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

Division Bench - Court No. – I

Service Tax Appeal No. 20174 of 2014

(Arising out of **Order-in-Original** No. 63/2013-Adjn (Commr) S.T. dated 07.10.2013 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-IV)

Microsoft Global Services Center (India) Private Limited .. **APPELLANT**
Building No.2, Microsoft Campus, Gachibowli,
Hyderabad – 500 032.

VERSUS

Commissioner of Customs, Central Excise & Service Tax Hyderabad-IV .. **RESPONDENT**
Posnett Bhavan, Tilak Road, Ramkoti
Hyderabad – 500 001.

WITH

Service Tax Appeal No. 22056 of 2014

(Arising out of **Order-in-Appeal** No. 61/2014 (H-IV) S.Tax 63/2013-Adjn (Commr) S.T. dated 26.02.2014 passed by Commissioner (Appeals-II) Customs, Central Excise & Service Tax, Hyderabad)

Microsoft Global Services Center (India) Private Limited .. **APPELLANT**
Building No.2, Microsoft Campus, Gachibowli,
Hyderabad – 500 032.

VERSUS

Commissioner of Customs, Central Excise & Service Tax Hyderabad-IV .. **RESPONDENT**
Posnett Bhavan, Tilak Road, Ramkoti
Hyderabad – 500 001.

AND

Service Tax Appeal No. 22419 of 2014

(Arising out of **Order-in-Appeal No.**100/2014 (H-IV) S.Tax dated 26.03.2014 passed by Commissioner (Appeals-II) Customs, Central Excise & Service Tax, Hyderabad)

Microsoft India (R & D) Pvt. Ltd. .. **APPELLANT**
Building No.2, Microsoft Campus, Gachibowli,
Hyderabad – 500 032.

VERSUS

Commissioner of Customs, .. **RESPONDENT**
Central Excise & Service Tax
Hyderabad-IV
Posnett Bhawan, Tilak Road,
Ramkoti, Hyderabad,
Telangana – 500 001.

Appearance
Shri Prasad Paranjape, Advocate for the appellants.
Shri V.R. Pavan Kumar, Authorized Representative for the Respondent.

Coram: **Hon'ble Mr. S.K. MOHANTY, MEMBER (JUDICIAL)**
Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30923-30925/2020

Date of Hearing : 19.02.2020
Date of Decision : 24.09.2020

[ORDER PER: MR. S.K. MOHANTY]

These appeals are directed against the impugned order dated 07.10.2013 passed by the learned Commissioner of Customs, Central Excise & Service Tax, Hyderabad – IV and the impugned orders dated 26.02.2014 & 26.03.2014 passed by the learned Commissioner of Customs, Central Excise & Service Tax (Appeals-II), Hyderabad. Vide the impugned order dated 07.10.2013, the learned adjudicating authority has confirmed Cenvat demand of Rs.58,35,892/- along with interest and imposed equal amount of penalty on the ground that Cenvat credit of service tax on Health Insurance, Cargo Handling and Photography Services were irregularly availed by the appellant during the period 2009-10 to 2011-12 (up to February, 2012).

The learned Commissioner (Appeals) vide the impugned order dated 26.02.2014 has upheld rejection of refund claim of Rs.96,20,945/- filed by the appellant on the ground that there was no nexus between the input services and the output service exported by the appellant. Another ground assigned in the said order for denial of the refund benefit of Rs.65,32,930/- was that the appellant had not applied the formula correctly as prescribed under Notification No. 5/2006 – C.E. (N.T.) dated 14.03.2006; the period of dispute involved in this case is from July 2008 to September 2011. In the impugned order dated 26.03.2014, the learned Commissioner (Appeals) has upheld rejection of refund claim of Rs.83,33,716/- on the ground that the input services do not have nexus with the output services; the disputed period in this case is from October to December 2012.

2. Briefly stated, the facts of the case are that the appellant herein is engaged in providing output services under the taxable category of "Information Technology Software", "Manpower Recruitment Agency", "Commercial Training and Coaching" and "Consulting Engineer" Services, defined under Section 65 of the Finance Act, 1994. The appellant is duly registered with the jurisdictional service tax authorities for providing such output services. The appellant avails Cenvat credit of Service Tax paid on various input services used/utilized in, or in relation to providing the said output services. In respect of the impugned order dated 07.10.2013, the learned Commissioner has confirmed the adjudged demands on the ground that the disputed services namely, Health Insurance, Cargo Handling and Photography Services are not confirming to the definition of 'input service', provided in Rule 2(l) of the Cenvat Credit Rules, 2004. In respect of two other appeals, the learned Commissioner (Appeals) has upheld rejection of refund benefit on the ground of non-establishment of nexus between the input and the output services exported by the appellant. In one of the case, he has also denied the benefit of refund, holding that the appellant did not observe the procedures laid down under Rule 5 *ibid* read with the notification issued there under.

