CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 51165 of 2022 [SM]

[Arising out of Order-in-Appeal No. 41/ST/DLH/2021 dated 30.11.2021 passed by the Commissioner of Central Excise & GST (Appeals-I), New Delhi]

M/s. Selling Simplified India Private Limited **...Appellant**
G-92, Basement, Kalkaji,
Delhi - 110019

VERSUS

Commissioner of CGST, East Delhi **...Respondent**
Delhi East Commissionerate,
Mayur Vihar Division, Delhi

APPEARANCE:

Mr. Vipin Upadhyay & Mr. Rochit Abhishek, Advocates for the Appellant
Mr. Ishwar Charan, Authorised Representative for the Respondent

CORAM: HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: 01.08.2022
PRONOUNCED ON: **09.09.2022**

FINAL ORDER No. 50825 / 2022

DR. RACHNA GUPTA

Present appeal has been filed to assail the Order-in-Appeal No. 41/2021 dated 30.11.2021. The facts giving arise to the impugned appeal in brief are as follows:

1.1 Appellant is engaged in rendering taxable services of business support to the following group companies i.e. Selling Simplified Group, Selling Simpliefied Inc, Selling Simplified Ltd. U.K. Three of the companies are located outside of India. The appellant is availing Cenvat credit of input services used to render the said output service as they are paying service tax on such input services. The appellant filed the refund claim on 22.12.2016 amounting to Rs.9,97,364/- under Notification No.27/2012-CE(NT)

dated 18.06.2012 issued under Rule 5 of Cenvat Credit Rules, 2004 (herein after called as CCR, 2004) along with several documents. Department observed that the appellant had centralized service tax registration for the premises at G-92, Basement, Kalkaji, Delhi but have claimed some input service credit for the services utilized at the premises located at A-22, Sector-64, Noida (UP), the unregistered premises. Some export invoices were also raised from the said unregistered premises. With these observations, the department formed an opinion that appellants should get registration for their Noida premises also. Accordingly, vide Show Cause Notice No. 01/2021 dated 04.03.2021, department proposed the rejection of the refund claim. The said proposal has initially been confirmed vide the Order-in-Original No.01/2021-22 dated 02.07.2021. The appeal there against has been rejected vide the order under challenge. Being aggrieved, the appellant is before this Tribunal.

2. I have heard Mr. Vipin Upadhyay and Mr. Rochit Abhishek, learned Counsels for the appellant and Mr. Ishwar Charan, learned AR for the department.

3. Learned Counsel for the appellant has submitted that the Adjudicating Authority below has rejected the refund on two grounds:

a. The export invoices were issued by the Appellant from an address that is not part of the Centralized Registration. The address mentioned in the invoices is of Noida; hence, this commissionerate does not have jurisdiction to decide this refund.

b. The Appellant and the group companies to whom the Appellant had provided Business Support services are merely establishments of a distinct person.

3.1 It is submitted that aforementioned first ground is beyond the scope of show cause notice, hence, the ground is liable to be set aside on this ground itself. Learned Counsel has relied upon the decision of Hon'ble Apex Court in the case of **Commissioner of C.Ex., Bangalore Vs. Brindavan Beverages (P) Ltd., 2007 (213) E.L.T. 487 (S.C.)**. It is further submitted neither Rule 5 of CCR, 2004 nor Notification No. 27/2012 lays down a condition for claiming a refund that the export invoices must be issued from such Office of the claimant as is mentioned in the service tax registration. Reliance has been placed on the decision of Hon'ble Karnataka High Court in the case of **M/s. mPortal India Wireless Solutions P. Ltd. Vs. CST, Bangalore, 2012 (27) STR 134 (Kar.).** It is submitted that refund has wrongly been rejected raising the issue of registration of Noida premises of the appellant. It is impressed upon that substantive benefit as that of refund cannot be denied on the grounds of procedural or technical irregularities.

