IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO.

Application No.ST/S/93197/17
Appeal No. ST/87882/2017

(Arising out of Order-in-Appeal No. PK/21/MC/2017 dt.02.08.2017 passed by the Commissioner (Appeals-II) Central excise, CGST, Mumbai)

: **Appellant**

Commissioner CGST, Mumbai Central Excise

VS

Morgan Stanley Investment Management Pvt. Ltd. : **Respondent**

Appearance

Shri Atul Sharma, Asstt.Commr. (A.R.) for Appellant
Shri Prasad Paranjape, Advocate for respondent

CORAM:

Hon'ble Shri Ramesh Nair, Member (Judicial)

Date of hearing : 20/02/2018
Date of decision: 20/02/2018

ORDER NO. A/85850/2018

The Revenue has filed the present appeal raising the following three questions of law:

(a) Whether the 'relevant date' for the purpose of deciding whether refund claim under Rule 5 of Cenvat Credit Rules, 2004 is barred by limitation should be reckoned from the date of receipt of foreign exchange as held by the Commissioner (Appeals) or it should be considered from the date of export of service or raising of invoices, as being contended by the Revenue in this appeal;

(b) Whether the Commissioner (Appeals) is right in holding that the eligible refund amount will not be reduced due to the assessee having utilized part of the cenvat credit balance for payment of service tax on domestic output services during the relevant period.

(c) Whether the Commissioner was right in allowing the cenvat credit on certain input services which were rejected, by the lower authorities on various grounds.

2. The fact of the case is that the appellant are engaged in providing investment advisory services to its overseas group entities due to export of majority of its output services. Respondent filed the refund claim for the period July 2014 to September 2014 on 29.6.2015. The said refund claim was rejected by the original authority. The respondent filed appeal before the Commissioner (Appeals) for the part of t rejected claim. The Commissioner (Appeals) allowed majority of the claim to the respondent, except for Rs. 1,51,518/-, for which the respondent has not filed appeal. The Revenue is in appeal to the extent the Commissioner (Appeals) has allowed the refund of the respondent.

3. Shri Atul Sharma, Ld. Assistant Commissioner (A.R.) appearing on behalf of the Revenue reiterates the grounds of appeal.

4. Shri Prasad Paranjape the Ld. Counsel appearing on behalf of the respondent submits that as regard limitation in the case of

respondent's own group-entities in Appeal No. ST/87435/2017 this Tribunal vide order No. A/85150-85151/2018 held that the computation of limitation in respect of filing the refund claim should be reckoned from the date of receipt of foreign exchange and not from the date of invoices or from the date of export of service, therefore this issue is already settled.

5. As regard the computation of eligible refund. He submits that the refund is to be computed as per the formula provided in Rule 5 of Cenvat Credit Rules,2004. The notification issued under the said Rule namely Notification No. 27/2012-CE(NT) provided at para 2 (g) stipulates that the refund amount shall not be more than the cenvat credit balance at the end of the quarter or at the time of filing of refund claim. The respondent has considered the cenvat credit balance on the last date of quarter which was Rs.34,47,125/- whereas the cenvat credit available on the date of filing of the refund was Rs. 68,53,677/-. Since the respondent has claimed refund of Rs. 34,05,172/- on the basis of the formula provide in Rule 5 of Cenvat Credit Rule, 2004 which is less than both the amounts mentioned above. They have correctly complied with the above prescription of law. The Assistant Commissioner while rejecting the claim of respondent has held that respondent ought to have considered the cenvat credit availed during the relevant quarter after deducting the service tax paid by them on domestic service tax liability. In other words, the Assistant Commissioner has denied the respondent to utilize opening balance of cenvat credit at the beginning of the relevant period for

the payment of their domestic service tax liability. He proposed to consider only that amount of cenvat credit availed during the relevant period after deduction of the amount used for payment of service tax on domestic service tax liability which is contrary to the clear provision under Rule 5 read with notification issued thereunder. Therefore the Commissioner (Appeals) has rightly held in favour of the respondent which deserves to be sustained.

6. As regard the eligibility of certain input services he submits that the Commissioner (Appeals) has rightly examined the eligibility of all the services before him based on the submission made before him in the grounds of appeal and hence allowed the claim of the respondent. He further submits that Revenue has never objected the availment of cenvat credit as no show cause notice was issued for denial of the credit. The issue of inadmissibility of the input service was raised at the stage of sanctioning of the refund claim. Therefore in view of the settled position in law without specific adjudication in respect of denial of cenvat credit, refund cannot be rejected. In support of his submission he placed reliance on the following judgements:

(i) *Commissioner of Service Tax, Mumbai Vs. M/s. Sequoia Capital India Advisors Pvt. Ltd.*
M/s. Morgan Stanley India Service Pvt. Ltd.
Order No. 85150-85151/2018 dt. 29.01.2018

(ii) *Commissioner of Central Excise and Service Tax Vs. M/s. Span Infotech India Pvt. Ltd.*
2018-TIOL-516-CESTAT-BANG-LB

(iii) *Commissioner of Customs, Central Excise & Service Tax, Hyderabad-IV Vs. M/s. Hyundai Motor India Engineering (P) Ltd. 2015-TIOL-739-HC-AP-ST*

7. On careful consideration of the submissions made by both the sides I find that issue of limitation is no longer res integara as has been held in various judgements that in case of export of service relevant date for computing the limitation is date of receipt of convertible foreign exchange against the service exported and not from the date of invoice issued for providing the export service. The Tribunal in their own case passed the following order:

"4. We have carefully considered the submissions made by both sides and perused the records. We find that in both the cases, the period involved is after 1.7.2012. Prior to 1.7.2012, the definition of export of service under Rule 5 was as under: -

> *"export service" means the service which is provided as per provision of Export of Service Rules, 2005 whether the payment is received or not.*

However, from 1.7.2012, the aforesaid definition of "export service" under Rule 5 was amended. The amended definition reads as under: -

> *"export service" means the service which is provided as per Rule 6A of the Service Tax Rules, 1994.*

Since all the relevant claims are pertaining to the period after 1.7.2012 only the amended definition of export service is applicable. Rule 6A of Service Tax Rules, 1994 are read as under: -

> ***RULE [6A. Export of services.*** *— (1) The provision of any service provided or agreed to be provided shall be treated as export of service when,-*
>
> *(a) the provider of service is located in the taxable territory,*
>
> *(b) the recipient of service is located outside India,*
>
> *(c) the service is not a service specified in the section 66D of the Act,*
>
> *(d) the place of provision of the service is outside India,*
>
> *(e) the payment for such service has been received by the provider of service in convertible foreign exchange, and*

(f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 2 of clause (44) of section 65B of the Act.

(2) Where any service is exported, the Central Government may, by notification, grant rebate of service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification.]"

From the plain reading of the above Rule 6A, it can be seen that as per sub-rule (1) clause (e), the payment for such service should be received by the provider of service in convertible foreign exchange. Therefore, unless and until the payment consideration in convertible foreign exchange against the export of service is received, the export of service is not complete. Accordingly, the relevant date of one year for filing of refund claim should be reckoned from the date of receipt of convertible foreign exchange. Since the department in appeal has raised only the issue of time limit for filing the refund claim, we are not going into any other issue.

5. Accordingly, the impugned order is upheld and Revenue's appeals are dismissed."

8. In view of the above judgements of this Tribunal in the appellant's own group entities case, I hold that refund cannot be denied on the ground of limitation. As regard the issue that whether the proposal of the Revenue to reduce the cenvat credit utilize for payment of service tax on the domestic clearances of the services for the purpose of considering the net cenvat credit availed for the purpose of formula, I do not agree with the Revenue's proposal for the reason that as per Notification No. 27/2012-CE(NT) dt. 18.6.2012 in para 2(g) it provides as under:

"2. Safeguards, conditions and limitations – Refund of CENVAT Credit under rule 5 of the s aid rules, shall be subjected to the following safeguards, conditions and limitations, namely:-

(a)..............
(b)................
(c)................
(d)................
(e)................
(f)...................
(g)the amount of refund claimed shall not be more than the amount lying in balance at the end or quarter for which refund claim is being made or at the time of filing of the refund claim, whichever is less.
(h)....................
(i)...................

From the plain reading of the above clause (g) it is crystal clear that amount of refund claimed by the respondent shall not be more than the amount lying in balance at the end of the quarter or at the time of filing of the refund whichever is less. As per the fact narrated by the Ld. Counsel the refund claim amount is lesser, both the amount and cenvat credit balance at the end of the quarter as well as cenvat credit balance at the time of filing the refund and therefore the condition envisaged under clause (g) of para 2 of the notification is scrupulously complied with. It is also observed that in formula given under Rule 5 is relevant which is reproduced below:

"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) "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;

(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."

From the above formula, and definition of net cenvat credit, it is clear that only cenvat credit availed on the inputs and inputs services by the manufacturer or the output service provider should be taken as 'net Cenvat credit'. The only amount which can be reduced is the amount which is reversed in terms of Sub-rule (5C) of Rule 3 during the relevant period. Therefore no amount which was utilized for payment of service tax in respect of domestic provision of service from cenvat amount is required to be reversed as per formula. The net sum will be the centvat credit attributable to export only. Therefore the formula itself taken care to reduce the element of cenvat credit attributable to the service provided in the domestic market, therefore the proposal of the revenue is based on presumption and assumption which has no authority therefore this proposal is also rejected and refund claim cannot be disputed on this count.

9. As regard the issue of admissibility of certain services, I find that the issue of admissibility of input service was raised in disposal of the refund claim filed under Rule 5 of the Cenvat Credit Rules. There cannot be two yardsticks i.e. one for allowing the credit and other for deciding the refund and therefore the refund claim cannot be rejected on the ground of admissibility of the input service at the stage of processing of refund claim. This was held by the Tribunal in the following cases :

(i) Commissioner of Service Tax, Delhi v. Convergys India Pvt. Ltd. - 2009 (16) S.T.R. 198 (Tri.-Del.)

(ii) Morgan Stanley Advantage Services Ltd. Versus Commr. Of S.T., Mumbai-II
2015 (37) S.T.R. 639 (Tri. - Mumbai)

Thus, the adjudicating authority was supposed to first decide the issue of admissibility of the input service by way of issue of show cause notice and carry out adjudication thereof then only the refund could have been rejected on this point. But in the facts of the present case without carrying out any adjudication process straight away refund was rejected which is incorrect and illegal. Therefore on this count itself, the Revenue's appeal on the issue of admissibility of the input service does not sustain. As per my above discussion, the appeal of the Revenue is not maintainable. Hence the Revenue's appeal is dismissed. Stay petition also stands disposed of.

(Pronounced in court)

(Ramesh Nair)
Member (Judicial)

SM.