**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA**
**EASTERN ZONAL BENCH: KOLKATA**

**Excise Appeal No. 390 of 2012**

(Arising out of Order-in-Appeal No. 06/ST/BBSR-I/2012 dated 21.03.2012 passed by Commissioner (Appeals), Central Excise, Customs & Service Tax, Bhubaneswar.)

**Commissioner of Central Excise, Customs & Service Tax, BBSR.**
Bhubaneswar Division, Plot No. 466(p), Shree Vihar, Patia, Bhubaneswar-751031 (Odisha)

**...Appellant (s)**

*VERSUS*

**M/s Infosys Technologies Ltd.,**
Plot No. E-4, Infocity, Bhubaneswar.

. ..**Respondent(s)**

**APPERANCE :**
Shri S. S. Chattopadhyay, Authorized Representative for the Appellant
Shri R. Dakshina Murthy, Advocate for the Respondent

**CORAM:**
**HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)**
**HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)**

**FINAL ORDER No...76612/2023**

DATE OF HEARING : 08.09.2023

DATE OF PRONOUNCEMENT: 12.09.2023

**PER K. ANPAZHAKAN :**

The present appeal has been filed against the impugned order dated 21.03.2012 passed by the Ld. Commissioner (Appeals), wherein he has allowed the appeal filed by the Respondent. Aggrieved against the said order, the Department has filed this appeal.

2. The briefly stated facts of the case are that the Respondent, M/s Infosys Technologies Ltd., Bhubaneswar, Odisha, were engaged in the activity of providing Maintenance of Software Services classifiable under Management, Maintenance and Repair Service. The Respondent was operating as a 100% EOU registered under Software Technology Park (STP) Scheme for export of the above taxable service. They used various input services viz., commercial

or industrial construction, erection, commissioning or installation, security service, air travel agent, chartered accountant, cleaning activity, commercial training or coaching, courier, manpower recruitment or supply, rent-a-cab operator, scientific or technical consultancy, management, maintenance or repair and telecommunication, which were used for rendering the said output service. They availed Cenvat credit on such input services and exported their output service without payment of Service Tax.

3. Rule 5 of the Cenvat Credit Rules, 2004 stipulates that where inputs/ input services are used in providing output services which are exported, then the Cenvat Credit in respect of the input or inputs services so used shall be allowed to be utilized by the output service provider toward payment of Service Tax on the output service, and where for any reason such payment is not possible, the provider of such output service shall be allowed refund of such amount subject to such safe guards, conditions and limitations as specified. On dated 08.02.2008 the Respondent filed a claim for refund of Cenvat Credit for an amount of Rs.90,88,508/-, in terms of Rule 5 of the Cenvat Credit Rules, 2004 read with Notification No. 5/2006-CE (NT) dated 14.03.2006, for the quarter ending January, 2008 to March, 2008 on the ground that they were not in a position to utilize the Cenvat Credit availed on the said input services..

4. The original authority rejected the refund claim vide order-in-original dt. 27.10.2008, on the ground that the input services against which the Respondent has filed the refund claim cannot be considered as 'input services' for the 'output services' rendered by them, as the said input services were not directly or indirectly related to the output services. Aggrieved by this order of the Assistant Commissioner, the Respondent filed an appeal before the Commissioner (Appeals), who vide his O-i-A dated 30.07.2009 remanded the case to the original authority to revisit the matter and pass a clear an order

afresh. The Assistant Commissioner pursuant to above appellate order, passed De-novo Order-in-Original dated .22.3.2011 sanctioning partial refund of Rs.2,78,649 on two input services viz., Management, Maintenance or Repair Service and Telecommunication Service and rejected the balance refund claim of Rs.88,09,859. The Respondent being aggrieved by the above De-novo Order dt.22.3.2011, filed appeal before the Commissioner (Appeals). The Ld. Commissioner (Appeals) allowed the appeal filed by the Respondent vide Order-in-Appeal dated 21.3.2012 (impugned order). Being aggrieved against the impugned order, the Department. has filed the present appeal before this Tribunal.

