CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Service Tax Appeal No. 85676 of 2016

(Arising out of Order-in-Appeal No. MUM-II-STAX-000-APP-67&68-15-16 dated 22.12.2015 passed by Commissioner of Service Tax-II (Appeals), Mumbai)

M/s. BNP Paribas India Solutions Pvt. Ltd. **Appellant**
Infinity Building No.4, Unit No.601,
6th floor, Off Film City Road,
Malad (W), Mumbai 400 097.

Vs.

Commissioner of Service Tax-II, Mumbai **Respondent**
4th floor, New Central Excise Building,
Maharshi Karve Road, Churchgate,
Mumbai 400 020.

AND

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Maharshi Karve Road, Churchgate,
Mumbai 400 020.

Appearance:

Shri Prasad Paranjape, Advocate, for the Appellant
Shri Prabhakar Sharma, Superintendent, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

Date of Hearing: 12.07.2022
Date of Decision: 26.08.2022

FINAL ORDER NO. A/85809-85810/2022

PER: SANJIV SRIVASTAVA

These appeals are directed against Order-in-Appeal No. MUM-II-STAX-000-APP-67&68-15-16 dated 22.12.2015 of the Commissioner of Service Tax-II (Appeals), Mumbai. By the impugned order, the Commissioner (Appeals) has upheld the orders of the Assistant Commissioner of Service Tax, Div-IV, Mumbai-II. By the orders-in-original the adjudicating authority has modified the refund claims filed by the appellant under Rule 5 of the Cenvat Credit Rules, 2004.

2.1 Appellant is engaged in providing support services to its group companies located outside India and they also provide services to domestic clients in India. Appellant filed refund applications under Rule 5 of the Cenvat Credit Rules read with Notification No. 05/06-CE(NT) dated 14.03.2006 for the period October 2009 to March 2010 and April 2010 to September 2010.

2.2 These refund claims were rejected in part. Against the part rejection of the refund claims appellant preferred appeals to the Commissioner (Appeals). The Commissioner (Appeals) by the impugned order has upheld the part rejection of the refund claims and hence these appeals.

3.1 We have heard Shri Prasad Paranjape, Advocate for the appellant and Shri Prabhakar Sharma, Superintendent, Authorised Representative for the Revenue.

3.2 Arguing for the appellant, learned counsel submits:-

- The lower authorities should not reject the refund claims for the reason that the services as claimed by them to be exported were not exported. However, the refund claims have been modified on the following two grounds:-
  - Certain input services which were used for output services abroad were received in the premises which were not the part of the registered premises of the appellant at the material time.
  - While calculating the cenvat credit availed during the quarter, the Assistant Commissioner has deducted the amount of cenvat credit that could have been

utilized towards the payment of service tax on the services provided domestically.

- On the first issue, the issue is now settled without proceedings for denial of credit in terms of Rule 14 of the Cenvat Credit Rules. In proceedings under Rule 15 the quantum of cenvat credit claimed could not have been modified. In the present case no such proceedings have been initiated during the material period to deny any amount of cenvat credit. For this purpose reliance is placed on the following:-
  - Circular No.120/01/2010-ST, dated 19.01.2020
  - Morgan Stanley Advantage Services Ltd. [2015 (37) STR 639 (Tri.-Mum)]
  - Convergys India Pvt. Ltd. [2009 (16) STR 198 (Tri.-Del.)]
  - Cross Tab Marketing Services Pvt. Ltd. [2021 (55) GSTL 29 (Tri.-Mum)]
  - BNP Paribas India Solution Pvt. Ltd. [2022 (58) GSTL 539 (Tri.-Mum)]
  - BNP Paribas India Solutions Pvt. Ltd. [2020 (2) TMI 224-CESTAT-Mumbai.

  Accordingly modification of refund claim on this ground cannot be sustained.
- On the second issue, by referring to formula as prescribed by Notification No.05/2006, it is seen that the formula is based on the total cenvat credit availed during the period for which refund claims have been filed. Any deduction from that will be contrary to the prescription by the formula. There is no bar in discharging the service tax liability from the opening balance available with them. If the formula is correctly applied, there cannot be any reason for modification of the refund from what has been availed by the appellant.

3.3 Learned Authorised Representative reiterates the findings recorded in the impugned order. After making the submissions he sought time to make written submissions in the matter. Acceding to the request made time of two weeks was allowed to Authorized Representative for making the written submissions.

