IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 703 of 2012

(Arising out of Order-in-Original No. LTUC/303/2012-C dated 24.09.2012 passed by the Commissioner of Central Excise and Service Tax, Large Taxpayer Unit, 1775, Jawaharlal Nehru Inner Ring Road, Anna Nagar Western Extension, Chennai – 600 101)

M/s. Sify Technologies Limited : Appellant
2nd Floor, Tidel Park, No. 4, Canal Bank Road,
Taramani, Chennai – 600 113

VERSUS

The Commissioner of Central Excise & Service Tax : Respondent
[Presently 'The Commissioner of G.S.T. and Central Excise,
Chennai South Commissionerate']
Large Taxpayer Unit, 1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar Western Extension, Chennai – 600 101

APPEARANCE:

Shri Raghavan Ramabadran, Advocate for the Appellant

Smt. K. Komathi, Additional Commissioner for the Respondent

CORAM:

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

FINAL ORDER NO. 40434 / 2023

DATE OF HEARING: 10.04.2023

DATE OF DECISION: 15.06.2023

Order : [Per Hon'ble Mr. P. Dinesha]

This appeal is filed by the assessee against the Order-in-Original No. LTUC/303/2012-C dated 24.09.2012 passed by the Commissioner of Central Excise and Service Tax, Large Taxpayer Unit, whereby the demand of Rs.21,76,056/- which was proportionate input credit attributable to the trading activity of the appellant, came to be confirmed under Rule 14 of the CENVAT Credit Rules (CCR), 2004 read with Section 73 (1) of the Finance Act, 1994. The period of dispute pertains to April 2010 to March 2011.

2.1 A Show Cause Notice dated 19.10.2011 came to be issued alleging that the appellant was engaged in providing erection, commissioning and installation to their customers in the form of establishing enterprise networking. They were also providing end-to-end network services, security services, hosting and application services to large organizations. It appeared from their books that during the course of providing the above services, the appellant was also selling bought-out goods like routers, interface cards, power adapters, cables, WAN slots, modem, network cards, anti-virus software, scanners, modular routers, power adapters, cable connectors, etc., which were used in connecting the system into network connection and data transfer to their end customers and it appeared that the above goods were imported on payment of duty, indigenously procured on payment of duty and also procured from wholesalers and dealers, on which they were not availing any input credit.

2.2 It appeared that the appellant was engaged in providing taxable services like telecommunication service, franchise service, online information, database access/retrieval, leased circuit services, franchise service, business auxiliary service, advertisement, intellectual property service, etc.

2.3 It also appeared that the appellant adopted a system to separately account for different services rendered by categorizing them as "Strategic Business Units" (SBUs). The details of the SBUs are captured at paragraph 2 of the impugned Order-in-Original. During the period from April 2010 to March 2011 (disputed period), the appellant, while rendering the services under SBUs 12, 15, 51 and 58, sold various items such as routers, interface cards, power adapter, cables, WAN slots, modem, etc.

2.4 It appeared from their balance-sheet that the above goods were mentioned as 'traded goods' and the

materials sold were billed separately. Thus, entertaining a doubt that the appellant:

(i) was availing input Service Tax credit on various services which were common services for both taxable services as well as traded goods,

(ii) for which no separate books were maintained by the appellant,

(iii) that the portion of common services and other services exclusively used for their trading activity did not qualify as an input service since the same were not used in providing output service within the meaning of Rule 2(p) of the CCR, 2004 and also,

(iv) that trading was not covered under the definition of "output service" for which reason any input service used for trading activity did not qualify as "input service" under Rule 2(l) *ibid.* for the purposes of availment of credit,

it was proposed vide the above Show Cause Notice to demand and recover an amount of Rs.2,36,03,621/-, being the input service credit wrongly availed by the appellant, apart from applicable interest and penalty under Rule 15 (1) *ibid.*

3. The appellant appears to have filed a detailed reply justifying its stand, but however, not fully satisfied, in the adjudication, the Adjudicating Authority has proceeded to confirm the demand to the extent of Rs.21,76,056/- under Rule 14 of the CCR, 2004 read with Section 76 (1) of the Finance Act, 1994, apart from interest under Rule 14 *ibid.,* read with Section 75 *ibid.* and penalty, as proposed under Rule 15 (1) *ibid.*

4. Ld. Commissioner has observed in the impugned Order-in-Original that a plain reading of Rule 2(l) of the CCR, 2004 made it clear that for a service to be eligible, it has to be used by a provider of taxable service for

providing output service; Rule 2(p) *ibid.,* which defines "output service" did not consider trading as an output service and consequently, has held that the portion of the total input service credit availed attributable to trading would not fall within the meaning of "input service" as defined under Rule 2(l) *ibid.* After holding so, he has proceeded to quantify the credit attributable to the trading activity wherein he has arrived at the demanded amount of Rs. 21,76,056/-.

5. It is against this order that the present appeal has been filed before this forum.

6.1 Shri Raghavan Ramabadran, Learned Advocate, appeared for the appellant and Smt. K. Komathi, Learned Additional Commissioner, represented the respondent.

