[2016] 68 taxmann.com 302 (Chennai - CESTAT)

CESTAT, CHENNAI BENCH

Cognizant Technology Solutions

v.

Commissioner of Central Excise & Service Tax (LTU), Chennai

R. PERIASAMI, TECHNICAL MEMBER
AND P.K. CHOUDHARY, JUDICIAL MEMBER
FINAL ORDER NOS. 40247-40265/2016
APPEAL NOS. ST/278 OF 2010 & OTHERS
FEBRUARY 15, 2016

CASE REVIEW

KPIT Cummins Infosystems Ltd. v. *CCE* [Order No. A/533/13/CSTB/C-I, dated 1-4-2013] (para 7), *mPortal India Wireless Solutions (P.) Ltd.* v. *CST* [2011] 16 taxmann.com 353/[2012] 34 STT 322 (Kar.) (para 19), *Apotex Research (P.) Ltd*. v. *Commissioner of Customs* [Inteim Order Nos. 79 to 152/2014, dated 18-9-2014] (para 19), *CCE* v. *Barclays Technology Centre (I)(P.)Ltd* [Order Nos. A/1324 & 1325/14/SMB/C-IV, dated 12-9-2014] (para 20), *Tata Consultancy Services Ltd*. v. *CST* [2012] 25 taxmann.com 386 (Mum.-CESTAT) (para 20), *CCE* v. *Computer Land UK Ltd.* [Appeal No. ST/86492/14-Mum., dated 13-4-2015] (para 23) and *CIT* v. *Tata Elxsi Ltd.* [2012] 349 ITR 98/204 Taxman 321/17 taxmann.com 100 (Kar.) (para 24) *relied on.*

CASES REFERRED TO

mPortal India Wireless Solutions (P.) Ltd. v. *CST* [2011] 16 taxmann.com 353/[2012] 34 STT 322 (Kar.) (para 7), *KPIT Cummins Infosystems Ltd*. v. *CCE* [Order No. A/533/13/CSTB/C-I, dated 1-4-2013] (para 7), *Apotex Research (P.) Ltd*. v. *Commissioner of Customs* [Inteim Order Nos. 79 to 152/2014, dated 18-9-2014] (para 7), *Repro India Ltd.*v. *Union of India* 2008 taxmann.com 943 (Bom.) (para 7), *CIT* v. *Tata Elxsi Ltd.* [2012] 349 ITR 98/204 Taxman 321/17 taxmann.com 100 (Kar.) (para 12), *CCE* v. *Computer Land UK Ltd.* [Appeal No. ST/86492/14-Mum., dated 13-4-2015] (para 13), *CIT* v. *Punjab Stainless Steel Industries* [2014] 364 ITR 144/46 taxmann.com 68/[2015] 229 Taxman 423 (SC) (para 14), *Anita Exports* v. *Union of India* 2015 (320) ELT 743 (Guj.) (para 14), *CCE* v. *Tiger Steel Engineering (India) (P.)Ltd.* [2010] 29 STT 25 (Mum.) (para 14), *BAPL Industries Ltd*. v. *Union of India* 2007 (211) ELT 23 (Mad.) (para 14), *Jumbo Bags Ltd*. v. *Commissioner of Customs* 2011 (268) ELT 81 (Tri. - Chennai) (para 14), *CIT* v. *Gem Plus Jewellery India Ltd.* [2011] 330 ITR 175/[2010] 194 Taxman 192 (Bom.) (para 17), *ITO* v. *Sak Soft Ltd*. [2009] 30 SOT 55 (Chennai)(SB) (para 17), *CIT* v. *Sudarshan Chemical Industries Ltd.* [2000] 245 ITR 769/112 Taxman 511 (Bom.) (para 17), *CIT* v. *Chloride India Ltd.* [2002] 256 ITR

625/[2003] 130 Taxman 352 (Cal.) (para 17), *CCE* v. *Barclays Technology Centre (I)(P.)Ltd* [Order Nos. A/1324 & 1325/14/SMB/C-IV, dated 12-9-2014] (para 20) and *Tata Consultancy Services Ltd*. v. *CST* [2012] 25 taxmann.com 386 (Mum.-CESTAT) (para 20).

Muthu Venkataraman, Adv., **Rajaram Ramanan**, Consultant, **Gopakumar R.**, Consultant, **Ramani N.V.S.**, Consultant, **Shankararaman**, Adv. and **Ms. Minchu Punoosse**, Adv. *for the Appellant.* **Ms. Indira Sisupal**, AC (AR) *for the Respondent.*

ORDER

R. Periasami, Technical Member - All the 19 appeals are taken up together for disposal, as the issues involved in these appeals are identical in nature, relating to refund of unutilized CENVAT credit on export of services under Rule 5 of Cenvat Credit Rules, 2004 (CCR). Out of 19 appeals, 15 appeals filed by the appellants are arising out of Order-in-Appeals No.15/2010 dated 15.02.2010, No. 06/2011 dated 04.02.2011, No. 68-71/2013 dated 02.12.2013, No. 05-09/2015 dated 18.02.2015 and No. 01-04/2015 dated 18.02.2015 and the remaining four appeals filed by the Revenue are arising out of one Order-in-Appeal No. 39-42/2011 dated 30.08.2011.

2. The brief facts of the case are that the Appellants are rendering software services and the services are exported and also to the domestic clients. The Appellant obtained centralized registration for service tax with the Commissioner of LTU, Chennai and also registered with STPI/SEZ as well. The Appellant claimed refund of CENVAT credit on the credit relating to input services used in the output services exported outside India under Rule 5 of CCR read with Notification No. 05/2006 dated 14 March 2006 as amended.