3.2 With respect to the second ground of rejection, it is submitted that the appellant and their group of companies to whom the services were exported are not merely the establishment of a distinct person and hence, the conditions mentioned in Rule 6A of the Service Tax Rules, 1994 stands fulfilled. Reliance has been placed upon the decision of this Tribunal, Ahmedabad Bench, in the case of **M/s. L & T Sargent & Lundy Limited Vs. C.C.E. & S.T. –**

Vadodara-I, Final Order No. A/12459/2021 dated 26.10.2021. With these submissions learned Counsel has prayed for the order under challenge to be set aside and the present appeal to be allowed.

4. While rebutting these submissions learned DR has placed reliance upon the Order-in-Appeal as has been challenged in the impugned appeal. It is submitted that Commissioner (Appeals) has duly dealt with the respective rule i.e. Rule 4 of Service Tax Rules, 1994, pursuant whereto it is a statutory mandate that the service provider who is eligible to take the Cenvat credit after export of services and in whose name the invoice has been raised shall be the registered premises of the service provider. Apparently and admittedly, the office of the appellant as Noida was an unregistered premise. The Cenvat credit of inputs received in Noida premises and based on the invoices of Noida premises cannot be made available for the premises being unregistered. It is submitted that there is no infirmity vide holding that for the Noida premises the competent jurisdiction lies with Commissioner, Noida, whereas, the claim in question was filed before Commissioner, Delhi. The findings are denied to be beyond the scope of show cause notice as the issue of Noida premises to be unregistered and thus not entitled for claim of refund of Cenvat credit is the basic allegation in the show cause notice. With these submissions, the appeal in hand is prayed to be dismissed.

5. Having heard the rival contentions and perusing the records, it is observed and held as follows:

5.1 The first issue which require adjudication appears to be; whether the authorities were justified in refusing to grant Cenvat credit on the ground that the service provider is not registered with the department. The relevant rule which talks about registration is Rule 4 of Service Tax Rules, 1994, sub clause (2) thereof is relevant for the present appellant. It reads as follows:

> *(2) Where a person, liable for paying service tax on a taxable service,-*
>
> *(i) provides such service from more than one premises offices; or*
>
> *(ii) receives such service in more than one premises or offices; or*
>
> *(iii) is having more than one premises or offices, which are engaged in relation to such service in any other manner, making such person liable for paying service tax,*
>
> *and has centralized billing system or centralized accounting system in respect of such service, and such centralized billing or centralized accounting systems are located in one or more premises, he may, at his option, register such premises or offices from where centralized billing or centralized accounting systems are located.*
>
> *(3) The registration under sub-rule (2), shall be granted by the Commissioner of Central Excise in whose jurisdiction the premises or offices, from where centralized billing or accounting is done, are located:*

Rule 4 provides that refund is allowed only in those circumstances where a manufacturer or provider of output service is not in a position to utilize the input credit or input service credit allowed under Rule 3 of said rules against goods exported during the quarter or month to which the claim relates.

I do not find anything in the aforesaid rules which require registration of each office/premise of the service provider in case the service provider has central registration. Even Form-A nowhere suggests that any such condition must be observed.

6. The another relevant rule for adjudicating the above framed question is Rule 5 of CCR, 2004. It reads and follows:

> ***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*
>
> $$\text{Refund amount} = \frac{\text{(Export turnover of goods + Export turnover of services}}{\text{Total turnover}} \times \text{Net Cenvat credit}$$
>
> *Where, -*
>
> *(A) "Refund amount" means xxxxx*
>
> *(B) "Net Cenvat credit means xxxxxxx*
>
> *(C) "Export turnover of goods" means xxxxx*
>
> *(D) "Export turnover of services" means xxxx*
>
> *Export turnover of services = payments received during the relevant period for export services + export services whose provision....*
>
> *(E) "Total turnover" means xxxxxx*
>
> *(a) xxxxxx*

