CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 60161 of 2013

[Arising out of Order-in-Original No. 11-12/ST/CB/CCE/ADJ/2013/1463-1468 dated 23.07.2013 passed by the Commissioner of Central Excise (Adj.), New Delhi]

Optum Global Solutions India Pvt Ltd **......Appellant**
Part of Ground Floor Block 1 and
Ground, 1st, 2nd, 3rd, 6th, 7th, 8th & 9th Floor Block 2,
Phase I, Building IT ITES SEZ of M/s ITPG Developers
Pvt Ltd, Behrampur, Near Sector 59,
Gurgaon, Haryana 122101

VERSUS

Commissioner of Central Goods & Service Tax, Gurugram **......Respondent**
Plot No. 36-37, Sector 32,
Gurugram, Haryana 122001

APPEARANCE:

Sh. Prasad Paranjape, Advocate for the Appellant

Sh. Siddharth Jaiswal and Sh. Pawan Kumar, Authorized Representatives for the Respondent

CORAM:

HON'BLE Sh. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Sh. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 60574/2024

DATE OF HEARING: 04.07.2024
DATE OF DECISION: 08.10.2024

PER : S. S. GARG

The present appeal is directed against the impugned order dated 23.07.2013 passed by the Commissioner of Central Excise & Service Tax, New Delhi, whereby the learned Commissioner has

confirmed the demand of service tax amounting to Rs.5,65,63,904/- along with interest of Rs.9,68,734/- and also imposed penalty of Rs.5,65,63,904/- under Section 78 of the Finance Act, 1994, penalty of Rs. 2,42,20,838/- under Rule 15(4) of the Cenvat Credit Rules read with Section 78 *ibid* and penalty of Rs.5000/- under Section 77 *ibid*.

2.1 Briefly stated facts of the present case are that the appellant is engaged in the provision of various services to its customers located outside India. For providing such services, the appellant has its offices at various locations such as Gurgaon, Mumbai, Pune and Hyderabad. These locations are either SEZ/STP units or DTA locations. The appellant had entered into an Agreement dated 15.11.2007 with Ingenix Pharmaceutical Services (UK) Ltd (hereafter in short "Ingenix") for providing two types of services as specified in Exhibit A and Exhibit B of the Agreement annexed with the appeal papers. The services mentioned in Exhibit A are Information Technology Enabled Data Management and Programming Services (in short "Data Management Services") and the services mentioned in Exhibit B are Clinical Research Management and Resourcing Services (in short "CRM services"). These two specified services were being rendered by the appellant from two distinct business locations registered under separate service tax registrations with the department. The DTA unit in Gurgaon was engaged in providing 'CRM services' whereas STP units in Mumbai and Pune were engaged in providing 'Data Management services'.

2.2 With respect to Data Management services, the department has accepted export position of the services and has been granting periodical refunds to the appellant. The present dispute is whether 'CRM services' provided by the appellant qualify as "export of services" or not.

2.3 The appellant has enclosed sample Refund Orders for the period July 2007 to June 2010 including copy of the Order-in-Appeal for the period October 2008 to March 2009 where original authority had first rejected the refund claims. This demonstrates that Data Management services of the appellant have been examined by the department and held to be export of services and these orders by now have attained finality.

2.4 Audit of the appellant was conducted for the years 2007-08 to 2009-10 and two queries were raised by the audit team vide its letters dated 16.08.2011 and 12.09.2011 viz. (a) interest is required to be paid on the amount of cenvat credit availed prior to obtaining registration and (b) CRM services should be classified as 'Technical Testing and Analysis services' and those do not qualify as 'export of services'. The appellant filed reply to the these queries raised by the audit team, but not satisfied with the reply filed by the appellant, the department issued a show cause notice dated 24.10.2011 for the period 2007-08 to 2010-11 *inter alia* alleging that:

> (A) The appellant had wrongly taken Cenvat Credit of input services on the strength of invoice before obtaining registration

with the department or had wrongly taken Cenvat Credit on invoices which were not addressed to the registered premises.

(B) Services provided by the appellant to Ingenix should be categorized as a 'Technical Testing and Analysis services'. Further, as the Technical Testing & Analysis services were performed by the appellant in India, the same could not be considered as 'exports of services' as per Export Rules.

(C) The appellant had intentionally and willfully suppressed the facts of providing impugned taxable service and calculation of value of impugned taxable service and had not paid the service tax on such services as applicable and had not filed proper service tax returns.