3. The learned Advocate appearing for the appellant submitted that all the disputed services availed by the appellant are confirming to the definition of 'input service', defined under both un-amended as well as amended provisions of Rule 2(l) *ibid.* Thus, he submitted that denial of Cenvat credit by the learned Commissioner of Service Tax is not in conformity with the statutory provisions. He further submitted that while adjudicating the refund applications filed by the appellant under Rule 5 *ibid*, the department cannot take recourse to the provisions of Rule 14 *ibid* read with Rule 2(l) *ibid*, to ascertain establishment of nexus between the input and the output services. In this context, he submitted that eligibility of refund benefit is subjected to compliance of the formula prescribed under Rule 5 *ibid* read with the notification issued there under. The learned Advocate has relied upon the letter dated 16.03.2012 issued by the Tax Research Unit, Department of Revenue, Ministry of Finance to justify the said stand. Further, the learned Advocate has relied upon the following judgments delivered by the judicial forum to strengthen the case of the appellant that the impugned orders cannot be sustained under the provisions of law:

(i) Commissioner of C. Ex., Bangalore-II Vs. Millipore India Pvt. Ltd. - 2012 (26) STR 514 (Kar.)

(ii) Commissioner of Central Excise Vs. HCL Technologies – 2015 (37) S.T.R. 716 (All.)

(iii) Atlas Documentary Facilitators Company (P) Ltd. Vs. C.S.T., Mumbai-I - 2017 (5) STR 22 (Tri-Mumbai)

(iv) LG Electronics India Pvt. Ltd. Vs. Commissioner of C. Ex. & S.T., Noida - 2016 (44) STR 97 (Tri.All.)

(v) Accenture Services Pvt. Ltd. Vs. Commissioner of S.T., Mumbai-II - 2015 (40) S.T.R. 719 (Tri.-Mumbai)

(vi) Sai Adventium Pharma Ltd. Vs. C.C.E., Cus. & S.T., Hyderabad-IV - 2016 (45) STR 185 (Tri Bang.)

(vii) Commr. of C.Ex. Delhi & Delhi – III Vs, Convergys India Services Pvt. Ltd. – 2017 (48) S.T.R. 173 (Tri.-Chan.)

(viii) Commissioner of Service Tax, Mumbai-II Vs. WNS Global Services - 2016 (44) STR 454 (Tri-Mumbai)

(ix) Commissioner CGST, Mumbai Central Excise Vs. Morgan Stanely Investment Management - 2018 (5) TMI 400 – CESTAT Mumbai

4. On the other hand, the learned AR appearing for the Revenue reiterated the findings recorded in the impugned order and supported the case of Revenue by contending that confirmation of adjudged Cenvat demand along with interest and penalty and rejection of refund claims are in agreement with the statutory provisions.

5. Heard both sides and perused the case records.

6. The issues involved in these appeals for consideration by the Tribunal are as under:

A. Whether, the appellant is entitled to claim Cenvat credit in respect of service tax paid on the disputed services viz., General Insurance, Cargo Handling and Photography Services, considering the same as 'input service', defined under Rule 2(l) *ibid* ?

B. Whether, rejection of refund benefit claimed under Rule 5 *ibid* is sustainable, without invoking the provisions of Rule 14 *ibid* at the stage of availment of alleged Cenvat credit ?

C. Whether, the formula prescribed under Rule 5 *ibid* has to be adhered to for claim of the refund benefit ?

7. The period of dispute in respect of the impugned order dated 07.10.2013 is from 2009-10 to 2011-12 (up to February, 2012). The Cenvat credit availed by the appellant on the disputed services was denied by the department on the ground that such services are not confirming either to the main part or the inclusive part of the definition of input service, contained in Rule 2(l) *ibid*. The appellant has contended that the General Insurance Services were availed by it towards group accidental insurance policies taken on behalf of the employees, burglar and travel insurance policies were taken for safeguarding the assets of the company and for insuring the employees for the journey undertaken for official purpose; that Cargo Handling Service was availed for movement of household items of employees during their official transfer from one location to the other; and Photography Service was availed for taking video photographs during the business presentations etc.

Further, the appellant has contended that in respect of Health Insurance and Cargo Handling Services, no Cenvat credit was availed by it after 01.04.2011, consequent upon amendment of the definition of input service.

