

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI**

Appeal No.:ST/00028/2010

(Arising out of Order-in-Original No. LTUC/257-261/2009-
C dated 30.09.2009 passed by The Commissioner (C.E. & S.T.),
Chennai - 101)

M/s. SIFY Technologies Ltd., Chennai : Appellant

Vs.

Commissioner of Service Tax, LTU, Chennai-101 : Respondent

Appearance:-

Shri. Raghavan Ramabhadran, Advocate
for the Appellant

Shri. K. Veerabhadra Reddy, JC (AR)
for the Respondent

CORAM:

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Hon'ble Shri V. Padmanabhan, Member (Technical)

Date of Hearing : 09.08.2018

Date of Pronouncement : 30.08.2018

Final Order No. 42327 / 2018

Per Bench,

The present appeal is considered for *de novo* decision as per the order of the Hon'ble Madras High Court dated 28.03.2018.

1.2 The Hon'ble High Court was considering the appeal filed by the appellant against the Final Order No. 42014/2017 dt. 12.09.2017.

The Hon'ble High Court passed the remand Order in the light of the arguments advanced on behalf of the appellant that the Technical

Member who was part of the Bench of this Tribunal who passed the said Final Order was the officer who had earlier issued the Show Cause Notice in the present case.

1.3 After considering the appeal record, we find that during the hearing of the appeal before the earlier Bench of the Tribunal on 04.09.2017, the fact that the Hon'ble Technical Member was the officer who had earlier issued the Show Cause Notice, was never brought to the notice of the Bench. Surprisingly, the last page of the Show Cause Notice copy available in the appeal file is also found missing. In any case, as per the directions of the Hon'ble Bench, the case was re-heard on 06.08.2018 as well as on 09.08.2018.

1.4. The appeal is against order dt.30.09.2009 of Commissioner, LTU, Chennai. This order is passed on a remand direction by the Tribunal vide Final Order No.1086/2008 dt.29.09.2008.

2. The brief facts of the case are that the appellants are registered with the department for discharging service tax under different categories like online information and data base access / retrieval, internet cafe, leased circuit services, franchise service etc. They were also rendering certain services on which service tax is not payable. The appellants were availing CENVATCredit of tax paid on various

input services used by them, in terms of CENVAT Credit Rules, 2004. The period involved in the present appeal proceedings is 1.4.2005 to 31.3.2008.

3. The appellants availed CENVATCredit in the following manner:

(a) CENVATCredit attributable exclusively to taxable services availed fully

(b) CENVATCredit attributable exclusively to exempted services were not availed

(c) CENVATCredit on input services which are common to both taxable service and exempted services were availed in full and these credits did not exceed 20% of output service tax liability and hence these were utilized without restriction.

(d) service tax credit on services listed in Rule 6 (5) and CENVATCredit on capital goods were fully availed and utilized.

4. The appellants were earlier availing credit on input services which were used by them for taxable as well as exempted services and were utilizing such credits only to the extent of 20% of the output tax liability in terms of Rule 6 (3) (c) of CCR 2004 during the

material time. However, from August 2005, they switched over to the present system of availing full credit on such common input services, for which no separate accounts were maintained, and utilized the full amount of such credits. The appellant claimed that since the full amount of credit available on such common input services (used both in taxable and exempted services) are below the 20% restriction of total service liability of output services, they need not restrict utilization in any manner. In other words, in terms of Rule 6(3), the appellants availed full credit on such common input services with no impact of the restriction in terms of utilization as envisaged under Rule 6 (3) (c).