2.5 The appellant filed detailed reply to the show cause notice and after following the due process, the learned Commissioner passed the impugned order by confirming the demand of service tax along with interest and penalties as proposed in the show cause notice. Hence, the present appeal.

3. Heard both the parties and perused the material on record.

4.1 The learned Counsel for the appellant submits that the impugned order is not sustainable in law and is liable to be set aside as the same has been passed without properly appreciating the facts and the law; and binding judicial precedents.

4.2 The learned Counsel further submits that the appellant is not liable to pay interest on Cenvat Credit availed by them under Rule 14 of the Cenvat Credit Rules. He also submits that interest and penalties are imposed on the appellant on the ground that certain cenvat credits were availed by the appellant prior to obtaining registration. He further submits that the law does not mandate obtaining registration prior to availing of cenvat credit and this Tribunal in *the appellant's own case* vide *Final Order No. 60798/2021 dated 06.04.2021 in Appeal No. ST/41/2012* has allowed such credits. He further submits that this issue is no more *res integra* and it has been consistently held by the Tribunal that for taking cenvat credit, registration is not mandatory as held in following cases:

- *Optum Global Solutions India Pvt Ltd vs. Commissioner of Service Tax - Final Order No. 60798/2021 dated 06.04.2021 (Tri. Chandigarh)*
- *mPortal India Wireless Solutions P. Ltd. vs. C.S.T., Bangalore - 2012 (27) S.T.R. 134 (Kar.)*
- *Commissioner of GST & C. Ex, Chennai vs. Pay Pal India Pvt. Ltd. - 2020 (39) G.S.T.L. 261 (Mad.)*
- *Commissioner of Service Tax-III, Chennai vs. CESTAT, Chennai - 2017 (3) G.S.T.L. 45 (Mad.)*
- *Commr. of G.S.T. & C. Ex., Chennai vs. Flextronics Technologies (I) (P) Ltd. - 2019 (366) E.L.T. 340 (Tri. - Chennai)*

4.3 He further submits that in view of the above decisions, credit availed prior to registration cannot be challenged and in the present

case, there is no challenge to eligibility of the credit so availed by the appellant on merits; in fact, there is no demand issued to the appellant alleging that credit is ineligible or recoverable from the appellant. Without there being a valid demand and confirmation thereof in an adjudication, demanding interest under Rule 14 of Cenvat Credit Rules, 2004 read with Section 75 of the Finance Act, 1994 is not permissible in law. The interest can only arise when there is a demand and confirmation thereof under Rule 14 of the Cenvat Credit Rules; whereas in the present case there is no demand of cenvat credit in the impugned show cause notice for the alleged incorrect availment of cenvat credit, hence the question of payment of interest does not arise. He further submits that the impugned show cause notice appears to have devised its own method of computation of interest i.e. from the date of taking credit till the date of registration and such a method of computing interest is not prescribed in law and therefore not sustainable in law. He further submits that the appellant being an exporter of services, had only availed the credit and not utilized the same and has been claiming refund of such unutilized credit from time to time. Thus, in the absence of actual utilization, interest demand is not sustainable as held by the Hon'ble Karnataka High Court in the case of *Commissioner of C. Ex. & S.T., Bangalore vs. Bill Forge Pvt Ltd reported in 2012 (26) S.T.R. 204 (Kar.)*.

4.4 As regards export of Clinical Research Management and Resourcing Services (CRM services), the learned Counsel submits that

the right from the audit stage and also the allegation in the impugned show cause notice and finding in the impugned order are only with respect to CRM services, whereas the demand has been confirmed against the appellant for the entire turnover comprising of Data Management services the turnover of which was Rs.29,07,54,584/- (58% of the total value disputed) as well as CRM services the turnover of which was Rs.21,39,84,137/- (42% of the total value disputed). He further submits that the demand to the extent of inclusion of Data Management turnover is certainly not sustainable in law.

4.5 He further submits that export status of Data Management services cannot be disputed as the appellant has been consistently being granted refund of accumulated input tax credit for export of Data Management services. The appellant has furnished the sample copies of such refund sanctioning orders alongwith the Appeal paper-book for the period July 2007 to June 2010 including Order-in-Appeal for the period October 2008 to March 2009 where the refund was first rejected by the original authority. He submits that these orders were not challenged by the department and thus attained finality. Therefore, Data Management services fulfil all the conditions of export as required in law.

