CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. III

SERVICE TAX APPEAL No.41524 of 2013

(Arising out of Order-in-Original No.06/2013 (RST) dt. 28.03.2013 passed by the Commissioner of Central Excise, Chennai-III Commissionerate, 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai 600 034)

M/s.Dassault Systemes Simulia Private Ltd. **Appellant**
(Formerly Abaqus Engineering Private Limited)
ASV Ramana Towers, 10th Floor,
No.37, 38, Venkatanarayana Road,
T.Nagar,
Chennai 600 017.

VERSUS

The Commissioner of GST & Central Excise **Respondent**
Chennai South Commissionerate,
MHU Complex No.692, Anna Salai,
Nandanam,
Chennai 600 035.

APPEARANCE :

Ms. Shrayashree T., Advocate
For the Appellant

Mr. M. Ambe, Deputy Commissioner (AR)
For the Respondent

CORAM : HON'BLE MS. SULEKHA BEEVI, MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER(TECHNICAL)

DATE OF HEARING : 01.06.2023
DATE OF DECISION : 08.06.2023

FINAL ORDER No.40406/2023

ORDER : Per Hon'ble Sulekha Beevi, C.S

Brief facts are that the appellant is a dealer of imported software for their parent company namely, M/s.Dassault Systems Simulia Corp., United State of America. The appellant is engaged in supply of software in India and also provide maintenance, enhancement and support service to their clients in India. During scrutiny of balance sheet for the year 2008-09 as well as the invoices raised by the appellant for the period 2008-09 and 2009-10, it was noticed that though the appellant had incurred expenditure of Rs.7,71,38,177/- towards import of software from their parent company during the period from May 2008 and March 2009 and Rs.13,61,91,300/- during the period 2009-10 they had remitted service tax only for the months of December 2009, January 2010, February 2010 and March 2010 There was short payment of service tax for the above months and also had not paid service tax for the period May 2008 to November 2009.

2. It appeared to the department that the software distributed / sold by the appellant would fall under the category of "Information and Technology Software Service" with effect from 16.05.2008. The appellant by import & sale of software as a dealer provided to their clients, the right to use information technology software for commercial

exploitation including right to reproduce, distribute and sell information technology software and right to use software components for the creation of and inclusion in the software products which would fall within the definition of "Information Technology Software Service" (ITSS). The expenditure incurred in foreign currency accounted in the books of accounts towards import of software related to taxable services provided by their parent company situated outside India. The appellant being recipient of services provided by a person from a country other than India was liable to pay service tax in terms of Section 66A of the Finance Act, 1994 and Section 67 (4) (c) of the Finance Act, 1944.

3. On scrutiny of balance sheets for the years 2005-06, 2006-07, 2007-08 & 2008-09 and invoices raised on the parent company it was noticed that appellant had accounted income under the heads "Inter Co-consulting / Professional fees" and "Inter Company income". The appellant had occasionally sent engineers to USA to undertake technical service for parent company and the billing was done on the basis of man hours at USA. The engineer would be physically present in US office and appellant raised the bill for the services in INR. Further, their research development team undertook quality control and testing work for the software that was developed by their parent company. For this service, the appellant charged the parent company in INR. As per the provisions of Section 65 (105) (k), Section 65 (68), Section 65 (105) (zzh), Section 65 (107) and Section 65 (106) it appeared that appellant has provided 'Manpower Recruitment & Analysis Service' to their parent

company and received taxable income for the services rendered. On enquiry the appellant stated that they are exporting the services to the parent company.

4. As per Rule 3 (2) of Export of Services Rules, 2005, only if the payment is received in convertible foreign exchange, the service can be treated to be exported. To a query raised by the department, the appellant had replied that they did not receive amount in foreign currency. It appeared that the appellant is liable to pay service tax under 'Manpower Recruitment or Supply Agency Service' and 'Technical Testing & Analysis Service'.

5. It was also seen that appellant had availed cenvat credit on input services provided by M/s.Sodexo SVC India Private Ltd., Mumbai under Business Support Service for the meal coupons. Credit was also availed on insurance services provided by United India Insurance Ltd. which provided group insurance for employees. The department was of the view that these services are not having any nexus with the output services provided by the appellants and hence not eligible for credit.

