CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

REGIONAL BENCH - Court – I

SERVICE TAX APPEAL No. 900 OF 2009
(Arising out of Order-in-Appeal No. 53/2009(H-II)S.Tax, dated 31.07.2009 passed by Commissioner (Appeals-II) of Customs, Central Excise & Service Tax, Hyderabad)

ADP Private Limited **APPELLANT**
6-3-1091/c/1, Fortune 9,
Raj Bhavan Road,
Somajiguda,
Hyderabad-500082

Vs.

Commissioner of Service Tax, **RESPONDENT**
HYDERABAD-II Commissionerate
#11-5-423/a/A,
Sitaram Prasad Towers,
Red Hills, Hyderabad – 500 004

WITH

SERVICE TAX APPEAL No. ST/2993/2012
(Arising out of Order-in-Appeal No. 80&81/2012(H-II)S.T, dt. 22.06.2012 passed by Commissioner (Appeals-II) of Customs, Central Excise & Service Tax, Hyderabad)

ADP Private Limited **APPELLANT**
6-3-1091/c/1, Fortune 9,
Raj Bhavan Road,
Somajiguda,
Hyderabad-500082

Vs.

Commissioner of Service Tax, **RESPONDENT**
HYDERABAD-II Commissionerate
#11-5-423/a/A,
Sitaram Prasad Towers,
Red Hills, Hyderabad – 500 004

WITH

SERVICE TAX APPEAL No. ST/2994/2012
(Arising out of Order-in-Appeal No. 82/2012(H-II)S.T, dt. 25.06.2012 passed by Commissioner (Appeals-II) of Customs, Central Excise & Service Tax, Hyderabad)

ADP Private Limited **APPELLANT**
6-3-1091/c/1, Fortune 9,
Raj Bhavan Road,
Somajiguda,
Hyderabad-500082

Vs.

Commissioner of Service Tax, **RESPONDENT**
HYDERABAD-II Commissionerate
#11-5-423/a/A,
Sitaram Prasad Towers,
Red Hills, Hyderabad – 500 004

WITH

SERVICE TAX APPEAL No. ST/25147/2013
(Arising out of Order-in-Appeal No. 149/2012(H-II)S.T, dt. 27.09.2012 passed by Commissioner (Appeals-II) of Customs, Central Excise & Service Tax, Hyderabad)

ADP Private Limited **APPELLANT**
6-3-1091/c/1, Fortune 9,
Raj Bhavan Road,
Somajiguda,
Hyderabad-500082

Vs.

Commissioner of Service Tax, **RESPONDENT**
HYDERABAD-II Commissionerate
#11-5-423/a/A,
Sitaram Prasad Towers,
Red Hills, Hyderabad – 500 004

WITH

SERVICE TAX APPEAL No. ST/26063/2013
(Arising out of Order-in-Appeal No. 194/2012(H-II)S.T, dt. 27.12.2012 passed by Commissioner (Appeals-II) of Customs, Central Excise & Service Tax, Hyderabad)

ADP Private Limited **APPELLANT**
6-3-1091/c/1, Fortune 9,
Raj Bhavan Road,
Somajiguda,
Hyderabad-500082

Vs.

Commissioner of Service Tax, **RESPONDENT**
HYDERABAD-II Commissionerate
#11-5-423/a/A,
Sitaram Prasad Towers,
Red Hills, Hyderabad – 500 004

WITH

SERVICE TAX APPEAL No. ST/26611/2013

(Arising out of Order-in-Appeal No. 2/2013(H-II)S.T, dt. 08.01.2013 passed by Commissioner (Appeals-II) of Customs, Central Excise & Service Tax, Hyderabad)

ADP Private Limited **APPELLANT**
6-3-1091/c/1, Fortune 9,
Raj Bhavan Road,
Somajiguda,
Hyderabad-500082

Vs.

