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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
SINGLE MEMBER APPEAL BRANCH

Appeal No. **ST/492 /2011 – SM[BR]** Date **01/09/2011**

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S VICHARA TECHNOLOGY INDIA PVT. LTD.
487, UDYOG VIHAR, PHASE-5, GURGAON,
HARYANA.

M/S VICHARA TECHNOLOGY INDIA PVT. LTD. Appellant
Vs
C.S.T. DELHI Respondent

I am directed to transmit herewith a certified copy of **Final order No. 540 / 2011-SM[BR]** Dated4.8.2011 passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
C.S.T. DELHI
17-B, I.P. ESTATE, IAEA HOUSE,
NEW DELHI.

2. Adv. / Consult
MR.K.K.GUPTA & OTHERS
PLOT NO. 2, 1ST FLOOR, RAJIV COLONY, N.H.8, GURGAON, (HARYANA)

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi -
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. IV
Service Tax Appeal No. 492 of 2011 (SM)

[Arising out of the Order-in-Appeal No. 431/BK/GGN/2010 dated 18/10/2010 passed by The Commissioner of Central Excise (Appeals), Gurgaon.]

For Approval and signature :
Hon'ble Shri Rakesh Kumar, Member (Technical)

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? :

2. Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? :

3. Whether their Lordships wish to see the fair copy of the order? :

4. Whether order is to be circulated to the Department Authorities? :

M/s Vichara Technology India Pvt. Ltd. Appellant

Versus

CST, Delhi, Gurgaon Respondent

Appearance

Shri Raja Jindal, C.A. – for the appellant.

Shri S.K. Bhaskar, Authorized Representative (DR) – for the respondent.

CORAM : **Hon'ble Shri Rakesh Kumar, Member (Technical)**

DATE OF HEARING : 04/08/2011.

Final Order No. 540/2011 SM (Br) Dated : ____________

Per. Rakesh Kumar :-

The appellant provide the service of software consultancy and bulk of their service is provided to their clients abroad. There is no dispute that the service provided to their clients abroad is export of service on which no service tax is required to be paid. The appellant also avail Cenvat credit in respect of various inputs and input services used in or in relation to providing of their output service, in accordance with the provision of Cenvat Credit Rules, 2004. Rule 5 of the Cenvat Credit Rules, 2004 provides that where any input or input service is "used in the manufacture of final product" which is cleared export under bond or letter of undertaking, as the case may be, or used in the manufacture of intermediate product cleared for export, or "used for providing service which is exported," the Cenvat credit in respect of inputs or input services shall be allowed to be utilized by the manufacturer or provider of output service towards payment of the duty of excise of final product, cleared for home consumption or for export and/or service tax on output 'services' and where for any reason, such adjustment is not possible, the manufacturer or output service provider shall be allowed the refund of such amount subject to such safeguards, conditions, and limitations, as may be specified by Central Government by notification in this regard. In this case, the appellant, among other services, had received advertising agency service, practicing C.A. service, cleaning services (pest control), general insurance service, maintenance service, rent a cab operator service, renting of immovable property service and security agency services and had availed Cenvat credit of service tax paid on these services, which according to them, had been used for providing their output service to their overseas clients. Since, the Cenvat credit of these services could not be used by them by payment of service tax on the taxable services provided to their customers in India, they applied for cash refund of the accumulated credit in terms of Rule 5 of the Cenvat Credit Rules, 2004. The refund claim was allowed by the Assistant Commissioner vide order-in-original dated 9/10/09. However, the department filed a review appeal before the Commissioner (Appeals) and the Commissioner (Appeals) vide order-in-appeal dated 18/10/10 set aside the original Adjudicating Authority's order and allowed the appeal on the ground that nexus of the input service with their output service was not established by the appellant. Against this order of the Commissioner (Appeals), the present appeal has been filed by the appellant.

2. Heard both the sides.

2.1 Shri Raja Jindal, C.A., the learned Counsel for the appellant, pleaded that the issue involved in this case is now covered by the detailed Circular No. 120/01/2010-S.T. dated 19/1/2010 issued by the Board wherein it has been clarified that the view being taken that to be eligible for refund under Rule 5 of the Cenvat Credit Rules, the input service must be directly used in output service exported is not correct, that as regards the extent of nexus between the input/[illegible] input service and the export goods/export service, it must be borne in mind, that the purpose is to refund the credit that has already been taken, that there cannot be different yardstick for establishing the nexus for taking of the credit and for refund of the credit, that even if different phrases are used in different rules of Cenvat Credit Rules, they must be construed in a harmonious manner, that the definition of 'input service' as given in Rule 2 (l) of Cenvat Credit Rules, includes within its ambit all services used in or in relation to manufacture of final product or output service and includes the services used directly or indirectly, that the term used "used in" in Rule 5 of the Cenvat Credit Rules, 2004 must be interpreted in a harmonious manner and that all the input services whose absence would adversely affect the quality and provision of the services exported should be considered as input services, that accordingly the Board in this Circular has clarified that the services of renting of premises, right to use software, maintenance and repair of equipment, rent a cab for pick up and dropping of the employees etc. would be eligible for refund while the services like event management, company sponsored dinners etc., which do not impact the efficiency of the output services would not be eligible, that the Commissioner (Appeals) while setting aside the Assistant

Commissioner's order has not given any reasoning and has not discussed the above-mentioned Circular of the Board while this Circular had been issued in January 2010, that on the basis of this Circular of the Board, the Cenvat credit availed in respect of all the disputed services would be eligible for cash refund and that in view of this, the impugned order is not correct.

2.2 Shri S.K. Bhaskar, the learned Departmental Representative defended the impugned order by reiterating the findings of the Commissioner (Appeals) and also stated that in any case the matter can be remanded to the Commissioner (Appeals) for denovo decision in the light of the Board's Circular which has not been considered in the impugned order.

3. I have carefully considered the submissions from both the sides and perused the records.

4. I find that in the Commissioner (Appeals) in para '6' of the impugned order has reproduced Rule 5 of the Cenvat

Credit Rules and in para '7' of the order, which is reproduced below, he ~~is~~ has simply stated that a close and direct nexus between the input service and output services has not been established – "**I find the benefits provided by the adjudicating authority on above said services are not legally correct and merits rejection. Since, the said professional services have no use in providing output services which have been exported. A close and direct nexus between these services and output services was not established by the party** (respondent)".

5. From the above para, it is clear that the Commissioner (Appeals) has not given any reasons for arriving for at the above-mentioned findings. While order of Commissioner (Appeals) was of October 2010 and the Board's Circular cited by the appellant is of January 2010. But surprisingly the same has not been discussed at all. This speaks volumes of the respect the Commissioners in the field have for the Board's Circular. In view of this, the impugned order is set aside and the matter is remanded to Commissioner (Appeals) for denovo decision strictly in accordance with the directions

contained in the Board Circular No. 120/01/2010-S.T. dated 19/1/2010 and also after hearing the appellants. The appeals stands disposed of, as above.

(Dictated and pronounced in open court.)

(Rakesh Kumar)
Member (Technical)

PK