IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal Nos. 40918 and 40919 of 2016

WITH

Service Tax Misc.[CT] Application Nos. 40075 and 40076 of 2023

(on behalf of Appellant)

(Arising out of Order-in-Appeal Nos. 124 & 125/2016 dated 22.02.2016 passed by the Commissioner of Service Tax (Appeals-I), Newry Towers, 2054/1, II Avenue, 12th Main Road, Anna Nagar, Chennai – 600 040)

M/s. Ad2Pro Global Creative Solutions Pvt. Ltd. : Appellant
[Formerly "M/s. Ad2pro Media Solutions Pvt. Ltd."]
3rd & 4th Floor, 75, Lohmandhari Towers,
Pantheon Road, Egmore,
Chennai – 600 008

VERSUS

The Commissioner of Service Tax : Respondent
Newry Towers, Plot No. 2054, I Block,
12th Main Road, II Avenue,
Anna Nagar, Chennai – 600 040

AND

Service Tax Appeal Nos. 41101 to 41106 of 2017

WITH

Service Tax Misc.[CT] Application Nos. 40069 to 40074 of 2023

(on behalf of Appellant)

(Arising out of Order-in-Appeal Nos. 15 to 20/2017 (STA-II) dated 20.02.2017 passed by the Commissioner of Service Tax (Appeals-II), Newry Towers, 3rd Floor, 2054/1, II Avenue, 12th Main Road, Anna Nagar, Chennai – 600 040)

M/s. Ad2Pro Global Creative Solutions Pvt. Ltd. : Appellant
[Formerly "M/s. Ad2pro Media Solutions Pvt. Ltd."]
3rd & 4th Floor, 75, Lohmandhari Towers,
Pantheon Road, Egmore,
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VERSUS

The Commissioner of Service Tax : Respondent
Newry Towers, Plot No. 2054, I Block,
12th Main Road, II Avenue,
Anna Nagar, Chennai – 600 040

APPEARANCE:

Ms. Shrayashree T., Advocate for the Appellant

Smt. Sridevi Taritla, Additional Commissioner for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER NOs. 40376-40383 / 2023

DATE OF HEARING: 25.04.2023

DATE OF DECISION: 30.05.2023

Order : [Per Hon'ble Mr. Vasa Seshagiri Rao]

There is a change in the appellant's name from "Ad2pro Media Solutions Private Limited" to "Ad2pro Global Creative Solutions Private Limited" and miscellaneous petitions have been filed by the appellant to this effect requesting for change in the cause-title. The above request is acceded to and the petitions for amending the cause-title are allowed, as prayed for.

1. M/s. Ad2pro Global Creative Solutions Private Limited [Formerly known as "M/s. Ad2pro Media Solutions Private Limited"], the appellants herein, have filed these eight appeals against the Order-in-Appeal Nos. 124 & 125/2016 dated 22.02.2016 passed by the Commissioner of Service Tax (Appeals-I), Chennai and also Order-in-Appeal Nos. 15 to 20/2017 (STA-II) dated 20.02.2017 passed by the Commissioner of Service Tax (Appeals-II), Chennai, regarding the partial sanction / partial rejection of their refund claims by the refund sanctioning authorities.

2. As all these appeals involve an identical issue regarding interpretation of time-bar under Section 11B of the Central Excise Act, 1944, they are taken up together for disposal by this common order.

3.1 Brief facts of the case are that the appellant, who were registered under Service Tax, are providing services under the category of 'advertising agency service' and 'business auxiliary service'. The appellants have been exporting the said services to various clients located outside India and so, have been claiming refund of unutilized input service tax credit under Rule 5 of the CENVAT Credit Rules, 2004.