Commissioner of Service Tax, **RESPONDENT**
HYDERABAD-II Commissionerate
#11-5-423/a/A,
Sitaram Prasad Towers,
Red Hills, Hyderabad – 500 004

AND

SERVICE TAX APPEAL No. ST/27237/2013
(Arising out of Order-in-Appeal No. 54/2013(H-II)S.T, dt. 20.03.2013 passed by Commissioner (Appeals-II) of Customs, Central Excise & Service Tax, Hyderabad)

ADP Private Limited **APPELLANT**
6-3-1091/c/1, Fortune 9,
Raj Bhavan Road,
Somajiguda,
Hyderabad-500082

Vs.

Commissioner of Service Tax, **RESPONDENT**
HYDERABAD-II Commissionerate
#11-5-423/a/A,
Sitaram Prasad Towers,
Red Hills, Hyderabad – 500 004

APPEARANCE:
None for the appellant

Shri N. Bhanu Kiran, A.R. for the respondent

CORAM: HON'BLE MR. S.K. MOHANTY MEMBER (JUDICIAL)
HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. /31051-31057/2019

DATE OF HEARING: 06/08/2019

DATE OF DECISION: 06/08/2019

[ORDER PER: P. VENKATA SUBBA RAO)

All these appeals are filed by the appellant on the same issue and hence are being disposed of together.

2. None appeared for the appellant. Heard learned A.R. and perused the records. The appellant herein is engaged in providing customised software development services (IT software services) and information technology enabled services (ITES) to their own group companies outside India. They have no domestic sale of these services. The information technology software services (ITSS) became taxable only with effect from 16th May 2008 whereas the ITES of the nature rendered by the appellant were taxable with effect from 1st July 2003 under the head 'Business Auxiliary Services'. The appellant availed CENVAT credit attributable to the taxable services rendered by them and had not availed CENVAT credit attributable to the exempted services. With respect to common input services, they have availed CENVAT credit in proportion to the taxable services rendered. The appellant filed refund claims for different periods under Rule 5 of CENVAT Credit Rules 2004 read with Notification No. 5/2006-CE(NT) dated 14.03.2006 as amended from time to time. These refund claims are partly allowed and partly disallowed by the lower authority. Aggrieved by the partial disallowance of the refund, appellant appealed before the 1st appellate authority who upheld the orders of the lower authority and hence these appeals. The appellant submits that the refund was partially denied to them on the following three grounds

(i) The services provided by the appellant are both ITES and ITSS. Services under the ITSS were exempt from payment of service tax during the relevant period and therefore could not have been taken as export turn-over for the purpose of refund.

(ii) CENVAT credit on certain input services has been taken incorrectly as the services in question do not fall under the definition of input services under CENVAT Credit Rules 2004. As the input service credit is not available at all, the refund of such credit wrongly taken cannot be permitted.

(iii) The revenue has adopted a formula given in Notification No. 5/2006 for determining the maximum amount of refund as follows:-

The maximum refund = total CENVAT credit taken on the input services during the given period × export turn over ÷ total turn over.

The explanation to this formula states that the export turn-over shall mean the sum total of the value of final products and output services exported during the given period in respect of which exporter claims the facility of refund under this rule. It also clarifies that total turn-over means the sum total of the value of all output services and exempted services provided including the value of services exported and all excisable and non-excisable goods cleared including the value of goods exported and the value of bought out goods sold during the given period.

3. The appellant submits that this formula has been incorrectly applied by the lower authorities by taking the total turn-over which includes both taxable and exempted services while denying the CENVAT credit availed as only CENVAT credit applicable to taxable services.

4. It is a well settled legal position that admissibility of CENVAT credit cannot be decided while determining the refund under Rule 5 of CENVAT

Credit Rules 2004. If any CENVAT credit is not admissible, the same needs to be recovered under Rule 14 of CENVAT Credit Rules 2004 through an appropriate notice. The appellant relies on the case laws of Convergy's India Pvt Ltd [2009-SR 1-GJX-0172-CESTAT] to assert that there cannot be two different yard sticks, one for permitting credit and the other for eligibility for granting rebate/refund. They would submit that same logic was followed in several cases by various Benches of the Tribunal including this Bench. In all these cases it has been held that CENVAT credit cannot be denied to the appellant while deciding the refund claim under Rule 5 of CENVAT Credit Rules 2004. The reason for this is Rule 5 deals with the refund of CENVAT credit and not its availment or utilisation. Any irregularly availed CENVAT credit can only be recovered under Rule 14 of CENVAT Credit Rules 2004. He would also assert that as far as the exempted services are concerned, they had not availed any CENVAT credit at all. There was an error in calculating the maximum amount of refund available as per the formula given in Notification No. 5/2006 CE(NT) dated 14.03.2006.

