THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 13.02.2013

\+ **CEAC 16/2012**

WIPRO LIMITED ..... Petitioner

Versus

UNION OF INDIA ..... Respondent

Advocates who appeared in this case:
For the Petitioner : Mr Devnath, Mr Aditya Bhattacharya, Mr Abhishek Anand & Mr Bhuvnesh Satijha, Advocate.
For the Respondent : Mr Satish Kr. Senior Standing Counsel for R-2.

CORAM: -
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

R.V. EASWAR, J

This is an appeal by Wipro Ltd., which was formerly known as Wipro BPO Solutions. It was at the material time engaged in the rendering of IT-enabled services such as technical support services, back-office services, customer-care services etc. to its various clients all of whom were situated outside India, i.e., in UK, USA and Australia.

2. The appeal arises out of the order passed by the Central Excise & Service Tax Appellate Tribunal ("CESTAT") in order No.

ST/593/2011(PB) on 05.10.2011, in Appeal No. ST/66/2008. On 12.12.2012, the following substantial question of law was framed: -

> "*Whether in facts & circumstances of present case impugned Final Order No.ST/593/11 dated 05.10.2011 passed by the Appellate Tribunal remanding the case back to the adjudicating authority for de novo adjudication with the direction that Convergys India case (supra) will not be applicable if the Appellant has not filed the declaration under Notification No.12/2005 dated 19.04.2005 or has filed after completion of export is correct in law in as much as the aforesaid direction is based on erroneous interpretation of the decision of Convergys India (supra)?*"

3. In respect of the services provided by the appellant, it was liable to pay service tax under the relevant provisions of Chapter V of the Finance Act, 1994. The Export of Service Rules, 2005 were framed by notification No.9/2005-ST on 03.03.2005. Rule 5 of the said Rules provided for "Rebate of service tax". It provided as follows: -

> *"**5. Rebate of service tax** – Where any taxable service is exported, the Central Government may, by notification, grant rebate of service tax paid on such taxable service or service tax or duty paid on input services or inputs, as the case may be, used in providing such taxable service and the rebate shall be subject to such conditions or limitations, if any, and fulfillment of such procedure, as may be specified in the notification."*

Notification No.12/2005-ST was issued on 19.04.2005. The notification stated that there will be granted rebate of the whole of the duty paid on excisable inputs or the whole of the service tax and cess paid on all taxable input services used in providing taxable service exported out of India (to countries other than Nepal and Bhutan), "subject to the conditions, limitations and procedures specified" therein. While paragraph 2 of the notification laid down the conditions and limitations, paragraph 3 prescribed the procedure. These paragraphs are as below:

> *"**2. Conditions and limitations: -***
>
> *(a) that the taxable service has been exported in terms of rule 3 of the said rules and payment for export of such taxable service has been received in India in convertible foreign exchange;*
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> *(b) that the duty, rebate of which has been claimed, has been paid on the inputs;*
>
> *(c) that the service tax and cess, rebate of which has been claimed have been paid on the input services;*
>
> *(d) the total amount of rebate of duty, service tax and cess admissible is not less than five hundred rupees;*
>
> *(e) no CENVAT credit has been availed of on inputs and input services on which rebate has been claimed; and*
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> *(f) that in case, -*
>
> *(i) the duty or, as the case may be, service tax and cess, rebate of which has been claimed, have not been paid; or*

(ii) the taxable service, rebate for which has been claimed, has not been exported; or

(iii) CENVAT credit has been availed on inputs and input services on which rebate has been claimed,

the rebate paid, if any, shall be recoverable with interest as per the provisions of section 73 and section 75 of the Finance Act, 1994 (32 of 1994) as if no service tax and cess have been paid on such taxable service.

3. Procedure: -

3.1 Filing of declaration. – The provider of taxable service to be exported shall, prior to date of export of taxable service, file a declaration with the jurisdictional Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, describing the taxable service intended to be exported with,-

(a) description, quantity, value, rate of duty and the amount of duty payable on inputs actually required to be used in providing taxable service to be exported;

(b) description, value and the amount of service tax and cess payable on input services actually required to be used in providing taxable service to be exported.