6. Again, it was noticed that the appellant utilized the credit towards payment of service tax for their liability in the months of December 2009, January 2010 and February 2010 respectively. In terms of proviso to Rule 3 (4) of the Cenvat Credit Rules, 2004 while paying duty of excise or service tax, as the case may be, the cenvat cedit shall

be utilized only to such extent that such credit is available on the last day of the month or quarter, as the case may be, for payment of tax / duty relating to that month or quarter, as the case may be. It appeared that the appellant had wrongly utilized the credit taken during the months of December 2009, January 2010, February 2010 and March 2010 towards payment of service tax relating to the months of December 2009, January 2010 and February 2010 respectively. The appellant was thus liable to pay interest of Rs.59,071/- for wrong utilization of cenvat credit.

7. Further, the appellant was also providing exempted services to educational institutions and certain units situated in Special Economic Zone. Rule 6 (3) of Cenvat Credit Rules, 2004 provides that appellant has to reverse the credit proportionate to the value of exempted services. The appellant had not intimated the department of their option to reverse credit on proportionate basis. The appellant is therefore liable to pay an amount equivalent to 8% (from 01.04.2008 to 06.07.2009) or 6% (from 06.07.2009) of the value of exempted services for the period August 2008 to March 2010 which amounted to Rs.15,15,699/-.

8. The show cause notice dt. 04.04.2011 was issued proposing to demand service tax on the taxable services as above and to recover the wrongly availed credit. After due process of law, the original authority vide impugned order confirmed the demand of service tax to the tune of

Rs.64,14,748/- under "Technical Testing and Analysis Services" (TTAS). and "Manpower Recruitment or Supply Agency Services" (MRASS). The credit of Rs.11,214/- was disallowed being ineligible as per the definition of "input services" and ordered to be recovered. An amount of Rs.12,17,484/- was confirmed being 6% / 8% of the value of exempted services which is required to be paid as per Rule 6 (3) of the CCR, 2004. Adjudicating authority also directed to pay interest and impose penalties. The adjudicating authority dropped in regard to ITSS Aggrieved by such order, appellant is before the Tribunal.

9. Ld. Counsel Ms.Shrayashree appeared and argued for the appellant. The Ld. Counsel adverted to the operative portion of the order and submitted that the appellant is now contesting only the demand of service tax of Rs.64,14,748/-, which is the demand confirmed under MRASS and TTAS. So also, the demand for requirement of reversal of cenvat credit as per Rule 6 (3A) which is Rs.1,21,17,484/- and the cenvat creit disallowed on input services for an amount of Rs.11,214/-.

10. It is submitted by the Ld. Counsel that an amount of Rs.64,14,748/- has been confirmed under "Technical Testing and Analysis Service (Rs.60,23,183/-)" and "Manpower Recruitment or Supply Agency Service (Rs.3,91,565)" on the appellant. In regard to Manpower Recruitment or Supply Agency Service, appellant submitted that they had deputed their Engineers to M/s.Dassault Systems, USA to perform technical services. M/s.Dassault Systems, USA had raised and

issued invoices in Indian rupees for the services on the basis of the amounts received by the Engineers. The appellant had received Foreign Inward Remittance Certificates (FIRC) and also furnished the same before the adjudicating authority. Similarly, the technical testing services also were provided to the appellant company situated outside India and consideration for the same had been received in foreign exchange. The Manpower Recruitment or Supply Agency Service and Technical Testing & Analysis Services were executed by the appellant as per the agreement entered by the appellant and their parent foreign company. The consideration was to be paid in convertible foreign currency, viz. US dollars. This satisfies the rules in regard to export of services and therefore cannot be subject to levy of service tax. Ld. Counsel adverted to Rule 4 of Export of Service Rules 2005 which reads as under :

> '*any service, which is taxable under clause (105) of Section 65 of the Finance Act, 1994, may be exported without payment of service tax'*.

As per Rule 3 (2) of the said rules, the provision of any taxable services specified in sub-rule (1) of Rule 3 shall be treated as 'export of service' subject to fulfilment of conditions namely:-

> *(a) such service is provided from India and used outside India; and*
>
> *(b) payment for such service is received by the service provider in convertible foreign currency."*

11. It is not disputed that the services were provided by the appellant to their parent company at USA. The department has denied to consider that the services have been exported alleging that appellant has received consideration in Indian rupees and not convertible foreign exchange. The said rule 3 (2) uses the word "convertible foreign exchange" and not "convertible foreign currency" as mentioned in the SCN. It is submitted by the counsel that show cause notice which is the basis of the case put forward by the department has been issued on the wrong application of the provisions of law.

