

2010-TIOL-564-CESTAT-BANG

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, BANGALORE**

ST/304/09, ST/341/09

Arising out of Order-in-Appeal No. 350/2008-ST Dated : 26.12.2008
Passed by the Commissioner of Central Excise, (Appeals), Bangalore

ST/321/09, ST/344/09

Arising out of Order-in-Appeal No. 353/2008-ST Dated : 26.12.2008
Passed by the Commissioner of Central Excise, (Appeals), Bangalore

ST/337/09

Arising out of Order-in-Appeal No. 316/2008-ST Dated : 28.11.2008
Passed by the Commissioner of Central Excise, (Appeals), Bangalore

ST/338/09

Arising out of Order-in-Appeal No. 320/2008-ST Dated : 28.11.2008
Passed by the Commissioner of Central Excise, (Appeals), Bangalore

ST/343/09, ST/367/09

Arising out of Order-in-Appeal No. 357/2008-ST Dated : 22.12.2008
Passed by the Commissioner of Central Excise, (Appeals), Bangalore

ST/388/09, ST/460/09

Arising out of Order-in-Appeal No. 09/2009-ST Dated : 23.1.2009
Passed by the Commissioner of Central Excise, (Appeals), Bangalore

ST/396/09, ST/444/09

Arising out of Order-in-Appeal No. 364/2008-ST Dated : 26.12.2008
Passed by the Commissioner of Central Excise, (Appeals), Bangalore

Date of Decision : 19.3.2010

**1-2) KBACE TECH PVT LTD - (ST/304, 341/08)
3) AON SPECIALTY SERVICES - (ST/321/09)
4) FIDELITY BUSINESS SERVICES LTD - (ST/367/09)
5-6. SHELL TECHNOLOGY - (ST/396, 444/09)
7-12) CCE, CST, BANGALORE - (ST/337, 338, 343, 344, 388, 460/09)**

Vs

**1-6) CCE, CST, BANGALORE -(ST/304/08, 321/09, 341/08, 367/09, 396/09,
444/09)
7) AMD ENGG LTD - (ST/337/09)
8) AMD FAR-EAST LTD - (ST/338/09)**

9) FIDELITY BUSINESS SERVICES PVT LTD - (ST/343/09)
10) AON SPECIALTY SERVICES PVT LTD - (ST/344/09)
11-12) CATER PILLER LOGESTIC - (ST/338, 460/09)

Appellants Rep by: Shri Sachin Aggarwal, Adv. (ST/321, 344, 343, 367, 396, 444/09), Shri Jitin Christofar, CA (ST/304 & 341/09), Shri P J Joseph (ST/388 & 460/09), None for (ST/337 & 388/09)

Respondent Rep by: Ms Sudha Koka, SDR

CORAM : Chittaranjan Satapathy, Member(T)
D N Panda, Member(J)

Service Tax – Refund of unutilized credit availed on input services in terms of Rule 5 of CENVAT Credit Rules – Certain Provisions of CENVAT Credit Rules *ultravires* the statutes - Since Section 37(2) of Central Excise Act and Section 94(2) of Finance Act, 1994 provide for Government to make rules for allowing credit of service tax and rebate of service tax on taxable services which are consumed for providing output services for export, rule making power to be exercised by the Government within this mandate only – Rules cannot provide for credit and rebate of service tax in respect of services which are not consumed for providing output services.

Rule making power - The definition of input service uses expression “any service used by a provider of taxable service for providing output service”, which not only differs from the expressions used in the statutes, but some of the inclusions provided in the said definition *prima facie* go beyond the scope of the rule making power of the Government as provided in the statutes.

