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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 01.08.2022*

\+ **SERTA 9/2022**

COMMISSIONER OF CGST DELHI EAST ..... Appellant
Through: Mr Akshay Amritanshu with Mr Pratik Samajpati and Mr Ashutosh Jain, Advs.

versus

ANAND AND ANAND ..... Respondent
Through: Mr J K Mittal with Ms Vandana Mittal and Ms Aashna Suri, Advs.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MS JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

1. This appeal is directed against the order dated 02.09.2021 passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi [hereafter referred to as the 'Tribunal'] in Final Orders No. 51891-51895/2021, concerning Service Tax Appeals (STA) bearing nos. 51910, 51911, 51912 & 51913/2016 and STA 52992/2016.

1.1. The first four appeals arose out of the Order-in-Appeal nos.126 to 129/ST/DLH/2015 dated 12.02.2016, while STA 52992/2016 arose out of Order-in-Appeal no.60/ST/DLH/2016-17 dated 24.08.2016.

2. The first set of appeals, which comprised four appeals, concern the following periods i.e., July to September 2012; October to December 2012; January to March 2013 and April to June 2013.

2.1. The fifth appeal i.e., STA 52992/2016 is concerned with the seven subsequent quarters, spanning between July 2013 to March 2015.

2.2. The respondent i.e., the assessee, being aggrieved by the Orders-in-Appeal, had preferred appeals before the Tribunal, which were allowed, as noticed above, *via* the impugned order dated 02.09.2021.

3. This time around, the appellant/revenue was aggrieved and therefo preferred the instant appeal under Section 35G of the Central Excise Act, 1944, read with the applicable provisions of the Finance Act, 1994 [in short, '1994 Act'] and Section 174 of the Central Goods and Services Tax Act, 2017 [hereafter referred to as the "CGST Act 2017"].

3.1. For the sake of convenience, the appellant will hereafter be referred to as 'revenue', while the respondent will be referred to as 'assessee'.

4. The revenue has, thus, *via* the instant appeal, proposed for our consideration, the following substantial questions of law:

> *"a. Whether the Ld. CESTAT was correct in holding that the Respondent was eligible for refund of CENVAT Credit on services on which no tax was payable by the Respondent?*
> *b. Whether the Ld. CESTAT was correct in holding that the service provided by the Respondent fell under the definition of "Output service" as defined under Section 2(p) of the CENVAT Credit Rules, 2004?*
> *c. Whether the Ld. CESTAT was correct in allowing the refund claims of the Respondent?"*

5. We have heard the learned counsel for the parties and since the issue raised in the appeal may arise *qua* other advocates/legal practitioners also, we are inclined to admit the appeal and decide the issue once and for all.

5.1. Accordingly, the appeal is admitted and the questions of law as proposed are taken up for consideration, with the consent of the learned counsel for the parties.

6. The short issue which arises for consideration is whether the assessee is entitled to a refund of unutilized CENVAT credit. The assessee seeks a refund of unutilized CENVAT credit under the CENVAT Credit Rules, 2004 [hereafter referred to as the '2004 Rules'].

7. Before we proceed further, the following broad facts are required to be noted.

7.1. The assessee is a firm of legal practitioners, which renders legal services

to its clients both in India, as well as outside India.

7.2. Pertinently, the assessee specializes in rendering services in the field of intellectual property rights and as per a finding of fact returned by the Tribunal, 75-80% of its receipts are from export of legal services.

7.3. The assessee has, thus, for the periods mentioned hereinabove, sought a refund of unutilized CENVAT credit on account of the export of legal services under Rule 5 of the 2004 Rules.

8. The record shows that insofar as the period covered by the first set of appeals [which, as noticed above, comprised four appeals] is concerned, the revenue had, in the first instance, sanctioned a refund of unutilized credit.

8.1. This decision, however, was subjected to review by the Principal Commissioner, Service Tax in the exercise of powers under Section 84(1) of the 1994 Act.

