CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Service Tax Appeal No. 88566 of 2018

(Arising out of Order-in-Appeal No. PK/368/ME/2018 dated 25.04.2018 passed by the Commissioner of CGST & Central Excise (Appeals-II), Mumbai)

M/s. DBOI Global Services Pvt. Ltd. **Appellant**
B-4, B-5, 6th floor, Nirlon Knowledge Park,
Off Western Express Highway,
Goregaon (E), Mumbai 400 063.

Vs.

Commissioner of CGST, Mumbai East **Respondent**
9th floor, Lotus, Lotus Infocentre,
Near Parel Station, Parel (E), Mumbai 400 012.

Appearance:

Shri Sushant Murthy, Advocate, for the Appellant
Shri Vinod Kumar, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

Date of Hearing: 12.01.2023
Date of Decision: 12.01.2023

FINAL ORDER NO. 85491/2023

This appeal is directed against Order-in-Appeal No. PK/368/ME/2018 dated 25.04.2018 passed by the Commissioner of CGST & Central Excise (Appeals-II), Mumbai. By the impugned order, Commissioner (Appeals) has upheld denial of refund claim filed under Rule 5 of the Cenvat Credit Rules for the reason that Cenvat credit against certain services was not admissible.

2.1 Appellant had filed a refund claim for an amount of Rs.4,69,94,522/- for the quarter April 2013 to June 2013. This refund claim was adjudged by the original authority after disallowing Cenvat credit to the tune of Rs.38,44,799/-. Against this order, appellant filed appeal before the Commissioner (Appeals), which has been rejected as per the impugned order.

3.1 I have heard Shri Sushant Murthy, Advocate for the appellant and Shri Vinod Kumar, Assistant Commissioner, Authorised Representative.

3.2 Arguing for the appellant, learned counsel submits that:-

- In a proceedings under Rule 5 of the Cenvat Credit Rules, 2004, denial of Cenvat credit cannot be done.
- If Cenvat credit was to be denied, the same should have been done after initiating proceedings under Rule 14 of the Cenvat Credit Rules, 2004. He relies upon the following decisions:-
  - BNP Paribas India Solution Pvt. Ltd. [2022 (58) GSTL 539 (Tri.-Mumbai)]
  - JFE Steel India Pvt. Ltd. [2021 (44) GSTL 292 (Tri.-Chan.)]
  - TPG Capital India Pvt. Ltd. [Final Order No. A/86651-86655/2019 dated 20.09.2019)]
  - Cross Tab Marketing Services Pvt. Ltd. [2021 (55) GSTL 29 (Tri.-Mumbai)]
  - Acceleya Kale Solutions Ltd. [2019 (369) ELT 803 (Tri.-Mumbai)].

3.3 Learned AR reiterates the findings recorded in the impugned order.

4.1 Commissioner (Appeals) has in the impugned order held as follows:-

"11. In view of the foregoing, I allow the appeal of the appellant partly and order for modification of the impugned order, with consequential relief, if any, in above terms.

Accordingly, the appeal filed by the appellant is disposed off in above terms."

4.2 For modifying the refund claim filed by the appellant lower authorities have allowed the credit in respect of some services and disallowed the same in respect of other services without initiating ay proceeding under Rule 14 of the CENVAT Credit

Rules, 2004. The details of the services in respect of which the credit has been allowed and disallowed is as indicated below:

