CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 3014 of 2011

[Arising out of Order-in-Original No. 80/2011 dated 23/08/2011 passed by the Commissioner of Central Excise & Service Tax, Bangalore]

IBM India Pvt. Ltd.
No.12, Subramanya Arcade, Bannerghatta Main Road, Bangalore - 560 029

Appellant(s)

VERSUS

C.C.E. & S.T.-Bangalore-LTU
100 Ft Ring Road, JSS Towers,
Banashankari-III Stage,
Bangalore - 560 085
Karnataka

Respondent(s)

Appearance:
Shri Harish Bindumadhavan, Advocate for the Appellant
Shri P. Rama Holla, Superintendent (AR) for the Respondent

CORAM:
HON'BLE SHRI S.K. MOHANTY, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20204/2022

Date of Hearing: 25/04/2022
Date of Decision: 28/04/2022

Per : S.K. MOHANTY

Briefly stated, the facts of the case are that the appellants herein are engaged, inter alia, in the business of

sale of information technology products and provision of information technology related services to their customers located within and outside the country; that as a provider of various taxable services, the appellant got themselves registered under the provisions of the Finance Act, 1994; that the appellants avail cenvat credit of service tax paid on the taxable services and utilized such credit for payment of service tax on the output taxable services provided by them. In this case, the appellant had acquired business of two corporate entities namely, Telelogic India Pvt. Ltd. ("Telelogic") and Cognos Software Pvt. Ltd. ("Cognos") in the month of November 2009 and January 2010 respectively. The acquisition of the said two companies were effected through Business Transfer Agreements entered into between the parties, containing specific provisions for transfer of assets and liabilities lying in the books of accounts of the acquired entities. Cenvat credit balance lying unutilized in the accounts of the acquired entities, in this case, was transferred to the appellants in September 2009, based on the provisions of Rule 10(2) of the Cenvat Credit Rules, 2004. Such unutilized credit was availed by the appellants, pursuant to the order passed in approving the 'Scheme of Amalgamation' by the competent court. Availment of such credit was duly accounted for by the appellants in their books of accounts. However, transfer of cenvat credit by those entities and availment of the same by the appellants were disputed by the Department on the ground that as per the requirement of Rule 10(3) *ibid*, the transfer can only be effective, when stock of inputs as such or in process or the capital goods are also transferred from

the transferor units to the transferee unit. On the basis of audit objection to such effect, the Department had initiated show-cause proceedings against the appellants, seeking denial of cenvat credit benefit availed by them. The matter arising out of the show-cause notice dated 01/09/2010 was adjudicated vide order dated 23/08/2011, wherein the original authority had disallowed the cenvat credit amounting to Rs. 3,22,84,927/- (Rupees Three Crores Twenty Two Lakhs Eighty Four Thousand Nine Hundred and Twenty Seven only) along with interest and also imposed equal amount of penalty on the appellants. Feeling aggrieved with the said impugned order, the appellants have preferred this appeal before the Tribunal.

2. Learned Advocate appearing for the appellants submitted that no restrictions have been imposed in the cenvat statute, providing that cenvat credit of service tax paid on the input services cannot be availed by the transferee unit upon sale/merger with the business units of the transferors. He further submitted that there is no condition prescribed in sub-rules (1), (2) & (3) of Rule 10 *ibid* that only central excise duty paid on inputs or capital goods shall be eligible for the cenvat benefit and not the service tax paid on the input services received by the recipient of services/transferor company. He further submitted that the provisions of sub rule (3) of Rule 15 *ibid* cannot be invoked, justifying imposition of equal amount of penalty on the appellants inasmuch as there is no element of suppression of facts, fraud or willful misstatement in availment of the cenvat credit lying in the books of the

transferor company. Learned Advocate has relied upon the following judgments to strengthen the case of the appellants that the adjudged demands confirmed by the Department cannot be sustained both on facts as on law:

a. RKHS Food and Allied Service Pvt. Ltd. V. Commr. of CGST & C.Ex., Mumbai-II 2019 (11) TMI 18 - CESTAT Mumbai

b. AEGIS Limited V. Commissioner of Cus., C.Ex. & ST, Hyderabad-II 2019 (5) TMI 53-CESTAT Hyderabad

c. Commissioner of Central Excise, Pondicherry V. CESTAT 2009 (240) ELT 367 (Madras High Court)

d. Kevin Enterprises Private Limited V. Commissioner of Central Excise, Vadodara - 2006 (6) TMI 449 - CESTAT Mumbai

e. Hewlett Packard (India) Sales Private Limited V. Commissioner of Customs, Bangalore - 2007 (211) ELT 263 (Bangalore Tribunal)

f. Commissioner, LTU Bangalore Vs. Bill Forge Pvt. Ltd. Bangalore – 2011-TIOL-799-HC-KAR-CX