5. The Revenue objected to their availing full credit on common input services and utilizing the same without any restriction. The appellants, as already mentioned above, had treated different input services for different manner of accounting. The credit on input services which are exclusively used for taxable output services were fully availed. In respect of services which are common for both taxable and exempted services and where separate accounts are maintained in terms of Rule 6(2), credit is availed only in respect of services attributable to taxable services. The dispute in the present case is with reference to certain input services which are common

for both taxable and exempted services for which no separate accounts are maintained. The appellants availed and utilized full credit on them. The original authority in the impugned order examined the various defence submissions of the appellant and recorded the following finding :

(a) He allowed the claim of the appellant that they have not availed any input service tax credit when such were utilized exclusively for providing exempted services. He recorded that the appellants have satisfied the condition under Rule 6(1).

(b) The original authority also held that in respect of input services used for both non-taxable and taxable services they have maintained separate accounts and taken credit only in respect of input services relatable to taxable services. It is recorded that they have fulfilled condition of Rule 6(2) properly in this regard.

(c) The original authority also held that the appellants have availed credit on capital goods properly and

(d) the input service tax credit in respect of listed services in terms of Rule 6 (5) was found to be properly availed by the appellant.

6. The original authority examined in detail the dispute regarding implication of Rule 6(3), the manner of accounting and

credit availment by the appellant. In order to appreciate the facts as examined by the original authority along with his reasoning, it is necessary to reproduce the relevant portion of the impugned order which is as under :

"22. Next, I find that the taxpayer have argued that they are eligible for full credit of those services mentioned under Rule 6(5), which do not require maintenance of separate books of accounts, notwithstanding anything contained in sub-clauses (2), (3) of (4) of Rule 6 of CCR, 2004. They have given details of such credit taken by them under Rule 6(5) and statement showing accounting of such inputs services in their computerised accounting system. I thus find that the credit taken by the taxpayer under Rule 6(5) is also in order. Having discussed on the eligibility of credit used for exclusive taxable services, credit on capital goods not used exclusively for providing exempted service and credit on services specified under Rule 6(5), what remains to be answered is their eligibility to take credit of common input services and its utilisation restricted to 20% of taxable output service under Rule 6(3) of CCR 2004.

23. In this regard, I note that as per Rule 6(3) of CCR, 2004, which begins with a non-obstante clause, regarding provisions contained in sub-rules (1) and (2), the manufacturer or the provider of output service, opting not to maintain separate accounts, shall follow either of the following conditions, as applicable to him, namely:-

(a)

(b)

(c) the provider of output service shall utilize credit only to the extent of an amount not exceeding twenty percent of the amount of service tax payable on taxable output service

24. The language of the above provision implies that credit can be taken only when the taxpayer opts not to maintain separate accounts in respect of common input service consumed in provision of taxable and exempted services. In the present case, the taxpayer have all along argued that they are maintaining separate accounts as envisaged under the provisions of Rule 6(2) of CCR, 2004, in which case, they cannot avail credit in respect of common input services, as there cannot be a situation of common input services, when separate accounts are maintained. Further, I find that in this case, the common input services have been used by the Finance, accounting corporate and administration SBUs of the taxpayer, which though not render any taxable / exempt services, but render services to all the SBUs including the e-learning SBU rendering exempted services at Khivraj complex. The taxpayer have accepted in their submissions

that they have availed service tax on these common input services (excluding those mentioned under Rule 6(5)) and utilised the same to the extent of 20% of service tax payable on output taxable services. They have not availed these common services on apportioned basis also corresponding to the SBUs rendering taxable and non-taxable services. Nor have they separately shown expenses incurred on behalf of the SBU rendering exempted services, by the SBUs rendering common services. In the absence of such bifurcation among the common input services, the eligibility even to the availment of such credit on common input services, does not arise, leave alone, its utilisation within the 20% limit. Further, 20% limit on service tax payable was prescribed only in case where no separate accounts are maintained and all input services are common, which cannot be made applicable to a situation where both separate accounts are maintained and common services are incurred. If credit is given for exclusive taxable services under Rule 6(2) and also for common services within the 20% limit, the entire credit availed on common input services in the present case, are well within the 20% limit, which would tantamount to allowing full credit of common input services, which is not the intention of the legislature.

