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

Appeal Nos.ST/40568 to 40571/2016

[Arising out of Order-in-Appeal No.16, 17, 18 & 19/2016 (STA-I) dt.04.01.2016 passed by the Commissioner of Service Tax (Appeals-I), Chennai]

CENZA Technologies Pvt. Ltd. — Appellant

Versus

Commissioner of Service Tax, Chennai — Respondent

Appearance:
Shri Rabeen Jayaram, Advocate
For the Appellant

Shri B. Balamurugan, AC (AR)
For the Respondent

CORAM:

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing/decision :31.03.2017

FINAL ORDER No. 40633-40636/2017

Issues involved in all these appeals are common emanating from common impugned order and hence they have been taken up together for disposal.

2. The brief facts of the case are that appellant are providing Online Information and Database access/retrieval service and Renting of Immovable Property services. They had filed refund claims under Rule 5 of the Cenvat Credit Rules, 2004 being the unutilized CENVAT credit.

3. In all these refund claims, a part of export turn over declared by the appellant has been rejected and the lower export turnover only has been adopted by the original adjudicating authority interalia on the grounds that export invoices related to FIRCs received beyond the period of one year stipulated for refund claim are hit by limitation. Some of the cenvat credits availed by the appellants were held to be ineligible on the grounds that the said services were not directly used for providing the output service. All these findings and decisions of the original authority, in each case, have been upheld by the lower appellate authority.

4. The details of period, refunds claimed and rejected etc. as recorded in the impugned order are tabulated as under :-

S.No.	OIO No./Date	Period involved	Refund claimed (Rs.)	Refund rejected. (Rs.)
1.	24/2014 (R) dt. 7.5.2014	July 2012 to Sept'2012	8,66,264	2,06,484
2.	31/2015 (R)dt. 13.5.2015	July 2013 to Sept'13	2,04,138	46,215
3.	32/2015 (R) dt. 18.5.2015	Oct'13 to Dec'13	1,70,010/-	20,947
4.	88/2015 (R) dt. 31.7.2015	Jan'14 to March'14	1,17,556	10,222/-

5. Being aggrieved by the partial rejection of the refund claims as above, appellant has filed the present appeals.

6. Summary of the contentious issues and amounts involved in these appeals are summarized in the following chart submitted by the appellant :

Appeal No. & Period	Refund details	Ineligible CENVAT credit as per the Department	Declared export turnover in the refund application	Approved export turnover by Department	Rejected export turnover and reasons
ST/40568/2016 July 2012 to Sep '12	Rs.8,66,264/- filed on 21.06.2013	1.Reliance Communication, Mobile Internet device addressed to Mr.Aditya Mirza, Director of the Company – Rs.235/- 2. Insurance – Rs.2086/- 3. Membership-Rs.11,000/- 4. Meal pass – Rs.368/- 5.Car Maintenance-Rs.566/-	Rs.1,94,02,792/-	Rs.1,50,25,160	Rs.43,77,632/- FIRC received during the quarter but prior to 21.06.2012
ST/40569/2016 July 2013 to Sep'13	Rs.2,04,138/- filed on 26.05.2014	1.Oriental Insurance-Rs.1343/- 2.Day & Day Housekeeping service Rs.6,666/-	Rs.2,88,31,498/-	Rs.2,32,15,084/-	Rs.56,04,097/- FIRC received during the quarter but prior to 26.05.2013
ST/40570/2016 Oct 2013 to Dec'13	Rs.1,70,010/- filed on 12.06.2013	1. Day & Day Housekeeping service Rs.10,237/- 2. Viva Internet charges Recharged on 25.10.13 (Credit Note)-Rs.1,100/-	Rs.1,73,50,903/-	Rs.1,63,60,138/-	Rs.1,79,025/- (Rejected on condition that received by NEFT transfer) Rs.8,71,740/- FIRC received during the quarter but prior to 27.05.2013
ST/40571/2016 Jan 2014 to Mar'14	Rs.1,17,556/- filed on 03.07.2014	1.Day & Day Housekeeping service-Rs.9,939/-	Rs.1,61,41,376/-	Rs.1,59,54,227/-	Rs.1,87,140/- (Rejected on condition that received by NEFT transfer.)