3.2 The appellants have filed refund claim for the quarter April 2012 to June 2012 on 27.03.2013 for sanction of refund of Rs.40,28,643/- and similarly, another refund claim for the quarter July 2012 to September 2012 on 27.06.2013 for sanction of refund of Rs.31,40,284/-. These refund claims were partially sanctioned as, while calculating the export turnover, the export invoices realized during the quarter which are dated more than one year, were treated as time-barred in terms of Section 11B of the Central Excise Act, 1944 and the amount realized in respect of these invoices was not reckoned in computation of the export turnover. The above partial rejection of refund claims came to be upheld by the Commissioner of Service Tax (Appeals-I), Chennai vide Order-in-Appeal Nos. 124 & 125/2016 dated 22.02.2016. The details are tabulated below: -

CESTAT Appeal No.	**Period**	**Refund claim date**	**Refund Amount (in Rs.)**	**OIO No.& dt.**	**Amount Sanctioned (in Rs.)**	**Amount Rejected (in Rs.)**	**Rejection accepted by Ad2pro**
ST/ 40918/ 2016	April 2012 to June 2012	27th Mar 2013	40,28,643/-	20/2014 dt. 22.04.2014	20,80,534/-	19,48,109/-	No
ST/ 40919/ 2016	July 2012 to Sep 2012	27th June 2013	31,40,284/-	23/2014 dt. 30.04.2014	16,91,195/-	14,49,089/-	No

Appeal to Commissioner (Appeals)				
Appellant Before Commr. (Appeals)	**Amount appealed (in Rs.)**	**OIA No. & dt.**	**OIA outcome**	**Refund rejected as per OIA (in Rs.)**
Ad2pro	19,48,109/-	124 & 125/2016 dt. 22.02.2016	Rejection upheld by Commr. (Appeals)	19,48,109/-
Ad2pro	14,49,089/-		Rejection upheld by Commr. (Appeals)	14,49,089/-

3.3 Similarly, the appellant had filed refund claims for the period from July 2013 to September 2013, April 2014 to June 2014, July 2014 to September 2014, January 2015 to March 2015, April 2015 to June 2015 and July 2015 to September 2015, in total six claims, which were processed and sanctioned by the refund sanctioning authority. The Revenue, however, filed appeals before the Commissioner of Service Tax (Appeals-II), Chennai against the sanction of the above refund claims involving the same issue of time-bar under Section 11B of the Central Excise Act, 1944 - whether to be considered from the date of export invoice or from the date of Foreign Inward Remittance Certificates (FIRCs). In all these six claims, the refund sanctioning authority has considered the decision of the Commissioner (Appeals) in Order-in-Appeal Nos. 184-190/2016 (STA-I) dated 23.03.2016 and also the provisions of the amending Notification No. 14/2016-C.E.(N.T.) dated 01.03.2016 to Notification No. 27/2012-C.E.(N.T.) dated 18.06.2012. However, the Department has filed appeals against these sanction of refunds on the plea that the amendment made vide Notification No. 14/2016-C.E.(N.T.) will be prospective and would not have retrospective effect and as certain invoices were time-barred considering the dates of the export invoices, these were required to be excluded in computation of the export turnover. The lower appellate authority has allowed the appeals filed by the Department

vide Order-in-Appeal Nos. 15 to 20/2017 (STA-II) dated 20.02.2017, as per the details given below: -

CESTAT Appeal No.	Period	Refund claim date	Refund Amount (in Rs.)	OIO No.& dt.	Amount Sanctioned (in Rs.)	Amount Rejected (in Rs.)	Rejection accepted by Ad2pro	Rejection amount admitted
ST/ 41101/ 2017	July 2013 to Sep 2013	11th June 2014	37,91,111/-	48/2016 dt. 01.07.2016	37,40,940/-	50,171/-	Yes	50,171/-
ST/ 41102/ 2017	April 2014 to June 2014	07th January 2015	69,88,441/-	51/2016 dt. 01.07.2016	69,86,958/-	1,483/-	Yes	1,483/-
ST/ 41103/ 2017	July 2014 to Sep 2014	07th January 2015	49,92,901/-	52/2016 dt. 01.07.2016	48,77,397/-	115,504/-	Yes	115,504/-
ST/ 41104/ 2017	Jan 2015 to Mar 2015	27th May 2015	44,17,193/-	54/2016 dt. 01.07.2016	44,17,193/-	-	Yes	-
ST/ 41105/ 2017	April 2015 to June 2015	25th February 2016	63,42,620/-	55/2016 dt. 01.07.2016	62,96,971/-	45,649/-	Yes	45,649/-
ST/ 41106/ 2017	July 2015 to Sep 2015	25th February 2016	89,28,863/-	56/2016 dt. 01.07.2016	88,38,379/-	90,484/-	Yes	90,484/-