3. Appeal Nos. ST 278/2010 and ST 295/2011 are filed by the Appellant against the Order in Appeal No. 15/2010 and 06/2011. The original adjudicating authorities as well as the Commissioner (Appeals) in these cases rejected/restricted the refund claims of the Appellant on the grounds that:

* Services related to development of information technology software and maintenance of such software were specifically included as taxable service only from 16.05.2008.

* Appellant was engaged in provision of software maintenance service which was not covered under the ambit of Management, maintenance, repair service ('MMRS') up to 16.05.2008) and hence the same was not taxable up to 16.05.2008.

Aggrieved by these orders, the appellants preferred appeals before this Tribunal. The details of the above appeals are listed as under:—

S.No In the C.L	*Period*	*Appeal No.*	*OIA No.*	*OIO No.*	*Refund restricted/rejected*
31	April 2007 to September 07	278/2010	15/2010 dt 15.02.2010	42/2008 dt 30.06.2008	6,12,02,380
32	October 2007 to	295/201	06/2011 dt	251/2009 dt.	11,38,96,892

	March 2008	1		04.02.2011	02.06.2009		

The adjudicating authority rejected the refund on the ground that the appellants rendered software maintenance service which was not taxable prior to 16.05.08 and the said service is not covered under 'Management Maintenance and or Repair service' The adjudicating authority also held that services relating to development of information technology software and maintenance of special software are specifically included as taxable services only from 16.05.2008. The appellants are not eligible for refund of CENVAT credit of input services availed on the software maintenance service. Aggrieved by these orders, the appellants preferred appeals and the Commissioner (Appeals) upheld the orders of the adjudicating authority and rejected the appeals.

4. Appeal Nos. ST/40422/2014 to ST/40425/2014 and ST/41019/2015 to ST/41023/2015 were filed against OIA's against the restriction in refunds and the adjudicating authority restricted the refund amount by adopting the formula prescribed under **Notification No. 05/2006 CE (NT) dated 14-03-2006**. The details of the appeals are as under:—

S.No	*Period*	*Appeal No.*	*OIA No.*	*OIO No.*	*Refund claimed*	*Refund Granted*	*Refund rejected (under dispute)*
33	Feb 2010	40422/2014	68-71/13 02/12/13	176/11 30/06/11	2,82,13,514	86,33,607	1,95,79,907
34	Mar-10	40423/2014		343/11 dt 30/09/11	2,79,12,079	86,32,133	1,92,79,946
35	July-10	40424/2014	68-71/13 02/12/13	344/11 dt 30/09/11	3,21,22,060	79,18,828	2,42,02,232
36	Aug-10	40425/2014		389/11 dt 30/11/11	2,45,48,423	97,17,342	1,48,31,081
41	Nov-10	41019/2015	05-09/15 18.02.15	281/12 dt 31.08.12	3,16,82,883	1,05,04,955	2,11,77,928
42	Dec-10	41020/2015		282/12 dt 31.08.12	7,89,88,416	80,48,903	7,09,39,513
43	Jan-11	41021/2015		286/12 dt 31.08.12	3,58,78,087	1,18,02,667	2,40,75,420
44	Feb-11	41022/2015		398/12 dt 31.12.12	3,30,37,886	51,58,752	2,78,79,134
45	March 2011	41023/2015		399/12 dt 31.12.12	5,63,35,510	63,05,026	5,00,30,484

The adjudicating authority restricted the refund claim on the following grounds:

> The export turnover portion in the formula prescribed under Rule 5 of CCR, does not include the value of exports made from SEZ.
>
> that is, in the numerator the total export turnover the adjudicating authority taken only STPI turnover and excluded the SEZ exports and while taking the total turnover

(denominator) the adjudicating authority has computed including SEZ exports and accordingly rejected the refund.

The adjudicating authority also excluded the quantum of amount from the refund claim which are otherwise ineligible for which separate show-cause notices were issued under CCRs. Aggrieved by this, the appellant preferred appeal against that portion of the order, where their refund claim was rejected/restricted and the Commissioner (Appeals) in OIA No, 68-71/2013 dated 02/12/2013 and OIA No. 5-9/2015 dated 18.02.2015, upheld the impugned order and rejected the appeals.

5. In eight appeals No. ST/551/2011 to ST/554/2011 and ST/41015/2015 to ST/41018/2015, the issues involved in all these appeals are identical but relates to the subsequent period. The appellants claimed refund under Rule 5 of CCR. The adjudicating authority has restricted the refund on the issue of taxability on the software maintenance and service and also on the computation of total export turnover and total turnover as per the formula. The adjudicating authority issued show-cause notices asking to show-cause why the refund claim could not be restricted or rejected on the ground that by duly working out the formula for computation of the refund provided under Notification No. 5/2006 and had accordingly rejected the refund on the ground raised in show-cause notice. Aggrieved by the order, the appellant assessee had preferred an appeal before the Commissioner (Appeals) who had set aside the Order-in-Original and allowed the refund. The table below provides the refund amounts calculated and refunded by the Commissioner (Appeals) in the respective OIA Nos.

