CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench - Court No. – I

Service Tax Appeal No. 21159 of 2014

(Arising out of **Order-in-Appeal** No.218/2013 (H-IV) S.Tax, dated 24.12.2013 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals-II), Hyderabad)

M/s Sentini Technologies Pvt Ltd., .. **APPELLANT**
Plot No. 1229, Block A,
Road No. 60, Jubilee Hills,
Hyderabad – 500 034.

VERSUS

Commissioner of Central Excise & Service Tax (Appeals-II) .. **RESPONDENT**
7th Floor, Kendriya Shulk Bhavan,
L.B. Stadium Road,
Basheerbagh, Hyderabad,
Telangana – 500 004.

Appearance
Shri G. Prahlad, Advocate for the Appellant.
Shri C. Mallikarjun Reddy, Superintendent for the Respondent.

Coram: HON'BLE Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE Mr. P. DINESHA, MEMBER (JUDICIAL)

FINAL ORDER No. A/30967/2020

Date of Hearing: 14.10.2020
Date of Decision: 04.11.2020

[Order per: P.V. SUBBA RAO]

This appeal is filed against Order-in-Appeal No. 218/2013 (H-IV) S.Tax dated 24.12.2013.

2. Facts of the case in brief are that the appellant is a 100% Export Oriented Unit (EOU) engaged in providing network management and other services to their clients. They also avail the benefit of CENVAT Credit as per Cenvat Credit Rules, 2004 (CCR, 2004) in respect of the inputs/input services used by them. During the course of business, they imported

'Netcool suite' from M/s Softential Inc, USA which they used in the services which they exported. This imported software being in the nature of a service covered under Section 66A of the Finance Act, 1994 the appellant paid the service tax amounting to Rs.1,61,47,454/- on 22.02.2010. Service tax is levied on the service provider of taxable service as per Section 66 of the Finance Act, 1994. However, in respect of some services covered under Section 66A, where the service is imported, the service recipient is liable to pay service tax as if he was the one who provided the service. If the service on which the service recipient paid service tax is their input service, they can take CENVAT credit of the same. CENVAT credit can be used to pay service tax on their output services. It can also be refunded to them if the output service is exported (Rule 5 of Cenvat Credit Rules, 2004). In this case, the appellant took CENVAT credit of the service tax paid by them under Section 66A on the Netcool Suite imported by them. Thereafter, on 14.05.2010, they filed a refund claim for the Cenvat credit for period January to March, 2010 under rule 5 of Cenvat Credit Rules, 2004 read with Notification No. 5/2006-CE-NT dated 14.03.2006. A show cause notice was issued to them on 09.08.2010 seeking to deny the refund on the grounds that (a) both the input service and output service fall under the information technology services and (b) that the amounts credited as per Foreign Inward Remittance Certificates (FIRC) are prior to the date of export invoices. It was therefore alleged that proper proof of export was not provided and there was no clarification as to whether the software is an input service for the services exported by them. After following due process, the original authority, by his order dated 27.11.2011, rejected the refund claim. On appeal, by his order dated 20.07.2011, the First Appellate Authority remanded the matter back to the original authority for denovo adjudication. The denovo order–in-original was passed on 30.09.2013 rejecting the refund on the following grounds:

a) It is to be established that the Appellant have imported Information Technology Software Service from their client abroad.

b) In the absence of any documentary evidence or End-User License Agreement between the parties which provides the transfer of right to use the information technology software service electronically, it cannot be categorically stated that the Appellant have imported "Information Technology Software Services".

c) There is a mismatch between the value of software imported and value of software exported which leads to a conclusion that there is sale of software.

The appellant's appeal against this order was rejected by the First Appellate Authority by the impugned order. Hence this appeal.