7. On behalf of the Appellant, Shri Rabeen Jayaram, Advocate reiterated the grounds of appeal and in particular submits that major chunk of the demand pertains to consideration received on Export of Services. He submits that for export of services, what is relevant is the quantum of inward remittances received during the quarter on services exported. He also points out that there is definitely a distinction between the definition of 'Export Turnover of Goods' in Rule 5 (C) of the Cenvat Credit Rules and 'Export Turnover of Services' in Rule 5 (D) ibid. He relies upon the case law of *Bechtel India Pvt. Ltd. Vs CCE Delhi* - 2014 (34) STR 437 (Tri.-Del.). He points out that Hon'ble Madras High Court in the case of *CCE Coimbatore Vs GTN Engineering (I) Ltd.*- 2012 (281) ELT 185 (Mad.) has held that though Rule 5 of Cenvat Credit Rules, 2004 did not prescribe any specific relevant date, it has to be the date on which the final products are cleared for export; however the judgment of Madras High Court relates to export of goods and not of 'services', and hence the ratio thereof would not be applicable to the present appeals. He also submits that in some cases, credits availed by them on input services have been held as ineligible credits, however these credits are very much permissible to be availed as per the provisions of the Cenvat Credit Rules, 2004.

8. On the other hand, on behalf of Revenue Shri B.Balamurugan (AC), Ld. A.R inter alia supports the adjudication and also submitted written submissions, which can be summarized as under :

i. The appeal is not sustainable for the reasons that the learned first appellate authority clearly held in paras 5 to 8 of the impugned Order in Appeal in page Nos. 3 to 5 in Paper Book page Nos.11 to 13 annexed with appeal No.S/40568/2016 the available precedents in this regard to arrive his decision.

ii. As per Rule 9(5) of the CENVAT Credit Rules, 2004, the burden of proof regarding admissibility of the CENAT Credit is casted upon the appellant. However, the appellant has not discharged their onus of admissibility of CENVAT credit taken on the impugned input services enumerating with the definition of Rule 2(l), ibid, inasmuch as, the definition of Rule 2(l) clearly contains exhaustive list of services falls and not falls under its purview. Thus, the input services on which CENVAT Credit disallowed by the lower authority is as per law.

iii. Similarly, the time limit reckoned by the lower authorities is as per law.

iv. Moreover, it is settled law that no interpretation could be made when there is no ambiguity in plain reading of the statutes.

v. The Hon'ble Apex Court in the case of 2012 (283) E.L.T. 161 (S.C.) Commissioner Of Central Excise, Mumbai Vs Fiat India Pvt. Ltd. in para 22 held as follows:

> **22.** ... but as we are concerned with interpretation of a statutory provision, the mere fact that a correct interpretation may lead to hardship would not be a valid consideration for distorting the language of the statutory provisions.

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vi. On reading para 3(a) & (b) of Notification No.27/2012 – CE(NT) dated 18.06.2012 reproduced below it is clear that the application should be filed before the expiry of Section 11 B of Central Excise Act, 1944:

8.1 Heard both sides and have gone through the records of the case.

8.2. Coming first to the disputed cenvat credits held as ineligible, it is seen that, all of them have been availed after the amendment to rule 2(l) of Cenvat Credit Rules, 2004 w.e.f. 1.4.2011. In respect of availment of input service credit towards internet devices for directors, insurance, club membership and meal pass there is no evidence put forth by appellants, either in the adjudication order or before the lower appellate authority that they are not for the personal use or consumption of any employee. For these reasons, I do not find any necessity for interfering with denial of cenvat credit in respect of these inputs / input services in the impugned order, hence appeals thereof are dismissed.

8.3 However, cenvat credits claimed for housekeeping services is, in my view, very much required for the proper upkeeping of the appellant's premises and in any case the same is not barred from the exclusion clauses of Rule 2(l) of CCR 2004. For this reason, the appellant is very much eligible to avail Cenvat Credit in respect of said Housekeeping services, hence appeal on this score is allowed.

9.1 Now, coming to the issue of rejected export turn over.

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9.2 In appeal ST/40568/2011, it is seen that an amount of Rs.43,77,632/- turnover has been rejected by original authority which decision has been upheld by the Lower appellate authority in the impugned order.