8.2. Consequently, a decision was taken, by the revenue, to prefer appeals against the Orders-in-Original, whereby a refund had been sanctioned in favour of the assessee.

8.3. The Commissioner of Appeals reversed the Orders-in-Original passed in favour of the assessee, *qua* the aforementioned periods.

9. Insofar as the fifth appeal i.e., STA 52992/2016, is concerned, the assessee's applications (which were seven in number), as alluded to hereinabove, and spanned seven quarters falling between July 2013 to March 2015, were rejected and in an appeal preferred by the assessee, the Commissioner of Appeals sustained the order of rejection.

10. It is in this background that the assessee, as adverted to above, was constrained to move the Tribunal.

10.1. The Tribunal passed a common order with respect to five appeals lodged before it, as the issues which arose for consideration had a common thread running through them.

11. It is in this backdrop that the arguments have been advanced on behalf of

the revenue by Mr Akshay Amritanshu and likewise, on behalf of the assessee, by Mr J. K. Mittal.

12. Mr Amritanshu has submitted that the Tribunal has committed a serious error in allowing the appeal preferred by the assessee by misinterpreting the provisions of the 2004 Rules.

12.1. In support of his submissions, Mr Amritanshu has placed reliance upon the provisions of Rule 2(p) and Rule 5 of the 2004 Rules.

12.2. It is Mr Amritanshu's contention that since the assessee is in the business of exporting legal services and hence did not pay service tax, it is not eligible for grant of CENVAT credit.

13. We may note that the record shows (although this aspect was not stressed by Mr Amritanshu), an analogy was sought to be drawn with exempted services.

13.1. The argument, at least before the authorities below, was that since CENVAT credit was not available for the services which were exempted from service tax, the same principle should apply to services that were exported.

14. On the other hand, Mr Mittal relied upon the very Rules to which reference was made by Mr Amritanshu, i.e., Rule 2(p) and Rule 5 of the 2004 Rules, to emphasize the point that what was excluded from the definition of "output services", was that part where the service provider was located within the taxable territory and the service tax was paid by the recipient (on reverse charge basis), who, like the service provider, is also located within the taxable territory.

14.1. In support of this plea, reference was also made to Section 68(2) of 1994 Act, Rule 2(1)(d)(i)(D)(II) of the Service Tax Rules, 1994 [in short, '1994 Rules'] and Notification No. 30/2012-Service Tax, dated 20.06.2012 issued by the Government of India, Ministry of Finance, Department of Revenue in the exercise of powers under Section 68(2) of the 1994 Act, along with the table appended thereto, in particular, the entry made against serial no.5.

15. Having heard the counsel for the parties and perused the record, we are of

the view that the Tribunal has reached the correct conclusion.

16. It is to be borne in mind that there is no dispute that the assessee is exporting legal consultancy services outside the taxable territory. It is also not disputed (something that we have noticed right at the beginning), that 75-80% of the assessee's total receipts emanate from the export of such services.

16.1. The core issue, therefore, which arises for consideration, is: whether the Tribunal was correct in concluding that the assessee should be allowed refund of unutilized CENVAT credit?

17. Before we examine the relevant provisions of 2004 Rules i.e., Rule 2(p) and Rule 5, it would be useful to examine certain provisions of the 1994 Act, the 1994 Rules and the notification dated 20.06.2012.

17.1. For the sake of convenience, Section 68 of the 1994 Act is extracted hereafter:

> "***Section 68.*** *Payment of service tax*
>
> *(1) Every person providing taxable service to any person shall pay service tax at the rate specified in section 66B in such manner and within such period as may be prescribed.*
>
> *(2) Notwithstanding anything contained in sub-section (1), in respect of such taxable services as may be notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66B and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service."*

17.2. As would be evident from the extract above, Sub-section (1) of Section 68 of the 1994 Act brings within its sway all taxable services for the purpose of payment of tax.

17.3. Sub-Section (2) of Section 68 of the 1994 Act, however, imposes the obligation of payment of service tax upon such persons, in the manner and at the rate prescribed under Section 66B and all other provisions of Chapter-V, as

if such person is liable for paying service tax in relation to such service.