3.2 Verification of declaration – The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall verify the correctness of the declaration filed prior to such export of taxable service, if necessary, by calling for any relevant information or samples of inputs and if after such verification, the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise is satisfied that there is no likelihood of evasion of duty, or as the case may be, service tax and cess, he may accept the declaration.

3.3 Procurement of input materials and receipt of input services. – The provider of taxable service shall, -

(i) obtain the inputs required for use in providing taxable service to be exported, directly from a registered factory or from a dealer registered for the purposes of the CENVAT Credit Rules, 2004 accompanied by invoices issued under the Central Excise Rules, 2002;

(ii) receive the input services required for use in providing taxable service to be exported and an invoice, a bill or, as the case may be, a challan issued under the provisions of Service Tax Rules, 1994.

3.4 Presentation of claim for rebate. –

(a) (i) claim of rebate of the duty paid on the inputs or the service tax and cess paid on input services shall be filed with the jurisdictional Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, after the taxable service has been exported;

(ii) such application shall be accompanied by, -

a. invoices for inputs issued under Central Excise Rules, 2002 and invoice, a bill, or as the case may be, a challan for input services issued under Service Tax Rules, 1994 in respect of which rebate is claimed;

b. documentary evidence of receipt of payment against taxable service exported, payment of duty on inputs and service tax and cess on input services used for providing taxable service exported, rebate of which is claimed;

c. a declaration that such taxable service, has been exported in terms of rule 3 of the said rules, along with documents evidencing such export.

(b) The jurisdictional Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, having regard to the declaration, if

satisfied that the claim is in order, shall sanction the rebate either in whole or in part.

Explanation 1. – "service tax and cess" for the purposes of this notification means, -

(a) service tax leviable under section 66 of the Finance Act, 1994; and

(b) education cess on taxable service levied under section 91 read with section 95 of the Finance (No.2) Act, 2004 (23 of 2004).

Explanation 2. – "duty" for the purposes of this notification means, duties of excise leviable under the following enactments, namely: -

(a) the Central Excise Act, 1944 (1 of 1944);

(b) the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(c) the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978);

(d) National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001), as amended by section 169 of the Finance Act, 2003 (32 of 2003), section 3 of the Finance Act, 2004 (13 of 2004) and further amended by clause 123 of the Finance Bill, 2005, which clause has the force of law by virtue of the declaration made under the Provisional Collection of Taxes Act, 1931 (16 of 1931);

(e) special excise duty collected under a Finance Act;

(f) additional duty of excise as levied under section 157 of the Finance Act, 2003 (32 of 2003);

> *(g) Education Cess on excisable goods as levied under section 91 read with section 93 of the Finance (No.2) Act, 2004 (23 of 2004); and*
>
> *(h) the additional duty of excise leviable under clause 85 of the Finance Bill, 2005, which has the force of law by virtue of the declaration made in the said Finance Bill under the Provisional Collection of Taxes Act, 1931 (16 of 1931).”*

It would appear that there is no prescribed form of declaration; however, Form ASTR-2 has been prescribed in the notification and the application for filing a claim for rebate of the duty paid on inputs or service tax paid on input services shall be in that form.

4. The appellant lodged two claims claiming rebate in respect of service tax paid on input services. In respect of the services rendered by the appellant between 16.03.2005 and 30.09.2005, the claim for rebate was filed on 15.12.2005 and in respect of the services rendered between 01.10.2005 and 31.12.2005, the claim was filed on 17.03.2006. The input services were mainly the night transportation services, recruitment services, bank charges etc. The declaration required to be filed in terms of paragraph 3 of the Notification No.12 (supra) was however filed by the appellant only on 05.02.2007.

5. Two separate show-cause notices were issued on 05.09.2006 in respect of the aforesaid two periods by the Deputy Commissioner, Service Tax, New Delhi-II calling upon the appellant to show cause why the rebate claims should not be rejected on the ground that the declaration as per paragraph 3 of the Notification No.12 (supra) was not filed "prior to the date of the export of taxable service". Replies to the notices were filed by the appellant on 09.10.2006 and 06.12.2006. It was pointed out in these replies that since the appellant did not have the actual data with respect to the description, value and the amount of service tax paid on input services until it received and utilised the same for export of output services, the filing of the declaration in terms of paragraph 3.1 of the notification was "practically not possible". It was also submitted that these details can be found in the appellant's refund applications in the prescribed forms which were filed on 22.03.2006. It was further submitted that since the services are exported on a continuous basis it was difficult to have one-to-one correlation between the export of the services and the inputs and input-services utilised for the export and that "it was not possible to give information regarding input services actually required to be used in providing taxable services to be exported".