Appeal to Commissioner (Appeals)				
Appellant Before Commr. (Appeals)	**Amount appealed (in Rs.)**	**OIA No. & dt.**	**OIA outcome**	**Refund rejected as per OIA (in Rs.)**
Department	23,30,382/-	15 to 20/2017 (STA-II) dt. 20.02.2017	Allowed Department appeal	23,30,382/-
Department	5,22,010/-		Allowed Department appeal	5,22,010/-
Department	3,504/-		Allowed Department appeal	3,504/-
Department	145,473/-		Allowed Department appeal	- (Liability admitted)
Department	6,82,803/-		Allowed Department appeal	6,82,803/-
Department	91,507/-		Allowed Department appeal	91,507/-

4. We have gone through the appellate records, the orders of the refund sanctioning authorities and the impugned orders passed by the Commissioner (Appeals).

5.1 Ms. Shrayashree T., Learned Advocate representing the appellant, has submitted that the issue in all these appeals is no more *res integra* and it has been settled by the decision of the Larger Bench of the Tribunal in the case of *Commissioner of Central Excise, Customs & Service Tax, Bengaluru v. M/s. Span Infotech (India) Pvt. Ltd. [2018 (12) G.S.T.L 200 (Tri. – LB)]* wherein it was held that in the light of Rule 5 of the CENVAT Credit Rules, 2004, Export of Service Rules and the provisions of Section 11B of the Central Excise Act, 1944, the relevant date from which one year time period for filing a refund claim of CENVAT Credit in case of export of services shall be calculated is the date of receipt of consideration i.e., the date of Foreign Inward Remittance Certificate (FIRC), as the export of service is said to be complete only on the date when the consideration is received in foreign exchange. It is further submitted that as the refund claims are filed on a quarterly basis, the end of the quarter in which the FIRC is received shall be the relevant date.

5.2 The Learned Advocate has placed reliance on the following decisions: -

(i) Miramed Ajuba Solutions Pvt. Ltd. v. Commissioner of Service Tax-III, Chennai [2023 (4) TMI 214 – CESTAT, Chennai]

(ii) Commissioner of Service Tax, Goa v. Ratio Pharma India Pvt. Ltd. [2015 (39) S.T.R. 31 (Tri. – LB)]

(iii) Infosys BPO Ltd. v. Commissioner of Central Excise & Service Tax, Bangalore, Service Tax-I [2022 (4) TMI 306 – CESTAT, Bangalore]

5.3.1 The attention of the Bench has also been drawn to the Order of the Commissioner (Appeals) in their own case in Order-in-Appeal Nos. 534-536/2016 dated 01.09.2016 wherein it was held that the date of receipt of consideration would be the relevant date under Section 11B of the Act and not the date of the export invoices. It has also been submitted that the above finding has been accepted by the Department as evident from the Appeal Nos. ST/40175-40177/2017 filed by the Department against the said Order-in-Appeal dated 01.09.2016, wherein it has been stated as under: -

> *"The Commissioner (A) observed that the relevant date of export of service is the receipt of payment in convertible foreign exchange and accepted the plea of the Assessee. The observation of the Commissioner (A) appears to be legal and proper and the same may be accepted."*