7.1 Insofar as the definition of 'input service' is concerned, Rule 2(l) *ibid* defining the said term undergone an amendment vide Notification No. 3/2011 – C.E. (N.T.), dated 01.03.2011, w.e.f. 01.04.2011. Under the un-amended provisions (effective up to 31.03.2011), the phrase 'activities relating to business' was specifically finding place in the inclusive part of the definition of 'input service'. The inclusive definition in a fiscal statute is a well recognized device to enlarge the meaning of the word defined and it expands the meaning of the basic definition. The facts in these cases are not in dispute that the expenses incurred by the appellant for using the disputed services were meant for accomplishing the business activities and also the same form part of the cost of the ultimate services provided by the appellant. The Hon'ble Karnataka High Court in the case of Milipore India Pvt. Ltd. (supra) has extended the credit facility on group personal accident policy, holding that availment of such service by the assessee is towards 'activities relating to business' of manufacture of excisable goods and that the premium paid on insurance policies are part of salaries of employees and elements of cost of production covered under the CAS-4. The said view has also been endorsed by the Hon'ble Allahabad High Court in the case of HCL Technologies (supra). Thus, under the un-amended definition of input service (effective up to 31.03.2011), the above disputed services should fall within the scope and ambit of the definition of input service for the purpose of availment of Cenvat credit of service tax paid thereon. The effect of amendment of the definition of input service w.e.f. 01.04.2011 is that certain services namely, Health Insurance etc., were excluded from the purview of definition of input service, in the eventuality, when the said excluded category of service(s) are used primarily for personal use or consumption of any employee. In other words, Cenvat credit of service tax paid on such service(s) should not be considered as input service, entitling an assessee to avail Cenvat credit thereon. In the present case, since some portion of the disputed Cenvat credit was availed by the appellant after amendment of the definition of 'input service' w.e.f. 01.04.2011 for the alleged personal benefit of its employees, as per the statutory provisions, the Cenvat credit shall not be available on the disputed services. We find that the impugned order has not quantified the service tax amount availed by the appellant before 01.04.2011 and the period thereafter. Thus, we are of the view that the matter is required to be examined at the original stage for ascertaining the quantum of Cenvat credit availed by the appellant for the period after 01.04.2011 and if such availment of credit is in context with the services for personal use or consumption of the employees, then the benefit of Cenvat credit should not be available to the appellant. On the contrary, if the disputed services are falling under the scope and purview of the main part and inclusive part of the definition and do not fall or categorised under the excluded category of services provided under such definition, the Cenvat credit facility should be available to the appellant.

8. Rule 3 (1) *ibid* is the enabling provision, which entitles a manufacturer or provider of output service for availment of Cenvat credit of various duties and service tax paid on the inputs/input services. The manner of utilisation of such credit is contained in sub-rule (4) of Rule 3 *ibid*. In the event, where the Cenvat credit has been wrongly taken or utilised, Rule 14 *ibid* mandates for recovery of such irregularly availed credit from the service provider, in the manner prescribed under Section 73 of the Finance Act, 1994. The basic requirement for effecting recovery of the Cenvat credit under the said statutory provision is for initiation of show cause proceedings within the stipulated time frame and thereafter, for adjudication of the dispute arising there from. In the present case, it is an undisputed fact on record that the department had not proceeded against the appellant for effecting recovery of the allegedly availed irregular Cenvat credit, by taking recourse to Rule 14 *ibid* read with Section 73 *ibid*. On the other hand, the department had raised the issue of non-establishment of nexus between the input services and exported output service for the first time, while adjudicating the subject refund claims filed under Rule 5 *ibid* by the appellant.