12. The Counsel explained that the demand for the services rendered by the appellant to the parent foreign company has been received in convertible foreign exchange and Foreign Inward Remittance Certificates have been issued. As per Section 2 (n) of Foreign Exchange Management Act, 1999 –

"Foreign exchange" means foreign currency and includes,-

(i) deposits, credits and balances payable in any foreign currency.

(ii) drafts, travellers cheques, letters of credit of bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency,"

(iii) drafts, travellers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency;"

13. As per Rule 3 of the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000 ('2000 FEMA Regulations'), the manner of receipt of foreign exchange is as below:

"3. Manner of Receipt in Foreign Exchange:-

1. Every receipt in foreign exchange by an authorized dealer, whether by way of remittance from a foreign country (other than Nepal and Bhutan) or by way of reimbursement from his branch or correspondent outside India against payment for export from India, or against any other payment, shall be as mentioned below:

Group	***Manner of receipt of foreign exchange***
1. Member countries in the Asian Clearing Union (except Nepal) namely, Bangladesh. Islamic Republic of Iran, Myanmar, Pakistan and Sri Lanka	*a. Payment for all eligible current transactions by debit to the Asian Clearing Union dollar account in India of a bank of the member country in which the other party to the transaction is resident or by credit to the Asian Clearing Union dollar account of the authorized dealer maintained with the correspondent bank in the member country; and* *b. payment in any permitted currency in all other cases.*
2. all countries other than those mentioned in (1)	***a. payment in rupees from the account of a bank situated in any country other than a member country of Asian Clearing Union or Nepal or Bhutan; or*** *b. Payment in any permitted currency*

14. Further, as per Rule 4 of the Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations 2000, the manner of repatriation of foreign exchange is as below:

"4. Manner of Repatriation :-

(1) On realization of foreign exchange due, a person shall repatriate the same to India, namely bring into, or receive in, India and –

(a) Sell it to an authorized person in India in exchange for rupees; or

(b) Retain or hold it in account with an authorized dealer in India to the extent specified by the Reserve Bank; or

(c) Use it for discharge of a debt or liability denominated in foreign exchange to the extent and in the manner specified by the Reserve Bank.

(2) ***A person shall be deemed to have repatriated the realized foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorized dealer."***

15. It is submitted that as per the above Rules, payment from a bank account situated in a Country outside India other than Nepal or Bhutan or member Country of Asian Clearing Union and received in Rupees in India would amount to receipt of convertible foreign exchange. In the instant case, the payment has been made by the foreign parent Company from accounts in Banks situated in the United States of America, namely, Bank of America, New York, USA, Bank of America, Califoria, USA, Citizens Bank International, Providence, USA, etc. and received in Indian Rupees as can be seen from the FIRCs. Therefore, as per Rule 3 and Rule 4 of the FEMA 2000 Regulations, it can be without any doubt stated that the payment of consideration by the foreign parent Company has been received by the Appellant in convertible foreign exchange.

16. The Ld. Counsel relied upon the FIRC and submitted that FIRC is issued only in respect of foreign exchange. In this regard, reference is made to Clause 3A.6(i) of the Exchange Control Manual, wherein the following is provided:

> *"3A.6 (i) Authorised dealers should issue certificates in form BCI against receipt of inward remittances or realization of foreign exchange on security paper if the amount exceeds Rs.15,000/- in value, bearing distinctive serial numbers and reference numbers. In case the amount of inward remittance or realization of foreign exchange is upto Rs.15,000/- certificates in form BCI with serial numbers and reference numbers may be issued on the letter-head of the authorized dealer (with their 'Logo' printed on it). Since inward remittances received for opening of or credit of Non-Resident (External) accounts/FCNR accounts can be repatriated freely, authorized dealers should not issue certificates against such remittances."*

17. The Ld. Counsel urged that it is established that the appellant has received consideration for the Manpower Supply services and Technical Testing and Analysis services in convertible foreign exchange. In this regard, reliance is placed on the following cases where it has been held that payment made by the service recipients outside India through their Banks located outside India and received by the service provider in India in Indian Rupees shall be treated as receipt of payment in convertible foreign exchange.