(b) xxxxxx (c) xxxxxx

(2) xxxxxx

Provided xxxxx

Provided further xxxxxx

Explanation 1: xxxxx

(1) "export service" means xxxxx

(2) "relevant period" means xxxxx

6.1 Mere perusal of Rule 5 of the 2004 Rules, would, *inter alia*, show that where a service provider, provides an output service, which is exported, without payment of service tax under a bond, he would be entitled to refund of Cenvat credit, as determined by the formula provided in the Rule. What is relevant to note is that Rule 5 of the 2004 Rules does not stipulate registration of premises as a necessary prerequisite for claiming a refund.

7. At this stage, if Notification No. 27/2012 dated 18.06.2012 is perused it shows that insofar as the provider of output service is concerned, for seeking refund of Cenvat credit, is required to file an application in prescribed form i.e. Form A (annexed to notification) before Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise as the case may be. Insofar as the jurisdiction of competent officer is concerned, the same is fixed, in consonance with the location of the registered premises of the service provider from which the output services are exported, clearly the notification does not prohibit the grant of Cenvat credit even if the premises are not registered. The fixation of jurisdiction of the competent officer, to my mind, cannot be read in a manner

that it obliterates the rights of the exporter of output services to claim refund of Cenvat credit. As already observed from Rule 4 of Service Tax Rules, 1994 that sub rules (2) and (3) thereof do not bring to fore any limitation with regard to the grant of refund for unutilized Cenvat credit qua export services merely on the ground that the premises are not registered. This is the view which has also been taken by Hon'ble Karnataka High Court in **mPortal India Wireless Solutions (P) Ltd. v. Commissioner of Service Tax, Bangalore, 2012 (27) S.T.R 134 (Kar.)** and in **Commissioner of Service Tax Vs. Tavant Technologies India Pvt. Ltd., 2016 (3) TMI 353=2016 (43) S.T.R 57 (Kar.).**

Furthermore, the Allahabad High Court, vide its judgment in the case of **Commissioner, Service Tax Commissionerate Vs. Atrenta India Pvt. Ltd. 2017 (2) ADJ 590 = 2017 (48) S.TR. 361 (All), has taken the same view.**

For the sake of convenience, the relevant observations made in **mPortal India Wireless Solutions (P) Ltd. v. Commissioner of Service Tax, Bangalore,** are extracted hereafter:

> *6. The assessee is a 100 per cent export oriented unit. The export of software at the relevant point of time was not a taxable service. However, the assessee had paid input tax on various service. According to the assessee a sum of Rs. 4,36,985/- is accumulated Cenvat credit. The Tribunal has categorically held that even though the export of software is not a taxable service but still the assessee cannot be denied the Cenval credit. The assessee is entitled to the refund of the Cenval credit. Similarly insofar as refund of Cenvat credit is*

concerned, the limitation under Section 11B does not apply for refund of accumulated Cenvat credit. Therefore, bar of limitation cannot be a ground to refuse Cenvat credit to the assessee.

7. Insofar as requirement of registration with the department as a condition precedent for claiming Cenvat credit is concemed, learned counsel appearing for both parties were unable to point out any provision in the Cenvat Credit Rules which impose such restriction. In the absence of a statutory provision which prescribed that registration is mandatory and that if such a registration is not made the assessee is not entitled to the benefit of refund, the three authorities committed a serious error in rejecting the claim for refund on the ground which is not existence in law. Therefore, said finding recorded by the Tribunal as well as by the lower authorities cannot be sustained. Accordingly, it is set aside."

Since, this view, as indicated above, has been reiterated by the Karnataka High Court in the judgment rendered in the case of **Commissioner of Service Tax Vs. Tavant Technologies India Pvt. Ltd. 2016 (3) TMI 353=2016 (43) S.T.R 57 (Kar.)** to avoid prolixity, the observation made in the said case are not extracted.