Binding nature of Board's Circular No. 120 doubtful – [Circular 120 dated 19.01.2010](#) being issued by an Officer on Special Duty in the Board and since it has no indication of being issued under Section 37B of Central Excise Act, its binding nature doubtful

Retrospective amendments to [Notification No. 5/2006-CE\(NT\)](#) - Retrospective amendments are proposed to be made to [Notification 5/2006-CE\(NT\)](#) only but not to relevant statutes or the rules made there under – Proposed amendments do not alter the expressions used in Section 94 of the Finance Act, 1994

Refund claims ineligible in respect of services which are not consumed for providing output services – No refund can be granted under the rules and the notifications issued there under in respect of services other than the services consumed for providing output services in view of the express language used in the statute

Lower authority to examine eligibility of input credit before sanctioning refund claims of unutilized credits – Lower authorities sanctioning refund claims have to necessarily examine if input credit relates to services consumed for providing output service in view of express statutory provisions – Adjudicating authority directed to examine eligibility of input credit and thereafter allow refunds in terms of Section 37(2) of Central Excise Act and Section 94(2) of Finance Act read with rules and notifications issued there under – Lower authority should also take note of proposed retrospective amendments to [Notification 5/2006-CE\(NT\)](#) – While deciding eligibility of input credit tests laid down by Supreme Court in *Maruti Suzuki Ltd* - [2009-TIOL-94-SC-CX](#), to be considered

Matter remanded

Case laws referred:

1. Mahindra Sona Ltd. vs. CCE , Nasik ([2009-TIOL-571-CESTAT-MUM](#))
2. CCE , Mumbai vs. GTC Industries Ltd. ([2008-TIOL-1634-CESTAT-MUM-LB](#))
3. CCE , Hyderabad vs. Deloitte Tax Services India Pvt. Ltd. ([2008-TIOL-629-CESTAT-BANG](#))
4. CST Delhi vs. Convergys India Pvt. Ltd. ([2009-TIOL-888-CESTAT-DEL](#))
5. Dell International Services (I) (P) Ltd. vs. CCE , Bangalore [Final Order No. 835-837/2009 835-837/2009 dated 23.6.2009 (Tri-Bang.)] = ([2009-TIOL-1957-CESTAT-BANG](#))
6. CCE , Bangalore vs. Motherson Sunni Electric Wires [2010-TIOL-144-CESTAT-BANG](#)
7. Victor Gaskets India Ltd. vs. CCE , Pune ([2008-TIOL-409-CESTAT-MUM](#))
8. Indian Rayon & Industries Ltd. vs. CCE , Bhavnagar ([2006-TIOL-1152-CESTAT-MUM](#))
9. Capiq Engineering Pvt. Ltd [2008-TIOL-1967-CESTAT-AHM](#)
10. CCE , Nasik vs. Cable Corporation of India Ltd [2008-TIOL-1180-CESTAT-MUM](#)
11. ABB Ltd. vs. CCE , Bangalore ([2009-TIOL-830-CESTAT-BANG-LB](#))
12. Tata Consultancy Services vs. State of Andhra Pradesh ([2004-TIOL-87-SC-CT-LB](#))
13. Gujarat State Fertilizer Co. Ltd. vs. UOI ([2009-TIOL-37-HC-AHM - CUS](#))
14. Commissioner of Income Tax vs. Tara Agencies ([2007-TIOL-124-SC-IT](#))
15. CCE , New Delhi vs. Avis Electronics Pvt. Ltd ([2002-TIOL-394-CESTAT-DEL-LB](#))
16. Mihir Textiles Ltd. vs. Collector of Customs, Bombay [1997 (92) ELT 9 (S.C.)]
17. Indian Aluminum co. Ltd. vs. Thane Municipal Corporation [1991 (55) ELT 454 (S.C.)]
18. Sarabhai M Chemicals vs. CCE , Vadodara ([2004-TIOL-104-SC-CX](#))
19. UOI vs. Ganesh Metal Processors Industries [2003 (151) ELT 21 (S.C.)]
20. Maruti Suzuki Ltd. vs. CCE , Delhi - III ([2009-TIOL-94-SC-CX](#))
21. M/s. Chemplast Sanmar Ltd. vs. CCE , Salem ([2010-TIOL-180-CESTAT-MAD](#))
22. Kailash vs. Nanku - AIR 2005 SC 2441
23. State of Punjab and another vs. Shamala Murari and another, (1976) 1 SCC 719
24. Ghanshyam Dass and others vs. Dominion of India and others (1984) 3 SCC 46