Reference was made to the details furnished in the refund/rebate claims filed in Form ASTR-2 which contained details regarding the description, value and the amount of service tax and cess paid on input services used in the export of services on actual basis which were more authentic than what would have only been an estimate in the declaration required to be filed prior to the date of the export. The appellant also pointed out in the replies that the requirement of filing the declaration prior to the date of the export of the services was a procedural requirement which could not be complied with due to practical difficulties and even if it was to be complied with as a ritual, the figures which the appellant could give therein would only be estimates which would not serve the purpose and object of the requirement which would be better achieved by verifying/scrutinising the actual figures given in the rebate claim forms with the documentary evidence that would then be available. It was submitted that since there was substantial compliance with the law and no fault or irregularity having been found in the details furnished in the rebate claims, the rejection of the rebate claims would not be justified.

6. The above submissions of the appellant did not find favour with the Deputy Commissioner, Service Tax, Delhi-II. He passed separate orders-

in-original in respect of the two claims on 28.02.2007. He held that since the appellant had not followed the procedure prescribed for obtaining the rebate as laid down in Notification No.12 (supra), it was not entitled to the same. He accordingly rejected the rebate claims which amounted to ₹1,98,24,267 and ₹1,45,03,718 in respect of the two periods mentioned earlier.

7. Aggrieved by the above orders-in-original passed by the Dy. Commissioner, Service Tax, the appellant preferred appeals to the Commissioner of Central Excise (Appeals), New Delhi who dismissed the appeals by a common order dated 31.10.2007. In substance he agreed with the view taken by the Dy. Commissioner, Service Tax, Delhi-II; he also seems to have taken objection to the appellant's plea that it was not possible for it to furnish the description, value and the amount of the service tax paid on the input services until these details were received by it on actual utilisation of such input services. According to him, the non-filing of the declaration form prior to the date of export of the services deprived the service tax department of the opportunity of carrying out the necessary preventive and audit checks for ruling out any likelihood of

evasion of service tax. In this view of the matter, the appeals were dismissed.

8. The appellant preferred further appeals before the CESTAT against the orders of the Commissioner of Central Excise (Appeals). The CESTAT passed a common order on 05.10.2011, the operative portion of which is as follows: -

> *"9. In this case, according to the department, the appellant have not filed any declaration whatsoever as required under para 3.1. According to the appellant, however, since prior to the export of the services, it was not possible to file detailed declaration regarding input and input services required to be used, such declaration had been filed every month, though after some delay. However, this aspect can be verified only by the original adjudicating authority for which this matter has to be remanded. Accordingly, the impugned order is set aside and the matter is remanded back to the original adjudicating authority for de novo decision after verifying the appellant's claim that every month they had been filing the required declaration under para 3.1 of the notification. If the appellant every month were filing the required declaration, though after some delay, as in the case of* ***CST v. Convergys India Pvt. Ltd. reported in 2010 (20) STR 166 (P&H)****, the ratio of this judgment would be applicable and in that case, the delay would be condonable. If however the declaration under para 3.1 had not been filed at all or had been filed after the completion of export of service for which rebate had been claimed, and thereby depriving the sanctioning authority of the opportunity to verify the correctness of the declaration and satisfy himself that there is no possibility of evasion of duty by misuse of this facility, the requirement of paras 3.1*

& 3.2 cannot be said to have been satisfied and the rebate would not be admissible. The impugned order is, therefore, set aside and the matter is remanded to the original adjudicating authority for de novo adjudication of the matter in terms of our above directions. The appeal is disposed off by way of remand."

Towards the end of the earlier paragraph, though, the Tribunal had expressed a clear opinion that "The condition prescribed in para 3.1 is for the purpose of preventing the evasion of duty by misuse of this facility and, therefore, if this condition, though a procedural condition, is violated, the rebate would not be admissible".

