

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

APPEAL NO. ST/87641 & 87737/2018

(Arising out of Order-in-Appeal No. PK/186 to 187/MC/2018 dated 04.04.2018 passed by the Commissioner of CGST & Central Excise (Appeals-II), Mumbai.)

**M/s Morgan Stanley India Financial
Services Pvt. Ltd.**

Appellant

Vs.

Commissioner of CGST, Mumbai East

Respondent

Appearance:

Shri Prasad Paranjape, Advocate with
Shri Suyog Bhare, Advocate

for Appellant

Shri Onil Shivdikar, Assistant Commissioner (AR)

for Respondent

CORAM:

HON'BLE SHRI AJAY SHARMA, MEMBER (JUDICIAL)

Date of Hearing: 28.11.2018

Date of Decision: 25.01.2019

ORDER NO. A/85196-85197/2019

These appeals have been filed by the Appellant from the Order-in-Appeals dated 04.04.2018 passed by the Commissioner of CGST & Central Excise (Appeals-II), Mumbai by which the learned Commissioner partly allowed the appeal filed by the Appellant and rejected the claim of CENVAT credit *qua* "Air Travel Agent Services", "Banking & Financial Services", "Business Auxiliary Services" and "General Insurance Services" on the ground that there is no nexus

between the input services and output services and therefore the Appellant has wrongly availed the CENVAT credit on these services. The learned Commissioner has also rejected the appeal *qua* the excess refund claim on account of non-reversal of erroneous credit admittedly availed by the Appellant in their ST-3 returns.

2. I have heard learned Counsel for the Appellant and learned Authorised Representative for the Revenue and perused the records.

3. Learned Counsel for the Appellant submitted that the learned Commissioner has erred in rejecting the refund claim filed by the Appellant under Rule 5 of CENVAT Credit Rules, 2004 read with Notification No. 27/2012-CE (NT) dated 18.06.2012. He further submitted that so far as the claim towards input services viz. "General Insurance Services", "Air Travel Agent Services", "Banking & Financial Services", "Storage and Warehousing Services" and "Business Auxiliary Services" are concerned, the same have already been allowed by the learned Commissioner in the Appellant's group entity Morgan Stanley Advantage Services Pvt. Ltd. He also produced the copy of the said order.

4. Learned Authorised Representative appearing on behalf of the Revenue reiterates the findings recorded in the impugned order and prayed for dismissal of the appeal.

5. During the course of hearing learned Counsel for the Appellant has also produced a chart indicating the amount in issue against

each head, the said chart is taken on record and is extracted as under:-

Sr. No.	OIO Date and Page No.	Period	Nexus Issue					Excess Refund Claimed	Total
			General Insurance Services	Air Travel Agent Services	Storage & Warehousing Services	Banking or Financial Services	Business Auxiliary Services		
A	B	C	D	E	F	G	H	I	J
1	23.12.15 (Pg. 27)	Oct 14 to Mar 15	-	63,559	12,666	3,872	1,172	8,41,890	9,23,159
2	19.07.16 (Pg. 45)	Apr 15 to Sep 15	7,70,288	77,662	8,806	1,439	831	-	8,59,026
Total			7,70,288	1,41,221	21,472	5,311	2,003	8,41,890	17,82,185

The facts of the matter in brief are that the Appellant is engaged in providing financial advisory services to overseas clients which includes assistance in monitoring and providing updates about the performances made by the overseas clients. For providing assistance in monitoring and providing updates the Appellants are required to appoint persons as a Nominated Director/Alternate Director in the investee company where investment had been made by overseas client, in order to facilitate the process of portfolio monitoring. The said Nominated Director/Alternate Director do not have any decisions making authority and the overseas client of the Appellant provides guidance on the agenda to the said Director prior to the Board meeting and the said Director acts only as instructed. Since the Directors of the company are accountable for the acts of employees or any other persons of the company, therefore the employees of the Appellant who are appointed as Nominated Director/Alternate

Director in the investee company are at financial risk which may arise against them in the event of any fraud is committed in the investee company. Ultimately the said financial liability has to be borne by the Appellant, therefore in order to protect themselves, the Appellant has taken an insurance policy from Tata AIG in its own name with respect to claim that may be made against its employees who are appointed as Nominee Director/Alternate Director in the investee company. The said insurance policy is taken so that the insurance company can pay the losses of the Appellant which may arise from the arrangement of appointing its employee as Nominee Director/Alternate Director in the investee company, during the course of providing services to its overseas clients. Therefore, it is clear that the insurance policy is taken by the Appellant in relation to the financial risks during the course of business that may arise upon the appointment of the employees as Nominee Director/Alternate Director in the investee company and not for the personal consumption of the employees. The said input service is used in the course of provision of output service and has not only a nexus with the output services but is essential for the business of the Appellant, therefore the Appellant is eligible for CENVAT credit on "General Insurance Services". In the matter of Morgan Stanley Advantage Services Private Limited which is Appellant's group entity, the Adjudicating Authority in respect of refund claim for the period from April, 2016 to June, 2016 had admitted that the "General Insurance Services" procured by the claimant had direct nexus with output services and hence eligible for refund.

6. So far as “Air Travel Agent Services” are concerned, the Appellant has availed those services for booking air tickets for the travelling of its employees for official meetings with the client at various locations. Those meetings are conducted to enable to the Appellant to understand the needs of the overseas client and to deliver qualitative services to them. These meetings are essential for the business of the Appellant and in its absence, the business of the Appellant is going to be affected. Therefore, in my view this input service as availed by the Appellant in connection with its business are essential for the provision of output services and therefore the Appellant is entitled for refund of Service Tax on the said services.

