CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>MUMBAI</u>

REGIONAL BENCH - COURT NO. 01

Service Tax Appeal No. 86920 of 2016

(Arising out of Order-in-Appeal No. PUN-SVTAX-000-APP-058 to 063-16-17 dated 10.05.2016 passed by Commissioner of Service Tax (Appeals), Pune)

Symantec Software India Pvt. Ltd. **.....Appellant**
Ground to Fifth Floor, Wing 1, Cluster B, Plot No.1
Survey No. 77, MIDC Kharadi Knowledge Park, EON Free Zone,
Pune – 411 014.

VERSUS

Commissioner of Service Tax- I, Pune. **.....Respondent**
ICE House 41/A, Sasson Road Pune – 411001.

WITH

Service Tax Appeal No. 86921 of 2016

(Arising out of Order-in-Appeal No. PUN-SVTAX-000-APP-058 to 063-16-17 dated 10.05.2016 passed by Commissioner of Service Tax (Appeals), Pune)

Symantec Software India Pvt. Ltd. **.....Appellant**
Ground to Fifth Floor, Wing 1, Cluster B, Plot No.1
Survey No. 77, MIDC Kharadi Knowledge Park, EON Free Zone,
Pune – 411 014.

VERSUS

Commissioner of Service Tax- I, Pune. **.....Respondent**
ICE House 41/A, Sasson Road Pune – 411001.

AND

Service Tax Appeal No. 86922 of 2016

(Arising out of Order-in-Appeal No. PUN-SVTAX-000-APP-058 to 063-16-17 dated 10.05.2016 passed by Commissioner of Service Tax (Appeals), Pune)

Symantec Software India Pvt. Ltd. **.....Appellant**
Ground to Fifth Floor, Wing 1, Cluster B, Plot No.1
Survey No. 77, MIDC Kharadi Knowledge Park, EON Free Zone,
Pune – 411 014.

VERSUS

Commissioner of Service Tax- I, Pune. **.....Respondent**
ICE House 41/A, Sasson Road Pune – 411001.

AND

Service Tax Appeal No. 86923 of 2016

(Arising out of Order-in-Appeal No. PUN-SVTAX-000-APP-058 to 063-16-17 dated 10.05.2016 passed by Commissioner of Service Tax (Appeals), Pune)

Symantec Software India Pvt. Ltd. **.....Appellant**
Ground to Fifth Floor, Wing 1, Cluster B, Plot No.1
Survey No. 77, MIDC Kharadi Knowledge Park, EON Free Zone,
Pune – 411 014.

VERSUS

Commissioner of Service Tax- I, Pune. **.....Respondent**
ICE House 41/A, Sasson Road Pune – 411001.

Appearance:

Shri Prakash Shah, Advocate for the Appellant
Shri Priyesh Bheda, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87182-87185/2023

Date of Hearing: 22.11.2023
Date of Decision: 22.11.2023

PER : S.K. MOHANTY

Briefly stated, the facts of the case are that the appellant herein M/s. Symantec Software India Pvt. Ltd. is engaged *interalia* in providing taxable services under the category of "Information Technology Software Services" and "Business Auxiliary Services" to its group entities located outside the country. The appellant avails CENVAT Credit of service tax paid on various taxable services. Since, the output services were entirely exported by the appellant during the disputed period, there was no scope or occasion on the part of the appellant to utilize the CENVAT credit for payment of service tax. Therefore, in terms of Rule 5 of CENVAT Credit Rules, 2004, the appellant had filed various refund applications before the original authority, claiming refund of service tax paid on the input services for different periods. The refund applications filed by the appellants were adjudicated by the original authority. In the orders, the original authority had partly allowed the benefit of refund and in few cases, had denied the refund benefit, holding that the disputed service namely 'works contract service' were not used in provision of the output service; and thus, Cenvat credit so availed by the appellant is not in conformity with the provisions of Rule 2 (l) *ibid*. On appeal against the said adjudication order, learned Commissioner (Appeals) has allowed the benefit of refund in two cases and denied such benefit in respect of other four adjudication orders, holding that the appellant did not produce the copies of invoices on which the CENVAT credit was availed by them. The appellant has assailed the impugned order on the ground that the authorities below cannot question the manner of availment of CENVAT credit. It is further contended that since availment of credit is the statutory right of assessee, the benefit of such availment of credit in case of exportation of goods or services cannot be whittled down on the ground that availment of credit is not in conformity with the statute.

2. Learned Advocate appearing for the appellant submitted that the issue arising out of the present dispute is no more *res integra* in view of the various judgments delivered by the judicial forum. He has relied upon the following judgments to support the case of the appellants that the benefit of refund provided under Rule 5 ibid should be available to the appellants.