- ***M/S. BCP Advisors Pvt. Ltd. v. Commissioner of Service Tax, Mumbai-I, 2017 (9) TMI 92 – CESTAT MUMBAI***
- ***Fives India Engineering & Projects Pvt. Ltd. v. Commissioner, 2019 (8) TMI 747 – CESTAT CHENNAI***
- ***M/S Mitsubishi Heavy Industries India Pvt. Ltd. v. CCE, Delhi-II, 2017 (5) G.S.T.L. 321 (Tri.-Del.)***
- ***Verifone Technology India Pvt. Ltd. v. Commissioner of Service Tax, 2017 (10) TMI 399 – CESTAT BANGALORE***
- ***M/s. Kobelco Machinery India Pvt. Ltd. v. Commissioner of Service Tax, Kolkata, 2019 (9) TMI 1526 – CESTAT KOLKATA***

- ***Sun-Area Real Estate Pvt. Ltd. v. Commissioner of Service Tax, Mumbai-I, 2015 (5) TMI 885 – CESTATE MUMBAI.***

18. The decisions in the case of *M/s.BCP Advisors Pvt. Ltd. Vs CST Mumbai-I* - 2017 (9) TMI 92 CESTAT MUMBAI and in the case of *Fives India Engineering & Projects Pvt. Ltd. Vs Commissioner* - 2019 (8) TMI 747 CESTAT CHENNAI were relied to support the above contention.

19. In regard to demand raised alleging that appellant has failed to exercise the option under rule 6 (6) (ii) of the CCR 2004 and therefore is liable to pay 6% / 8% of the value of exempted services, Ld. Counsel submitted that appellant has in fact reversed the amount attributable to value of exempted services provided by them to educational institutions. The said reversal has not been considered by the department holding that appellant had not intimated the department that they have opted to reverse the credit attributable to the value of exempted services as required under the said provision. The condition that the appellant has to intimate the department opting to reverse the credit is only procedural in nature and for the said reason, the substantive right of the appellant provided in the sub rule cannot be taken away. To support this argument Ld. Counsel relied upon the decision in the case of *Reliance Life Insurance Co. Ltd. Vs Commissioner of Service Tax* - 2017 (10) TMI 400 CESTAT MUMBAI. It was argued by the Ld. Counsel that when the assessee has reversed the credit, the department cannot insist that assessee has to avail a particular option of paying 6% / 8% of the value of exempted services. The decisions in

JSW Steel Ltd. Vs CCE Salem - 2019 (4) TMI 169 CESTAT CHENNAI and *Rockey Marketing Pvt. Ltd. Vs CST* - 2020 (11) TMI 82 CESTAT CHENNAI were also relied.

20. The third issue is with regard to disallowance of cenvat credit in respect of meal coupons and group insurance. It is submitted by the Ld. Counsel that period involved is prior to 01.04.2011 wherein the definition of "input services" had a wide ambit and almost all the services were covered within the definition. The decision in the case of *Ford Motor Pvt. Ltd. Vs CGST & CE Chennai* - 2018 (8) TMI 1513 CESTAT CHENNAI and *CST Bangalore Vs Yodless Infortech (P) Ltd.* - 2015 (39) STR 695 (Tri.-Bangalore) and M/s.*EXL Services.com (India) Ltd. Vs CCE & ST Delhi* - 2018 (9) TMI 499 CESTAT NEW DELHI were relied. It was also argued that these services were availed by the appellant for the benefit of employees and therefore is availed for providing output services. She prayed that the appeal may be allowed.

21. Ld. A.R Mr.M. Ambe appeared for Revenue and supported the findings in the impugned order. Para 3.4 of the impugned order was referred by the Ld. A.R to submit that as the consideration from the foreign company was not received in convertible foreign exchange, the services cannot be considered to have been exported. He prayed that the appeal may be dismissed.

