CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 87370 OF 2019

[Arising out of Order-in-Appeal No: PVNS/120/Appeals-II/MC/2019 dated 15th May 2019 passed by the Commissioner of CGST & Central Excise (Appeals-II), Mumbai.]

Deloitte Global Financial Advisory India Pvt Ltd
27th -32nd Floor, Indiabulls Finance Centre, Tower 3
Senapati Bhapat Marg, Elphinston Road (W)
Mumbai - 400013 … ***Appellant***

versus

Commissioner of Service Tax -III
9th Floor, Lotus Info Centre, Near Parel Station
Parel (East), Mumbai - 400012 ***…Respondent***

APPEARANCE:

Ms Dirhia Gusahaney, Advocate for the appellant

Shri Prabhakar Sharma, Superintendent (AR) for the respondent

FINAL ORDER NO: A / 85318 /2023

DATE OF HEARING: 04/10/2022
DATE OF DECISION: 03/03/2023

The dispute in this appeal of M/s Deloitte Global Financial Advisory India Pvt Ltd lies in the, by now, narrow compass of the

empowerment vested in the authority competent to sanction refund under rule 5 of CENVAT Credit Rules, 2004, and solely in discharge of that responsibility, to scrutinize eligibility for, not refund but, threshold entitlement to credit under rule 3 of CENVAT Credit Rules, 2004. The appellant had sought sanction of ₹1,54,78,789 claimed to be credit availed on procurement of taxable services and/or dutiable goods deployed in the rendering of services outside the country between April 2016 and June 2016 that, in accordance with the statutory mechanism for neutralization of imposts in the value of exported services or goods, were to be reimbursed to the exporter. The original authority disallowed refund to the extent of ₹ 15,68,353 that, carried in appeal, did not find favour with Commissioner of CGST & CX (Appeals-II), Mumbai and that order[1] of dismissal is now impugned here. The disputed services, on which credit of ₹ 15,06,787, ₹ 58,573, ₹ 2118 and ₹ 875 was taken and found to be ineligible, are ‘management consultancy service’, ‘real estate agent service’, ‘garden maintenance’ and ‘club and association service’; it does not appear to have occurred to the lower authorities that, in the era of ‘negative list’ which, by and large, did away with the identity of services for bearing the burden of tax on procurement and the erstwhile labels, as being of mere statistical relevance lacking statutory acknowledgement, the machinery provision for neutralization of tax on exports surely would not permit inveigling of such distinguishment of availed credit.

[1] [order-in-appeal no. PVNS/20/APPEAL-II/MC/2019 dated 26th April 2019]

2. The impugned order, while set in the framework of 'input service' meaning

> *'(l) ….any service,-*
>
> *(i) used by a provider of taxable service for providing an output service; or*
>
> *(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal,*
>
> *and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, such as auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal;'* *(emphasize supplied)*

in rule 2 of CENVAT Credit Rules, 2004 and distinguishment of it as prevailing before, and from, 1st April 2004, after deletion of 'activities related to business' and 'such as', held that the enumeration in the inclusive limb therein, while admittedly not exhaustive, could not be stretched beyond logical reason to cover all, and every, service even if not contributing to the manufacture of goods or rendering of services; it has also held that decisions cited by the claimant pertained to the pre-amended definition, that lack of 'garden maintenance' would have

no impact on rendering of service, that claimant had failed to evince that 'club and association service' was not for personal use of employees and that the nature of service received by secondment of employee from parent company or its nexus with exported service is not apparent from the invoice. Thus, while the order of the original authority, accepting that the claimant did render export of service in accordance with rule 6A of Service Tax Rules, 1994 and that other conditions prescribed for eligibility, *viz*. declaring that drawback or refund of service tax under Customs, Central Excise and Service Tax Drawback Rules, 1995 has not been claimed, refund claim to be within time limit prescribed in notification no. 27/2012-CE (NT) dated 18th June 2012 and debit of amount claimed as refund in the CNEVAT credit account at the time of filing of claim for refund, in rule 5 of CENVAT Credit Rules, 2004 had been fulfilled, went on to hold that the four services, including that involving payment for travel related expense and international medical insurance of seconded employee designated as management consultancy service on which tax had been discharged on 'reverse charge', were ineligible for want of nexus, the first appellate authority did not consider tax paid for obtaining 'club and association' as lacking in nexus if established that it was not for personal use. Though the proximate consequence was denial of refund to the extent of ₹ 15,68,353, the real impact is deprivation of credit to that extent for, in terms of rule 5 of CENVAT

Credit Rules, 2004, credit of ₹ 1,54,78,789 had been reversed before the claim was filed but only ₹ 1,39,10,525 has been monetized with no order for restoration of the rest in the account. Hence, in the formulation of issue for resolution *supra* on the deprivation being legal and proper, in addition to evaluation of submission by Learned Counsel and Learned Authorized Representative, reference may be had to the scheme and the refund mechanism gainfully.