However, the same view has been taken by the Allahabad High Court in its judgment in the case of **Commissioner, Service Tax Commissionerate Vs. Atrenta India Pvt Ltd., 2017 (2) ADJ 590**, passed in Central Excise Appeal No. 214 of 2016. The relevant portions of which, for the sake of convenience, are extracted hereafter:

"12. Learned counsel for appellant has placed before us the rules made for refund of Cenvat credit vide Notification No. 5/2006-C.E. (N.T.), dated 14-3-2006. The aforesaid rules

have been framed in exercise of powers conferred by Rule 5 of Cenvat Credit Rules, 2004 and in supercession of earlier Notification. It provides that refund of Cenvat credit shall be allowed in respect of:

……..

13. Rule 2 & 3 state that claim for refund would be submitted not once for any quarter in a calendar year and by manufacturer or provider of out put service by submitting an application in Form-A. The said rules are quoted as under:

(2) The claims for such refund are submitted not more than once for any quarter that where, -

(a) The average export clearances of final products or the output services in value terms is fifty percent or more of the total clearances of final products or output services, as the case may be in the preceding quarter, or

(b) The claim is filed by Export Oriented Unit, the claim for such refund may be submitted for each calendar month.

8. The second ground of rejection as observed above raises another question:

Whether the supply of service by a subsidiary/sister concern of a foreign company in India which is incorporated under the laws in India to a foreign company incorporated under laws of a country outside India will hit by condition (v) of sub-section 6A of Service Tax Rules, 1994. It reads as follows:

"Export of services.-

6A. *(1) The provision of any service provided or agreed to be provided shall be treated as export of service when, -*

(a) the provider of service is located in the taxable territory.

(b) the recipient of service is located outside India,

(c) the service is not a service specified in the section 66D of the Act.

(d) the place of provision of the service is outside India,

(e) the payment for such service has been received by the provider of service in convertible foreign exchange, and

(f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act

(2) Where any service is exported, the Central Government may, by notification, grant rebate service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification."

9. The bare perusal of the aforesaid provision clarifies that services rendered would be treated as "Export of services" when clause (a) to clause (d) refers to provider of service is located in the taxable territory and recipient of service is located outside India and the service is not a service specified in Section 66D of the Act and the place of the provision of the service is outside India and as per clause (e) the payment for such service has been received by the provider of service in convertible Foreign Exchange. However, so far as the clause (f) of Rule 6A of Rules, 1994 is concerned, it provides that the provider of service and recipient of service are not merely establishments of a distinct person in accordance with them (b) of explanation 3 of clause (44) of Section 65B of the Act. As

per clause (44) of Section 65B of the Act, 1994 "service means any activity carried out by a person for other for consideration, and includes a declared service. Item (b) of the explanation 3 stipulates that an establishment of a person in taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons. Hence, by no stress of imagination, it can be said that the rendering of services by the petitioner No.1 to its parent Company located outside India was service rendered to its other establishment so as to deem it as a distinct person as per Item (b), explanation 3 of clause (44) of Section 65B of the Act, 1994 the petitioner No.1 which is an establishment in India, which is a taxable territory and its holding Company, which is the other company in non taxable territory cannot be considered as establishments so as to treat as distinct persons for the purpose of rendering service. The issue in the similar circumstances has already been dealt with by **Hon'ble High Court Gujarat in the case of M/s. Linde Engineering India Pvt Ltd Vs. Union of India reported as 2022 (57) G.S.T.L. 358 (Guj.)** The Hon'ble High Court observed as follows:

> *" However, on analysis of the aforesaid provisions of the Act, 1994 i.e. Section 65B(44) 3(b) and Section 66D; Rule 6A of Rules 1994; Rule 2(e) and Rule 6 of Cenvat Credit Rules, it appears that the respondents have assumed the jurisdiction on mere misinterpretation of the provisions of explanation 3(b) to Section 65B(44) of the Act, 1994 read with Rule 6A of the Rules, 1994 as by no stress of imagination, it can be said that the rendering of services by the petitioner No. 1 to its parent Company located outside India was service rendered to its other establishment so*

as to deem it as a distinct person as per Item (b), explanation 3 of clause (44) of Section 65B of the Act, 1994, the petitioner No. 1 which is an establishment in India, which is a taxable territory, which is the other company in non-taxable territory cannot be considered as establishments so as to treat as distinct persons for the purpose of rendering service. Therefore, the services rendered by the petitioner No 1-Company outside the territory of India to its parent Company would have to be considered "export of service" as per Rule 6A of the Rules, 1994 and Clause (f) of Rule 6A of the Rules, 1994 would not be applicable in the facts of the case as the petitioner No. 1, who is the provider of service and its parent Company, who is the recipient of services cannot be said to be merely establishment so as to be distinct persons in accordance with Item (b) explanation 3 of Clause (44) of Section 658 of the Act, 1994."

10. I further observe that the conditions prescribed under export of Service Tax Rules, 2005 for the services to qualify to export are:

(i) the service should be provided from India and used outside India.

(ii) Payment for such service is received in convertible foreign exchange.

11. In the present case there is no denial that services have been provided from India and have been used outside India and that the payment has been received in convertible foreign exchange. It stands clear that the services in the present case amounts to export of service. This Tribunal in the case of **M/s. All Merchants Limited vs. CCE reported as 2013 (29) STR 257 (Tri.Del)** and

in the case of **M/s. Microsoft Corporation India Pvt Ltd. Vs. C.ST., New Delhi reported as 2014 (36) STR 766** has held that as long as the service recipient is located outside India and the benefit of services accrue outside India, the services provided by an Indian company would qualify as export. The situation gets further clarified from departments own Circular No. 111/05/2009-S.T. dated 24.02.2009 wherein it has been clarified that the relevant factor is the location of the service receiver and not the place of performance. In this context, the phrase 'used outside India' is to be interpreted to mean that the benefit of the service should accrue outside India. Thus, for Category III services [Rule 3(1)(iii)], it is possible that export of service may take place even when all the relevant activities take place in India so long as the benefits of these services accrue outside India. In all the illustrations mentioned in the opening paragraph, what is accruing outside India is the benefit in terms of promotion of business of a foreign company. Similar would be the treatment for other Category III [Rule 3(1)(iii)] services as well".

Regarding the allegation of absence of nexus between the export and service, in some of the input services he submits that Tribunal in the case of Apotex Research Pvt. Ltd. v. CC, Bangalore-2014-TIOL-1836-CESTAT-BANG, held that there is no need to establish nexus between input services and output services at the time of filing of refund claim.

12. In the light of the entire above discussion both the questions framed above stands decided in favour of the appellant. It is held that Adjudicating Authority while rejecting the claim on the ground

of jurisdiction has definitely traveled beyond the scope of show cause notice. Hon'ble Apex Court in the case of **M/s. Brindavan Beverages (P) Ltd.** (supra) has held that show cause notice is a foundation on which the department has to build up its case. Thus, it should be specific and should contain all relevant details so that an assessee is able to give reply to specific allegations of the show cause notice. Since the issue of jurisdiction was not specifically taken in the show cause notice the adjudication on this point against the assessee is not sustainable. The appellant since admittedly has centralized registration in terms of sub clause (2) and (3) of Rule 4 is Noida unit was not required to be registered. Refund claim should not have been rejected on this ground. The services provided by the appellant amounts to export of service as were received by the company located outside the taxable territory irrespective those were the group companies of the appellant.

13. In view of these observations, the order under challenge is held to be the result of wrong interpretation of the relevant provisions and notifications. It is accordingly hereby set aside. Consequent thereto, appeal stands allowed.

[Order pronounced in the open Court on **09.09.2022**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

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