22. Heard both sides.

23. The first issue is with regard to demand of Rs.64,14,478/- made under 'Technical Testing and Analysis Services' and 'MRSS'. The appellant has submitted that since these are export of services and for this reason the amount received as consideration is not subject to levy of service tax. The relevant rule has already been reproduced above. It is not disputed that the appellant has provided these services to their parent company situated outside India. The Department has denied to accept the contention that these services have been exported on the ground that the appellant has not received the consideration in convertible foreign exchange. Ld. Counsel has explained the provisions with regard to manner of receipt in foreign exchange. As per said rules, a person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorized dealer. The appellant has furnished FIRC documents before the authorities below. Sample copies were produced before us also. The very same issue was considered by the Tribunal in the case of *Mitsubishi Heavy industries India Pvt. Ltd. CCE Delhi* - 2017 (9) TMI 358 CESTAT DELHI. The discussion made by the Tribunal is as under :

> "**7.** The only point of dispute in the present appeal is whether or not the appellant received the consideration for service, in convertible foreign exchange. We have perused one of the certificates of Foreign Inward Remittance issued by the Bank of Tokyo Mitsubishi UFJ Ltd., New Delhi. The said certificate states that the specified amount has been remitted by Mitsubishi Heavy Industries Ltd., Tokyo by remitting Bank in Tokyo-Mitsubishi UFJ, Global Service Banking Division Tokyo, Japan. The purpose of remittance has been shown as service fee, with a reference number. It is certified that the payment "has not been received in non-convertible rupees or

under any other special trade or payment agreement". The payment is in terms of re-imbursement in an approved manner.

8. A reference to Regulation 4(2) of Foreign Exchange Regulations, 2000 will show that a person shall be deemed to have repatriated the realized foreign exchange to India when he receives in Indian payment in rupees from the account of a bank situated in any country outside India. Admittedly, the payments in the present cases were received by the appellant from M/s. Mitsubishi Heavy Industries Ltd., Japan through their account in the bank of Tokyo - Mitsubishi UFJ Global Service Banking Division, Japan. The FIRC issued by the appellant's bank in New Delhi clearly certifies that the payment has not been received in non-convertible rupees.

9. The Original Authority had given, a rather brief finding on this issue. It would appear that the Original Authority is mainly influenced by the payment of service tax by the appellant along with interest after the issue of show cause notice and accordingly, it would appear that he did go into the factual/legal submissions made by the appellant while contesting the tax liability. In fact, he brushed aside the submission of the appellant regarding notification issued by the Reserve Bank of India with reference to receipt of foreign exchange, by noting that the provisions of Finance Act are different. We find that such finding is not at all sustainable. Admittedly, inward or outward remittance of any money into or out of India is regulated by the Reserve Bank of India. There is a specific enactment and the Regulation in this regard. Notification No. 9/2005-S.T., dated 3-3-2005 under which Export of Service Rules, 2005 was issued mentions the condition as payment for such service is to be received by a service provider in convertible foreign exchange. The manner of such payment to be received and how convertible foreign exchange is dealt with for cross border transactions, is wholly regulated by the RBI.

10. It is relevant to note that when a service is provided to a person located abroad and the conditions is payment of consideration in convertible foreign exchange, the same shall stand satisfied, if the recipient of service transfers the money from his account which is in convertible foreign currency and remitted to Indian provider of service. The credit to account of Indian recipient of money at the bank of Indian recipient, will necessarily be in Indian rupees. It is apparent that no foreign exchange amount can be credited in bank located in India. The transactions are in Indian rupees. This aspect has been examined by the Tribunal in *Balaji Telefilms Ltd.* - 2016 (43) S.T.R. 98 (T-M). The Tribunal observed as below :-

"14. That brings us to the second condition, viz., receipt of consideration in convertible foreign currency. The contract, undoubtedly, designates the consideration in Indian rupees. It is claimed by the respondent that this is normally resorted to so that the service provider is not put to loss on account of currency fluctuations and that, by such designation, the producer in India is assured of receiving the contracted amount; undeniably, a necessary factor in minimizing the risk of budgetary overrun. This justification is, unarguably, acceptable as logical.

15. The respondent did produce a certificate from Hong Kong and Shanghai Banking Corporation Ltd., their bankers, indicating that inward remittance from the overseas entity was in convertible foreign currency. The original authority rendered its findings after acknowledging this certificate. In the light of this, it is surprising that Revenue has chosen to argue that the condition of inward remittance in Export of Services Rules, 2005 had not been fulfilled.