25. *Further, even if the taxpayer had maintained separate accounts for certain taxable services and common accounts for certain taxable and exempt services, then such benefit could be given, as the 20% limit can be reckoned only to the value of taxable and exempt service for which common accounts are maintained. However, in the present case, the common input service credit taken by the SBUs, Finance, administration, accounts and corporate, do not provide any taxable / non-taxable service, but in turn provide services to the all other SBUs that provide taxable / exempt services and the 20% reckoning has to be made to the total taxable output services, which would amount to allowing the entire credit under Rule 6(3), which is not the intention of legislature as mentioned in para supra. I find that the taxpayer had NIL closing balance of the input service tax credit on common services under Rule 6(3) during the months June 2005 to January 2006, July & August 2006 and thereafter in September 2007. This shows that they have completely utilised the common input service credit and had no accumulation of the same much against the intention of the legislature.*

26. *Hence, it infers from the provisions of Rule 6 of CENVAT Credit Rules, 2004 that only either of the option under Rule 6(2) or under Rule 6(3) is allowable and since the taxpayer has all along argued in their submissions that they are maintaining separate accounts for taxable and non-taxable service with supporting accounting details and not availing credit on services exclusively relating to exempted / non-taxable services, I hold that they are eligible to avail credit only to the extent of services exclusively used for taxable services, for which separate accounts are maintained under Rule 6(2), apart from 100% of capital goods credit under Rule 6(4) and 100% of credit on specified services under Rule 6(5).*

27. *The case laws and the Board's circular dt.9.10.2003 cited by the taxpayer all relate to decisions that credit is eligible when separate accounts are maintained or credit reversed on input services used in exempted services. The same are therefore not discussed in detail as the fact that the taxpayer is maintain separate accounts has been accepted as discussed in the above paras and credit taken exclusively relating to taxable services have also been held to be eligible in the paras discussed above. They have also relied on the decision in the case of M/s. Royal Sundaram Alliance Insurance Company, wherein, the Commissioner dropped the demand vide OIO no.LTUC/28/2009-C dt.3.2.2009 having been satisfied with the separate books of accounts maintained by the assessee similar to them. This case is also not discussed here as the separate books of accounts maintained by the taxpayer in respect of taxable and exempt services have been accepted and credit taken exclusively relating to taxable services allowed. It would be worthwhile to point out here that in the said case, the assessee had taken only proportionate credit of common input services relating to taxable services on the basis of premium from taxable and exempted services and their exempted services were only 0.1% of total services. However, in the present case, the income from taxable and exempt services or their ratio to the total are not known and the taxpayer has not taken proportionate credit relating to taxable services, but taken the entire credit on common input services and utilised the same within the limit of 20% of total taxable output services. The circumstances in the present case are different from that of the case of M/s. Royal Sundaram quoted by the taxpayer and hence the said the decision cannot be squarely applicable here."*

7.1 Ld. counsel contesting the findings of the original authority submitted mainly on the following grounds :

(a) The impugned order which was passed as per the remand direction dt. 29.09.2008 of the Tribunal has travelled beyond the scope of such remand. The original authority held that the appellants wrongly followed the provisions under Rule 6(3) when they have maintained separate accounts in respect of common input

services in terms of Rule 6 (2). There is no bar in availing credits as per mechanisms as provided under Rule 6 (2) as well as Rule 6 (3).

(b) It is only in respect of inputs / input services where an assessee is unable to maintain separate books of accounts, they have taken recourse to the mechanism under Rule 6 (3). Thereafter they have followed the provisions of Rule 6 (3) (c) and have not violated the said provision since the 20% amount of output service tax liability is higher than the total credit availed, in terms of Rule 6 (3).

There is no violation of any provisions.

(c) The interpretation of the original authority regarding *non-obstante* clause in Rule 6 (3) is not correct. Such clause is to be read harmoniously with the provisions of sub-rule (1) and sub-rule (2) to bring out the credit mechanism to be followed by the assessee in proper perspective.