3. On the other hand, the learned AR appearing for the Revenue reiterated the findings recorded in the impugned order.

4. Heard both sides and perused the case records.

5. The impugned order, in this case, has confirmed the impugned demands on the appellants, holding *inter alia* that transfer of cenvat credit whether credit of duty paid on

inputs or capital goods or credit of service tax paid on the input services, is allowable only if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory or business premises and that the credit availed on the goods are duly accounted for to the satisfaction of the department. The impugned order has also recorded that the provisions of sub-rules (2) and (3) of Rule 10 *ibid* have not been complied with by the appellants and as such, they are not permitted to avail or utilize the cenvat credit balance lying in the accounts of the transferor unit.

6. Transfer of cenvat credit lying unutilized in the books of accounts of a provider of taxable output service, who transfers his business premises on account of amalgamation, merger, sale etc. is contained in Rule 10 *ibid.* The said statutory provision is extracted herein below:

> *"(1) If a manufacturer of the final products shifts his factory to another site or the factory is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the factory to a joint venture with the specific provision for transfer of liabilities of such factory, then, the manufacturer shall be allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated factory.*
>
> *(2) If a provider of output service shifts or transfers his business on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the business to a joint venture with the specific*

provision for transfer of liabilities of such business, then, the provider of output service shall be allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated business.

(3) The transfer of the CENVAT credit under sub-rules (1) and (2) shall be allowed only if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory or business premises to the new site or ownership and the inputs, or capital goods, on which credit has been availed of are duly accounted for to the satisfaction of the Deputy Commissioner of Central Excise or, as the case may be, the Assistant Commissioner of Central Excise."

7. On a cogent reading of sub-rules (1) and (2) of Rule 10 *ibid* as above, it transpires that transfer and availment of unutilized cenvat credit is permissible under the statute, subject to fulfillment of the conditions that transfer of business must be on account of change of ownership or on account of sale, merger, amalgamation etc.; that there should be specific provision for transfer of liabilities of the business of service provider; that transfer is allowed only if stock of input as such or in process, or the capital goods are also transferred along with the business premises to the transferee company; and that the credit particulars are duly accounted in the books for satisfaction of the jurisdictional officer of Central Excise.

8. On perusal of the case records, we find that the

appellants had recorded the credit particulars transferred from the transferor company in the ST-3 returns, with the narration that "the closing balance of Rs. 1,47,34,988/- (Rupees One Crore Forty Seven Lakhs Thirty Four Thousand Nine Hundred and Eighty Eight only) is transferred to IBM India Pvt. Ltd. as the business of Telelogic has been transferred". Similarly, with regard to the other transferor M/s. Cognos, the appellants have also duly reflected the credit particulars in the periodic ST-3 returns filed before the jurisdictional service tax authorities. Further, it is not the case of the Revenue that no agreements were entered between the appellants and the transferor units for transfer of their respective businesses and that the scheme of such transfer had not been approved by the Hon'ble High Court. Learned Commissioner appears to have erred in finding that transfer of cenvat credit on input services is permissible only on the amalgamation whereas in terms of Rule 10 (1) & (2) of Cenvat Credit Rules, such a transfer is permissible on transfer of business on account of sale, merger, amalgamation, lease or transfer of business to a joint venture without specific provision for transfer of liabilities of such business. We find that there is no provision in the statute that each one of the situations mentioned therein should be approved by the Hon'ble High Court.

9. We also note that in the column '5B' in the ST-3 return, titled as 'cenvat credit taken and utilized', the appellants had reflected therein the credit particulars as '-', which means that as a result of merger, only cenvat credit of service tax was available in the books of accounts of the

transferor company and no input or capital goods credits were available with them. Thus, it cannot be said that the appellants had not duly reflected the credit particulars in their books of accounts for the satisfaction of the Department officers. In view of above, we are of the considered opinion that the appellants had duly complied with the requirements of Rule 10 *ibid* for availment of the cenvat credit lying unutilized in the books of the transferor's company and thus, denial of the cenvat benefit by the original authority will not stand judicial scrutiny. The judgments relied upon by learned Advocate support the case of the appellants that the adjudged demands cannot be sustained.

10. In view of the foregoing discussions and analysis, we do not find any merits in the impugned order, insofar as it has confirmed the adjudged demands on the appellants. Therefore, by setting aside the impugned order, the appeal is allowed in favour of the appellants.

(Order pronounced in the Open Court on 28/04/2022)

(S.K. MOHANTY)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

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