16. Admittedly, the Indian Rupee is not a freely convertible currency and benefit of export privileges were sought to be denied on the ground that contract was designated in Indian rupees. By that very argument, Indian rupee could not have been received as inward remittance through the banking channels because of that very non-convertibility. Consequently, there is no justification for entertaining any doubt that inward remittances were in convertible foreign currency."

11. In *Sun Area Real Estate Pvt. Ltd.* - 2015 (39) S.T.R. 897 (Tribunal-Mum.), it was held that the FIRC issued certifying that the payment not received in non-convertible rupees establishes payment in foreign exchange. Such payment in rupees is equal to foreign exchange. The Tribunal referred to Notification dated 3-5-2000 of the RBI and Regulation 3 of Foreign Exchange Regulations, 2000.

12. In view of the discussions and analysis on legal and factual issues, as above, we find no merit in the impugned order. Accordingly, the same is set aside. The appeal is allowed."

24. The Tribunal had followed the said decision in the case *Fives India Engineering & Projects Pvt. Ltd. Vs CGST & CE* and observed as under:

"5.2…..

Thus, when the amount is adjusted in the bank account and remitted to the service provider in India through bank account in Indian currency, the same is to be considered as paid in convertible foreign currency. Following the said decision, I am of the view that the condition provided in Rule 6A is fulfilled and the services are exported. The second issue is held in favour of the appellant.

5.3 The third issue is with regard to unjust enrichment. It is settled law that taxes cannot be exported and, therefore, since the services are provided outside India the doctrine of Unjust Enrichment cannot be applied to services exported. In the present case, the services having been exported outside India, the discussions made by the authority below observing that the appellants have included the element of service tax in the debit note and, therefore, the refund is hit by doctrine of Unjust Enrichment, cannot sustain. Further, the learned counsel for the appellant has furnished various documents to show that the element of service tax was not collected from the service recipient but only the value of services were received, as seen from the bank statement issued from foreign bank. Therefore, the issue of unjust enrichment is also held in favour of the appellant."

25. Following the proposition laid in the above decisions, we are of the considered opinion that the view taken by the department that appellant has not received consideration in convertible foreign exchange is without

any factual or legal basis. The contention of the appellant that the services were exported stands established. The levy of service tax on MRASS & TTAS, therefore cannot sustain and the demand of Rs.64,14,478/- requires to be set aside, which we hereby do.

26. The second issue is with regard to allegation that the appellant has to reverse the cenvat credit which is attributable to the value of exempted services provided by them as required under Rule 6 (3) of CCR 2004 . It is not disputed that that the appellant has reversed the proportionate credit attributable to the value of exempted services. The department is of the view that as the appellant had not intimated the department that they are exercising the option in terms of Rule 6 (3A) has confirmed the demand. Thus, the appellant has been asked to pay 6% / 8% of the value of exempted services. This issue is no longer *res integra*. The Tribunal in the case of *M/s.Reliance Life Insurance Co. Ltd. Vs CST Mumbai* - 2017 (10) TMI 400 CESTAT MUMBAI analysed the issue and held that procedure given in Rule 6 (3A) of CCR 2004 is intended to make Rule 6 (3) workable and available to the assessee. Rule 6 (3) (i) cannot be made automatically applicable on failure to intimate in writing about the option to be availed by the assesseee. The said issue was considered by the Tribunal in the case of *Rockey Marketing Pvt. Ltd.* (supra) and Tribunal observed as under :

> "4. Heard both sides. The appeal has been filed for refund of Rs.49,24,398/. On perusal of the impugned order, we find that the Commissioner (Appeals) has observed as under :

> "9. It is observed that the value of exempt service as determined by the appellant in view of Rule 6 (3D) (c) is Rs.11,68,48,502/- (10% of cost of exempt goods sold) on which the amount required to be reversed @ 7% vide Rule 6(3) (i) is Rs.81,79,395/-. However, the appellant have reversed / paid Rs.86,10,981/- resulting in excess payment of Rs.4,31,586/-.
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> 10. It is observed that the impugned reversal/payments were made in December, 2015 and the refund claim was filed in February,2016. Hence, the refund claim is not hit by time bar. Regarding unjust enrichment, it appears that appellant's claim that they have not passed on the incidence of the impugned amount to any other person is prima facie acceptable. However, this shall be proved by the appellant beyond pale of doubt with the support of documents and records."