5. *Per contra,* learned A.R. asserts that the formula has been correctly applied and refund of CENVAT credit is available only when the output services are taxable services and they are not exempted services. He would also argue that if input service is not eligible as a cenvatable item at all, allowing refund of such wrongly availed CENVAT credit is not permissible within the scheme of CENVAT Credit Rules 2004. In view of the above, he would assert that all appeals may be rejected.

6. We have considered the arguments of the learned A.R. and perused the records. It is a well settled principle that availment of CENVAT credit, its utilisation and its refund are different aspects dealt with under CCR 2004. Rule 5 of CENVAT Credit Rules 2004 provides for refund of CENVAT Credit in

respect of goods/services exported out of India. Nowhere in this rule 5, is there a provision to determine whether availment of CENVAT Credit in the first place is correct or otherwise. There is a separate provision for recovery of irregularly availed CENVAT credit under Rule 14 of CENVAT Credit Rules 2004. There are also provisions for recovery of interest as well as imposition of penalties if any CENVAT Credit is irregularly availed. Therefore, we agree with the appellant that the rejection of refund of CENVAT Credit partly on the ground that the input services are not eligible for CENVAT Credit at all is not correct in law. In view of the above, we find that the rejection of refund claim on this ground is not correct and needs to be set aside. As far as the appellant's assertion that the formula given in Notification No. 5/2006-CE(NT) dated 14.03.2006 for determining the maximum refund has been wrongly applied by the lower authorities is concerned, we find that this needs factual verification in each case. The relevant portion of the Notification is as follows:-

> "5. The refund of unutilised input service credit will be restricted to the extent of the ratio of export turnover to the total turnover for the given period to which the claim relates i.e.
>
> Maximum refund =Total CENVAT credit taken on input services during the given period × export turnover ÷ Total turnover.
>
> *Illustration :* If total credit taken on input services for a quarter = Rs. 100
>
> Export turnover during the quarter = Rs. 250
>
> Total turnover during the quarter = Rs. 500
>
> Refund of input service credit under Rule 5 of the CENVAT Credit Rules, during the **quarter £=100×250/500 i.e. Rs. 50.**
>
> *Explanation :* For the purposes of condition no. 5, -
>
> 1. "Export turnover" shall mean the sum total of the value of final products and output services exported during the given period in respect of which the exporter claims the facility of refund under this rule.
>
> 2. "Total turnover" means the sum total of the value of, -

(a) all output services and exempted services provided, including value of services exported;

(b) all excisable and non excisable goods cleared, including the value of goods exported;

(c) The value of bought out goods sold, during the given period.

This formula needs to be applied as it has been drafted without any intendment or modifications. For this limited purpose of calculation we remand the matter to the original authority. The third issue raised by the appellant that they have not availed CENVAT credit in respect of the exempted services which they have exported also gets subsumed and taken care of in this calculation.

7. In view of the above, the appeals filed by the appellant are allowed refund of CENVAT credit even on the input services which the Revenue feels are ineligible and denial of refund on this ground is set aside. The appeals are remanded to the original authority for limited purpose of calculation of the amount of refund eligible as per the formula given in Notification No. 5/2006-CE(NT) dated 14.03.2006 as applicable with respect to each refund claim. All appeals are disposed of herein above.

(Operative portion of the Order pronounced
in open court on conclusion of the hearing)

(S.K. Mohanty)
Member (Judicial)

(P. Venkata Subba Rao)
Member (Technical)

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