(d) The original authority denied the entire credit on common input service which is against the provisions of Rule 6(3). When they have followed full requirements of the said sub-rule, the credit cannot be denied.

(e) Without prejudice to the above, CENVAT credit cannot be denied on any input service as there is no provision for such denial

when they have used common input service both for taxable as well as exempted output services.

7.2 Ld. counsel, with a calculation chart and certain case laws, further elaborated his above submissions. In essence, what is submitted by the appellant is that wherever they have maintained separate accounts in respect of common input services that is done as per sub-rule (2) of Rule 6. Wherever such separate accounts are not possible to be maintained, they have followed Rule 6 (3). However, the clause (c) of Rule 6(3) had no impact as 20% tax liability on the output service was higher than the total credit availed under Rule 6(3) on common input services.

7.3 The Ld. Counsel submitted that w.e.f. 01.04.2008, Rule 6(3) of the C.C.R. Rules, 2004 has been amended and the restriction of 20% of the amount of Service Tax payable on taxable service has been done away with. Further, he submitted that the Board vide their Circular dt. 21.11.2008 has clarified that any CENVAT Credit accumulated as on 01.04.2008, because of the restriction of 20% up to that date, should be allowed to be utilized after 01.04.2008.

7.4 In this connection, he also relied on the Tribunal decisions in the case of *Mumbai International Airport Pvt. Ltd. Vs.*

Commissioner of C. Ex., Mumbai-V – 2014 (33) S.T.R. 308 (Tri. – Mum.) and *DHL Logistics Pvt. Ltd. Vs. Commissioner of Central Excise, Thane-II – 2015 (38) S.T.R. 620 (Tri. – Mum.)*. He submitted that even if CENVAT Credit has been wrongly taken in the period prior to 01.04.2008, on account of the 20% restriction, Revenue can only demand interest on the wrongly availed credit from the date of utilization till 01.04.2008. He also justified availing the benefit under Rule 6(2) as well as 6(3) by relying on the decision of *Eicher Tractors Vs. Commissioner of C. Ex., New Delhi – 2000 (116) E.L.T. 712 (Tribunal)* which has been passed in the context of the erstwhile Rule 57 CC of the Central Excise Rules, 1944. The Ld. Counsel further submitted that the quantification done by the lower authority in arriving at the demand is faulty. He submitted a calculation sheet and submitted that the assessee should at least be allowed the proportionate common credit attributable to dutiable output service.

8. Ld. A.R strongly contested the submissions of the appellant. He also submitted a credit chart to illustrate that the action of the appellant with reference to common input service is against the basic principle of Rule 6. They chose to maintain separate accounts in respect of certain common input services and in respect of other common input services they have not maintained separate accounts

and followed provisions of Rule 6 (3). Such type of selective application of Rule 6 (2) and 6 (3) has, in fact, resulted in a situation where they have effectively availed and utilized all the credit on inputs services and have not been put to any restriction though, admittedly, some of the output services were exempt and such services were rendered using taxable input service on which credit has been availed. Such situation is totally against the principles and the mechanism of CCR as provided under Rule 6 as well as Rule 3 of the CCR 2004. By selective application of rule, the appellants have in fact availed and utilized credits on input services used for exempted output services. Such practice is against the basis of CCR 2004.

9. We have heard both the sides and perused appeal records. The facts of the case are not in dispute. It is only the application of provisions of Rule 6 to the facts of the case which are in dispute. Admittedly, the appellants were using inputs / input services which are common for exempted as well as taxable output services. In respect of certain services, they have maintained separate accounts in terms of Rule 6(2) which was found to be correct and proper by the original authority. However, the dispute is in respect of certain other common input services they have followed the scheme under

Rule 6 (3). In this regard, it is necessary to reproduce the relevant portion of the provisions of Rule 6 of the CCR which are as under :

"Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services.