FINAL ORDER NO.590 TO 601/2010

Per : Chittaranjan Satapathy :

Heard both sides. This group of twelve appeals involve similar issues and hence these were listed together and heard together partly on 28.01.10 and the hearing was continued and concluded on 29.01.10. Out of these twelve appeals, six have been filed by the assessee appellants and six have been filed by the department. The impugned periods in respect of these appeals vary from case to case but broadly fall within the time-frame from April 2006 to September 2007.

2. The seven service tax assessees involved in this group of twelve appeals have exported various output services. They have taken credit of service tax paid on various services received by them claiming these to be input services used in the export of output services. Accordingly, they have claimed refund of such credit taken by them which has remained un-utilized as no service tax is payable on the export of output services and they have not been able to utilize such credit otherwise. A common feature in these cases is that the original authority has allowed refund in respect of tax paid on some of the services received by the assessees while rejecting the refund claims in respect of some of the other services. On appeal, the lower appellate authority has allowed refund in respect of some more of the services while rejecting the refund claim in respect of remaining services. The department is in appeal in respect of refund claims allowed by the lower appellate authority whereas the assessees are in appeal against the rejection of the refund claims by the lower appellate authority.

3. The services in respect of which refunds have been allowed by the original authority, the services in respect of which the lower appellate authority has allowed the refund but the department has appealed against, and the services for which the lower appellate authority has rejected the refund claims and the assessees have come in appeal are enumerated in the Table below in Columns 3, 4 and 5 respectively: -

TABLE

S.No	Name of the assessee and output services exported	Services for which refund allowed by the original authority	Services for which refund allowed by the lower appellate authority	Services for which no refund has been allowed
1	2	3	4	5
1.	Kbace Tech. P.Ltd (Output Service: Consulting Engineers' Services)	1. Rent of premises 2. Maintenance of computers	1. Manpower supply services 2. Security Agency Services	1. Repair and Maintenance of Premises 2. Rent for generator 3. Management Consulting Services

				4. Chartered Accountant's Services
2.	Aon Specialty Services (Output service: Business Support Services)	1. Management, Maintenance or Repair Service. 2. Business Support Services	1. Clearing and forwarding Agent's Services 2. Manpower Recruitment and Supply Agency Services	1. Management or Business Consultant's Service, 2. General Insurance Service
3.	Fidelity Business Services Ltd. (Output service: Business Auxiliary Services)	1. Management, Maintenance or Repair Service, 2. Telecommun. Services. (partially allowed)	1. Advertising Agency Services 2. Management, Maintenance or Repair Service, 3. Manpower Recruitment and Supply Agency Services, 4. Security Agency Services. (partially allowed)	1. Advertising Agency Services 2. Architect Services, 3. Clearing and forwarding Agent's Services, 4. Commercial Training and Coaching Services, 5 Courier Services, 6. Erection, Commissioning and Installation Services, 7. Event Management Services, 8. General Insurance Services, 9. Insurance Auxiliary service 10. Management or Business Consultant's Service,

				<p>11. Management, Maintenance or Repair services,</p> <p>12. Manpower Recruitment and Supply Agency Services,</p> <p>13. Professional charges,</p> <p>(Appeal not being pressed for this item)</p> <p>14. Rent a Cab services,</p> <p>15. Security Agency Services,</p> <p>16. Telecommun. Services.</p>
4.	Shell Technology (Output service: Consulting Engineers' Services).	<p>1. Courier Services,</p> <p>2. Interior Decorator Services,</p> <p>3. Management, Maintenance or Repair Service,</p> <p>4. Real Estate Agent Services,</p> <p>5. Telecommun. Services.</p>	<p>1. Advertising Agency Services,</p> <p>2. Banking and Other Financial Services,</p> <p>3. Cargo Handling Services,</p> <p>4. Manpower Recruitment and Supply Agency Services,</p> <p>5. Security Agency Services.</p>	<p>1. Business Support Services</p> <p>2. Chartered Accountant's Services,</p> <p>3. Commercial Training and Coaching Services,</p> <p>4. Consulting Engineer's services,</p> <p>5. Erection Commissioning and Instlln. Services,</p> <p>6. Event Management Services,</p> <p>7. Management</p>