However even after lapse of nearly six weeks no written submissions have been filed.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 We find that the first ground for modification of refund claims is that certain credits which have been taken for computation of the refund in terms of Rule 5 of the Cenvat Credit Rules are ineligible credits. However, admittedly no proceedings have been initiated against the appellant for denial of such credit in terms of Rule 14 of the Cenvat Credit Rules. In absence of such proceedings, the lower authorities cannot be justified in modifying the refund claims for this reason. This is the view which has been expressed by the Tribunal in appellant's own case reported in [2022 (58) GSTL 539 (Tri.-Mum)]. The relevant para is reproduced below:-

*"**5.** I have heard Learned Counsel for the Appellant and Learned Authorised Representative for the Revenue and perused the case records including the written submission and the case laws filed by the respective sides. There is no doubt that Rule 5 ibid provides for refund of accumulated Cenvat credit subject to compliance of the procedure/guideline laid down under the notifications issued thereunder. The refund of Cenvat credit on the services in issue was mainly denied to the Appellant on the ground of 'no nexus' between the input services and the export services. The issue which falls for consideration in these Appeals is whether the department can deny refund of Cenvat credit under Rule 5 ibid alleging that there was no nexus between the output and input services. It is well settled legal position that denial of Cenvat credit can be done only by issuing notice under Rule 14 ibid. Having allowed the Cenvat credit or by not denying the same, the department cannot reject refund of Cenvat credit under Rule 5. It is well settled principle that availment of Cenvat credit, its utilisation and refund are different aspects dealt with under CCR, 2004. Rule 5 provides for any refund of Cenvat credit and nowhere in this Rule there is a provision to determine the correctness about the availment of Cenvat credit. Its only*

Rule 14 ibid which provides for recovery of irregularly availed Cenvat credit. I find force in the submission of Learned Counsel that since availment of credit has not been questioned by the department in terms of Rule 14 ibid, the refund benefit cannot be denied on the ground of non-establishment of nexus between input and the output services. This Tribunal in Appellant's own case on an identical issue, for the period April, 2012 to March, 2013 and April, 2016 to September, 2016 in the matter of M/s. BNP Paribas India Solutions Pvt. Ltd. v. Commissioner of CGST, Mumbai East reported in 2020 (2) TMI 224-CESTAT Mumbai, set aside the denial of refund by the department to the Appellant on the ground of non-establishment of nexus between the input and output services, after discussing Rule 5 ibid in detail. The relevant extract of the said order is as under :

"xxxx xxxx xxxx

6. Rule 5 of the Cenvat Credit Rules was substituted by Notification No. 18/2012-C.E. (N.T.), dated 17-3-2012 (w.e.f. 1-4-2012). Under the said substituted rule, it has been provided that the manufacturer or the service provider has to claim the refund as per the formula prescribed therein. Considering such amendment of Rule 5, the Tax Research Unit of Department of Revenue vide circular dated 16-3-2012 has clarified that the new scheme under Rule 5 does not require the kind of correlation that is needed at present between exports and input services used in such exports. Since the amended rule w.e.f. 1-4-2012 does not provide for establishment of nexus between the input and the output services and the benefit of refund is to be extended only on compliance of the formula prescribed therein, I am of the view that denial of refund benefit on the ground of non-establishment of nexus cannot be sustained, I find that this Tribunal in the case of Maersk Global Services Centres (I) Pvt. Ltd. (supra) has extended the refund benefit on the ground that establishment of nexus between the input and the output services cannot be insisted upon. The relevant paragraphs in the said decision is extracted hereinbelow :

"7. In this case, the department has not disputed the fact regarding export of output service by the appellant. The dispute

raised in the present case were in context with non-establishment of nexus between the input and output services, service description provided in the invoices were not confirming to the input service definition provided under Rule 2(l) ibid and the invoices were not submitted by the appellant, establishing the fact that the refund benefit should be granted to it. So far as establishing the nexus between input and the output service is concerned, I find that this Tribunal in the case of Accelya Kale Solutions Ltd. (supra) by relying upon the letter dated 16-3-2012 of TRU has held that under Rule 5 ibid, refund of input service credit is permissible on compliance of the formula prescribed therein and not otherwise. The relevant paragraphs in the said order are extracted hereinbelow :

3. Rule 5 of Cenvat Credit Rules, 2004, was substituted vide Notification No. 18/2012-C.E. (N.T.), dated 17-3-2012, with effect from 1-4-2012. The said substituted rule has prescribed the formula for claiming refund of service tax by the service provider. Under such amended rule in vogue, there is no requirement of satisfying the nexus between the input services and the output service provided by the service provider. Consequent upon substitution of the said Rule in the Union Budget-2012, the Tax Research Unit (TRU) of CBEC vide letter dated 16-3-2012 has clarified as under :-

> *"F.1 Simplified scheme for refunds :*
>
> *1. A simplified scheme for refunds is being introduced by substituting the entire Rule 5 of Cenvat Credit Rules, 2004. The new scheme does not require the kind of correlation that is needed at present between exports and input services used in such exports. Duties or taxes paid on any goods or services that qualify as inputs or input services will be entitled to be refunded in the ratio of the*

export turnover to total turnover.