S.No in the C.L	*Period*	*Appeal No.*	*OIA No.*	*OIO No.*	*Refund restricted/rejected*
46	April 2008 to September 2008	551/2011	39/2011 To 42/2011 dated 30 August 2011	377/2009 dt 07.12.2009	20,89,11,988
47	October 2008	552/2011		408/2009 dt 29.12.2009	4,22,20,331
48	November 2008	553/2011		44/2010 dt. 28.01.2010	6,86,31,605
49	December 2008	554/2011		69/2010 dt. 25.02.2010	5,76,74,059
37	April 2008 to September 2008	41015/2015	01 to 04/2015 dated 18/02/2015	179/2012 dt 17/05/2012	20,70,57,564
38	October 2008	41016/2015		295/2012 dt 11/09/2012	4,20,33,231
39	November 2008	41017/2015		354/2012 dt 02/11/2012	6,80,51,630
40	December 2008	41018/2015		355/2012 dt 02/11/2012	5,34,64,665

The adjudicating authority in compliance of the Commissioner (Appeals) order No. 39 to 42/2011 dated 30.08.2011 sanctioned the consequential refund vide four OIOs as above (Sl.No. 37-40 in the table). The revenue reviewed the said refund orders and filed appeals before the Commissioner (Appeals). The Lower appellate authority in the impugned order No.1-4/2015 dated 18.02.2015 allowed the revenue appeals and set aside the orders. Aggrieved by the order of the Commissioner (Appeals) in OIA No. 1-4/2015 dated 18.02.2015, the appellants preferred appeals before this Tribunal in ST/41015/15 to 41018/2015.

6. The ld. Advocate appearing on behalf of the appellants submitted a written synopsis in a tabular form of issues appeal-wise and reiterated the same. In respect of appeal Nos. ST/278/10 and ST/295/11, he submits that the Revenue either restricted or rejected on the input service credit on the only ground that the software maintenance service was not taxable under Notification No. 5/06 prior to 16.05.2008. He drew the attention of the Bench to para 16 of the adjudication order and submitted that the service provided by the appellants are taxable and further submitted that they have paid service tax on management, maintenance and or repair services. He submits that the payment of service tax on the MMRS is not under dispute and the same has been recorded at para 9 of the OIO No. 39 to 42/2011 dated 30.08.2011 and also submits that they have not claimed any input service credit on the services utilized under SEZ from April, 2007 to September and October to March 08. He drew attention to page 9 and page 49 of the returns, where the service tax amount on MMRS has been paid at page 21 & 51 where proof of payment of service tax paid both in cash as well as by debiting in CENVAT account under the MMRS service including their services.

7. Without prejudice to the aforesaid submission, they also submitted that even assuming the services were not taxable during the impugned period; refund of unutilized input service credit ought not to be denied on the ground of taxability since otherwise it would amount to export of taxes. Further he submits that even if the services are not taxable prior to 16.05.2008, he submits that they are eligible for refund under Rule 5 of CCR and refund cannot be denied on the ground of non-taxability. In support of their argument, they placed reliance on catena of decisions including the following and submitted a compilation of case laws relied upon in this regard:-

He relied on the following decisions:

* *mPortal India Wireless Solutions (P.) Ltd.* v. *CST* [2011] 16 taxmann.com 353/[2012] 34 STT 322 (Kar.)

* *KPIT Cummins Infosystems ltd*. v. *CCE* [Order No. A/533/13/CSTB/C-I, dated 1-4-2013]

* *Apotex Research (P.) Ltd*. v. *Commissioner of Customs* [Inteim Order Nos. 79 to 152/2014, dated 18-9-2014]

* *Repro India Ltd.*v. *Union of India* 2008 taxmann.com 943 (Bom.)

He submitted that in view of the Hon'ble High Court and Tribunal's decisions, they are eligible for refunds.

8. On the second issue relating to the method of computation of export turnover and total turnover in

appeals No. ST/40422/14 to ST/40425/14 and ST/41019/15 to ST/41023/15, he proceeded his submissions as per appeal No. ST/40422/14 to ST/40425/14. The issue for consideration was on the manner of arriving at quantum of eligible refund in accordance with the formula prescribed under **Notification 05/2006 CE(NT) dated 14-03-2006**. He submitted that the appellants operate from various premises across India and have taken a centralized registration for service tax purposes and that all their premises were either STPI or SEZ units from where services are predominantly exported with negligible domestic sales. A sample computation methodology which was under dispute on the manner of arriving at the eligible refund was submitted and further stated that there are three parameters for arriving at the quantum of refund which are as follows:

* CENVAT Credit

* Export turnover

* Total Turnover

As far as CENVAT Credit is concerned, while the Appellant applied for refund of entire CENVAT Credit taken, the Department had restricted the same to the net eligible CENVAT Credit after deducting ineligible CENVAT Credit for which separate proceedings were initiated.

9. As regards Export turnover & Total turnover, it was submitted that they claimed the benefit of refund on export turnover of both SEZ & STPI units and that no CENVAT Credit was availed on services received by SEZ units since they were ab initio exempt. However, for the purpose of turnover, the Appellant had adopted turnover of SEZ & STPI units, since Rule 5 of CENVAT Credit Rules is for entity as a whole and not for STPI/SEZ separately. They submitted that while applying the formula the lower adjudicating authority deducted the value of SEZ exports from the export turnover (i.e. numerator) but retained the same in the total turnover (i.e. denominator) thereby drastically reducing their refund claims. It was submitted that the Notification specifically mentions that the formula is to be applied only for the activity "to which the claim relates" and thus if the department wanted to adopt a stand that the SEZ activities had no relation to the claim, such turnover should have been deducted from the total turnover (i.e. denominator) also.