4.6 As regards CRM services, the ld. Counsel further submits that the services rendered by the Appellant under the CRM services are in the nature of providing supervision and support on behalf of Ingenix

with regard to administration of drugs developed by pharmaceutical companies to humans in hospitals. Clinical trials of medicines on humans can be conducted only under strict regulatory approvals. The appellant does not possess such approvals in its name and hence it cannot and do not undertake clinical trials or carry out any testing or analysis on any drugs, goods or materials. The appellant only carries out supervision services on behalf of Ingenix to supervise and report back to Ingenix about trials and tests being conducted by hospitals i.e. whether they are being conducted as per defined guidelines/parameters, being applied on correct patients and in a correct manner etc. He further submits that these services are rightly classifiable as 'business auxiliary services' ("BAS") being services rendered on behalf of the client or at best it may merit classification as 'business support service' ("BSS") being services as a support to Ingenix's business. Whether as BAS or BSS, these services are held as export under Rule 3(1)(iii) of Export of Services Rules, 2005, based on the location of the customer; which in the present case being outside India, the appellant has rightly considered these services as export as there is no dispute regarding receipt of foreign exchange in this case. He further submits that the impugned order has wrongly classified these services as 'Technical Testing and Analysis services', which is contrary to the statutory provision. The definition of 'Technical Testing and Analysis service' means any service in relation to physical, chemical, biological or any other scientific testing or analysis of goods or material or information

technology software or any immoveable property. In the said definition, it is clarified that Technical Testing and Analysis service includes testing and analysis undertaken for the purpose of testing of drugs and preparations; whereas the appellant does not carry out any services in relation to any testing of the drug or conducting clinical trials, but carries out only supervisory activity with respect to testing being carried out by appointed agencies of Ingenix, such as hospitals. Ingenix has separate agreements with hospitals/doctors for carrying out clinical trials of testing of drugs and such services of hospitals to Ingenix may qualify as technical testing and analysis services but not services rendered by the appellant which are only in the capacity of support or supervisory function and hence rightly classified as BAS. He further submits that collation of reports in a desired (digital) format is a Data Management service which department has already accepted as export of service. Even assuming without admitting CRM service involves collation of reports, they would be meant for and would be sent to Ingenix in UK and these services would be complete only when such reports are ultimately delivered to Ingenis, which is situated in the UK. He also submits that the impugned service, even assuming without admitting is in the nature of testing and analysis service, can be said to be partly performed outside India, to the extent of delivery of reports outside India and thus, qualifies as 'export of service' under Export of Service Rules, 2005. For this, he relies on the following decisions:

- *Commissioner of Service Tax, Ahmedabad vs. B.A. Research India Ltd - 2010 (18) STR. 439 (Tri. Ahmd.)*
- *Apotex Research Pvt. Ltd. vs. Commissioner of C Ex. & ST, Bangalore - 2022 (63) G.STL 99 (Tri - Bang)*
- *C3i Consultants India Pvt. Ltd vs C.C.E., CUS. & S.T., Hyderabad-II - 2014 (35) S.T.R. 556 (Tri-Bang.)*

4.7 He also submits that once the services are classified as BAS or BSS as held by the Tribunal in a recent case of *Arcelor Mittal Stainless India Pvt. Ltd. vs. Commissioner Service Tax, Mumbai-II reported in 2023- TIOL-469-CESTAT-MUM-LB*, it will qualify as export of service.

4.8 As regards extended period of limitation, the ld. Counsel submits that the department has already examined the nature of services rendered by the appellant while sanctioning refund claims for export of Data Management services; therefore, confirmation of demand for the extended period holding suppression of facts and imposing mandatory penalties cannot be sustained.

4.9 As regards penalty of Rs.2,42,20,838/- under Rule 15(4) of the Cenvat Credit Rules read with Section 78 of the Finance Act, 1994 for alleged incorrect availment of cenvat credit during unregistered period, the ld. Counsel submits that the credit cannot be denied even if availed prior to registration as held in various cases cited above. Further, in the absence of any demand for recovery of alleged

incorrectly availed cenvat credit and confirmation thereof, imposition of penalty equal to credit amount is not justified in law.

5. On the other hand, the learned AR for the Revenue reiterates the findings of the impugned order.

6. We have considered the submissions made by both the parties and perused the material on record and have also gone through the various judgments relied upon by the appellant. We find that there are two issues involved in the present case:

First issue: Whether, cenvat credit availed by the appellant prior to registration requires payment of interest?

Second issue: Whether, Clinical Research Management and Resourcing Services (CMR services) provided by the appellant qualify as 'export of service'?