2. *xx xx xx*
4. *On perusal of the statutory provisions read with the clarifications furnished by the TRU, it transpires that under the substituted Rule 5 of the rules, there is no requirement of showing the nexus between the input service and the output service provided by the assessee. Since the refund under the said amended rule is governed on the basis of receipt of export turnover to the total turnover, establishing the nexus between the input and output service cannot be insisted upon for consideration of the refund application."*

8. In view of above, the impugned order, insofar as it has denied the refund benefit on the ground of non-establishment of nexus between the input and output services, is set aside and the appeal is allowed in favour of the appellant."

There is no dispute that the aforesaid decision of this Tribunal in appellants' own case covered both pre-and post-amendment period and also the services which are in issue herein. So far as the decision in the matter of Maersk Global (supra) is concerned, I am afraid that the Learned Authorised Representative is not correct in his submission that the said decision pertains to pre-amendment period. Similarly, while interpreting Rule 5 this Tribunal in the matter of M/s. Cross Tab Marketing Service Pvt. Ltd. v. C.C. GST, Mumbai East; reported in 2021-VIL-466-CESTAT-MUM-ST = 2021 (55) G.S.T.L. 29 (Tri. - Mumbai) vide order dated 17-9-2021 held that the amended Rule 5 ibid does not require establishment of any nexus between input and

export services. The rule only provides that the admissible refund will be proportional to the ratio of export turnover of goods and services to the total turnover, during the period under consideration and the net Cenvat credit taken during that period. Indisputably, in the refund proceedings under Rule 5 ibid as amended, any such attempt to deny or to vary the credit availed during the period under consideration is not permissible. If the quantum of the Cenvat credit is to be varied or to be denied on the ground that certain services do not qualify as input services or on the ground of 'no nexus', then the same could have been done only by taking recourse to Rule 14 ibid."

4.3 In case of Qualcomm India Pvt Ltd [2020 (43) GSTL 402 (T-Hyd)] on the same issue the Hyderabad bench observed as follows:

"6.*Rule 3 of the Cenvat Credit Rules, 2004 is the enabling provision, which entitles a manufacturer of excisable goods and the provider of output service to take Cenvat credit of the duties and taxes paid on the inputs and the input services, with the objective of utilisation of the same for payment of Excise duty on the products and service tax on the output services. In case of exportation of output service, there is no question of utilisation of Cenvat credit available in the books of accounts. Thus, Rule 5 ibid provides for refund of accumulated Cenvat credit, subject to compliance of the procedures/guidelines laid down under the notifications issued thereunder. We find that the refund benefit was denied to the assessee-appellant on the sole ground that there was no nexus between the input services and the output service exported by the appellant. Further, in Revenue's appeal, it has been contended that certain disputed services are not conforming to the definition of input service provided under Rule 2(l) ibid. Insofar as taking of irregular Cenvat credit is concerned, Rule 14 ibid clearly mandates that in case of irregular availment of credit or its utilisation, such credit can be recovered from the assessee and for effecting the recoveries, the provisions of Section 11A of the Central Excise Act, 1944/Section 73 of the Finance Act, 1994 shall apply mutatis mutandis. It is an admitted fact on record that the department has not invoked*

the provisions of Rule 14 ibid for effecting recovery of the alleged irregular Cenvat credit availed by the assessee-appellant. Thus, under such circumstances, it can be said that taking of Cenvat credit on the disputed services by the appellant is in conformity with the Cenvat statute. Rule 5 ibid nowhere specifies that Cenvat credit can be denied on the ground of irregular availment or utilisation of the same. Thus, in absence of specific provisions contained in the statute, denial of the refund benefit provided under Rule 5 ibid, in our considered opinion, cannot stand for judicial scrutiny. Since the department has not specifically alleged regarding actual exportation of services by the assessee-appellant and use/utilization of disputed services for such activities, benefit of refund should be available in terms of the unambiguous provisions contained in Rule 5 ibid, subject only to adherence of the formula laid down thereunder."