10. He drew attention to page 73 of OIO (para-6) of Appeal ST/40423/2014, Table 3 and explained in detail with regard to how the appellants claimed the refund by computing the total value wherein it was mentioned that Net CENVAT Credit after deducting those credits for which separate proceedings were initiated was Rs. 1,80,76,926. He mentioned that while this amount was not under dispute, the dispute is on account of Export Turnover and Total Turnover. It was submitted that as per Appellant claim, the value of Export turnover was Rs.659,81,11,217/- (including exports from STP and SEZ units), value of domestic turnover was Rs. 18,44,27,676/- and total turnover was Rs. 678, 25,38,893/-. As per the turnover, it was submitted that the Appellant should have been granted a refund of Rs. 1,75,85,386/ - whereas the Department had granted only Rs. 86,32,133/ -; the refund has been restricted by the Department by adopting export turnover of services from STPI units alone i.e. Rs.323,88,12,961/- in the export turnover (i.e. numerator) and retaining the total turnover of

Rs.678,25,38,893/- (i.e. denominator). He submitted that where the adjudicating authority at para 15.2 and 15.4 and at page 77 under para-23 has computed the total turnover (including the value of export services) to be Rs. 678,25,38,893/- then the export value also should be taken as Rs.659,81,11,217/-

11. Assailing the methodology adopted by the lower adjudicating authority, it was submitted that even if the Department wanted to restrict the export turnover (i.e. numerator) only to the value of services exported from STPI units (i.e. 323, 88,12,961) then the total turnover should have alternatively been export turnover of STPI services + DTA services i.e. (Rs. 323,88,12,961+ Rs. 18,44,27,676= Rs.342,32,40,637). Even if this alternative formula were adopted, if the refund amount would have been Rs. 1,71,03,028 (i.e. 1,80,76,926 X 323,88,12,961/342,32,40,637) which is substantially higher than the refund granted by the Department.

12. In support of these above arguments, they placed reliance upon catena of decisions in the context of Section 80HHC and Section 10 A of the Income-tax Act, 1961. He specifically drew our attention to ruling of Hon'ble Karnataka High Court in the case of *CIT* v. *Tata Elxsi Ltd.* [2012] 349 ITR 98/204 Taxman 321/17 taxmann.com 100 which in turn placed reliance on various judicial pronouncements and held that there should be uniformity in the ingredients of both numerator and denominator of the formula since otherwise it would produce anomalies or absurd results. Relying on the said precedents, it was submitted that if the department chose to exclude the SEZ turnover from numerator it also ought to have excluded the same from denominator.

13. Reliance was placed on the decision of the CESTAT Mumbai in the case of *CCE* v. *Computer Land UK Ltd.* [Appeal No. ST/86492/14-Mum., dated 13-4-2015], wherein it was held that if the Revenue wanted to reduce the value of invoices from Export turnover then the same should be removed from the total turnover. A paper book containing the provisions and case laws relied by him for the manner of applying the formula was submitted.

14. The learned authorized representative of the Revenue supported the findings made by the lower authorities in the impugned order in respect of Appeal No. 278/2010 and 295/2011 (i.e. Sl. No. 31 & 32 of the cause list). She submitted that when software maintenance services were taxable only from 16/05/2008, the question of granting refund in respect of services exported prior to such date does not arise since the services were not taxable. With respect to the issue of manner of applying the formula prescribed under Notification 05/2006 - CE (NT) dated 14 -03-2006, she submitted that the term total turnover should include turnover of all the services provided by the Appellant and in support of her argument she relied upon a Supreme court ruling in the case of *CIT* v. *Punjab Stainless Steel Industries* [2014] 364 ITR 144/46 taxmann.com 68/[2015] 229 Taxman 423 to argue that turnover should include all the turnover of the Appellant as understood in common accounting parlance. She also drew our attention to judicial precedents in the context of SEZ's in the case of *Anita Exports* v. *Union of India* 2015 (320) ELT 743 (Guj.) and mentioned that service tax authorities do not have oversight of the activities performed in SEZ and only SEZ authorities have the same. Reliance was placed upon the following judicial precedents and mentioned that supplies to SEZ could not be eligible for benefits since they are only deemed exports and not physical exports:—

* *CCE* v. *Tiger Steel Engineering (India) (P.)Ltd.* [2010] 29 STT 25 (Mum.)

* *BAPL Industries Ltd*. v. *Union of India* 2007 (211) ELT 23 (Mad.)

* *Jumbo Bags Ltd*. v. *Commissioner of Customs* 2011 (268) ELT 81 (Tri. - Chennai)

She also mentioned that she had instructions from Commissioner (LTU) to place on record Show-cause notices (SCN) issued for denial of CENVAT Credit which were excluded from these proceedings.

15. On the rejoinder, the Advocates appearing for the Appellant reiterated the case laws relied upon by them for Appeal No. 278/2010 and 295/2011. With respect to the manner of application of the formula, they submitted that Supreme Court in the case of CIT vs. Punjab Stainless Steel relied upon by the Department was in fact favourable to them. They relied upon the operative part of the Supreme Court ruling which held that the turnover of scrap (similar to SEZ turnover in the present instance) was liable to be deducted from the total turnover. They also relied upon Para 28 of the said Supreme Court order to submit that the benefit granted under Rule 5 of CENVAT Credit Rules is only to incentivize and encourage exports and therefore any interpretation leading to a reduction in the value of export should not be resorted.

16. He submitted that Rule 5 being a beneficial provision with an objective to grant refund of unutilized CENVAT Credit, the refund ought to have been granted in accordance with the claim made by the Appellant rather than restricting the same in a manner which is not the intention of the legislature. Further, it was also submitted that the Appellant did not avail of any CENVAT Credit pertaining to the SEZ operations and that is what is more critical since the refund that is granted is of CENVAT Credit and not that of turnover.

17. As regards, other precedents relied upon by Department representative, they submitted that the decisions pertain only to deemed exports of supplies made to SEZ and in the facts of the Appellant all the exports are physical exports from STPI/SEZ units to customers located outside India and hence the precedents relied upon by the Department in the context of deemed exports are irrelevant.

1. *Tata Elxsi Ltd.* (*supra*)
2. *CIT* v. *Gem Plus Jewellery India Ltd.* [2011] 330 ITR 175/[2010] 194 Taxman 192 (Bom.)
3. *ITO* v. *Sak Soft Ltd*. [2009] 30 SOT 55 (Chennai)(SB)
4. *CIT* v. *Sudarshan Chemical Industries Ltd.* [2000] 245 ITR 769/112 Taxman 511 (Bom.)
5. *CIT* v. *Chloride India Ltd.* [2002] 256 ITR 625/[2003] 130 Taxman 352 (Cal.)