9.3 The reasons for the said rejection emerges in para-7.3 of the order of the original authority on page 22 of the appeal papers which is reproduced as under :

> "7.3 In the instant case, from the declaration and documents furnished, I find that although the claimants have realisedtotalling amount of Rs.1,94,02,792/- during the relevant period, from the FIRC's furnished I notice that they have received payment amounting of Rs.1,50,25,160/- relating to the export invoices raised between 25.06.2012 and 31.08.2012. I find that the claimants have not received any advances for export service for which the provision of service have not been completed during the relevant period. Similarly I also find that the claimants have not received any payment prior to the relevant period for which the services have been completed during this period. Accordingly, I proceed to determine the export turnover taking into account the relevant date in terms of Sec 11B of the Central Excise Act. While venturing to do so, I find that the export invoices related to the FIRCs received during the relevant quarter raised before 21.06.2012 are beyond the period of one year stipulated under Sec 11B to reckon for the export turnover, since the claim has been filed by the claimants only on 21.06.2013. Accordingly I find that the Export turnover is liable to be determined as Rs.1,50,25,160/- for the purpose of this claim as defined under Rule 5(1) D of Cenvat Credit Rules, 2004. I find that the claimants have declared the Export turnover in the relevant columns of Form A of the claim as Rs.1,94,02,792/- which I find has been arrived at without reckoning the actual export proceed realization (within the time frame stipulated under Sec 11B of the Central Excise Act), which I therefore reject as incorrect."

9.4 Discernably, original authority has reduced the export turnover from Rs.1,94,02,792/- to Rs.1,50,25,160/- for the reason that balance amount relates to FIRCs though received in the relevant quarter, however, export invoices thereof have been raised before 21.06.2012 and hence are beyond the period of one year stipulated under Section 11B, since claim has been filed by appellant only on 21.06.2013.

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9.5 Nonetheless I find merit in the advocate's averment that *GTN Engineering* judgement of Hon'ble Madras High Court related to export of goods and not services. In the present case, appellants are a 100% EOU engaged in the export of Business Support Services only.

9.6 I also find merit in the contention of ld. Advocate that there is a distinction between the definition of Export Turnover of Goods and that of Export Turnover of Services, in Rule 5 of the CCR 2004.

9.7 Relevant portion of Rule 5 ibid are reproduced hereinbelow for better appreciation :

RULE 5. Refund of CENVAT Credit. — (1) A manufacturer who clears a final product or an intermediate product for export without payment of duty under bond or letter of undertaking, or a service provider who provides an output service which is exported without payment of service tax, shall be allowed refund of CENVAT credit as determined by the following formula subject to procedure, safeguards, conditions and limitations, as may be specified by the Board by notification in the Official Gazette :

$$\text{Refund amount} = \frac{(\text{Export turnover of goods} + \text{Export turnover of services})}{\text{Total turnover}} \times \text{Net CENVAT credit}$$

Where, -

(A) "Refund amount" means the maximum refund that is admissible;

(B) "Net CENVAT credit" means total CENVAT credit availed on inputs and input services by the manufacturer or the output service provider reduced by the amount reversed in terms of sub-rule (5C) of rule 3, during the relevant period;

(C) <u>"Export turnover of goods" means the value of final products and intermediate products cleared during the relevant period and exported without payment of Central Excise duty under bond or letter of undertaking;</u>

(D) "Export turnover of services" means the value of the export service calculated in the following manner, namely :-

Export turnover of services = payments received during the relevant period for export services + export services whose provision has been completed for which payment had been received in advance in any period prior to the relevant period - advances received for export services for which the provision of service has not been completed during the relevant period;

(E) "Total turnover" means sum total of the value of -

(a) all excisable goods cleared during the relevant period including exempted goods, dutiable goods and excisable goods exported;

(b) export turnover of services determined in terms of clause (D) of sub-rule (1) above and the value of all other services, during the relevant period; and

(c) all inputs removed as such under sub-rule (5) of rule 3 against an invoice, during the period for which the claim is filed.