6.2 Both the counsel admit categorically that the Revenue has not filed any appeal before this forum against the Order-in-Original impugned here, in this appeal.

7.1 The submissions of the Learned Advocate for the appellant are summarized below: -

(i) The appellant did not use any inputs exclusively for trading, which fact is also not denied by the Revenue.

(ii) Trading is an exempted service even prior to 2011. Rule 2 (e) *ibid.,* amended vide Notification No. 03/2011-C.E.(N.T.) dated 01.03.2011 has clarified that 'exempted service' would include trading.

(iii) The Hon'ble High Court of Judicature at Madras in the case of *M/s. Ruchika Global Interlinks v. CESTAT, Chennai [2017 (5) G.S.T.L. 225 (Mad.)],* has held that the amendment to Rule 2 (e) in 2011 was clarificatory in nature and that trading was an 'exempted service' even prior to the date of amendment.

(iv) The trading activity was therefore an exempted service even prior to and including the period of dispute.

(v) The very basis for the demand in the impugned order is misplaced inasmuch as Rule 3 and Rule 2 (l) of the CENVAT Credit Rules, 2004 are general provisions for availment of CENVAT Credit whereas Rule 6 specifically provides for situations where common input services are used for rendering both taxable and exempted services and hence, no demand having been raised under Rule 6, the impugned order is not sustainable.

(vi) Rule 14 *ibid.* could not have been invoked since there is no recovery provision provided under the said rule for denying the credit pertaining to an activity which is neither a service nor a manufacturing activity.

(vii) He would rely on an order of the co-ordinate Allahabad Bench of the CESTAT in the case of *M/s. LG Electronics India Pvt. Ltd. v. Commr. of Cus., C.Ex. & S.T., Noida [2017 (3) G.S.T.L. 249 (Tribunal – Allahabad)]*

(viii) Without prejudice to the above contentions on merit, he would also dispute the quantification of demand on the ground that the appellant had already reversed the credit which was in excess.

(ix) In respect of common input services, the Revenue has sought to recover the entire credit pertaining thereto vide parallel proceedings and hence, there is overlapping of the demands.

7.2 He would further submit, referring to an earlier order of this Bench in the appellant's own case [Final Order No. 42732 of 2018 dated 30.10.2018 – CESTAT, Chennai], a copy of which is placed at page 54 of the compilation of

case-law filed, to contend that though the Bench was seized of the very same issue of alleged wrong availment of CENVAT Credit and though the appellant had relied on the decision of the Hon'ble High court in *M/s. Ruchika Global Interlinks (supra)*, in the said case, the Bench has held that the said order of the Hon'ble High Court was not applicable to the appellant. He would also contend that this Bench, in its earlier order referred to *supra*, has held that the Hon'ble High Court in *M/s. Ruchika Global Interlinks (supra)* held that for recovery of proportionate credit availed on trading, the trading activity had to be considered as an exempted service prior to 01.04.2011 also, which is not applicable to their case.

8.1 *Per contra*, the Learned Additional Commissioner for the respondent relied on the findings of the Adjudicating Authority. She would also contend that the trading activity carried on by the appellant was neither a taxable service nor a manufacturing activity and therefore, the quantification has been rightly arrived at by the Adjudicating Authority.

8.2 She would also submit that all the Strategic Business Units (SBUs) of the appellant assessed by the LTU are considered as a single entity under one registration and therefore, the total turnover, trading turnover and total CENVAT Credit are to be considered in respect of all units belonging to the LTU.

9. We have heard the rival contentions and have gone through the documents and written submissions filed by the rival parties. We have also gone through the various decisions / orders relied upon during the course of arguments.

10. Upon hearing both sides, we find that the only issue to be decided by us is: whether the demand raised by the Commissioner of Central Excise and Service Tax, Large Taxpayer Unit, Chennai, is in order?

11. We find it more appropriate to delve into the observations / findings of the adjudicating authority / Commissioner in the impugned order. The relevant observations are extracted hereinbelow for the sake of convenience: -

> *"4. Also, it is seen that…..*
>
> *…. The above services are common services for both taxable services as well as trading activity and they have been utilised for rendering both taxable / exempt services as well as for trading activity. The Taxpayer claim to have maintained separate accounts in respect of input services utilised for taxable and exempted services.*
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> *…*
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> *6. In their written submissions filed on 27.06.2012, Sify, interalia stated as under:*
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> - *…*
> - *…*
> - *…*
>
> - *No input service credits used exclusively in trading activity had been availed and the said activity is carried out only in Enterprise services SBU during the course of provision of networking and other erection services on which service tax had been paid.*
>
> - *…*
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> - *…*
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> - *…*
>
> - *Further only common input service credit is to be taken for quantification, as the Department*

has accepted the fact that they are maintaining separate books of accounts for taxable and exempted services and hence the demand worked out in the notice was incorrect.