				<p>or Business Consultant's Service,</p> <p>8. Rent a Cab services,</p> <p>9. Tour Operator Services</p> <p>10. Travel Agent Services.</p>
5.	Caterpillar Logistic (Output service: Business Auxiliary Service)	<p>1. Telephone Services</p>	<p>1. Security Services,</p> <p>2. Manpower Recruitment Services</p>	<p>1. Commercial Coaching Services,</p> <p>2. Business Auxiliary Service</p> <p>3. Management Consultant Service,</p> <p>4. Car hire service for transporting of employ office</p>
6.	AMD Engg. Ltd. (Output service: Consulting Engineers' Services)	<p>1. Advertising Agency Services</p> <p>2. Courier Services</p> <p>3. Event Management Services</p> <p>4. Mailing list compilation and mailing services'</p> <p>5. Management, Maintenance & Repair Service,</p> <p>6. Rental of immovable property Services</p> <p>7. Sponsorship Services</p> <p>8. Telecommunication Services.</p>	<p>1. Manpower supply,</p> <p>2. Security services,</p> <p>3. Clearing and Forwarding Services</p> <p>4. Chartered Accountant's Services</p>	(No appeal filed by the assessee)

7.	AMD Far-East Ltd. (Output service: Consulting Engineers' Services)	1. Courier Services 2. Management, Maintenance & Repair Services 3. Rental of immovable property Services 4. Telecommunication Services.	1. Manpower supply, 2. Security services 3. Clearing and Forwarding Services 4. Chartered Accountant's Services 5. Management Consultancy Service	(No appeal filed by the assessee)
----	---	---	---	-----------------------------------

4. The issue before us is as to whether refund of the credit relating to services listed under Columns 4 & 5 of the Table above can be allowed and a related issue that arises in this context is whether credit in respect of such services is admissible in respect of the respective output services exported by the assessee indicated under column 2 of the Table above. The departmental appeals also challenge the orders of the lower appellate authority on the ground that he has not kept in view the provisions of clause 5 of the Notification No. 5/06-CE(NT) dated 14.03.2006, while allowing refund of the entire amount of credit. Before taking up the arguments advanced on behalf of both sides, for clarity sake, we first examine the legal provisions relevant in the context of these cases.

5. The Cenvat Credit Rules, 2004, have been made by the Central Government in exercise of the powers conferred by Section 37 of the Central Excise Act, 1944 and Section 94 of the Finance Act, 1994. The provisions of the Finance Act, 1994 continue to govern the field of service tax in the absence of a separate law enacted by the Parliament to deal with this important and growing field of taxation. The enabling provisions under Section 37 (2) allow the Central Government to make rules, *inter alia*, for the following:-

"(xvi) provide for the grant of a rebate of the duty paid on goods which are exported out of India or shipped for consumption on a voyage to any port outside India (including interest thereon),"

"(xvii) provide for the credit of duty paid or deemed to have been paid on the goods used in, or in relation to the manufacture of excisable goods,"

"(xviii) provide for credit of service tax leviable under Chapter V of the Finance Act, 1994 (32 of 1994) paid or payable on taxable services used in, or in relation to, the manufacture of excisable goods,"

"(xix) provide for the lapsing of credit of duty lying unutilized with the manufacture of specified excisable goods on an appointed date and also for not allowing such credit to be utilized for payment of any kind of duty on any excisable goods on and from such date."

6. Section 94 of the Finance Act, 1994 allows the Central Government to make rules to provide, *interalia*, for the following:-

"(ee) the credit of service tax paid on the services consumed for providing a taxable service in case where the services consumed and the service provided fall in the same category of taxable service."