18. We have carefully considered the submissions of both sides and perused the records and the grounds of appeal in respect of both the assessee appeals as well as Revenue appeals. The short issue involved in this case relates to rejection of refund on input service credit utilized in the export of services and refund claimed under Rule 5 of CCR. The adjudicating authority and the lower appellate authority in the appellant assessee's appeals rejected or restricted the refund on the ground as under:-

(1) The software maintenance service under the category of Management Maintenance and Repair Service (MMRS) is not taxable/exempted.

(2) Restricted their refund claim by adopting different value for computation in respect of total turnover vis-a-vis export turnover provided in the formula prescribed under Notification No. 5/2006- CE(NT) dated 14.03.2006.

19. We now propose to discuss the first issue relating to the input services utilized for the export of service. On perusal of the records, ST-3 returns, we find that the appellant is a software firm engaged in the business of software development and obtained centralized service tax registration under LTU Commissionerate and discharging service tax on the software services rendered to local customers and also exported software services. There is no dispute on the payment of service tax by the appellant on the MMRS during the period 2007-2008. On perusal of the photocopy of ST-3 returns filed by the appellant for the period April - September, 2007 at page-48 of the annexure to the ST-3 return, we find that the appellant has furnished the details of the taxable service ie., MMRS and at page 51 it has been clearly mentioned that the appellant has paid the service tax both by cash as well as by debit in their CENVAT credit of a total amount of Rs. 86,72,780/- paid by cash and Rs. 12,16,456/- paid through their CENVAT account and also they have paid education cess and higher education cess of Rs. 1,73,457/- in cash and Rs. 24,329/- through CENVAT and Rs.5,351/- in cash and Rs. 12,120/- through CENVAT account respectively and the appellant has claimed refund of service tax paid on input service which was used in output service. From the above, it is very clear that the Revenue cannot adopt two standards, when the appellant paid service tax under MMRS the same was accepted by the Revenue. Whereas, while claiming the refund under Rule 5 of CCR, the department choose to argue differently, stating that the said services are exempted. The issue of granting refund of unutilized input credit/input service tax credit used in the export of services under Rule 5 of CCR has been settled by various Hon'ble High Courts and Tribunal. The decision of the Tribunal at Mumbai Bench in the case of *KPIT Cummins Infosystems Ltd.* (*supra*) has dealt the identical issue on the software consultancy service exported during the relevant period and allowed the appeal by following the Hon'ble High Court of Karnataka decision in the case of *mPortal India Wireless Solutions (P.) Ltd.* (*supra*). The relevant portion of the said decision is reproduced as under:—

'5.1 From the records of the case it is seen that during the impugned period the appellant had exported the following goods/services:

(*i*) Software Maintenance Service, classifiable under the category of 'Management, Maintenance or Repair Service';

(*ii*) Software Development service; and

(*iii*) Software Consultancy Service.

5.2 As regards the management, maintenance or repair of computer software service, the same is classifiable under the taxable service category of 'management, maintenance or repair service' as defined in Section 65(64) of the Finance Act, 1994. As regards the development of software and software consultancy, the same became taxable under service tax only w.e.f. budget 2008 when

'Information Technology Software Service' was brought under the tax net for the first time. Therefore, as far as these two services are concerned, they were not a taxable service during the impugned period.

5.3 Nevertheless, they were exempted services as defined in Rule 2(e) of the CENVAT Credit Rules, 2004 as per which:

"'exempted services' means taxable services which are exempt from the whole of the service tax leviable thereon, and includes services on which no service tax is leviable under section 66 of the Finance Act".

In other words, exempted services included both taxable services as well as non-taxable services. As regards "output service" as per Rule 2(p) of the CENVAT Credit Rules -

"output service' means any taxable service provided by the provider of a taxable service, to a customer, client, subscriber, policyholder or any other person, as the case may be, and the expressions 'provider' and 'provided' shall be construed accordingly."

Under Rule 5 of the CENVAT Credit Rules:

"where any input or input service is used in the manufacture of final product which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate product cleared for export, or used in providing output service which is exported, the CENVAT credit in respect of the input or input service so used shall be allowed to be utilised by the manufacturer or provider of output service towards payment of duty of excise on any final product cleared for home consumption or for export on payment of duty or service tax on output service, and where for any reason such adjustment is not possible, the manufacturer or the provider of output service shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by Notification."

5.4 Accordingly, Notification NO. 5/2006-CE (.N.T.) dated 14/03/2006 has been issued. Rule 6 of CENVAT Credit Rules, 2004 deals with obligation of the manufacturer of dutiable and exempted goods and provider of taxable and exempted services. Under Rule 6(3)(c), the provider of output service shall utilize credit only to the extent of an amount not exceeding 20% of the amount of service tax payable on taxable output service. In the present case, the services provided by the appellant and exported is not a taxable output service inasmuch as software development software service and software consultancy service become taxable only in the Budget 2008. Therefore, the cap of 20% prescribed under Rule 6(3)(c) have no application whatsoever. Therefore, there was no bar on the appellant in availing full credit in respect of IT software services during the material period.