17.4. To put it plainly, Sub-section (2) of Section 68 of the 1994 Act empowers the Central Government to shift the burden of tax on a person other than the service provider. This burden can only be shifted by the Central Government, by issuing a notification in the official gazette.

17.5. Such a notification was issued on 20.06.2012, whereby, *inter alia*, the burden of the tax was shifted with regard to certain services, upon the recipient. Insofar as the legal practitioners are concerned, the notification dated 20.06.2012 provided the following:

> *"**I. The taxable services**—*
> ***(A)***
> *(iv) provided or agreed to be provided by,-*
> *xxx xxx xxx*
> *(B)* ***an individual advocate or a firm of advocates by way of support services,*** *or …"*
> *xxx xxx xxx*
>
> ***(B)*** *provided or agreed to be provided by any person which is located in a non-taxable territory and received by any person located in the taxable territory;*
> ***(II)*** *The extent of service tax payable thereon by the person who provides the service and the person who receives the taxable services specified in (I) shall be as specified in the following Table, namely:-*

Table

Sl. No.	*Description of a service*	*Percentage of service tax payable by the person providing service*	*Percentage of service tax payable by the person receiving the service.*
5	***in respect of services provided or agreed to be provided by individual advocate or a firm of advocates by way of legal services.***	***Nil***	*100%"*

[Emphasis is ours]

18. Alongside the issuance of the said notification dated 20.06.2012, an amendment was also made in the 1994 Rules, in particular to Rule 2(1)(d)(i)(D)(II). For the sake of convenience, the said provision is extracted hereafter:

> *"**Rule 2**. Definitions*
> *(1) In these rules, unless the context otherwise requires:*
> *xxx xxx xxx*
> *(d) person liable for paying service taxes*
> *(i) in respect of taxes notified under sub-section (2) of section 68 of the Act means, -*
> *xxx xxx xxx*
> *(D) In relation to services provided or agreed to be provided by.-*
> *xxx xxx xxx*
> *[(II) a firm of Advocates or an individual advocate other than a senior advocate by way of legal services]*[1]

18.1. A conjoint reading of provisions of Section 68(2) of the 1994 Act, notification dated 20.06.2012 and Rule 2(1)(d)(i)(D)(II) of the 1994 Rules would show that insofar as an individual advocate or a firm of advocates is concerned, who provide legal services to any business entity located in the taxable territory, the burden of tax is to be borne by the recipient of such service.

18.2. The assessee, admittedly, falls in this zone, insofar as legal services which are provided by it to the recipients located in the taxable territory are concerned.

19. Rule 2(p) of the 2004 Rules, on which the revenue seeks to place reliance, reads as follows:

> *"**Rule 2(p)** 'output service' means any service provided by a provider of service located in the taxable territory but shall **not** include a service. -*
> *(1) specified in section 66D of the Finance Act; or*
> *(2) **where the whole of service tax is liable to be paid by the recipient of service**."*
>
> [Emphasis is ours]

[1] Prior to Service Tax (Fourth Amendment) Rules, 2016 *vide* notification No. 33/2016-ST, dated 06.06.2016.

19.1. Therefore, a plain reading of Rule 2(p) of the 2004 Rules would show that the definition of "output service" has the following attributes: First, the service should be provided by a provider of service who is located in the taxable territory. Second, the service provided by the service provider should not fall in the negative list of services, as adverted to in Section 66D of the 1994 Act. Third, in cases where the whole i.e., the entire service tax is liable to be paid by the recipient of service, such service would not fall within the definition of "output service".

20. Insofar as the assessee is concerned, there is no dispute that it is located within the taxable territory i.e., in India. It is also not disputed that the assessee does not fall within the negative list of the services provided under Section 66D of the 1994 Act.