7. The “Storage and Warehousing Services” have been availed by the Appellant for storage of important business related information and the files which are very essential for smooth and organise functioning of business. “Banking & Financial Services” had been availed by the Appellant for availing foreign exchange conversion services for its employees travelling abroad for the business of the Appellant and the "Business Auxiliary Services" have been procured by the Appellant for repairing of the cellular phone of its employees who have been provided with the cellular phone/mobile phone for checking emails and for giving replies to the queries of the overseas clients. Whenever the said employees leave the organisation, they have to surrender the said phones to the Appellant and thereafter the same are sent for formatting to avoid leakage of above information. Therefore in my view, these services are essential and there is nexus between the input services and output services and therefore for these

services also the Appellant is entitled for refund. In a similar matter, a Co-ordinate Bench of the Tribunal in the matter of *Manhattan Associates (I) Development Centre Pvt. Ltd. Vs. CST, Bangalore* reported in 2017 (5) GSTL 99 (Tri.-Bang.) has held that the Appellant therein is entitled for refund and there is nexus between the input services and output services.

8. Now I come to the issue of denial of excess refund claim to the Appellant for the quarters October, 2014 to December, 2014 and January, 2015 to March, 2015. The same was denied by the Authorities below on account of non-reversal of erroneous credit availed by the Appellant in their ST-3 return. It is admitted fact that the Appellant had erroneously availed excess CENVAT credit to the tune of Rs.7,70,687/- in the month of August, 2014 at the time of filling Service Tax return for the period April, 2014 to September, 2014. According to the Appellant they had identified this error after the due date for revision of Service Tax return for the aforesaid period. But while filing the Service Tax return for the period October, 2014 to March, 2015 the Appellant had reversed the CENVAT credit which was erroneously taken by them during the month of August, 2014 from the total availment for the month of October, 2014 and the CENVAT credit availmnet for the said month of October, 2014 was done in the following manner:-

Particulars		Amount
CENVAT credit availed during the month of October 2014	A	11,29,175
Less: Erroneous availment of CENVAT credit in the month of August 2014	B	(7,70,687)
CENVAT credit availed (as reflected in service tax return)	C = A-B	3,58,488

Although the Appellant could have reduced the aforesaid amount which was erroneously taken from the opening balance for the month October 2014, but according to them, then there would have been a mis-match between the opening and closing balance for the month of September, 2014 & October, 2014 respectively. In order to avoid the mismatch the Appellant had adjusted the excess CENVAT credit for the month of October, 2014. This resulted in a difference in the total availment of CENVAT credit for the period October, 2014 to December, 2014 as per the CENVAT credit register and Service Tax return. The Appellant could have also reversed the entry for the same. The Appellant has adopted the formula prescribed under Rule 5 of the CENVAT Credit Rules, 2004 for computing the amount of refund which is as follows:-

Maximum admissible refund =	Export turnover of goods + export turnover of services Total Turnover	x	CENVAT credit availed during the period as reduced by any reversals required under Rule 3(5C) of the CENVAT Credit Rules, 2004
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The amount arrived by the aforesaid formula is maximum amount that can be claimed as refund under Rule 5 *ibid*. However, the actual sanction amount depends on other conditions and restrictions prescribed under the Notification No. 27/2012-CE (NT) dated 18.06.2012. Para 2(g) of the said notification prescribes that the sanction amount should be subject to quantitative restriction as follows:-

“2(g) the amount of refund claimed shall not be more than the amount lying in balance at the end of quarter for which

refund claim is being made or at the time of filling of the refund claim, whichever is less.”

9. Both the Authorities below have erred in considering the amount of unutilised credit for the quarter, which was calculated by deducting the amount of domestic services tax liability for the period discharged through utilisation of CENVAT credit, from the amount of CENVAT credit availed by the Appellant during the period. The submission of the Appellant seems to be reasonable that nowhere in Notification No. 27/2012 or in Rule 5 *ibid* there is a requirement to consider the amount of unutilised credit for the period. The calculations/tables have been produced by the Appellant for comparing *the amount of CENVAT credit balance available on the last day of the quarters, on the day of filling the refund claim and also the quantum of refund claim worked out as per Notification No. 27/2012-CE (NT) dated 18.06.2012*. From a perusal of the same, I am of the view that the Appellant has claimed the amount which is lowest among those three heads.

10. A similar issue has come up before this Tribunal in the matter of *Commissioner CGST, Mumbai Central Excise Vs. Morgan Stanley Investment Management Pvt. Ltd.* and this Tribunal vide order No. A/85850/2018 dated 20.02.2018, after taking into consideration the Notification No. 27/2012-CE (NT) dated 18.06.2012 and Rule 5 of CENVAT Credit Rules, 2004 passed the following order:-

“XXXX XXXX XXXX

8. 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 said 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.”

11. In view of the facts and the decision mentioned above, it is clear that the Appellant has followed calculation as prescribed by Notification No. 27/2012 and Rule 5 *ibid*, and has rightly claimed refund of the lowest amount for the relevant quarters viz. October, 2014 to December, 2014 and January, 2015 to March, 2015 and there is no question of excess credit availed by the Appellant and therefore the Appellant is entitled for the excess refund claim.

12. The appeals are therefore allowed, with consequential relief, if any.

(Pronounced in Court on 25.01.2019)

(Ajay Sharma)
Member (Judicial)

Prasad