5.5 The appellant has received input/input services for rendering of taxable services during the material period, which has been exported. The hon'ble High Court of Karnataka in mPortal India Wireless Solutions P. Ltd. (supra) case, in a similar situation, held as follows:

"6. The assessee is a 100% export oriented unit. The export of software at the relevant point of time was not a taxable service. However, the assessee had paid input tax on various services. According to the assessee a sum of Rs.4,36,985/- is accumulated cenvat credit. The Tribunal has categorically held that even though the export of software is not a taxable service but still the assessee cannot be denied the cenvat credit. The assessee is entitled to the refund of the cenvat credit. Similarly insofar as refund of cenvat credit is concerned, the limitation under Section 11B does not apply for refund of accumulated cenvat credit. Therefore, bar of limitation cannot be a ground to refuse cenvat credit to the assessee.

7. Insofar as requirement of registration with the department as a condition precedent for claiming cenvat credit is concerned, learned counsel appearing for both parties were unable to point out any provision in the cenvat credit rules which impose such restriction. In the absence of a statutory provision which prescribes that registration is mandatory and that if such a registration is not made the assessee is not entitled to the benefit of refund, the three authorities committed a serious error in rejecting the claim for refund on the ground which is not in existence in law. Therefore, said finding recorded by the Tribunal as well as by the lower authorities cannot be sustained. Accordingly, it is set aside.

5.6 The appellant mPortal India Wireless Solutions P. Ltd. was also a 100% EOU and the transaction undertaken are also identical in the sense that they relate to export of software. Therefore, the above decision is squarely applicable to the facts of the case before us. In any case, the object of EXIM Policy of the Government of India is to promote exports of goods and services and not export of taxes. Service tax being a destination based consumption tax, in the case of exports there should not be any tax burden and the tax burden, if any, is to be imposed by the Government of the country where the services are consumed. Otherwise, it would render the exports of software uncompetitive. Keeping in view of above policy objective of the government, it is appropriate to hold that the appellants are eligible for the refund of the amount claimed by them of Rs.2,14,45,060/- during the impugned period on account of export of exempted services subject to the satisfaction of other conditions prescribed in Notification No. 5/2006-CE(NT) dated 14/03/2006 and the Revenue shall verify the same."'

The ratio of the above Tribunal decision is squarely applicable to the present case as the Tribunal in the above case has held that the software maintenance service is classifiable under the category of Management and Maintenance or Repair Service (MMRS) during the relevant period and in the present case it is clearly established that the appellants have paid the service tax on MMRS and availed credit. The above decision was followed by the co-ordinate Bangalore Bench of the Tribunal in the case of *Apotex Research (P.) Ltd.* (*supra*). The various Tribunal's decisions relied by the Revenue are not applicable and distinguishable to the facts of the present case.

20. Further the Tribunal Mumbai Bench in the case of *CCE,* v. *Barclays Technology Centre (I)(P.)Ltd* [Order Nos. A/1324 & 1325/14/SMB/C-IV, dated 12-9-2014] by relying the decision in the case of *Tata Consultancy services Ltd*. v. *CST* [2012] 25 taxmann.com 386 (Mum.-CESTAT), rejected the revenue

appeal and allowed the refund of input services utilized in the export of software services to SEZ. As already discussed in the preceding paragraphs, the appellants have paid service tax on MMRS and duly filed the ST-3 returns and availed the cenvat credit and claimed the refund under Rule 5 of CCR on that portion of the input services used in export of services during the relevant period. By respectfully following the Hon'ble High Court decision and the Tribunal decision referred above, we have no hesitation to hold that the appellants are eligible for refund under Rule 5 of CCR on the input services used in the export of service. Accordingly, impugned orders No.15/10 and No.6/11 (in appeal No. ST/278/2010 and ST/295/11) are liable to be set aside to that extent of rejection of refunds. Both the appeals are allowed with consequential relief.

21. On the second issue in respect of nine appeals of the appellant assessee in ST/40422 to 40425/14 and ST/41019 to 41023/15, relates to the computation of total turnover vis-a-vis export turnover for determining the refund amount as per the formula prescribed under Notification No. 05/2006-CE(NT) dated 14.03.2006.

The clause 5 of Notification No. 5/2006 is reproduced as under:—

> "5. The refund of unutilised input service credit will be restricted to the extent of the ratio of export turnover to the total turnover for the given period to which the claim relates i.e.
>
> Maximum refund (Total CENVAT credit taken on input services during the given period export turnover Total turnover.
>
> Explanation : For the purposes of condition No. 5, —
>
> 1. 'Export turnover' shall mean the sum total of the value of final products and output services exported during the given period in respect of which the exporter claims the facility of refund under this rule.
> 2. 'Total turnover' means the sum total of the value of, —
>
> (*a*) all output services and exempted services provided, including value of services exported;
>
> (*b*) all excisable and non-excisable goods cleared, including the value of goods exported;
>
> (*c*) The value of bought out goods sold, during the given period."

22. We find in the present case, while calculating the quantum of refund eligible as per the formula prescribed under Rule 5 of CCR, the appellant claimed the refund on the export turnover of both SEZ and STPI units. For the purpose of total turnover, the appellants have computed total turnover of both SEZ and STPI units as the appellants being one entity. Whereas, it is seen the adjudicating authority while computing the value has deducted the value of SEZ exports from the export turnover (numerator) but retained the SEZ export turnover in the total turnover (Denominator). The appellants contended that the adjudicating authority when deducting the value of SEZ exports from the turnover, ought to have deducted the same from the total turnover. vis-a-vis, or if he has included it in the turnover, he should have also included it in the export turnover.

23. In this regard on identical issue the Mumbai Tribunal Co-ordinate Bench in the case of *Computer*

Land UK Ltd., (*supra*) discussed the correct method of computation of total turnover vis-a-vis export turnover and upheld the impugned order and rejected the revenue appeal. The relevant portions of the order are reproduced as under.