3. The original authority and first appellate authority are in concurrence on unquestionable bar of eligibility of 'garden maintenance' and 'real estate agent service' and, while both are in concurrence that the nature of activity claimed to be towards 'management consultancy service, is ineligible, the first appellate authority did not rule out eligibility of 'club and association service' though lack of details to distinguish from personal use was held to suffice for confirming denial of eligibility. Countering the argument advanced by Learned Authorized Representative that the impugned order had rightly discarded the decisions cited by claimant for pertinancy to issues in dispute before the amendment of 2011 to rule 2(l) of CENVAT Credit Rules, 2011, Learned Counsel referred to the decisions of the Tribunal in *Commissioner of CGST, Mumbai v. Citicorp Services India Pvt Ltd [2019 (5) TMI 380 – CESTAT MUMBAI]*, in *24/7 Customer Pvt Ltd v. Commissioner of Central Tax, Bengaluru East [2021 (8) TMI 814 – CESTAT BANGALORE]* and of

the Hon'ble High Court of Madras in *Rane TRW Steering System Ltd v. Commissioner of Central Excise and Central Tax, Chennai Outer [2018 (2) TMI 1745 – MADRAS HIGH COURT]*. It was further contended that, with taxability of secondment of employees having been settled by the Hon'ble Supreme Court in *Commissioner of Central Excise & Service Tax, Bangalore v. Northern Operating Systems Pvt Ltd [2022 (5) TMI 967]* and that of includables in *Union of India v. Intercontinental Consultants & Technocrats (P) Ltd [2018 (3) TMI 357 – SUPREME COURT]*, the intrinsic necessity of such secondment to the output/output service is undeniable.

4. It is from rule 3 of CENVAT Credit Rules, 2004, subject to rule 4 therein, that a central excise or service tax assessee gets to appropriate credit of tax charged on procurement of goods and services which is reported to the jurisdictional authorities in the prescribed returns who are, then, enabled to recover credit that, according to them, is not within entitlement under the authority of rule 14 of CENVAT Credit Rules, 2004. One of the determinants of entitlement is utilization of procured goods or services in the manufacture of dutiable goods or rendering of taxable services and it may not always be possible for manufacturers and service providers to be able to segregate so at the threshold, or account for at the time of consumption, the ultimate deployment of, particularly, services and, in acknowledgement thereof, rule 6 of CENVAT Credit Rules, 2004

offers different avenues for reversal on actual, or mathematically approximate, segregation on their own initiative. Failure to voluntarily reverse empowers invoking of rule 14 of CENVAT Credit Rules, 2004 by jurisdictional authorities. It is, thus, patently obvious that rule 14 of CENVAT Credit Rules, 2004 is the sole route available for erasure of credit taken at the threshold, or continued thereafter, but is, or has been, rendered ineligible.

5. 'Nexus', as it is generally known, goes beyond the obvious entitlement or disentitlement and is a corollary of intangibility of services that hampers certainty of utilization in the output/output service sought to be circumscribed by deployment of 'includes' and 'business activities such as' to isolate manifest connection. Such 'nexus' should, logically, be a threshold adjudgment owing to irrelevance for manufacture or rendering of service *in toto*. And, yet, the lower authorities found no reason to hesitate in subjecting the appellant to the test only upon claim for monetizing of credit; it would appear that the rejection is premised on objection to monetizing and not to availment itself.

6. From perusal of rule 5 of CENVAT Credit Rules, 2004, it is seen that it is not the utilization of input/input service in exports that has prompted this attractive neutralization scheme but the restricted scope for utilization of credit legitimately availed towards discharge

of duty or tax liability. Though referred to as refund, it is also not refund in the true sense that the claimant is not 'person liable to pay tax or duty' having had to pay such duty or tax despite lack of authority of law; the discharge of tax liability by the provider of service, and in accordance with authority of law, is not in question at all. The intent is to neutralize the taxes included, thereby, in the value of goods manufactured or service so that taxes are not exported too. The limited remit of the sanctioning authority, subject to procedural prescription separately notified, is spelt out in the rule itself to limit denial, if any, only to such contingencies and disallowance, if at all, is restricted to the ascertainment of proportion in accordance with that borne by exports to total turnover as mathematical attribution.

7. This has been held by the Tribunal in *KKR India Advisors Pvt Ltd v. Commissioner of CGST, Mumbai Central [2018 (6) TMI 797-CESTAT MUMBAI]* thus

> *'7.…… I also observe that the adjudicating authority, without issuance of show cause notice as regards the admissibility of the input service, rejected the refund which is not permissible, but the Revenue is of the view that the credit is not admissible. The first step is to a show cause notice invoking Rule 14 of the Cenvat Credit Rules, 2004 for denial of the cenvat credit. Then only the refund can be rejected which was not done. Obviously the refund claim cannot be rejected by disputing the admissibility of the input services as held by this Tribunal in Warburg Pincus India Pvt Ltd v. CST-I, Mumbai – 2018-TIOL-1229-CESTAT-MUM.*

8. Similar stand was adopted by the Tribunal in *Commissioner of CGST, Mumbai v. Citicorp Services India Pvt Ltd* thus

> *'4.4.……Further, the correctness of availment of Cenvat Credit at the stage of filing of refund claim cannot be questioned, since the statute deals with the situation differently.'*

It is seen from the impugned order that no such notice was issued to the appellant herein. The preliminary objections to the refund limited itself to a few objections that appear to have been responded to and none of those have proposed that the said amount of credit was to be recovered. In the absence of this critical requirement to comply with principles of natural justice, the denial of credit is without authority of law and impugned order is set aside.

(Order pronounced in the open court on 03/03/2023)

(C J MATHEW)
Member (Technical)

**/as*