- Event Management Services & Mandap Keeper Services (credit denied)
- Short Term Accommodation Services (credit denied)
- Advertising Services (credit allowed)
- Interior Decorating Services (credit allowed)
- Supply of Tangible Goods Services (credit denied)
- Cleaning Services (credit denied)
- Customs House Agents Services, Goods Transport Agency's Services (credit allowed)
- Courier Services (credit denied)
- Storage and Warehousing Services (credit denied)
- Management, Maintenance & Repair Service, Out of Pocket Expenses (credit denied)
- Manpower Recruitment or supply agency service (credit allowed)
- Broadcasting Services (credit denied)
- Business Auxiliary Services (credit denied)
- Legal Consultancy Services (credit allowed)
- Renting of Immovable Property Services (credit denied)
- Business Support Services (credit denied)
- Chartered Accountant Services (credit allowed)
- Management Consultancy Services (credit allowed)
- Commercial Training Services (credit allowed)
- Security Services (credit allowed)
- Missing Invoices (credit denied)
- Invoices not having registration number (credit denied)
- Dummy Invoices (credit denied)
- Time barred Invoices (credit denied)

4.3 The exercise taken by the lower authorities for denying the credit was to be initiated as per Rule 14 of the Cenvat Credit Rules and that could not have been taken in a proceedings under Rule 5. This view has been held contrary by the Tribunal as referred to the order of the Tribunal in the case of Cross Tab Marketing Services Pvt. Ltd. [2021 (55) GSTL 29 (Tri.-Mumbai)]. Relevant paras of the said order are reproduced below:

"4.1 I have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Commissioner (Appeals) has vide the impugned order that held that CENVAT credit taken by the appellant on following services is inadmissible as they do not qualify as input services-

- *Air travel agent services (para 7.1)*
- *Banking and Financial Services (para 7.3)*
- *Cab Operator Services (para 7.5)*
- *Courier Services (para 7.7)*
- *Maintenance and Repair Services (para 7.10)*
- *Market Research Agency Service (para 7.11)*

4.3 Rule 5 of the CENVAT Credit Rules, 2004 was amended by the Notification No 18/2012 -CX (NT) dated 07.03.2012 to provide as under.

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:

Refund amount = (Export turnover of goods+ Export turnover of services) x Net CENVAT credit
Total turnover

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 subrule (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.

(2) This rule shall apply to exports made on or after the 1st April, 2012: Provided that the refund may be claimed under this rule, as existing, prior to the commencement of the CENVAT Credit (Third Amendment) Rules, 2012, within a period of one year from such commencement: Provided further that no refund of credit shall be allowed if the manufacturer or provider of output service avails of drawback allowed under the Customs and Central Excise Duties and Service Tax Drawback Rules, 1995, or claims rebate of duty under the Central Excise Rules, 2002, in respect of such duty; or claims rebate of service tax under the Export of Services Rules, 2005 in respect of such tax.

Explanation 1.- For the purposes of this rule,-

(1) "export service" means a service which is provided as per the provisions of Export of Services Rules, 2005, whether the payment is received or not;

(2) "relevant period" means the period for which the claim is filed.

Explanation 2.-For the purposes of this rule, the value of services, shall be determined in the same manner as the value for the purposes of sub-rule (3) and (3A) of rule 6 is determined."

4.4 From the plain reading of the said rule it is evident that the amended rule 5, does not require establishment of any nexus between the input services and the exported services. The rule only provides that the admissible refund will be proportional to the ratio of export turnover of goods and services to the total turnover, during the period under consideration, of the Net CENVAT credit taken during that period. Undisputedly in the refund proceedings under Rule 5 of CENVAT Credit Rules, 2004 as amended any such attempt whereby credit availed during the period under consideration is sought to be denied or varied, is not permissible. If the quantum of the Cenvat Credit is sought to be varied, by holding that certain services do not qualify as input services then the same could have been done by invoking the provisions of Rule 14 of the CENVAT Credit Rules, 2004. In my view the Commissioner (Appeal)/ Adjudicating Authority has misdirected himself by undertaking such exercise while adjudging the refund claim filed in terms of Rule 5. In the case of Accelya Kale Solutions Ltd. Vs. Commissioner of Central Goods Service Tax and Central Excise, Mumbai [2018-TIOL2452-CESTAT-MUM]. tribunal observed, as under:-