7.1 As regards the **first issue**, we find that the law does not mandate obtaining registration prior to availing of cenvat credit. Moreover, in the appellant's own case, this Tribunal vide *Final Order No. 60798/2021 dated 06.04.2021 in Appeal No. ST/41/2012* has allowed such credits. We also find that the Tribunal has consistently held in the various cases cited above that cenvat credit availed prior to registration is not invalid.

7.2 Further, we find that in the present case, the department has not challenged the eligibility of credit availed by the appellant on merits and there is no demand issued to the appellant alleging that

the credit is ineligible or recoverable. In the absence of valid demand and confirmation thereof in an adjudication, demanding interest under Rule 14 of Cenvat Credit Rules, 2004 read with Section 75 of the Finance Act, 1994 is not permissible in law. Therefore, we hold that the demand of interest is not sustainable.

8.1 As regards the **second issue** regarding export of CRM services, we find that in the show cause notice as well as in the impugned order, the allegation is with regard to CRM services whereas the demand has been confirmed against the appellant for entire turnover comprising of Data Management services as well as CRM services, which is bad in law because the turnover for Data Management services was 58% of the total taxable value and the turnover for CRM services was to the tune of 42% of the total taxable value and therefore confirming the entire demand under CRM services is not tenable.

8.2 Further, we find that with regard to Data Management services, the department has accepted it as an export and has been granting regularly the refunds to the appellant, which is clear from the various refund orders placed on record. These refund orders have not been challenged and have attained finality which clearly establishes that Data Management services fulfill all the conditions of export as required in law.

8.3 Further, we find that the nature of services provided by the appellant is in the nature of providing supervision and support on

behalf of Ingenix with regard to administration of drugs developed by pharmaceutical companies to humans in hospitals. The appellant does not possess approvals from the regulatory authorities to conduct the clinical trials or carry out any testing or analysis on any drugs, goods or materials; the appellant only carries out supervision services on behalf of Ingenix with whom they had entered into an Agreement to supervise and report back to Ingenix about trials and tests being conducted by hospitals and therefore, these services are rightly classifiable as 'business auxiliary services' ("BAS") being rendered on behalf of the client or it may at best be classified as 'business support service' ("BSS") being services as a support to Ingenix's business.

8.4 Further, we find that as per the Rule 3(1)(iii) of Export of Services Rules, 2005, the services rendered by the appellant to Ingenix who is located outside India, fall under the 'export of services' because there is no dispute with regard to receipt of foreign exchange also. Though, in the impugned order, impugned services rendered by the appellant have been classified as 'Technical Testing and Analysis services', which according to us, do not fall in the definition of 'Technical Testing and Analysis service' because the appellant is not undertaking any technical testing and analysis for the purpose of testing of drugs and preparations. The ld. Commissioner in para 31.1 of the impugned order has observed that the service of administration of drugs or clinical research or testing of drugs provided by hospitals to pharmaceutical companies do not get completed unless results were collated by the assessee in the desired

format. The collation of reports in a desired (digital) format is a Data Management service which the department has already accepted as 'export of service'. Even assuming that the services performed by the appellant are in the nature of testing and analysis service, even then, it will amount to 'export of service' because the said service partly performed outside India, to the extent of delivery of reports outside India and thus, qualifies as 'export of service' under Export of Service Rules, 2005 as held in the cases *CST vs. B.A. Research India Ltd (supra), Apotex Research Pvt Ltd (supra)* and *C3i Consultants India Pvt Ltd (supra*).

9. As regards extended period, we find that the appellant has not suppressed any material facts because the appellant has been filing returns regularly for Data Management services and was getting the refunds, which clearly establishes that the appellant has not suppressed any material facts; therefore, invocation of extended period is bad and thus, penalty imposed under Section 78 of the Act is not sustainable. Similarly, penalty of Rs.2,42,20,838/- imposed under Rule 15(4) of the Cenvat Credit Rules read with Section 78 of the Finance Act, 1994 is not sustainable because once the availment of cenvat credit without registration is valid in view of the various case-laws, then in the absence of any demand for recovery of alleged cenvat credit, imposition of penalty equal to credit amount is not sustainable in law.

10. In view of our discussion above, we are of the considered view that the impugned order is not sustainable in law and therefore, we set aside the same by allowing the appeal of the appellant with consequential relief, if any, as per law.

(Order pronounced in the court on 08.10.2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

RA_Saifi