- *Since only 4 SBUs viz. 12, 15, 51 & 58, indulge in trading activity, the credit taken in these SBUs alone should be considered for proportionate reversal and not the entire credit availed in other SBUs rendering purely taxable services.*

- *Accordingly credit attributable to trading would only work out to Rs.67.42 lakhs as against the demand of Rs.2.36 crores proposed in the notice and that they had already reversed Rs.31 lakhs of this amount.*

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13.1 It is seen from the records that, though separate accounting codes have been allotted to each SBU and accounts maintained individually therein, the Taxpayer have a single 'Permanent Account Number' viz. AAACS9032R, for their entire business for Income Tax purposes. It is also seen that they have a single centralised registration for payment of Service Tax viz. AAACS9032RST001.

…

13.4 For these reasons, I hold that the Taxpayer are not maintaining separate books of accounts for taxable and exempted services and hence their claim to the contrary is not correct. Consequently, their submission that the calculation for reversal of

cenvat credit has to be done SBU wise (as in the above Table), is not acceptable. I therefore hold that, the trading turnover and total turnover for the purpose of the present calculation, have to be taken for the entire group (across all SBUs).

14. ….

…. Hence, such supply / trading in goods, is only incidental to their main service providing activities and is not part of their main course of business. In such circumstances, it is logical that only a tiny fraction of the input service credit will in fact be attributable to trading activity. I find that the generalized method used by the show cause notice for quantifying input service credit attributable to 'trading' viz. (Total turnover / Trading Turnover) x Total Cenvat availed, is unscientific and throws up a disproportionately large figure which is not in the interest of justice and equity. On the other hand, it is also seen that there were no explicit statutory provisions detailing the method to be adopted for such quantification, at that point of time.

15. ....

….

Without going into the legal issue of whether these amendments are clarificatory and hence retrospective in nature or not, I feel that the above method of valuation can still be adopted for the period in question viz.04/2010 to 03/2011, for the reason that were no explicit provisions in this regard at that time. The absence of explicit provisions cannot be used to demand astronomical amounts arrived at by unscientific methods ….

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17. ….

I find that the above decisions can be squarely applied to the present facts of the case, in as much as, it has been observed that proportionate credit pertaining to trading activity should be reversed which will be considered as not availed at all upon such reversal. Thus, I find that on this aspect, the demand proposed in the show cause notice is in order."

12.1 It is very clear from the above that the stand of the Revenue is volatile, that is to say, from the findings of the Commissioner in the impugned order, the proposed demand in the Show Cause Notice did not have any legal sanctity as the same, apparently, was not as per the law as prevalent during the period in dispute. Moreover, at paragraph 4, which is extracted hereinabove, there is a mention about the claim of the appellant to have maintained separate accounts in respect of input services utilized for taxable and exempted services. There is also on record the submissions of the appellant, duly extracted at paragraph 6 of the impugned order, and from that, the two following vital points emerge: -

- No input service credits used exclusively in trading activity had been availed and the said activity is carried out only in Enterprise services SBU during the course of provision of networking and other erection services on which service tax had been paid.
- Accordingly credit attributable to trading would only work out to Rs.67.42 lakhs as against the demand of Rs.2.36 crores proposed in the notice and that they had already reversed Rs.31 lakhs of this amount.

The effect of the above is that the appellant had voluntarily reversed Rs.31 lakhs.

12.2 There is also an admission as to the appellant maintaining separate accounts at paragraph 13.1 of the impugned order, which is also extracted above as ready reference, but however, for something happened in the earlier years, for which the adjudicating authority is clearly *functus officio*, he concludes to hold that the appellant are not maintaining separate books of accounts for taxable and exempted services at paragraph 13.4, which is also extracted in the earlier paragraphs.

13. The authority should have gone strictly by the facts and documents as available, since it is well understood that each year is independent and the facts may vary. Hence, we do not propose to accept the above conclusion of not maintaining separate accounts which, according to us, is a baseless allegation made without proper application of mind.

14.1 Further, the adjudicating authority has, at paragraph 14, held that there is no specific provision under the statute for determining the value of trading activity prior to the insertion of Explanation with effect from 01.03.2011, which observation is repeated at paragraph 15, which is also extracted elsewhere in this order, and proceeds to determine the value of trading activity in a manner unknown to law.

14.2 Further, at paragraph 17, a part of which is extracted elsewhere in this order, he has referred to the rulings of the Ahmedabad and Mumbai CESTAT Benches wherein it was held that CENVAT Credit could not be availed on trading activity and that portion of credit attributable to trading had to be reversed. This again is passed without proper application of mind to the pleadings of the appellant, which is extracted by the said authority in the impugned order itself at paragraph 6, which is

reproduced elsewhere in this order and the same is also reproduced below at the cost of repetition: -

> *"Accordingly credit attributable to trading would only work out to Rs.67.42 lakhs as against the demand of Rs.2.36 crores proposed in the notice and that they had already reversed Rs.31 lakhs of this amount."*

15. In view of the above serious, glaring and inconsistent stands of the Revenue, we are of the view that the demand proposed in the Show Cause Notice and that which was confirmed in the impugned order, are not sustainable, for which reason the same deserves to be set aside.

16. Consequently, we set aside the demand and allow the appeal with consequential benefits, if any, as per law.

(Order pronounced in the open court on **15.06.2023**)

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

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

Sdd