20.1. Insofar as the last attribute is concerned, over which the entire dispute centers, it cannot but be concluded that the said exclusionary provision i.e., Sub-rule (2) of Rule 2(p) of the 2004 rules, is not applicable to the assessee, as in respect of legal service exported by it, service tax is not paid by the recipient of service. The recipient of service is located outside the taxable territory and therefore, this provision can only apply to legal services offered by the assessee to the recipient of service located within the taxable territory.

21. This brings us to Rule 5 of the 2004 Rules. For the sake of convenience, the said Rule is extracted hereafter:

> *"**Rule 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…"*
>
> [Emphasis is ours.]

21.1. A plain reading of Rule 5 of the 2004 Rules would show that as long the service provider provides an output service which is exported without payment of service tax, such service provider will be eligible for refund of CENVAT credit.

21.2. It is because the expression "output service" finds a mention in Sub-rule(1) of Rule 5, that the revenue chose to refer to Rule 2(p) of the 2004 Rules and, in our view, consequently, mixed up the domestic service provided by the service provider i.e., the assessee, with the export service.

21.3. Mr Mittal is right, in his contention, that if Rule 2(p) of the 2004 Rules is read in the manner in which the revenue seeks to read it, it would lead to Rule 5 of the 2004 Rules being rendered redundant.

22. Before we conclude, we may also indicate that the analogy drawn by the revenue with exempted service is flawed, is evident upon a plain reading of Rule 6(7) of the 2004 Rules. The said rule reads as follows:

> *"**Rule 6.** Obligation of manufacturer of or producer of final products and a provider of output services.*
>
> *[(1) The CENVAT credit shall not be allowed on such quantity of input used in or in relation to the manufacture of exempted goods or for provision of exempted services, or in input service used in or in manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services, except in circumstances mentioned in sub-rule (2).*
>
> ***Provided** that the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.]*[2]
>
> *xxx xxx xxx (7) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the taxable services are provided, without payment of service tax, to a unit in a Special Economic Zone or to a developer of a Special Economic Zone for their*

[2] Prior to CENVAT Credit (Third Amendment) Rules, 2016 (w.e.f. 01.04.2016.)

*authorised operations or when a service is exported."*22.1. Therefore, ru 6(7) of the 2004 Rules clearly excludes from its ambit those exempted services which are exported. This argument of the revenue also cannot be sustained.

22.2. This aspect is fortified when we read provisions of Rule 2(e) of the 2004 Rules, which clearly defines "exempted service". For the sake of convenience, the same is extracted hereafter:

> *"**Rule 2.** In these rules, unless the context otherwise requires-*
> *xxx xxx xxx*
> *(e) "exempted service" means a*
> *(1) taxable service which is exempt from the whole of the service tax leviable thereon; or*
> *(2) service, on which no service tax is leviable under section 66B of the Finance Act; or*
> *(3) taxable service whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken;*
> *[But shall not include a service which is exported in terms of Rule 6A of the Service Tax Rules, 1994.][3]"*

22.3. Clearly, the definition of exempted service excludes services which are exported in terms of Rule 6A[4] of the 1994 Rules.

23. Therefore, for the foregoing reasons and what is indicated hereinabove, we are in agreement with the conclusion reached by the Tribunal.

24. The questions of law framed hereinabove are answered in favour of the assessee and against the revenue.

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[3] Prior to CENVAT Credit (Third Amendment) Rules, 2016 (w.e.f. 01.04.2016.)

[4] **6A.** Export of services.— (1) The provisions of any service provided or agreed to be provided shall be treated as export of service when,—

(a) the provider of service is located in the taxable territory,
(b) the recipient of service is located outside India,
(c) the service is not a service specified in the section 66D of the Act,
(d) the place of provision of the service is outside India,
(e) the payment for such service has been received by the provider of service in coverable foreign exchange, and
(f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause 44 of section 65B of the Act.

(2) Where any service is exported, the Central Government may, by notification, grant rebate of service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified by the Central Government, by notification.

25. Consequently, the appeal filed by the revenue is dismissed.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

AUGUST 1, 2022/pmc

Click here to check corrigendum, if any