> '4. On perusal of the record, it transpires that the first appellate authority has clearly recorded the factual matrix of the case as to there being no dispute that the appellant had rendered export of services and has availed CENVAT credit of the input services received by him. Revenue is only disputing the quantum of the refund claim which has been sanctioned to the appellant based upon the finding that the provisions of Rule 5 of the CENVAT Credit Rules, 2004 contemplates for sanctioning of the refund based upon a formula which according to the Revenue authorities indicates that the appellant has been sanctioned additional refund which is not due to them.
>
> 5. On perusal of the said formula and the case, I find that the appellant have claimed that invoice No. Mar 12-01 and Mar 12-02, both dated 30.03.2012 were for the year 2011-12 but payments were received subsequently in the Financial year 2012-13 and they availed refund accordingly. Revenue wants to eliminate these two invoices from the export turnover of the goods but they want to include the CENVAT credit in the total turnover of export of goods. This view which has been propounded by the ld. Departmental Representative and the appeal of the department is canvassing the findings expressed by the Adjudicating Authority.
>
> 1. I find that this view is incorrect as, if the revenue wants to reduce the value of the invoices from the export turnover, the same also should be removed from the total turnover of the export. I find the first appellate authority has correctly recorded the factual matrix which is reproduced below:
>
> "15. I find that it is clearly mentioned in the new Rule 5(2) of the CCR that the new Rule shall apply to exports made on or after the 1st April, 2012. Further, 'export service' has been defined under clause (1) of Explanation 1 under the new Rule 5 and the same reads as under:
>
> "(1) 'export service' means a service which is provided as per the provisions of Export of Services Rules, 2005, whether the payment is received or not;"
>
> From this definition it is clear that for the purposes of new Rule 5 of the CCR, receipt of payment is immaterial and only the actual export of service by way of its provision & issuance of invoice remain the relevant criteria. As per the first proviso to Rule 5(2) of the CCR, refund in respect of services exported could be made under the old Rule 5 of the CCR within a period of one year, i.e. up to 31.03.2013. In other words, for the exports made up to 31.03.2012, refund was admissible under the old rule 5 of the CCR and for the exports made on or after 01.04.2012, refund is admissible under the new Rule 5 of the CCR. Accordingly, for all exports completed up to 31.03.2012 by way of their provision & issuance of invoice, the new Rule 5 of the CCR is not applicable.
>
> 16. Applying the provisions described in Para 15 above on the present case, I find that the Appellant have included the Invoice No. Mar'12-01 and Invoice No. Mar 12-02, both dated 30-03-2012, in the present refund claim on the ground that payments in respect of the same were

received on 11-04-2012. However, the export of services covered by the said invoices had been completed prior to 31-03-2012, as reflected in the date of issuance of the said invoices. As provisions of new Rule 5 of the CCR are applicable to the exports made on or after 01-04-2012, the exports covered said invoices issued prior to 01-04-2012 have to be excluded from the present refund claim for arriving at export turnover of the present quarter of April 2012 to June 2012. For calculating export turnover of the services and total turnover of services for relevant period of April-June 2012, only those services which were provided after 01-04-2012 need to be considered. Further, it is clear from the figures mentioned in the Order-in-Original that the Appellant had exported their entire turnover and had not provided any services to Domestic Tariff Area in the relevant period. Therefore, the 'export turnover' would be equal to the 'total turnover', in terms of clause (E) of Rule 5(1) of the CCR. Accordingly, the figures of 'Export Turnover of Services' and 'Total Turnover' come to Rs.11,95,79,832/- each.

17. In view of the above discussions, I find that the admissible refund amount needs to be re-calculated. The same is done as under:

Export turnover of services = 11,95,79,832/-

Total Turnover= 11,95,79,832/-

Net CENVAT Credit=41,52,535/-

Refund amount = Export turnover of services × Net CENVAT credit ÷ Total turnover

= 11,95,79,832 × 41,52,535 ÷ 11,95,79,832 = 41,52,535/-

Since refund of Rs. 27,67,134/- has already been granted vide the impugned Order-in-Original, the appellant are found entitled to further refund of Rs.13,85,401/- only. (41,52,435/- minus 27,67,134/- = 13,85,401/-)"

7. I find that there is no infirmity or illegality in the Order-in-Appeal which has set aside the Order-in-Original.'

24. Further, the Hon'ble High Court in the case of *Tata Elxsi Ltd.* (*supra*), in respect of computation of deduction under Section 10 (A) of IT Act, dealt the identical issue of computation of export turnover and total turnover and dismissed the revenue appeal and upheld the Tribunal order. The relevant portion of the said order is reproduced as under:—

"10. The Bombay High Court had an occasion to consider the meaning of the word 'total turnover' in the context of Section 10-A, in the case of *Commissioner of Income Tax* v. *Gem Plus Jewellery India Ltd.* 2011 -330-ITR-P-175 (Bom.). Interpreting sub-section (4) of Section 10-A, it is held as under:

Under sub-section (4) the proportion between the export turnover in respect of the articles or things, or as the case may be, computer software exported, to the total turnover of the business carried over by the undertaking is applied to the profits of the business of the undertaking in

computing the profits of the business of the undertaking in computing the profits derived from export.....