"(eee) the credit of service tax paid on the services consumed or duties paid or deemed to have been paid on goods used for providing a taxable service."

"(g) grant of exemption to, or rebate of service tax paid on, taxable services which are exported out of India"

"(h) rebate of service tax paid or payable on the taxable services consumed or duties paid or deemed to have been paid on goods used for providing taxable services which are exported out of India."

"(hh) rebate of service tax paid or payable on the taxable services used as input services in the manufacturing or processing of goods exported out of India under Section 93A."

7. From the above statutory provisions, it is seen that the Central Government has the power to make rules to provide for credit of service tax paid on:-

1. The services consumed for providing a taxable service in case where the services consumed and the service provided fall in the same category of taxable service.

2. The services consumed or duties paid or deemed to have been paid on goods used for providing a taxable service.

There are also powers to make rules for granting of exemption to or rebate of service tax paid on, taxable services which are exported out of India. Similar provisions are there to make rules for rebate of service tax paid or payable on the taxable services consumed or duties paid or deemed to have been paid on goods used for providing taxable services which are exported out of India.

8. These provisions make it clear that in respect of output service exported, the Government has the power to make rules for providing credit of service tax paid on the services consumed for providing such service. Similar power also exists for providing rebate of service tax paid or payable on the taxable services consumed for providing output services exported. In other words, the law provides for making rules for allowing credit of service tax and rebate of service tax on taxable services which are consumed for providing output services for export. We are not concerned in this case with output services which are not exported. Since the legislature has used the expression "services consumed for providing a taxable service" for the purpose of making rules for grant of credit of service tax, it follows that the rule making power has to be exercised by the Central Government within this mandate of the statute. In other words, the rules cannot provide for credit and rebate of service tax in respect of services which are not consumed for providing output services.

9. In this background, we look at the provisions of the Cenvat Credit Rules, 2004, which have been framed invoking the statutory rule making powers conferred under Section 37 of the Central Excise Act, 1944 and Section 94 of the Finance Act, 1994. We find that the said rules define the expression input service under Rule 2 (1) to mean any service, -

"(i) used by a provider of taxable service for providing an output service, or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and (clearance of final products, upto the place of removal,)

and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal."

Rule 3 of the said rules allows a manufacturer or producer of the final product or a provider of taxable service to take credit *interalia* of service tax paid on any input service received by the manufacturer of final product or by the provider of the output service. The above definition of 'input service' has been adopted for the purpose of the Export of Service Rules, 2006

10. We note at this stage that Section 94 (2) of the Finance Act, 1994, refers to credit of service tax paid on the services consumed for providing a taxable service whereas the definition of input service in the Cenvat Credit Rules, 2004, uses the expression any service used by a provider of taxable service for providing an output service. Not only there is a difference in the expressions used, but also some of the inclusions provided in the definition of input service in the rules prima facie appear to go beyond the scope of the rule making power provided in the statute, which speaks of the "services consumed for providing a taxable service".

11. We do not find any power under Section 94 of the Finance Act, 1994, for making rules for refund of cenvat credit. Only in Section 37 (2) (xxiii) of the Central Excise Act, 1944, there is a reference to form and manner in which application for refund shall be made under Section 11B of the Central Excise Act, 1944. Yet, Cenvat Credit Rules, 2004, contains Rule 5 which specifically deals with refund of cenvat credit. Rule 5 provides for refund of un-utilized credit of service tax in respect of input service used in providing output service which is exported.

12. Thus, we find that different expressions have been used in the Act and the Rules. As pointed out earlier, under Section 94 of the Finance Act, 1994, the expression used is services consumed for providing a taxable service, under Rule 2 (1) the expression used is any service used by a provider of taxable service and under Rule 5 thereof, the expression used is input service used in providing output service. Under Rule 5 of the Cenvat Credit Rules, 2004, [**Notification No. 5/06-CE\(NT\) dated 14.3.06**](#), has been issued providing for safeguard and limitations for granting refund of service tax in respect of input service used in providing output service, which has been exported. The notification *interalia* provides for restricting refund of un-utilized input service credit to the extent of the ratio of export turnover to the total turnover.