5.3.2 The Learned Advocate has argued that following the principle of consistency, the above admission of the Department as to the correct position of law with respect to the 'relevant date' under Section 11B in case of export of services is to be made equally applicable to the dispute in the instant appeals. In this regard, she has placed reliance upon the decisions of the Hon'ble Apex Court in the following cases: -

(i) *BSNL v. Union of India [2006 (2) S.T.R. 161 (S.C.)]*

(ii) *Birla Corporation Ltd. v. Commissioner of Central Excise [2005 (186) E.L.T. 266 (S.C.)]*

wherein it was held that judicial discipline requires that when a question is arising for consideration and facts are almost identical to a previous case, the Revenue cannot be allowed to take a different stand.

6. The Learned Authorized Representative Smt. Sridevi Taritla (Addl. Commissioner) representing the Revenue has reiterated the findings in the impugned orders. She has contended that the amending Notification No. 14/2016-C.E.(N.T.) dated 01.03.2016 to Notification No. 27/2012-C.E.(N.T.) dated 18.06.2012 should be read only to have prospective effect in the absence of any specific and express provisions therefor in that Notification.

7. We have heard both sides and considered all the submissions made as well as the documents and records as available in these appeals.

8. The only issue that is required to be resolved in all these appeals is: whether the 'relevant date' under Section 11B of the Central Excise Act, 1944 with respect to refund claims for unutilized CENVAT Credit in case of export of services under Rule 5 of the CENVAT Credit Rules, 2004 read with Notification No. 27/2012-C.E.(N.T.) dated 18.06.2012 is the date of the export invoice or the date of receipt of consideration in convertible foreign currency i.e., the date of FIRCs, and consequently, whether the value of export for which invoices have been raised prior to the period of one year but in respect of which consideration has been realized during the relevant quarter within the period of one year, can be added to the export turnover for computation of the eligible refund under Rule 5 of the CENVAT Credit Rules, 2004?

9.1 On study of various decisions of the judicial authorities including the co-ordinate Benches of the Tribunal, we find that Section 11B of the Central Excise Act, 1944 has been drafted to prescribe a procedure for claiming of refund of Central Excise Duty under various circumstances within one year from the relevant date. The 'relevant date' has been defined in the explanation to this Section for various purposes. As far as the export of services is concerned, no relevant date was prescribed in this Section because this was meant for refund of duty of

excise and not for export of services. Since the Notification No. 27/2012-C.E.(N.T.) dated 18.06.2012 required the claim to be made before the expiry of a period specified under Section 11B and this Section does not specify what is the relevant date in case of export of services, the Tribunal has, in a series of decisions, held that relevant date in case of export of services is the date of realization of the foreign exchange. The reason for this is the export of services is not complete unless the foreign exchange is realized as per Rule 3(2)(b) of Export of Services Rules, 2005. Therefore, unless the foreign exchange is realized, the export is not complete and therefore the relevant date must be the date of realization of foreign exchange.

9.2 Subsequently, Notification No. 14/2016-C.E.(N.T.) dated 01.03.2016 was issued as a modification to the original Notification No. 27/2012-C.E.(N.T.) dated 18.06.2012. The Notification reads as follows:-

> *"* *Notification*
> *No. 14/2016 - Central Excise (N.T)*
> *New Delhi, the 1st March, 2016*
>
> *G.S.R. (E). - In exercise of the powers conferred by rule 5 of the CENVAT Credit Rules, 2004, the Central Board of Excise and Customs hereby makes the following amendment in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 27/2012-C.E. (N.T.), dated 18th June, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 461(E), dated the 18th June, 2012, namely :-*
>
> *In the said notification, in Paragraph 3, for clause (b), the following shall be substituted, namely :-*
>
> > *"(b) The application in the Form A along with the documents specified therein and enclosures relating to the quarter for which refund is being claimed shall be filed as under :*
> >
> > *(i) in case of manufacturer, before the expiry of the period specified in section 11B of the Central Excise Act, 1944 (1 of 1944);*
> >
> > *(ii) in case of service provider, before the expiry of one year from the date of -*

> *(a) receipt of payment in convertible foreign exchange, where provision of service had been completed prior to receipt of such payment; or*
>
> *(b) issue of invoice, where payment for the service had been received in advance prior to the date of issue of the invoice.".*

In the present case, the exports were made and refund claims were filed before the issuance of the above notification. The lower adjudicating authority, reckoning the date of export invoice as the relevant date, rejected these refund claims as time barred.