"3. Rule 5 of Cenvat Credit Rules, 2004, was substituted vide Notification No. 18/2012-CE (NT) dated 17.03.2012, with effect from 01.04.2012. The said substituted rule has prescribed the formula for claiming refund of service tax by the service provider. Under such amended rule in vogue, there is no requirement of satisfying the nexus between the input services and the output service provided by the service provider. Consequent upon substitution of the said Rule in the Union

Budget – 2012, the Tax Research Unit (TRU) of CBEC vide letter dated 16.03.2012 has clarified as under:-

"F.1. Simplified scheme for refunds:

1. A simplified scheme for refunds is being introduced by substituting the entire Rule 5 of Cenvat Credit Rules, 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.""

4.5 Similar view has been expressed by the tribunal in case of TPG Capital India Pvt Ltd [Final Order No A/86651-86655/2019 dated 20.09.2019]. Tribunal has observed therein stating as follows:

"4. However, it is seen that no objection was raised by the revenue at the time of availing of credit. Rule 5 allows refund of accumulated credit and at the time of grant of refund, the Revenue is not permitted to examine the availability of the CENVAT credit. Such an exercise was required to be adopted by the Revenue at the time of availment of credit, by way of initiation of separate proceedings. Having not done that, it is not permissible to raise the objection at the time of grant of refund in terms of the said rule. The reliance by the Learned Advocate to the Circular no. 120/01/2010-ST dated 19.01.2010 clarifying the issue that by observing that there cannot be different yardstick for establishing nexus for taking of credit and for refund of credit, is appropriate. Otherwise also, we find the issue stands decided by the many decisions of the Tribunal. One such reference can be made to the Tribunal decision in the case of Barclay Global Service Centre Pvt. Ltd.& Ors. V. Commissioner of Central Excise & Service tax, Noida [2019-TIOL-1714-CESTAT-ALL]. It stands held in the said decision that as no objection was raised by the Revenue at the time of availing the credit, such objection cannot be raised at the time of deciding the refund claim in terms of provision of Rule 5."

4.6 In view of the discussions as above I am not in position to sustain the impugned order to the extent indicated. Since the Commissioner (Appeals) has by the impugned order held the refund to be admissible, to the extent of CENVAT Credit held admissible by him subject to verification of the documents by the original authority I modify his order to this extent i.e. that entire credit as claimed by the Appellant for determining the refund amount is held admissible if not held admissible in proper proceedings initiated under Rule 14 of the CENVAT Credit Rules, 2004."

4.4 Similar view has been taken by the Tribunal in the case of BNP Paribas India Solution Pvt. Ltd. [2022 (58) GSTL 539 (Tri.-Mumbai)]:-

"There is no dispute that the aforesaid decision of this Tribunal in appellants' own case covered both pre-and post-amendment period and also the services which are in issue herein. So far as the decision in the matter of Maersk Global (supra) is concerned, I am afraid that the Learned Authorised Representative is not correct in his submission that the said decision pertains to pre-amendment period. Similarly, while interpreting Rule 5 this Tribunal in the matter of M/s. Cross Tab Marketing Service Pvt. Ltd. v. C.C. GST, Mumbai East; reported in 2021-VIL-466-CESTAT-MUM-ST = 2021 (55) G.S.T.L. 29 (Tri. - Mumbai) vide order dated 17-9-2021 held that the amended Rule 5 ibid does not require establishment of any nexus between input and export services. The rule only provides that the admissible refund will be proportional to the ratio of export turnover of goods and services to the total turnover, during the period under consideration and the net Cenvat credit taken during that period. Indisputably, in the refund proceedings under Rule 5 ibid as amended, any such attempt to deny or to vary the credit availed during the period under consideration is not permissible. If the quantum of the Cenvat credit is to be varied or to be denied on the ground that certain services do not qualify as input services or on the ground of 'no nexus', then the same could have been done only by taking recourse to Rule 14 ibid."

4.5 In view of the above the impugned order cannot be sustained on merits.

5.1 The appeal is allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

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