The formula for computation of the deduction under Section 10-A would be as under:-

Profits of the business × export turnover ÷ Total turnover

From the aforesaid judgments, what emerges is that, there should be uniformity in the ingredients of both the numerator and the denominator of the formula, since otherwise it would produce anomalies or absurd results. Section 10-A is a beneficial section. It is intended to provide incentives to promote exports. The incentive is to exempt profits relatable to exports. In the case of combined business of an assesse, having export business and domestic business, the legislature intended to have a formula to ascertain the profits from export business by apportioning the total profits of the business on the basis of turnovers. Apportionment of profits on the basis of turnover was accepted as a method of arriving at export profits. In the case of Section 80 HHC, the export profit is to be derived from the total business income of the assesse, whereas in Section 10-Am the export profit is to be derived from the total business of the undertaking. Even in the case of business of an undertaking, it may include export business and domestic business, in other words, export turnover and domestic turnover. The export turnover would be a component or part of a denominator, the other component being the domestic turnover. In other words, to the extent of export turnover, there would be a commonality between the numerator and the denominator of the formula. In view of the commonality, the understanding should also be the same. In other words, if the export turnover in the numerator is to be arrived at after excluding certain expenses, the same should also be excluded in computing the export turnover as a component of total turnover in the denominator. The reason being the total turnover includes export turnover. The components of the export turnover in the numerator and the denominator cannot be different. Therefore, though there is no definition of the term 'total turnover' in Section 10-Am there is nothing in the said Section to mandate that, what is excluded from the numerator that is export turnover would nevertheless form part of the denominator. Though when a particular word is not defined by the legislature and an ordinary meaning is to be attributed to the same, the said ordinary meaning to be attributed to such word is to be in conformity with the context in which it is used. When the statute prescribes a formula and in the said formula, 'export turnover' is defined, and when the 'total turnover' includes export turnover, the very same meaning given to the export turnover by the legislature is to be adopted while understanding the meaning of the total turnover, when the total turnover includes export turnover. If what is excluded in computing the export turnover is included while arriving at the total turnover, when the export turnover is a component of total turnover, such an interpretation would have expressly stated so. If they have not chosen to expressly define what the total turnover means, then, when the total turnover includes export turnover, the meaning assigned by the legislature to the export turnover is to be respected and given effect to, while interpreting the total turnover which is inclusive of the export turnover. Therefore the formula for computation of the deduction under Section 10-A, would be as under:

Profits of the business of the understating × Export turnover ÷ Total Turnover (Export turnover + domestic turnover)"

25. The above Tribunal decision and the Hon'ble High Court decision are squarely applicable to the facts of the present case insofar as the computation of the export turnover and total turnover for computing the export value as per the formula prescribed under Clause 5 of Notification No. 5/2006 dated 14.03.2006. As in the present case, the lower authorities while computing the turnover deducted the value of SEZ exports from the export turnover (numerator) and retained the same in the total turnover (denominator) which has resulted in the anomaly and the reduction in the quantum of refund. The Clause 5 of the Notification No. 5/06 dated 14.3.06, clearly stipulates that the formula has to be applied only for the activity to which the claim relates and it is for the entity as a whole. Accordingly, we hold that when the revenue proceeded to include the value of SEZ exports in computing the total turnover, the same should also have been included in computing export turnover. By respectfully following the above Tribunal decision and the Hon'ble High Court decision, we hold that the order of the LA rejecting the refund claim by adopting the wrong method of computation is not justified and liable to be set aside to that extent of restriction of the refund claim. We hold that the value of export turnover should be equal to the total turnover and the value of SEZ exports should be included in the export turnover (numerator). Accordingly, the appellants are eligible for the full refund claim in appeal Nos. ST/40422 to 40425/14 and ST/41019 to 41023/15, and the impugned orders OIA Nos. 68 to 71 dated 02,12,2013 OIA Nos. 05 to 09/2015 dated 18.02.2015, are set aside to that extent.

26. In respect of Revenue appeals in ST/551-554/2011 filed against the OIA No. 39 to 42/11 dated 30.08.2011, the Commissioner (Appeals) has set aside that portion of the original order rejecting the refund claim on account of MMRS is not taxable and also set aside the order relating to computation of eligible refunds by deducting the amount of SEZ turnover from the export turnover and not deducting it from the total turnover. The Commissioner (Appeals) in his detailed order discussed the issue and also relied on the Tribunal decision set aside the impugned order and allowed the appeals. As we have already given our detailed findings on both the issues in the preceding paragraphs in the assessees appeals and held that the appellants are eligible for full refund of input services credit on the export of service as well as on computation of export turnover vis-a-vis total turnover as per the formula under clause 5 of Notification No. 5/2006 dated 14.03.2006, the same is applicable to the revenue appeals. Therefore, we do not find any infirmity in the impugned orders passed by the Commissioner (Appeals) and we uphold the impugned orders and revenue appeals are rejected.

27. As regards the appeals filed by the asessee in appeal No. ST/41015 to 41018/15 against the OIA No. 01-04/2015 dated 18.02.2015, we find that the LAA has set aside the order of sanctioning refund arising out of the decision of OIA 39-42/11 dated 30.08.2011 and allowed the revenue appeal. Since the revenue appeals filed against OIA No. 39-42/11 dated 30.08.2011 are rejected as above, and the refund orders sanctioned by the original authority are restored and upheld and the OIA No.01-4/2015 dated 18.02.2015, are set aside and the assessees appeals are allowed.

28. In the result, we hold:-

1. Appeal No. ST/278/10 arising out of OIA No. 15/10 dated 15.02.2010 and appeal No. ST/295/11 arising out of OIA No. 6/2011 dated 04.02.2011 are set aside to that extent of rejecting refund claim and the appeals are allowed with consequential relief.
2. Appeal No. ST/40422-40425/2014 arising out of OIA No. 68 to 71 dated 02.12.2013 and appeal No. ST/41019-41023/2015 arising out of OIA No. 5-09/2015 dated 18.02.2015 are set aside to that extent and the assesses appeals are allowed with consequential relief.
3. In respect of revenue appeals No. ST/551- 554/2011 arising out of OIA No. 39-42/2011 dated 30.08.2011 are upheld and the revenue appeals are rejected.
4. In respect of appeal ST/41015-41018/2015, arising out of OIA No. 1-4/2015 dated 18.02.2015 are set aside and the assesses appeals are allowed.

All the 19 appeals are disposed off in the above terms.