9. The question for consideration is whether the filing of the declaration in terms of paragraph 3 of the notification No.12 (supra) on 05.02.2007, after the date of the export of the services, amounted to non-compliance with the condition disentitling the appellant from the rebate claims. The case of the appellant is that given the nature of services rendered by it, it is impossible to give the description, value and amount of the input services used in the services that are exported and that in any case, having regard to the object and purpose of the condition which is to prevent misuse of the rebate claim, there cannot be any objection if the relevant details are furnished in the rebate claim which are capable of

verification with the help of documentary evidence which would by then be available. The revenue on the other hand canvasses for the acceptance of the reasoning adopted by the lower authorities including the CESTAT.

10. We are of the view that there is a good deal of force in what the appellant says. Any condition imposed by the notification must be capable of being complied with. If it is impossible of compliance, then there is no purpose behind it. The appellant is in the business of rendering IT-enabled services such as technical support services, customer-care services, back-office services etc. which are considered to be "business auxillary services" under the Finance Act, 1994 for the purpose of levy of service tax. The nature of the services is such that they are rendered on a continuous basis without any commencement or terminal points; it is a seamless service. It involves attending to cross-border telephone calls relating to a variety of queries from existing or prospective customers in respect of the products or services of multinational corporations. The appellant's unit in Okhla is one of those places which are popularly known as "Call Centres" – business process outsourcing (BPO) centres. The wealth of skilled, English-speaking, computer-savvy youth in our country are a great source of manpower required by the multinational

corporations for such services. The BPO centres become very active from evening because of the time-difference between India and the European and American continents. The mainstay of the call centres is a sophisticated computer system and a technically strong and sophisticated international telephone network. The service consists of providing information relating to the products and services of the MNCs, queries relating to maintenance and after-sales services, providing telephonic assistance in case of glitches during operating the consumer-products or while utilising the services and so on. For instance, the customer sitting in USA has a problem operating a washing machine sold to him by an American company. When he calls the company, the local telephone number would be linked to the call centre number in India and it will actually be an employee of the Indian call centre who would answer the queries and assist the customer in USA get over the problem. Another example could be of a person in USA wanting to book an international air-ticket from an airline; his queries over the phone will be answered by the employee of the Indian call centre, sitting in some place in India. The American manufacturer of the washing machine or the American airline

company is the source of revenue for the Indian call centre or BPO centre.

11. Apart from the telephone and computer network, every call centre requires an employee-strength to attend to the calls. First they have to be recruited and then they have to be trained in following and speaking in different accents peculiar to different countries. This involves costs of recruitment and training. Once recruited, the staff has to be brought to the call centres. This involves costs on transportation and since most of the work, as stated earlier, is performed from late evening to the early hours in the next morning, the transportation of the staff is at night and that is the reason why the appellant calls it "night transportation services". When remittances are received from the client-corporations abroad through banks, there are bank charges. All these costs when charged to the appellant also involve service tax payment as additional costs. It is the service tax/cess paid by the appellant on such costs that qualify for the rebate under Rule 5 of the Export of Services Rules, 2005.

12. The services rendered by the appellant in its call centre or BPO centre are considered exported, as the services are rendered to persons outside the country. Thus every phone call is an export of taxable service.

But the bills and invoices in respect of the input-services described in the preceding paragraph would in the normal course be received by the appellant only at regular intervals, say once in a month or fifteen days etc., depending upon the arrangement which it has with those service-providers. Now we have to appreciate that in a call centre where there are hundreds of employees attending to calls from abroad at any given point of time, it is next to impossible to anticipate the date of export and with precision demarcate the point of time prior to the export and also determine the point of time when the export may be said to have been completed. What can be the determining factor? Is each call to be considered as an independent export of taxable services? Is the total number of calls attended to on any particular day to be considered as the export of taxable services? Or is the appellant to reckon the calls on a monthly basis? It needs also to be remembered that there is no way of anticipating any call or the number of calls the call centre would be required to attend on a single day, so that the appellant can comply with the requirement of filing a declaration "prior" to the date of export of taxable service. The very bedrock of the business is the attending of calls and given that they are received on a continuous basis, we find it difficult