5. In their grounds of appeals, the Appellant(Department) stated that the adjudicating authority has examined the admissibility or inadmissibility of the refund of Cenvat credit claimed by the Respondent in respect of the thirteen services and observed that only two services i.e. the Management, Maintenance or Repair services and Telecommunication Service were related to development of software and eligible and allowed the refund of Rs.2,78,649/- in respect of the said two input services and rejected the refund claim of Rs.88,09,859/- in respect of the remaining eleven services, vide order-in-Original dated 18.03.2011 on the ground that these input services namely (i) Commercial or Industrial Construction Services (ii) Erection, Commissioning or Installation Services (iii) Scientific or Technical Consultancy Service (iv) Security Agencies Services (v) Air Travel Agent (vi) Chartered Accountant service (vii) Cleaning Service (viii) Commercial Training or Coaching Service (ix) Courier Service (x) Manpower Recruitment Agency and (xi) Rent-a-Cab Scheme Operator Service did not have any link/correlation with the development of Software for the quarter ending January, 2008 to March, 2008 under the provisions of Rule 5 of the Cenvat Credit Rules, 2004 read with Notification No. 05/2006-CE (NT) dated 14.03.2006.

6. The Appellant stated that Rule 5 of the Cenvat Credit Rules, 2004 vide notification No. 5/2006-CE (NT) dated 14.03.2006, as amended, has prescribed certain conditions and limitations for such refund. A plain reading of Rule 5 clearly reveals that only such Cenvat Credit availed in respect of any inputs or input services which are used in providing the output services exported are eligible for refund. The refund of Cenvat Credit in respect of input services which are not used in the exported goods are not permitted. Thus, any person claiming refund under Rule 5 must prove to the satisfaction of the sanctioning authority that the input services on which Cenvat credit was availed are eligible input services. In this case, sanctioning authority i.e. Assistant Commissioner was not satisfied with the submissions submitted by the Respondent and rejected the refund claims in respect of the eleven input services. The Commissioner (Appeals) has erred in allowing the refund of the input services which were not used in providing the output services. Accordingly, the Department prayed for setting aside the impugned order.

7. The Respondent submitted that Notification No. 5/2006-CE(NT) had been amended vide Notification No. 7/2010-CE(NT) dated 27.02.2010 so as to substitute the words "used in" with the words" used in or in relation to" in clause (a) and the word "used in " with the words "used for" in clause (b) of the said Notification. Further, the Board vide letter No. D.O.F. No. 334/1/2010-TRU dated 26.02.2010 has also clarified that these amendments are made applicable retrospectively with effect from 14.03.2006.

8. The Respondent submits that pursuant to the impugned order the Assistant Commissioner of Central Excise passed a De-novo Order dt.30.8.2012 wherein the refund amount of Rs.88,09,859 was sanctioned. Hence the Revenue's appeal is infructuous and should be dismissed *in limine.* The refund sanction order dt.30.8.2012 passed by the Assistant commissioner has been accepted by the department and not challenged in appeal and no notice was issued to

recover it as wrongly sanctioned refund as per section 11A of the Central Excise Act,1944. The Respondent placed reliance on the following judicial decisions in support of the above contention.

a. CST Vs.Yokogawa IA Technologies India P.Ltd 2011 (24) STR 465 (T).
b. CCE Vs.Tata Steel Ltd, 2020 –TIOL-1058-CESTAT-KOL.

9. The Respondent submits that the Department could not have raked up the eligibility of Cenvat credit in the refund application filed by them.. The Respondent relied upon the following decisions in support of their contention:

a. *CST Vs. Convergys India Pvt Ltd 2009 (16) STR 198 (T)*. The appeal filed by the Department was dismissed by the Hon'ble High Court of Punjab & Haryana in *CST Vs.Convergys India Pvt Ltd., 2010 (20) STR 166 (P&H)*.
b. *Aeries Technology Group Pvt Ltd Vs.CGST, 2022 (3) TMI 195 – CESTAT-Mumbai*

The show cause notice did not demand or propose to deny Cenvat credit already taken under Rule 14 of the Cenvat Credit Rules and hence the eligibility issue could not have been raised in the refund proceedings.