6. (1) The CENVAT credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or exempted services, except in the circumstances mentioned in sub-rule (2):

Provided that the CENVAT credit on 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 manufacture of goods cleared without payment of duty under the provisions of that rule.

(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any Inputs or input services and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable.

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer or the provider of output service, opting not to maintain separate accounts, shall follow either of the following conditions, as applicable to him, namely:-

(a)

(b)

(c) the provider of output service shall utilize credit only to extent of an amount not exceeding twenty per cent of the amount of service tax payable on taxable output service.”

10. It is clear that Rule 6 (1) is a substantive plenary provision.

Hon'ble Supreme Court in *CCE Vs Gujarat Narmada Fertilizers Co.*

Ltd. - 2009 (240) ELT 661 (SC) held that sub rule (1) of Rule 6 is

plenary. It restates a principle, namely, that CENVAT credit of duty

paid on inputs used in the manufacture of exempted final product is

not allowable. This principle is inbuilt in the very structure of the

CENVAT scheme. Sub-rule (1), therefore, merely highlights that

principle. Sub-rule (1) covers all inputs, including fuel, whereas sub-

rule (2) refers to non-fuel inputs. Sub-rule (2) as well as (3) put in

place the mechanism to comply with the mandate of sub-rule (1) in

the case of a manufacturer/provider of an output service availing

CENVAT Credit, but manufactures/provides output services which

are both chargeable to duty as well as exempted. Sub-rule (2)

requires the manufacturer/provider of output service to maintain

separate accounts for inputs/input services which are used for

manufacture of dutiable goods/providing taxable service as well as

those which are used towards the exempted goods/services. In

terms of the sub-rule (2), the assessee is allowed to take CENVAT

Credit only in respect of inputs/input services used towards

dutiable goods/services. Sub-rule (3), on the other hand, caters to the circumstances where the manufacturer/service provider does not maintain separate accounts as per sub-rule (2). The procedure which is required to be followed in such circumstances is outlined in sub-rule (3).

11. The appellants have relied on the principle laid down by the Hon'ble Supreme Court in *Gujarat Narmada Fertilizers Co. Ltd. (supra)*. However, they have relied on this only to state that sub-rule (1) should not be read in isolation. In the present case, we are faced with a situation where the appellants have several common inputs/ input services. For some of them, they followed sub-rule (2) and maintained separate accounts and for some others they have followed Rule 6 (3). Rule 6 (3) allowed credit on common input services notwithstanding the provisions of Rule 6 (1) or Rule 6 (2). The appellant's claim is that Rule 6 (2) and Rule 6 (3) can operate concurrently. We are not in agreement with such a proposition. Both sub-rule (2) and (3) of Rule 6 talk about "manufacturer" or "provider of output services". The said sub-rules do not talk about the service wise maintenance of accounts. It is with reference to "manufacturer or "provider of output service". As already noted, sub-rule (1) absolutely prohibits availing CENVAT credit on input

service which is used in the manufacture of exempted goods or exempted services except in the circumstances mentioned in sub-rule (2). In other words, it is very clear that plenary provision of sub-rule (1) is giving exception to a situation envisaged in sub-rule (2). Sub-rule (2) is for a 'manufacturer' or 'provider of output service' who shall maintain separate accounts for receipt, consumption and inventory of input and input services meant for use in the manufacture of dutiable final products or in providing output service as well as those exempted. A combined reading of provisions of Rule 6 makes it clear that CENVAT credit shall not be allowed for input services used for exempted service except where the assessee using common input services, both for exempted as well as taxable output services, maintains separate accounts in respect of consumption of such input services on which credit is availed.