3. Learned Counsel for the appellant submits that it is a settled position of law that once a service has been treated as "input service" under Cenvat Credit Rules and credit has been taken and the department has not disputed the taking of credit, refund of such credit under Rule 5 of Cenvat Credit Rules, 2004 cannot be denied on the ground that it is not an input service. If the Revenue was of the opinion that the credit has been taken wrongly on ineligible inputs or input services then the credit should be denied after following the procedure under Rule 14 of Cenvat Credit Rules, 2004. He relies on the following case laws to buttress his argument:

1. Virtusa India (P) Ltd., [2020 (4) TMI – CESTAT, Hyd]
2. 3D PLM Software Solutions Vs CCE, Mumbai [2017 (2) TMI 152 – CESTAT, Mum]
3. Microsoft Global Services Center (India) Pvt Ltd., Vs CCE [2020 (10) TMI 57]
4. Mckinsey Global Services India Pvt Ltd., Vs CCE
   [2019 (2) TMI 595–CESTAT, Chennai]
5. CCE, Mumbai Vs Toyo Engineering India Ltd., [2006 (201) ELT 513 (SC)]
6. Rawmin Mining and Indus Ltd., Vs CCE [2009 (13) STR 269 (Tri-Ahmd)]

He vehemently argued that there is no separate definition for input or input service either under Rule 5 or in the Notification No. 5/2006-CE dated 14.03.2006. Therefore, the definition under Rule 2 of CCR applies to the entire Cenvat Credit Rules including the refund under Rule 5 read with notification. It cannot be that a service is an input service under CCR, 2004 but it ceases to be so when it comes to refunding the amount under Rule 5. Since this issue has been settled in the judgments listed above they are entitled to refund.

4. His second argument was that both the lower authorities have erred in holding that they failed to establish the remittance of foreign exchange under FIRC covered by each invoice. They had submitted refund claim for the period January 2010 to March 2010. They had raised invoices for US $ 11,62,000 during that period and the invoices and corresponding FIRC number and date had been certified by the Chartered Accountant at the stage of show cause notice itself. He further submits that their banker has also since certified the amounts received against each invoice and corresponding FIRC and the same is enclosed at page 104 of the appeal book. Copies of corresponding SOFTEX forms (forms meant to monitor remittance of foreign exchange), invoice copies and FIRCs were enclosed at pages 64-102 of the paper book. He would further submit that one of the contentions in the de-novo order is that the import value of the services on which they have claimed Cenvat credit is Rs. 15.68 crores whereas the value of the exported services is merely Rs. 5.5 crores and no business of ordinary prudence would spend more on inputs/input services than they receive for their final services. He would submit that the reason for this confusion is that the refund claims were filed for the first quarter in January to March 2010. Using the same input service viz., Netcool Suite, further exports were made during the subsequent periods. He further submits that one of the apprehensions of the Department was as to how the foreign exchange was received well before the invoice was raised. He clarifies that this was because advances were received by them from their clients even before the actual export took place. These advances were subsequently set off against actual exports. He submits RBI's letter HY.FE.IMP/2420 dated 05.02.2009/2009-10 dated December 30, 2009 to support his claim that this set off has been permitted by the RBI. He would therefore urge that there is no case for the Department to reject their refund claim under Rule 5 of Cenvat Credit Rules, 2004.

5. He would submit that when they had paid service tax under reverse charge mechanism under section 66A, they had filed refund ST-3 returns. The Department had not objected to their payment of service tax nor intimated that no service tax was payable on the imported software. After paying the service tax, they took Cenvat credit of the service tax so paid and

showed it in their ST-3 returns. The department has not objected to their taking Cenvat Credit. Till now, no show cause notice has been issued seeking to deny Cenvat credit taken by them under Rule 14. It is only the cash refund under Rule 5 of Cenvat Credit Rules, 2004 which has been denied to them without any basis.

