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

Division Bench - Court No. – I

Service Tax Appeal No 22355 of 2014

(Arising out of **Order-in-Appeal** No.90/2014 (H-IV) ST, dated 25.03.2014 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals-II&IV), Hyderabad)

Qualcomm India Pvt Ltd., .. **APPELLANT**
5th Floor, Building No. 8,
Mindspace, Hitec City, Madhapur,
Hyderabad – 500 081.

VERSUS

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

AND

Service Tax Appeal No 30172 of 2016

(Arising out of **Order-in-Appeal** No.HYD-EXCUS-004-APP-0150-0151/15-16, dated 18.11.2015 passed by Commissioner of Service Tax (Appeals), Hyderabad)

Commissioner of Customs, .. **APPELLANT**
Central Excise & Service Tax

Hyderabad-IV
Posnett Bhawan, Tilak Road,
Ramkoti, Hyderabad,
Telangana – 500 001.

VERSUS

Qualcomm India Pvt Ltd., .. **RESPONDENT**

5th Floor, Building No. 8,
Mindspace, Hitec City, Madhapur,
Hyderabad – 500 081.

Appearance

Shri Prasad Paranjape, Advocate for the assessee.
Shri C. Mallikarjun Reddy, Superintendent for the Department.

Coram: Hon'ble Mr. S.K. MOHANTY, MEMBER (JUDICIAL)

Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/31169-31170/2019

Date of Hearing:07.08.2019
Date of Decision:07.08.2019

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

1. Denial of refund benefit provided under Rule 5 of the Cenvat Credit Rules, 2004 read with the notification issued there under is the subject matter of present dispute in these appeals filed by both the assessee-appellant as well as Revenue. Since the issue involved in the appeals is identical, the same are taken up for hearing together and a common order is being passed.

2. Briefly stated, the facts of the case are that the assessee-appellant is inter alia, engaged in providing software related services for design, developing and testing for enhancement and improvement of Qualcomm group's existing products and new products. Such services provided by the assessee-appellant are categorised as taxable service, defined under Section 65 of the Finance Act, 1994. The assessee-appellant exports the entire output service to the outside countries. In view of exportation of the entire output service, the assessee-appellant was not in a position to utilise the cenvat credit for payment of service tax on the taxable output services. Thus, during the disputed period, the assessee-appellant had filed refund application before the jurisdictional service tax authorities, claiming refund of service tax paid by it on the taxable input services. The original authority had partially allowed the refund benefit in favour of the assessee-appellant and denied the benefit in some other cases, holding that there was no nexus between the input services and the output service exported by it. Feeling aggrieved with such portion of the impugned order in denying the refund benefit, the assessee-appellant has filed the present appeal before the Tribunal. Revenue's contention against the impugned order dated 18.11.2015 is that after amendment of the definition of input service w.e.f. 01.04.2011, the assessee-appellant has to specifically prove that the input services are confirming to the definition contained in Rule 2(ℓ) of the Cenvat Credit Rules, 2004 and were in fact, used in providing output service.

3. The Learned Advocate appearing for the assessee-appellant submits that being a 100% STP unit, the assessee had exported the entire output service to its group companies located abroad. Thus, he submitted that the disputed input services were in reality used for the output services exported

by the appellant and accordingly, the nexus with regard to the input and the output services are duly established. He also submitted that even if the Cenvat credit is deniable on the ground of non-establishment of nexus, then in that case, the department was required to issue the show cause notice under Rule 14 *ibid* read with Section 11A of the Central Excise Act, 1944/Section 73 of the Finance Act, 1994. Therefore, Learned Advocate submits that since such provisions have not been invoked and refund benefit has been denied solely on the ground of non-establishment of nexus between the input service and output service, denial of the benefit of refund on such ground is not in conformity with the statutory provisions and thus, the impugned order is liable to be set aside on that ground alone. He has also relied upon and referred to the Final Order No. 30707-30711/2017 dated 07.06.2017 passed by this Tribunal, in the case of the appellant itself, holding that while deciding the refund issue, the nexus aspect cannot be questioned by the department. Learned Advocate also stated that since the assessee-appellant is entitled for the benefit of refund of service tax, it should also be entitled for the interest in terms of Section 11BB *ibid* for delayed payment of the refund amount to the assessee-appellant.

4. Learned AR appearing for the Revenue reiterates the findings recorded in the impugned order and also contended that since the burden lies with the assessee-appellant to prove the fact regarding use of the disputed input services for exportation of the output service has not been satisfactorily explained, denial of refund benefit by the lower authorities is in conformity with the statutory provisions. With regard to the Revenue's appeal, the Learned AR also reiterates the grounds of appeal urged in the appeal memorandum.

5. Heard both sides and examined the case records.

6. Rule 3 of the Cenvat Credit Rules, 2004 is the enabling provision, which entitles a manufacturer of excisable goods and the provider of output service to take cenvat credit of the duties and taxes paid on the inputs and the input services, with the objective of utilisation of the same for payment of excise duty on the products and service tax on the output services. In case of exportation of output service, there is no question of utilisation of

cenvat credit available in the books of accounts. Thus, Rule 5 *ibid* provides for refund of accumulated cenvat credit, subject to compliance of the procedures/guidelines laid down under the notifications issued there under. We find that the refund benefit was denied to the assessee-appellant on the sole ground that there was no nexus between the input services and the output service exported by the appellant. Further, in Revenue's appeal, it has been contended that certain disputed services are not conforming to the definition of input service provided under Rule 2(ℓ) *ibid*. Insofar as taking of irregular cenvat credit is concerned, Rule 14 ibid clearly mandates that in case of irregular availment of credit or its utilisation, such credit can be recovered from the assessee and for effecting the recoveries, the provisions of Section 11A of the Central Excise Act, 1994/ Section 73 of the Finance Act, 1994 shall apply *mutatis mutandis*. It is an admitted fact on record that the department has not invoked the provisions of Rule 14 *ibid* for effecting recovery of the alleged irregular cenvat credit availed by the assessee-appellant. Thus, under such circumstances, it can be said that taking of cenvat credit on the disputed services by the appellant is in conformity with the cenvat statute. Rule 5 *ibid* nowhere specifies that cenvat credit can be denied on the ground of irregular availment or utilisation of the same. Thus, in absence of specific provisions contained in the statute, denial of the refund benefit provided under Rule 5 *ibid*, in our considered opinion, cannot stand for judicial scrutiny. Since the department has not specifically alleged regarding actual exportation of services by the assessee-appellant and use/utilization of disputed services for such activities, benefit of refund should be available in terms of the unambiguous provisions contained in Rule 5 *ibid*, subject only to adherence of the formula laid down there under. The Learned Advocate appearing for the assessee-appellant submitted that it should be entitled for the benefit of interest for non-consideration of the refund application within the stipulated time frame prescribed under the statute. However, on perusal of the case records, more specifically the grounds of appeal annexed to the appeal memorandum, we find that the assessee-appellant has not raised any plea on the issue of payment of interest therein. Since such issue is not arising out of the appeal proceedings before the Tribunal, it will not be the appropriate to consider such plea at this juncture for a decision as emphasized by the learned Advocate for the appellant.

7. In view of above discussions, by setting aside the impugned order, the appeal is allowed in favour of the assessee-appellant. The appeal filed by Revenue is dismissed.

(Order dictated & pronounced in open court)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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