that the appellant has not disclosed the cenvat credit in ST-3 returns. Now the question arises can the non-

disclosure or delay in disclosure in ST-3 returns, the assessee loses his right to claim cenvat credit or not? In the present case, I find that after going through the various conditions set out in the appendix to the Notification 5/2006 issued under Rule 5 of Cenvat Credit Rules, 2004 and Rule 4 and Rule 9 of Cenvat Credit Rules, I find that appellant has filed all the necessary documents for claiming the cenvat credit viz. invoices, books of accounts, cenvat credit register which are required as per the various Rules and the Notification to claim cenvat credit but inadvertently he has failed to disclose the same in the ST-3 return which is only a procedural infraction in view of various judgments relied upon by the appellant cited supra. Further I find that under the Notification as well as under the Rule, it has not been categorically provided that non-disclosure of cenvat credit in the ST-3 return will disentitle the assessee from claiming the cenvat credit if he is otherwise entitled to. Further I find that the cenvat credit is a beneficial legislation and it should be construed liberally so as to uphold the letter and spirit of such beneficial piece of legislation and a narrow interpretation would read down the benefit given by the legislature and defeat the very purpose of enacting of such beneficial legislation. Therefore, the denial of the refund only on the basis of non-disclosure of the cenvat credit in ST-3 return is not legally sustainable and therefore, I set aside the rejection of refund on this ground. Further I find that the Commissioner (Appeals) in the impugned order has observed that the appellants have not submitted any 11 documents to prove their contention that they have rightly availed the cenvat credit. It appears that both the authorities have not examined all the documents which have been filed by the appellant in support of their refund claim. In view of this, I set aside the impugned order and remand the matter back to the original authority to examine the refund claim on the basis of other documents filed by the appellant. Accordingly, both the appeals are allowed by way of remand to the original authority. The original authority will provide adequate opportunity to the appellant to produce all the documents which they may rely in support of their refund. Consequently, both the appeals are allowed by way of remand.”

Following the above ratio, we set aside the impugned order to this extent also and allow the claim of the assessee on this ground.

23. In view of the above, we find that refund cannot be rejected for the reason that there is a discrepancy between the CENVAT record and ST-3 Returns. However, we are in agreement with the submissions of the learned Authorized Representative, relying on the cases cited above, that the same can be allowed only if records maintained by the appellants demonstrate that the input services were used/ utilized for the export of services. We are of the considered opinion that the issue requires to travel back to the Original Authority for a re-consideration in view of our findings as above.

24. During the course of hearing, learned Authorized Representative brought to the notice of the Bench that the appellants have not disputed the rejection of refund of credit availed on certain services like Customs House Agent Services, Event Management Services and have withdrawn the claim and the same may not be agitated. As the appellants have not raised the above either in the Grounds of Appeal or they have not mentioned during the hearing, we find that there is no scope for any apprehension on the part of the Revenue in this regard.

25. In view of the above, the appeal is allowed by way of remand to the Original Authority in the following terms:

(i) The appellants have not fulfilled the conditions of Proviso to Rule 3(1)(iii) of Export of Service Rules, 2005 in respect of claim of export ITSS Services, in the impugned period. However, refund is admissible for the reason that no demand has been raised on the appellant for provision of these services held not eligible to be considered as export.

(ii) The Original Authority shall verify the claim of the appellants, for refund of Rs.2,81,87,493/-, for the period October 2007 to March 2008, in respect of Business Support Services exported, with the records and allow such refund, if found otherwise admissible.

(iii) The appellants are eligible to avail CENVAT credit on the service tax paid on the generator provided to them by their supplier and are eligible for refund of the same.

(iv) The appellants are eligible for refund of credit even if there is a mis-match between CENVAT credit records and ST-3 Returns, provided the appellants demonstrate that such services have been procured on payment of tax and are used in the provision of services exported.

(Order pronounced in the open court on 28/03/2024)

**(S. S. GARG)**  
**MEMBER (JUDICIAL)**

**(P. ANJANI KUMAR)**  
**MEMBER (TECHNICAL)**

PK