12. Sub-rule (3) of Rule 6 is another option available to the assessee who opts not to maintain separate accounts under sub-rule (2). Thus sub-rule (3) provides for a situation when a manufacturer / service provider who is using common inputs for dutiable and exempted products is not able to maintain separate accounts. Though the sub-rule uses the words 'opting not to maintain separate

accounts', in fact, the same has to be construed to mean a situation when he is not able to maintain separate accounts for e.g:- due to the complex process of manufacture or complex stream of use of such inputs / input services. There is no compulsion on the manufacturer / service provider to maintain separate accounts, and the manufacturer / output service provider can opt not to maintain separate accounts by following sub-rule (3). Thus sub-rule (2) takes care of manufacturer / service provider who can maintain separate accounts for common inputs / input services and sub-rule (3) takes care of manufacturer / service provider who is not able to maintain separate accounts. However, the options are left open to both categories by the use of *non-obstante clause* in sub-rule (3). In other words, it cannot be said that for certain common input services, the assessee can maintain separate account under sub-rule (2) and in respect of others, he need not maintain such account and opt for sub-rule (3). In our considered opinion that will defeat the very mandate of the main provision under sub-rule (1).

13. We note that mechanism adopted by the appellant for following both sub-rule (2) and sub-rule (3) in respect of different common input services defeats the very restrictions placed under different conditions of sub-rule (3). As seen in the present case itself

that appellant invoked clause (c) of sub-rule (3) and submitted that they were not hit by restriction of 20% in utilizing credit on tax liability of final output services, on the ground that total credit availed under sub-rule (3) falls short of the same. We note this claim is misleading and ignoring the fact that they have maintained separate accounts and availed full credit in respect of common input services attributable to taxable output services in terms of sub-rule (2). In other words, it would lead to a situation where the assessee can choose to maintain separate account in respect of common input services under sub-rule (2) and, at the same time, follow sub-rule (3) in respect of a few of the common input services so that the bar of 20% utilisation of credit on final tax liability can be avoided. We find the present situation is against the basic principle of CCR. We are of the considered opinion that in respect of common input services for which the appellant is entitled to credit they have an option either to follow sub-rule (2) or sub-rule (3). Following both selectively in respect of selective common input services is against the basic principle and the legal bar under sub-rule (1). Accordingly, we hold that the original authority is correct in disallowing the credit which was availed by the appellant under sub-rule (3).

14. The appellants submitted that there is no provision to deny credit on common input services. While we agree on such legal principle, we note that credit cannot be availed beyond the scope of provision in Rule 6. In the appellant's case credits are availed in terms of provision under sub-rule (2) and sub-rule (3) simultaneously. Hence the question of irregularly availing and disputing the reversal due to lack of legal machinery is not tenable. In other words, the appellants should follow legal provision as per Rule 6. Having not followed, they cannot take a plea that there is no provision to deny credit already availed. When the appellants maintained separate accounts for common input services and availed credits under sub-rule (2) of Rule 6, then there is no question of another option for common input services under sub-rule (3) of Rule 6.

15. Regarding submission of the appellant that the present order is beyond the scope of remand directions of the Tribunal vide final order dated 29.09.2008, we note that the Tribunal made an open remand of the case for a *de novo* adjudication. As such, original authority examined the issue and passed the order. In the present appeal, we have examined the grounds agitated by the appellant

and we are in agreement with the final finding of the original authority for reasons recorded by us as above.

16. The appellants also made submission that they should be eligible for at least proportionate credit attributable to taxable output service. We find that during the relevant time, there is no such provision available to the appellant.

17. Regarding invoking extended period and penalty, on careful consideration of the facts of the case, we are in agreement with the original authority. As recorded in the proceedings, the appellants were actually following Rule 6 (3) with restrictions of utilisation upto 20% in terms of Rule 6 (3) (c) upto August 2005. Admittedly, they have now knowingly switched over to the present system of selectively following Rule 6 (2) as well as Rule 6 (3) which resulted in the present dispute and proceedings. Accordingly, we find that the appeal is without merit and, accordingly, the same is dismissed.

(pronounced in open Court on 30.08.2018)

(V. Padmanabhan)
Member (Technical)

(SulekhaBeevi C.S.)
Member (Judicial)

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