10. The Respondent relied on the Board Circular No.120/01/2010 - ST dated 19.01.2010, wherein at para 3.1.1 it was clarified that as regards the extent of nexus between the inputs/input services and the export goods/services, it must be borne in mind that the purpose is to refund the credit that has already been taken. There cannot be different yardsticks for establishing the nexus for taking of credit and for refund of credit. It is settled position of law that Board Circulars are binding on the Department as per the Supreme Court decision in CCE Vs. Dhiren Chemical Industries 2002 (139) ELT 3 (SC). Accordingly, the Respondent stated that denial of refund on the ground that the said eleven input services were not used in providing output services is legally not tenable.

11. The Ld. A.R. reiterated the points mentioned in the grounds of appeal filed by the Department. He also submitted that there was some calculation error in sanctioning of the refund to the Respondent.

12. Heard both sides and perused the appeal records.

13. Before going into the merits of the appeal, we would examine the preliminary objections raised by the Respondent. The Respondent submits that pursuant to the impugned order the Assistant Commissioner of Central Excise passed a De-novo Order dt.30.8.2012 wherein the refund amount of Rs.88,09,859 was sanctioned. Hence the revenue's appeal is infructuous, as no appeal was filed against the refund sanctioning order. We do not agree with the objection. The Assistant Commissioner has sanctioned the refund as per the O-i-A passed by the Commissioner (Appeals). The Department has filed appeal against the O-i-A and hence sanctioning of the refund as per the Commissioner (Appeal) order would not make the appeal infructuous. Regarding the issue of calculation raised by the Respondent, we find that this point was not raised in the grounds of appeal by the Appellant. Hence, this point cannot be raised at this stage. Accordingly, we would examine the appeal on merits on the basis of the submissions made by both the sides.

14. We observe that in the impugned order the Appellate Authority has given a specific finding as to how the Respondents were eligible for the refund. The relevant pars in the impugned order are reproduced below:

> 9. I have perused the impugned order and the submissions made by the appellant. Claim of refund for quarter ending January, 2008 to March, 2008 was filed on 08.02.2008. The same has moreover been rejected by the lower authority on the ground that input services credit availed by the appellant did not qualify as input services for development of software in terms of rule 5 of the said rules, read with Notification No. 5/2006-CE (NT), dated 14.03.2006, issued thereunder, as these said services were not used in providing output service. Aggrieved by the impugned order of the Assistant Commissioner, the appellant had filed an appeal before the Commissioner (Appeals). The Commissioner (Appeals), vide order-i-

appeal No. 58/ST/BBSR-I/2009, dated 30.07.2009, had remanded the case to the original authority to revisit the matter and pass a clear analytical order afresh taking into account the relativity of various services put forth by the appellant. As per the directions of the Commissioner (Appeals), the lower authority passed an order after discussing eligibility of refund claim against each input services separately under the impugned order. Out of total refund claim of Rs.90,88,508/-, the lower authority had rejected an amount of Rs.88,09,859/- on the ground that the input services such as (i) Commercial and Industrial Construction Service, (ii) Erection, Commissioning and Installation Service, (iii) Scientific and Technical Consultation Service, (iv) Cleaning Activity Service, (v) Commercial Training and Coaching Service, (vi) Courier Service, (vii) Manpower Recruitment Agency Service, (viii) Rent-a-Cab service, did not have any link / co-relation with the development of software.