8.1 A service provider is permitted under the Cenvat statute to take credit on the input or input service used in output service, which is exported by it. The credit so taken by such type of service provider is allowed for utilisation for payment of service tax on the output service. However, For any reason, where such credit adjustment is not possible, a service provider is allowed for refund of such credit amount, subject to fulfilment of the conditions and limitations, as may be specified by the Central Government by way of issuance of notification. Such refund provisions are governed under Rule 5 *ibid*. In this case, the Central Government has issued the Notification No. 5/2006-C.E. (N.T.) dated 14.03.2006, providing the procedure for grant of refund of input or input service used in providing output service, which has been exported without payment of service tax. The condition No. 5 in the said notification has provided that "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". The said notification has also prescribed the formula, which has to be followed by the service provider for claiming refund of input tax credit. The notification dated 14.03.2006 (supra) was amended vide Notification No. 7/2010-C.E. (N.T.) dated 27.02.2010, by substituting the words 'used in' as 'used for' in clause (b) and the words 'used in' was substituted with the words as 'used in or in relation to' in the Form 'A' appended thereto. The effect of amendment of the earlier notification dated 14.03.2006 was that the input or input service may not be used directly in providing the exported output service and even indirect use also would suffice for the purpose of refund benefit. Further, the Finance Act, 2010 has amended the provisions of Rule 5 *ibid* with retrospective effect to read the words 'in or in relation to', in place of the words 'used in'. As a result of the changes made in the Service Tax statute in the Union Budget 2012, the Tax Research Unit of Department of Revenue in the Ministry of Finance has issued the letter dated 16.03.2012, clarifying that establishment of nexus or correlation between exports and input services used in such exports may not be insisted upon and the refund claim be decided on the ratio of the export turnover to total turnover. The relevant paragraph in the letter dated 16.03.2012 (supra) is extracted herein below:

> *"F.1. Simplified scheme for refunds:*
>
> *1. A simplified scheme for refunds is being introduced by substituting the entire Rule 5 of CCR, 2004. The new scheme does not require the kind of correlation that is needed at present between exports and input services used in such exports. Duties or taxes paid on any goods or services that qualify as inputs or input services will be entitled to be refunded in the ratio of the export turnover to total turnover".*

8.2 On a conjoint reading of the statutory provisions and the notifications issued by the Central Government from time to time, it transpires that input services may not necessarily be used directly in provision of the output service and use of such services 'in or in relation to' also meet the requirement of Rule 5 *ibid* for the purpose of refund benefit. While interpreting the expression 'in relation to' used in the statute, the Hon'ble Supreme Court in the case of Doypack Systems Pvt. Ltd. Vs. Union of India [1988 (36) ELT 201 (S.C.)] has held that the said phrase is equivalent to or synonymous with 'pertaining to' and 'concerned with' and therefore, the said phrase has a very broad connotation and cannot be given a narrow meaning. In view of the settled position of law, there is no requirement of establishing one to one correlation between the input services and the output service. Based on adoption of prescribed formula, the refund application alone should be processed and settled by the department and the aspect of direct nexus or correlation between the input service and output service should not be looked into for such purpose. Therefore, we do not find any merits in the impugned orders, insofar as the refund benefit was denied to the appellant on the ground of non-establishment of direct nexus between the input services and the output service exported by it.

9. On careful examination of various notifications (supra) issued by the Central Government, it reveals that based on the prescribed formula, the refund application has to be filled by the appellant and to be processed by the jurisdictional service tax authorities for sanction of refund of un-utilised

Cenvat credit, owing to the reason of exportation of output service. No other mode or method has been prescribed in the statute for consideration of the refund benefit. In the case in hand (Appeal No. ST/22056/2014), the learned Commissioner (Appeals) has recorded the submissions of the appellant that the adjudicating authority has not applied the formula correctly for determination of eligible refund amount. However, without consideration of such submissions of the appellant, he has held that the original authority had taken into consideration the admissible credit, which appears justifiable. Since, the specific issue regarding adoption of the formula prescribed under Rule 5 *ibid* has not been discussed by the authorities below, we are of the considered view that the matter should be remanded to the original authority for a fresh finding on the issue, whether the requirement of the said rule has actually been complied with by the appellant.

10. In view of the foregoing discussions and analysis, the appeals filed by the appellant are disposed of in following terms:

(a) <u>Appeal No.ST/20174/2014</u>

The appellant should be entitled for availment of Cenvat credit on the disputed services viz. Health Insurance, Cargo Handling and Photography Services up to the period 31.03.2011, inasmuch as, such services are confirming to the definition of input service. With regard to the period after 01.04.2011, the matter is remanded to the original authority for quantification of Cenvat credit availed by the appellant in respect of the disputed services, which were consumed for personal use/benefit of the employees. If the disputed services are falling under the scope and purview of the main and inclusive part of definition of 'input service' and do not fall under the excluded category of services as per such definition, the Cenvat credit facility should be extended to the appellant.

(b) <u>Appeal No. ST/22419/2014</u>

The impugned order is set aside, insofar as it has held that direct nexus/correlation is required between the input services and the exported output service and accordingly, the appeal is allowed in favour of the appellant.

(c) <u>Appeal No. ST/22056/2014</u>

The matter is remanded to the original authority for a fresh fact finding on the issue, whether the requirement of Rule 5 *ibid* regarding adoption of correct formula has been complied with by the appellant.

(Order pronounced in open court on 24.09.2020)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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