(i) Qualcomm India Pvt. Ltd. Vs. Commissioner of Customs C. Ex. & S.T., Hyderabad IV reported in 2020 (43) G.S.T.L. 402 (Tri Hyd.);

Affirmed by Hon'ble Telangana High Court – 2021 (11) TMI-72-Telangana High Court.

(ii) Maersk Global Services Centres (India) Pvt. Ltd. Vs. CCGST, Navi Mumbai reported in 2019 (10) TMI-959-CESTAT Mumbai;

(iii) M/s. Moneygram India Pvt. Ltd. Vs Commissioner of CGST & C. Excise, Mumbai Reported in 2019 (11) TMI 1661-CESTAT Mumbai;

(iv) BNP Paribus India Solutions Pvt. Ltd. Vs. Commissioner of CGST, Mumbai East 2020 (2) TMI 224-CESTAT Mumbai;

(v) PMI Organisation Centre Pvt. Ltd. Vs. Commissioner of CGST, Mumbai East 2022 (65) G.S.T.L. 244 (Tri. - Mumbai);

(vi) JFE Steel India Pvt. Ltd. Vs. Commissioner of CGST, Gurugram, 2021 (44) G.S.T.L. 292 (Tri. Chan.);

(vii) BNP Paribus India Solutions Pvt. Ltd. Vs. CST, Mumbai –II, 2022 (8) TMI 1I55- CESTAT Mumbai;

3. On the other hand, learned AR appearing for the Revenue reiterated the findings recorded in the impugned order and further submitted that since the appellant did not produce the copy of invoices for examination by the learned Commissioner (Appeals), the matter should be remanded back to him for proper appreciation of the fact as to whether, the credit has been taken in conformity with the statutory provision or otherwise.

4. Heard both sides and examined the case records.

5. Rule 3 ibid is the enabling provision, which entitles a manufacturer or a service provider to avail CENVAT credit of Central Excise duty paid on the inputs and service tax paid on the input services. The manner of availment and utilization of CENVAT credit is contained in the CENVAT statute. If availment or utilization of the credit is not in conformity with the CENVAT statute, then Rule 14 ibid provides that such irregularly availed or utilized CENVAT credit can be recovered from the assessee and for effecting such

recovery, the provisions of Section 11A of the Central Excise Act, 1944 or Section 73 of the Finance Act, 1994 shall apply *mutantis-mutandis.* It is not the case of Revenue that the CENVAT Credit availed on the input services by the appellant is not in conformity in the CENVAT statute, as this fact is evident from the records that at the time of taking CENVAT credit on the disputed services, no proceedings were initiated by the department, seeking recovery of the alleged irregular credit. Since, Rule 5 ibid is a self-contained rule, which provides for grant of refund of accumulated CENVAT credit in case of exportation of the services, while dealing with such provision, the department cannot take recourse to the other provisions in the statute to say that availment of credit or utilization of credit is not in conformity with the statutory provisions. Insofar as claim of refund under Rule 5 ibid is concerned, the department has to only verify whether the requirement of the said rule read with the notification issued thereunder have been fulfilled or not. Rule 5 refund is permissible in case of observance of the formula laid down therein, which the appellant in this case has complied with. Since, the output services were exported by the appellant, the un-utilized CENVAT credit availed on the input services, in our considered opinion, should be available to the appellant. We find that the issue arising out of the present dispute is no more open for any debate in view of the orders passed by the Tribunal in the case of *Qualcomm India Pvt. Ltd. Vs. Commr. Of Cus., C.Ex. & S.T., Hyderabad-IV* – 2020 (43) G.S.T.L. 402 (Tri.- Hyd.). The relevant paragraph in the said judgement is extracted herein below:

> *"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 thereunder. 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 appropriate to consider such plea at this juncture for a decision as emphasized by the learned Advocate for the appellant."*

The said order dated 07.08.2019 (supra) passed by the Tribunal was also upheld by the Hon'ble Telangana High Court, reported in 2021 (11) TMI 72 - Telangana High Court. The Hon'ble High Court at paragraph 21 in the said order has recorded the following observations:

> *"21. Thus, this Court is of the view that in the given facts and circumstances, the reasons assigned by the Tribunal for holding that the respondent/assessee is entitled for grant of refund of unutilized CENVAT Credit under Rule 5 of the Finance Act, does not call for any interference."*

6. In view of the foregoing discussions, we do not find any merits in the impugned order, insofar as it has denied the refund benefit to the appellants. Therefore, by setting aside the impugned order, the appeals are allowed in favour of the appellants.

(Dictated and pronounced in the open court)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

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