to conceive of any possibility as to how the appellant could not only determine the date of export but also anticipate the call so that the declaration could be filed "prior" to the date of export. In addition to this practically impossible situation, the appellant is also required by the procedure laid out in paragraph 3 of the notification to describe, value and specify the amount of service tax and cess payable on input services actually required to be used in providing taxable service to be exported. With the possible exception of the description, we are unable to appreciate how the service-exporter will be in a position to value and specify the amount of service tax/cess payable on the input services actually required to be used in providing the exported service. An estimate is ruled out by the use of the word "actually required"; and unless what was actually required is known, it is impossible to value and specify the amount of service tax or cess payable on the input services. That will be known only when the bill or invoice for the input-services is received by the appellant. The bill or invoice is received after the calls are attended to. Thus, it seems to us that in the very nature of things, and considering the peculiar features of the appellant's business, it is difficult to comply with the requirement "prior" to the date of the export.

13. Let us take the case of a manufacturer-exporter of physical products, say, bicycles. The point of time when the export of bicycles is made is clearly demarcated and known. The export order is executed; the bicycles are manufactured and packed. They are ready for export. The process of export commences with the filing of the shipping bill. The exporter can now comply with the procedure laid down in paragraph 3 of the notification prior to that date. That is clear. The export is of physical goods; each export is under a separate shipping bill and it is easy to determine the point of time of commencement and termination of the export. Even in the case of a 100% export-oriented unit, every shipping bill is a separate export. It is also in such a case possible to describe, quantify and value the rate of duty and the amount of duty payable on inputs actually utilised in such exports under clause (a) of paragraph 3.1 of the notification. A one-to-one matching of such inputs with the exported products is possible without much of a problem. The inputs in the example given above would be steel, aluminium, rubber, plastic etc., and it is possible to even standardise, by adopting suitable costing methods, and determine the quantity, value, rate etc., of these inputs required to manufacture a single unit of bicycle. By a process of

multiplication depending upon the number of bicycles exported, it is possible to determine the figures for the entire lot of bicycles kept ready for export. But a similar requirement in the case of an export of a taxable service of the type provided by the appellant, as opposed to the export of physical goods, appears to us to be almost impossible of compliance for the reasons stated in the preceding paragraphs.

14. All the lower authorities, including the CESTAT, are unanimous in their view that the requirement, though one of procedure, is nevertheless inflexible as it is conceived with a view to preventing the evasion of service tax and dispensing with the same would deprive the service tax authorities from carrying out the necessary preventive and audit-checks. The correctness of this view, as a broad proposition, need not be decided in this case. The question here is one of impossibility of compliance with the requirement. If, having regard to the nature of the business and its peculiar features – which are not in dispute – the description, value and the amount of service tax and cess payable on input-services actually required to be used in providing the taxable service to be exported are not determinable prior to the date of export but are determinable only after the export and if, further, such particulars are furnished to the service tax

authorities within a reasonable time along with the necessary documentary evidence so that their accuracy and genuineness may be examined, and if those particulars are not found to be incorrect or false or unauthenticated or unsupported by documentary evidence, we do not really see how it can be said that the object and purpose of the requirement stand frustrated. In the present case, no irregularity or inaccuracy or falsity in the figures furnished by the appellant both on 05.02.2007 and in the rebate claims has been alleged. Moreover, it appears to us somewhat strange that none of the authorities below has demonstrated as to how the appellant could have complied with the requirement prior to the date of the export of the IT-enabled services.

15. We clarify that our decision rests on the facts of the case and on the peculiar nature of the business of the appellant and that we have not decided the broader question whether the requirement of paragraph 3 of the Notification No.12/2005-ST dated 19.04.2005 is merely procedural and hence directory or is substantive and hence mandatory.

16. In the view we have taken, it is deemed not necessary to refer to the authorities cited on behalf of the appellant.

17. We accordingly allow the appeal and direct the respondents to allow the rebate claims. There shall however be no order as to costs.

R.V.EASWAR, J

BADAR DURREZ AHMED, J

FEBRUARY 13, 2013
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