From the above observation, it can be seen that the appellant has been compelled to reverse credit @ 7% of the value of exempted services under Rule 6 (3) (i) read with Rule 6 (3D) (c) only for the reason they have not followed the procedure of intimating the department with regard to the option exercised. The Tribunal in the case of Philips Carbon Black Ltd. (supra)has observed that noncompliance with the procedure prescribed under Rule 6 (3A) of the CCR does not result in loosing substantive right to avail the option of reversing proportionate credit as envisaged in Rule 6(3) (i); That procedural lapse is condonable and denial of substantive right is unjustified. Similar view was taken by the Tribunal in the cases referred to by Ld. counsel for the appellants. In para-9 of the order in M/s.Philips Carbon Black Ltd. case (supra), the Tribunal as under :

> "9. The issue can be looked at from another angle as well. Rule 6(1) of the CCR interalia provides that cenvat credit shall not be made available in respect of inputs used in the manufacture and clearance of exempted goods. The reason being that there is no tax cascading requiring elimination in such a situation. Therefore, the said Rule 6(1) is clearly not aimed at revenue maximization but credit neutralization. Rule 6(2) and Rule 6(3) of the CCR are only aimed at securing compliance with the substantive provision contained in Rule 6(1) of the CCR where common inputs are used in the manufacture of a dutiable and exempted final product. Reversal of proportionate cenvat credit in respect of the common input used in the manufacture of exempted goods is an option duly permitted under Rule 6(3)(ii) of the CCR itself. Non-compliance with the procedure prescribed under Rule 6(3A) of the CCR does not result in the manufacturer losing his substantive right to avail the option of reversing proportionate credit, as such procedural lapse is condonable and denial of substantive right on such procedural failure is unjustified in light of the decision of the Tribunal in the Cranes & Structural Engineers Case (supra). Therefore, the imposition of Rule 6(3)(i) of the CCR for demanding payment of 5%/6% of the sales value of electricity is even otherwise unsustainable."

5. From the above, we have no hesitation to hold that the view taken by the Commissioner (Appeals) that the appellant has to reverse credit as per Rule 6 (3) (i) is against the provisions of law. The appellant would be eligible for refund after reversal / paying of proportionate credit on exempted services by applying Rule 6 (3) (i). This amount however has to be verified. Appellant has furnished details of the credit availed and the amount reversed by them along with the letters issued to department. The indirect tax regime has been shifted from Service Tax to GST, appellant would be eligible for cash refund of such

> amount. However, we direct the lower authority to quantify the amount eligible for refund after complying with Rule 6 (3) (i) being the proportionate credit availed on exempted services. We find the issue under consideration in the appeal in favour of the assessee and against the Revenue. For the limited purpose of quantification of the amount eligible for refund, we remand the matter to the adjudicating authority. Needless to say that refund being of input service credit, the question of unjust enrichment does not arise. The appeal is allowed in above terms."

27. After appreciating the facts and law and applying the proposition laid in these decisions, we hold that the demand cannot sustain and requires to be set aside which we hereby do.

28. The third issue is with regard to demand of Rs.11,214/- by which cenvat credit availed on meal passes and group insurance services has been disallowed. It is submitted by the Ld. Counsel that the said services were availed for the benefit of the employees. Needless to say that during the relevant period (prior to 01.04.2011) the definition of "input services" had a wide ambit as it included the phrase "activities relating to business". Thus, almost all the services were covered within the definition of "input services" if used for providing the output services. There is nothing to show that the said services were not used for the employees of the appellant-company. The Tribunal in the case of *Ford* (supra) had considered the issue and held that the credit is eligible. We hold that appellant is eligible for credit and the disallowance of credit is not sustainable and requires to be set aside which we hereby do.

29. From the discussions above, we find that demands confirmed in the impugned order which is discussed and considered in this final order cannot sustain and requires to be set aside which we hereby do. The appeal is allowed with consequential relief, if any.

(pronounced in court on 08.06.2023)

Sd/-
(M. AJIT KUMAR)
MEMBER (TECHNICAL)

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

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