(2) This rule shall apply to exports made on or after the 1st April, 2012 :

Provided that the refund may be claimed under this rule, as existing, prior to the commencement of the CENVAT Credit (Third Amendment) Rules, 2012, within a period of one year from such commencement :

Provided further 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 and Service Tax Drawback Rules, 1995, or claims rebate of duty under the Central Excise Rules, 2002, in respect of such duty; or claims rebate of service tax under the [Service Tax Rules, 1994] in respect of such tax.

Explanation 1. - For the purposes of this rule, -

(1) "export service" means a service which is provided as per [rule 6A of the Service Tax Rules, 1994;

(1A) "export goods" means any goods which are to be taken out of India to a place outside India.

(2) "relevant period" means the period for which the claim is filed.

Explanation 2. - For the purposes of this rule, the value of services shall be determined in the same manner as the value for the purposes of sub-rules (3) and (3A) of rule 6 is determined. **(Emphasis Supplied)**

From the above, what emerges is that for considering the export turnover of goods, value of final products and intermediate products cleared and exported during the relevant period alone can be taken. However, for calculating export turnover of services, <u>while</u> advances received for export services where provision of service has not been completed during the relevant quarter, **<u>will not be</u>** taken into account, nonetheless, two other types of turnover will be definitely taken into account as follows :

(i) Exported services for which advance payment had been received earlier in earlier quarters, but actual export thereof has been effected only during the relevant quarter

(ii) Payment received during the relevant quarter for export of services. There is no condition indicated that such payment will be related only for services exported during the relevant quarter. By implication, I do not find any bar to inclusion of payment received during the relevant period for export of services which have been effected in an earlier quarter.

9.8 Thus, relevant quarter/period for which refund has been claimed under Rule 5 ibid can very well also relate to export of services effected earlier. From a combined reading of the various portions of the definition of 'export services' in Rule 5 (D), in my view, the only requirement is that both receipt of payment and provision of export services should have been completed by, or within the quarter for which the refund claims under Rule 5 ibid are being made. That is, if payments had been received earlier and actual export effected only in the relevant period, claim of corresponding credit refund can only be made during the relevant period. So also, if any export of services has been effected earlier but inward remittances/FIRCs have been received only during the relevant quarter for which claim is made, refund of credit amount corresponding to the payments received can only be made during the relevant quarter. In this way, the Government is ensuring that not only services are exported but also payments thereof are received at the point when the refund claim under Rule 5 ibid is made.

9.9 No doubt, the provisions of Section 11B have been made applicable to service tax vide Section 83 of the Finance Act, 1994. Nonetheless, by the rule of implied exception, the specific provisions of Rule 5 of Cenvat Credit Rules, 2004, will definitely take precedence following the maxim ***Generalia Specialibus non derogant*** - according to which when a matter falls under a specific provision, then it must be governed by that provision and not by the general provision.

9.10 In the Tribunal's decision in the case of *Bechtel India Pvt. Ltd. Vs CCE Delhi* – 2014 (34) STR 437 (Tri.-Del.) cited supra by the ld. Advocate, wherein also export of services was involved, it has been held that in case of export services, export is complete only when foreign exchange is received in India and therefore claim filed within one year from the date of receipt of foreign exchange, not to be held as time-barred. Operative part of the said decision is reproduced below :-

> "7. On going through above provisions for claiming refund under Rule 5 of the Cenvat Credit Rules, 2004, output is required to be exported in accordance with procedure laid down in Export of Service Rules, 2005 (as per condition 1 of the Appendix to Notification 5/2006), once service is exported refund claim can be filed subject to limitation as prescribed under Section 11B of the Act. In the instant case export of service is complete only when foreign exchange is received in India as per Export of Service Rules, 2005 (i). In the Section 11B, relevant date for refund of export of goods is date of export. Section 11B is made applicable for claiming refund under Rule 5 of the Cenvat Credit Rules as per condition 6 of Notification 5/2006. In case of export of Services, export is complete only when foreign exchange is received in India. Therefore relevant date of export of services is date of receipt of foreign exchange. In the present case all the four claims have been filed within 1 year from the date of receipt of foreign exchange and are therefore filed in time and cannot be held as time barred."