6. I have also gone through the Notification No. 5/2006-CE (NT), dated 14.03.2006. This said Notification has been amended vide Notification No. 7/2010-CE(NT), dated 27.02.2010 so as to substitute the words ñused inò with the words ñused in or in relation toò occurring in clause (a) and the word ñused inò with the words ñused forò in clause (bf) of the said notification. The above changes ensured that the provisions of refund under the notification and under the said rules get aligned and that refund is granted on all goods or services on which cenvat can be claimed by the exporter. The Board vide letter No. D.O.F. No. 334/1/2010-TRU, dated 26.02.2010, has clarified that these amendments are made applicable retrospectively with effective from 14.03.2006 so as to resolve the dispute in respect of pending cases. I find that all the input services mentioned at paragraph 5 above are used for providing output services which are exported without payment of service tax. The lower authority has not considered the said amendments while passing the order and disallowed the refund claim in respect of the said services in question, which is not legal or proper.

15. We observe that the Commissioner (Appeals) has examined the definition of 'input services' and given a very categorical finding regarding admissibility of the credit of 'input services' used in providing the output services by the Respondent. We find that the Respondent has availed Cenvat credit on the input services used by them in providing the output services. The Department has not raised any objection at the time of availing and utilizing the credit. The decisions relied upon by the Respondent mentioned in Para 8 supra supports their contention that the eligibility of Cenvat credit cannot be questioned at

the time of filing of the refund when it was not questioned when the same was availed and utilized by them. Accordingly, we hold that when no objection was raised at the time of availing and utilizing the credit, the objection regarding the eligibility of credit cannot be raised at the time of filing of the refund claim, to deny the refund claim. We find that Board Circular No.120/01/2010 - ST dated 19.01.2010, supports this view. In the said Circular, in Para 3.1.1 it has been clarified that as regards the extent of nexus between the inputs/input services and the export goods/services, it must be borne in mind that the purpose is to refund the credit that has already been taken. There cannot be different yardsticks for establishing the nexus for taking of credit and for refund of credit.

16. We observe that prior to 1.4.2011 the 'input service' definition in Rule 2(l) of the Cenvat Credit Rules, 2004 was very wide as it was an inclusive definition and covered the expression "activities relating to business". This covers all such 'input services' used by the Respondent in providing their output services. Accordingly, we hold that there is no infirmity in the impugned order passed by the Commissioner (Appeals) allowing the refund. We observe that the Respondent has relied on the following judicial decisions which support their contention:

a. Royal Hathcheries Pvt Ltd & Ors Vs.State of AP & Ors. 1994 SCC 429.
b. Cocal Cola India Pvt Ltd Vs.CCE, 2009 (15) STR 657 (Bom).
c. CCE Vs.Ultratech Cement Ltd., 2010 (20) STR 577 (Bom).
d. Mahalakshmi Oil Mills Vs.State of Andhra Pradesh 1988 (38) ELT 714 (SC).
e. Utopia India Pvt Ltd Vs.CST 2011 (23) STR 25 (T-Bang).
f. CST Vs.Yodlee Infotech (P) Ltd 2015 (39) STR 695 (T-Bang).
g. Bajaj Hindusthan Ltd Vs.CCE, 2014 (33) STR 305 (T)
h. Capiq Engineering Pvt Ltd Vs.CCE, 2009 (245) ELT 186 (T).
i. C.J.Gelatine Products Ltd Vs.CCE, 2012 (25) STR 109 (T)
j. Toyota Kirloskar Motor Pvt Ltd Vs.CCE, 2011 (24) STR 645 (Kar).

k. Jeans Knit P Ltd Vs.CC, 2011 (21) STR 460 (T-Bang).

17. In view of the above discussions and by relying on the above said decisions cited by the Respondent, we hold that the impugned order has rightly allowed the appeal filed by the Respondent. Accordingly, we reject the appeal filed by the Appellant.

(Pronounced in the open court on…12.09.2023.…)

Sd/-
**(Ashok Jindal)**
**Member (Judicial)**

**Sd/-**
**(K. Anpazhakan)**
**Member (Technical)**

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