6. Lastly, he would argue that although there is no specific provision for payment of interest on refund under Cenvat Credit Rules, 2004, the Hon'ble High Court of Gujarat had, in the case of Commissioner of Central Excise Vs Reliance Industries Limited [2010-259-ELT-356-Guj], held that refund of Cenvat Credit under Rule 5 of Cenvat Credit Rules, 2004 is also a refund under section 11B of Central Excise Act and accordingly the provisions of payment of interest under Section 11BB of the Act for delayed refunds fully apply to such refunds as well. Revenue had appealed against this judgment and Hon'ble Supreme Court had in Commissioner Vs Reliance Industries Ltd., [2011-274-ELT-A110-SC] held as follows:

"Delay condoned. Having heard Learned Counsel for the respective parties and having considered the reasoning of the High Court, we are not inclined to entertain the Special Leave Petition and the same is accordingly dismissed."

The ratio of this judgment squarely applies to them and therefore, he would submit, that they are also entitled to interest on the refund as claimed in their appeal.

7. Learned Departmental Representative reiterated the findings of the lower authority. He submits that as can be seen from the show cause notice at page 140 of the paper book there was no evidence of a linkage between the FIRCs and export invoices. In fact, the export proceeds were realised prior to the export itself. Therefore, there is a doubt if the export proceeds pertain to the export in question at all. He further submits that the "Netcool Suite" was imported by the appellant in 2009 but the service tax was paid in February, 2010 which raised suspicion in the minds of the departmental officers. As can be seen from the impugned order, the appellant was not able to establish the nexus between invoices and the forex receipts and therefore no refund is admissible to them. He draws the attention of the Bench to Notification No. 5/2006-CE (NT) dated 14.03.2006 as applicable

during the relevant period to assert the notification directs that the refund of Cenvat Credit shall be allowed in respect of

(a) input or input services used in the manufacture of final product which is cleared for export under bond or letter of undertaking; and

(b) input or input service used for providing output service which has been exported without payment of service tax

subject to safeguards, conditions, limitations laid down in the notification. He would assert that subsequently this notification under Rule 5 of CCR was modified to allow refund on proportionate turnover basis i.e., a proportion of export turnover to total turnover multiplied by the total CENVAT credit taken could be refunded without examining whether the refund was in respect of the input or input service for the exported goods/services. However, during the relevant period, refund was allowed only in respect of the inputs or input services which were used in providing the export service. Therefore, credit of any service used by them cannot be refunded unless it was relatable to the exported service. It was therefore incumbent upon the officers to check the nexus between input service and output service and the appellant failed to establish the same. Therefore, the refund was correctly rejected.

8. On a specific query from the Bench as to whether any notice was issued under Rule 14 of Cenvat Credit Rules, 2004 denying the credit of the input service claimed by the appellant, he replied in negative. He, however, argued that if the Department had failed to take action to deny the appellant credit under Rule 14 within time, it missed the bus. The appellant can continue to enjoy and use the Cenvat credit. Refund of Cenvat Credit under Rule 5 is a different leg of transaction and the notification again stipulates that refund can be allowed only in respect of input service. If it is not an input service no refund can be sanctioned. If the Department had been negligent in not denying Cenvat Credit on the ground that the service in question is not an "input service" it is not estopped from examining the same at the time of sanctioning the refund as it is an essential requirement of the notification which enabled sanction of such refund. He, therefore, urged that the appeal is without merits and the same may be rejected.