9.11 Similar view has been taken in the Tribunal's decision in the case of *Oceans Connect India Pvt. Ltd. Vs CCE Pune-II* - 2016 (46) STR 858 (Tri.-Mumbai)

> "**6.** From the overall case, issues to be decided by me arises as under :
>
> (a) Regarding the refund under Rule 5 read with Notification No. 27/2012-C.E. (N.T.) whether export turnover shall include the receipt of foreign convertible currency as per the FIRC during the particular quarter or as per the date of invoice.
>
> (b) Whether the Cenvat credit is admissible in respect of event management service, insurance auxiliary service, rent-a-cab service, for providing exports services?
>
> (c) In relation to refund under Rule 5 whether limitation of one year should be reckoned from the date of FIRC or from the end of particular quarter.
>
> Regarding the export turnover relevant provisions of Rule 5 is reproduced below :
>
> **Rule 5. Refund of CENVAT Credit.** - (1) A manufacturer who clears a final product or an intermediate product for export without payment of duty under bond or letter of undertaking, or a service provider who provides an output service which is exported without payment of service tax, shall be allowed refund of CENVAT credit as determined by the following formula subject to procedure, safeguards, conditions and

limitations, as may be specified by the Board by notification in the Official Gazette :

Refund amount =	(Export turnover of goods + Export turnover of services) / Total turnover	x Net CENVAT credit

Where, -

(A) ------

(B) --------

(C) ------

(D) "Export turnover of services" means the value of the export service calculated in the following manner, namely :-

Export turnover of services = payments received during the relevant period for export services + export services whose provision has been completed for which payment had been received in advance in any period prior to the relevant period - advances received for export services for which the provision of service has not been completed during the relevant period;

From the aforesaid provision in clause (D) of Rule 5(1) for export turnover of services, one of the element is payment received during the relevant period for export services. In the present case as per the FIRC the payment in convertible foreign currency was received during the relevant quarter therefore the same should be considered as export turnover during the relevant quarter only. There is no provision in the definition of turnover of services that the export turnover should be taken as per the date of invoice. Therefore the contention of the Ld. Commissioner (Appeals) is not sustainable and the refund has to be computed by taking date of FIRC during the particular quarter for the purpose of export turnover."

9.12 It is also to be noted that Notification No.27/2012 CE (NT) was amended vide Notification No.14/2016-CE (N.T) dt. 01-03-2016 to provide that the time limit for filing application for refund of cenvat credit under Rule 5 of the Cenvat Credit Rules, 2004,in case of export of services, shall be one year from the date of (a) receipt of payment in convertible foreign exchange, where provision of service has been completed prior to receipt of such payment; or (b) the date of issue of invoice, where payment for the service has been received in advance prior to the date of issue of the invoice. Evidently, Board has also corrected any ambiguity that may have existed in the erstwhile Notification 27/12-CE (NT) by clarifying that where provision of service has been completed prior to receipt of such payment, the time limit is one year from the receipt of payment in convertible foreign exchange.

9.13 In the event, I am of the considered opinion that in the case of export of services as provided by Rule 5 of the Cenvat credit Rules itself, inward remittances/FIRCs/payments received either directly or through legal and accepted channels of remittances including by NEFT, received during a particular quarter even though related to invoices issued or export services provided for the period prior to that quarter, will definitely required to be included in the export turnover of services for that quarter. Appeal in respect of this dispute is therefore allowed in all the three appeals. (ST/40568/2016, ST/40569/2016 and ST/40570/2016). For appeal No.ST/40571/2016, where an amount of Rs.1,87,140/- of export turnover has been rejected since received by NEFT transfer, the appeal is allowed for the same reasons and also since there is no allegation that the inward remittance has been received through illicit channels or are not legitimate proceeds of services exported.

9.14 Appeals on the above dispute involving rejection of part of export turnover on the grounds that though the FIRCs were received in the relevant quarter, the related export invoices were issued beyond period of limitation are therefore allowed.

10. In respect of the disputed input services, as already discussed hereinabove in paras 8.2 and 8.3, except for credit relating to housekeeping services, no interference is made with regard to the denial of other input service credits. However the matter is remanded back to the original authority for the limited purpose of requantification of the export turnover and resultant revision in quantum of refund of cenvat credit under Rule 5 ibid, based on the decisions herein above.

Appeal is partly allowed on the above terms.

(Dictated and pronounced in open court)

21/04/2017

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

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Customs, Excise & Service Tax Appellate Tribunal

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