10. We find that there is no ground that Section 11B mandates that the date of invoice must be considered as the relevant date. The residual category under Section 11B is the date of payment of duty. In case of export of services, as in these appeals, there is no payment of duty. As such, in various cases, the Tribunal has considered as to what constitutes an export of service under the Export of Service Rules and concluded that the date of realization of foreign exchange is the relevant date. If the export is not complete, the exporter of services is not entitled to claim refund under Rule 5 of the CENVAT Credit Rules, 2004. Therefore, harmoniously reading the Export of Service Rules and Section 11B of Central Excise Act, 1944, the Tribunal has taken a view that in case of export of services, the relevant date must be the date of realization of foreign exchange. For this reason only, an amending Notification No. 14/2016-C.E.(N.T.) dated 01.03.2016 was issued to remove the lacuna in the initial Notification No.27/2012-C.E.(N.T.) dated 18.06.2012.

11. We find that the above issue is resolved by the Larger Bench decision of the CESTAT in the case of *Commissioner of Central Excise, Customs & Service Tax, Bengaluru v. M/s. Span Infotech (India) Pvt. Ltd. [2018 (12) G.S.T.L 200 (Tri. – LB)]* wherein it was held that

'relevant date' for refund of unutilized CENVAT Credit in case of export of services to be taken as the end of the quarter in which the FIRC is received since the prescribed procedure states that the refund claims are to be filed for every quarter. The relevant portion of the order is reproduced below: -

> *"9. Rule 5 of the Cenvat Credit Rules, 2004 provides for refund of unutilized Cenvat credit, even after adjustment of the same for payment of duty of excise or service tax. The conditions, safeguards and limitations for consideration of such refund claims have been spelt out by the Government through notifications. Notification No. 5/2006 (up to 17-6-2012) and Notification No. 27/2012 (w.e.f. 18-6-2012) (as amended) has specified the conditions in this regard. These notifications specify that such refund claims are to be filed within the period specified in Section 11B. The relevant date specified under the above section leaves no room for doubt as far as export of goods is concerned. However as far as export of services is concerned, the various sub-sections specifying relevant date under Section 11B do not cover the case of export of services. Further, the exporters of services have been given the option to file claims for such refunds once in a quarter and in respect of 100% EOUs, once in a month. The issue referred to Larger Bench is whether the time limit prescribed under Section 11B in respect of filing of refund claims is to be applied from the date of receipt of payment for export of services or can be considered from the end of the quarter in which such payments have been received.*
>
> *10. After considering the provisions of the notifications issued under Rule 5 of the CCR, we note that there is a specific condition that the refund claims are required to be filed within the period specified under Section 11B. Consequently, we are of the view that completely ignoring the provisions of Section 11B may not be appropriate. This view is supported by the decision of Hon'ble Madras High Court in the case of GTN Engineering (supra) wherein Hon'ble High Court has disagreed with the view*

expressed by Hon'ble Karnataka High Court in the case of mPortal (supra) that Section 11B will have no application with respect to refund under Rule 5 of CCR.