9. We have carefully considered the arguments on both sides and perused the records. In the current round of litigation what is before us is the impugned order of the First Appellate Authority upholding the de-novo adjudication order of the original authority. From the documents presented before us including the agreement which the appellant had with M/s Softential Inc USA, the invoices , the FIRCs, the statement by the banker and the set off letter issued by the RBI we were convinced that what the appellant had imported is a software which they used to produce their export services. In fact, the service tax on the imported input service was paid by the appellant themselves under reverse charge mechanism under section 66A of the Finance Act, 1994. They have reflected this payment of service tax in their ST-3 returns. There is nothing on record or in the submissions made by both parties before us to show that the Department has objected to they paying service tax. After paying the service tax the appellant has taken Cenvat Credit of the service tax paid treating the same as input service and showed it in their ST-3 returns. The Department has not objected to the appellant's taking Cenvat Credit. No proceedings were initiated to deny and recover the Cenvat Credit so taken under Rule 14 of Cenvat Credit Rules, 2004 which is the provision for recovery of Cenvat Credit wrongly taken. Therefore, it is evident that the Department has accepted that the Cenvat Credit has been taken on the "input service" by the appellant. It is now a well established principle that once Cenvat Credit is allowed on any goods or services as inputs or input service they do not cease to be so while processing a refund claim under Rule 5 of Cenvat Credit Rules, 2004. There is no separate definition of input or input service either in Rule 5 of Cenvat Credit Rules, 2004 or in Notification No. 5/2006-CE. Therefore, the definition under Rule 2 of Cenvat Credit Rules, 2004 applies both to taking CENVAT credit and claiming its refund under Rule 5.

10. The next question is whether the input service so used is an input service used for export service or it is an input service used for some other service, such as domestically sold services. During the relevant period, only refund of Cenvat Credit on input service used in providing output service which was exported was allowed. Therefore, there can be cases where the input service was for output service A which is domestically sold but not an

input service for output service B which is exported. However, in this particular case the unit is a 100% export oriented unit and there is no domestic sale. Therefore, there is no scope for such an apprehension.

11. We have considered Revenue's argument that the value of the input service was much higher than the output service exported and no prudent business would spend more on input services than the sale value of output service. This issue has been clarified by the Learned Counsel that they filed a refund claim for only for the period January 2010 to March 2010 whereas the input service was used for exports made thereafter as well.

12. The third argument of the Department was that the so called export proceeds were realised even before the invoices were issued. The FIRCs do not show the invoice numbers and therefore there is doubt whether any foreign exchange has been realised at all against the so called exported services. Learned Counsel clarified that they had got a certificate from the Chartered Accountant certifying that the FIRCs pertain to receipts of foreign exchange for the exports concerned. He also produced a statement certified by their banker giving FIRC numbers and the export invoices to which the receipts pertain. He also submitted a copy of the set off certificate issued by the RBI permitting setoff of remittances for imports against remittances for exports.

13. FIRCs give details of remittances as they are received and during the course of business, these receipts may not be invoice wise. For instance, the amount against any one invoice may be received in parts. Similarly, an amount may be received in advance even before the exports were made which may be adjusted against the final invoice. In fact, even importers in India are allowed to remit to overseas supplier in advance of actual imports. There can also be part receipts against the same invoice. The FIRCs, in the standard format, do not usually indicate the invoice numbers. If the importer or exporter has a running account the exports may take place continuously and the overseas buyer may keep remitting from time to time. It can only be clarified by the Chartered Accountants or the banks or auditors as to which payment the remittances in the FIRCs pertain to. In this case, such a statement was provided by the bank. A set off letter has

been received in respect of appellant from the RBI. Therefore, we find that this apprehension of the Department that the export proceeds have not been realised is not well founded.

14. We, therefore, find that the appellant is entitled to the refund claimed by them under Rule 5 of CCR, 2004 as claimed. These Rules do not provide for grant of interest. However, Hon'ble High Court of Gujarat, has, in the case of Reliance Industries Limited.,(supra) held that refund of Cenvat Credit under Rule 5 of Cenvat Credit Rules, 2004 is also a refund under section 11B of the CEA, 1944 and therefore, the provisions of interest under Section 11BB apply and this decision was upheld by the Hon'ble Supreme Court by dismissing the SLP filed by the Revenue. Therefore, the appellant is also entitled to interest on refund under Rule 5 of Cenvat Credit Rules, 2004.

15. In view of the above, we set aside the impugned order and hold the appellant is entitled to refund under Rule 5 of Cenvat Credit Rules, 2004 along with interest under Section 11BB as applicable. The appeal is allowed.

(Order pronounced on 04/11/2020 in open court)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(P. DINESHA)
MEMBER (JUDICIAL)

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