4.4 Rule 5 of the CENVAT Credit Rules, 2004 as substituted by the Notification No 18/2012-CE (NT) dated 17.03.2012 is reproduced below:

"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:

$$Refund\ Amount = \frac{Export\ turnover\ of\ goods + Export\ turnover\ of\ services}{Total\ turnover}\ X\ (Net\ CENVAT\ credit)$$

Where,-

(A) "Refund amount" means the maximum refund that is admissible;

(B) "Net CENVAT credit" means total CENVAT credit availed on inputs and input services by the manufacturer or the output service provider reduced by the

amount reversed in terms of sub-rule (5C) of rule 3, during the relevant period;

(C) "Export turnover of goods" means the value of final products and intermediate products cleared during the relevant period and exported without payment of Central Excise duty under bond or letter of undertaking;

(D) "Export turnover of services" means the value of the export service calculated in the following manner, namely:-

Export turnover of services = payments received during the relevant period for export services + export services whose provision has been completed for which payment had been received in advance in any period prior to the relevant period –advances received for export services for which the provision of service has not been completed during the relevant period;

(E) "Total turnover" means sum total of the value of

(a) all excisable goods cleared during the relevant period including exempted goods, dutiable goods and excisable goods exported;

(b) export turnover of services determined in terms of clause (D) of sub-rule (1) above and the value of all other services, during the relevant period; and

(c) all inputs removed as such under sub-rule (5) of rule 3 against an invoice, during the period for which the claim is filed.

(2) This rule shall apply to exports made on or after the 1stApril, 2012:"

4.5 Form A appended to Notification No 27/2012 dated 18.06.2012, prescribing the conditions limitations and safeguards in respect of refund claims filed under the Rule 5 is as follows:

S. No.	***Description***	***Amount in Rs.***
1.	*Total value of the goods cleared for export and*	

	exported during the quarter.	
2.	*Export turnover of the services determined in terms of Clause D of sub-rule (1) of rule 5.*	
3.	*Total CENVAT Credit taken on inputs and input services during the quarter.*	
4.	*Amount reversed in terms of sub-rule (5C) of rule 3*	
5.	*Net CENVAT Credit = (3) - (4)*	
6.	*Total value of all goods cleared during the quarter including exempted goods, dutiable goods and goods for export.*	
7.	*Export turnover of services and value of all other services, provided during the said quarter.*	
8.	*All inputs removed as such under sub-rule (5) of rule 3, against an invoice during the quarter.*	
9.	*Total Turnover = (6) + (7) + (8)*	
10.	*Refund amount as per the formula = (1) * (5)/(9), in respect of goods exported.*	
11.	*Refund amount as per the formula = (2) * (5)/(9), in respect of services exported.*	
12.	*Balance of CENVAT Credit available on the last day of quarter.*	
13.	*Balance of CENVAT Credit available on the day of filing the refund claim.*	
14.	*Amount claimed as refund, [Amount shall be less than the minimum of (10), (12) and (13) in case of goods or the minimum of (11), (12) and (13) in case of services]*	
15.	*Amount debited from the CENVAT account [shall be equal to the Amount claimed as refund (14)]*	

4.6 On perusal of the above Form A at Sl No 3, it is quite evident that for computation of the "Net CENVAT Credit" is done on the basis of total cenvat credit taken on inputs and input services. From the total CENVAT Credit taken deductions is made of the amounts reversed under Rule 5C of the CENVAT Credit Rules, 2004. The formula is very clear on this aspect that no deduction from the total cenvat credit taken will be made on any other account while computing the Net CENVAT Credit. The s formula under Rule 5 determines the maximum eligible refund to the assessee (10, 11 of the Form A). Whatever taxes are paid

utilizing the cenvat credit availed during the period will automatically get deducted because if an assessee has utilized certain portion of the credit, then that amount would not be available as a balance on the close of the month/quarter in which the refund is sought. This Balance of CENVAT Credit is stated at Sl No 12 in the Form A. The Form A at 13 asks for the Balance Amount available in the CENVAT account of the claimant on the date of filing the refund claim and as per 14, claimant can claim the refund of the minimum of the amounts determined at Sl No 11, 12 and 13. It is also very clear that that while filing the refund claim claimant has to debit the amount claimed by him as refund under Rule 5 from his CENVATY Account. Above prescriptions clearly show that the lower authorities have been in error while deducting the amount of the credit that would have been utilized for payment of the taxes/duties in respect of the domestic clearances from the total CENVAT Credit taken while determining the Net CENVAT Credit for application of formula as per Rule 5.

4.5 Accordingly we are not in position to sustain the impugned order on both the counts.

5.1 The impugned order is set aside and the appeals allowed.

(Order pronounced in the open court on 26.08.2022)

(Sanjiv Srivastava)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

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