11. The definition of relevant date in Section 11B does not specifically cover the case of export of services. Hence, it is necessary to interpret the provisions constructively so as to give its meaning such that the objective of the provisions; i.e. to grant refund of unutilized Cenvat credit, is facilitated. By reference to the Service Tax Rules, 1994 as well as the successor provisions i.e. the Export of Services Rules, 2005, we note that export of services is completed only with receipt of the consideration in foreign exchange. Consequently, the date of Foreign Inward Remittance Certificate (FIRC) is definitely relevant. The Hon'ble Andhra Pradesh High Court has held that the date of receipt of consideration may be taken as relevant date in the case of Hyundai Motors [2015 (39) S.T.R. 984 (A.P.)].

12. The related question for consideration is whether the time limit is to be restricted to the date of FIRC or can be considered from the end of the quarter. The Tribunal in the case of Sitel India Ltd. (supra), has observed that the relevant date can be taken as the end of the quarter in which FIRC is received since the refund claim is filed for the quarter.

13. Revenue has expressed the view that relevant date in the case of export of services may be adopted on the same lines as the amendment carried out in the Notification No. 27/2012, w.e.f. 1-3-2016. Essentially, after this amendment the relevant date is to be considered as the date of receipt of foreign exchange. While this proposition appears attractive, we are also persuaded to keep in view the observations of the Hon'ble Supreme Court in the case of Vatika Township (supra), in which the Constitutional Bench has laid down the guideline that any beneficial amendment to the statute may be given benefit retrospectively but any provision imposing burden or liability on the public can be viewed only prospectively. Keeping in view the observations of

the Apex Court, we conclude that in respect of export of services, the relevant date for purposes of deciding the time limit for consideration of refund claims under Rule 5 of the CCR may be taken as the end of the quarter in which the FIRC is received, in cases where the refund claims are filed on a quarterly basis."

12.1 In the grounds-of-appeal in Appeal Nos. ST/40918/2016 and ST/40919/2016, in respect of the refund claims filed for Rs.40,28,643/- on 27.03.2013 and for Rs.31,40,284/- 27.06.2013, the appellant has requested for refund of interest where the refund claims filed under Rule 5 of the CENVAT Credit Rules, 2004 were rejected by the original refund sanctioning authority, in terms of the provisions of Section 11BB of the Central Excise Act, 1944.

12.2 However, a perusal of the provisions of Notification No. 27/2012-C.E.(N.T.) dated 18.06.2012 which prescribes the procedure for the refund of CENVAT Credit under Rule 5 of the CENVAT Credit Rules, 2004 reveal that conditions (h) and (i) of the Notification state that: -

"2. Safeguards, conditions and limitations. - Refund of CENVAT Credit under rule 5 of the said rules, shall be subjected to the following safeguards, conditions and limitations, namely :-

…

(h) the amount that is claimed as refund under rule 5 of the said rules shall be debited by the claimant from his CENVAT credit account at the time of making the claim.

(i) In case the amount of refund sanctioned is less than the amount of refund claimed, then the claimant may take back the credit of the difference between the amount claimed and amount sanctioned."

12.3 The procedure prescribes debiting the CENVAT Credit account before filing the refund claim and it also provides for taking back of the credit into their CENVAT Credit account of the amount not considered for sanction or where the refund claims are partially sanctioned. So, in view of this, we find that the provisions are very clear as to debiting or crediting of the CENVAT Credit maintained by an assessee prior to applying for refund or its sanction or otherwise. It has to be noted that accumulated CENVAT Credit lying unutilized does not carry any interest. The procedure prescribed for filing refund claims for unutilized CENVAT Credit in case of export of services under Rule 5 of the CENVAT Credit Rules, 2004 clearly lays down that the assessee is free to take back the credit of not sanctioned / partially sanctioned refunds. As such, payment of interest in the circumstances of these appeals is not provided for.

13. In view of the above, we order to set aside the impugned orders viz. Order-in-Appeal Nos. Order-in-Appeal Nos. 124 & 125/2016 dated 22.02.2016 and Order-in-Appeal Nos. 15 to 20/2017 (STA-II) dated 20.02.2017 passed by the lower appellate authority and allow the appeals.

(Order pronounced in the open court on **30.05.2023**)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sdd