13. The assessee appellants, have brought to our notice that a [**Circular No. 120/01/2010-ST dated 19.01.2010**](#), has been recently issued from Board's File No. 354/268/2009-TRU by the Officer on Special Duty (Tax Research Unit). It is argued on behalf of the appellants that they are entitled to claim the refund of un-utilized credit of service tax in terms of this circular. On a query from the Bench, it could not be confirmed by the department that the Officer on Special Duty who has issued the said circular dated 19.01.2010, is an officer authorized to communicate orders of the Board. Secondly, the said circular does not indicate that the same has been issued under Section 37 B of the Central Excise Act, 1944, as made applicable in relation to service tax under Section 83 of the Finance Act, 94. Hence, the binding effect of the said circular

is in doubt. However, since the appellants are placing reliance on the said circular, we reproduce below para 3 (which is the relevant portion) of the said circular in the context of the issues involved in this group of appeals: -

"3. The matter has been examined. At the outset it is necessary to understand that the entire purpose of [Notification No. 5/2006-CX \(NT\)](#) is to refund the accumulated input credit to exporters and zero-rate the exports. Accumulated credit and delayed sanction of refund causes cash flow problems for the exporters. Therefore, the sanctioning authorities are directed to dispose of the refund claims expeditiously based on the following clarifications to the issues raised in paragraph 2 above.

3.1 Use of different phrases in rules and notification [para 2(a)] :

3.1.1 The primary objection indicated by the field formations is that the language of [Notification No. 5/2006-CX \(NT\)](#) permits refund only for such services that are used in providing output services. In other words, the view being taken is that to be eligible for refund, input services should be directly used in the output service exported. As regards the extent of nexus between the inputs/input services and the export goods/services, it must be borne in mind that the purpose is to refund the credit that has already been taken. There cannot be different yardsticks for establishing the nexus for taking of credit and for refund of credit. Even if different phrases are used under different rules of CENVAT Credit Rules, they have to be construed in a harmonious manner. To elaborate, the definition of input services for manufacturer of goods, as given in Rule 2 (I) (ii) of CENVAT Credit Rules, 2004, includes within its ambit all services used " in or in relation to the manufacture of final products " and includes services used " directly or indirectly ". Similarly Rule 2 (I) (i) of CENVAT Credit Rules also gives wide scope to the input services for provider of output services by including in its ambit services " used.... for providing an output service". Similar is the case for inputs.

3.1.2 Therefore, the phrase, "used in" mentioned in [Notification No. 5/2006-CX \(NT\)](#) to show the nexus also needs to be interpreted in a harmonious manner. The following test can be used to see whether sufficient nexus exists. In case the absence of such input/input service adversely impacts the quality and efficiency of the provision of service exported, it should be considered as eligible input or input service. In the case of BPOs/call centres, the services directly relatable to their export business are renting of premises; right to use software; maintenance and repair of equipment; telecommunication facilities; etc. Further, in the instant example, services like outdoor catering or rent-a-cab for pick-up and dropping of its employees to office would also be eligible for credit on account of the fact that these offices run on 24 x 7 basis and transportation and provision of food to the employees are necessary prerequisites which the employer has to provide to its employees to ensure that output service is provided efficiently. Similarly, since BPOs/call centres require a large manpower, service tax paid on manpower recruitment agency would also be eligible both for taking the credit and the refund thereof. On the other hand, activities like event management, such as company-sponsored dinners/picnics/tours, flower arrangements, mandap keepers, hydrant sprinkler systems (that is, services which can be called as recreational or used for beautification of premises), rest houses etc. prima facie would not appear to impact the efficiency in providing the output services, unless adequate justification is shown regarding their need.

3.2 One-to-one co-relation between inputs and outputs and scrutiny of voluminous record [para 2(b) & (c) above] :

3.2.1 Similar problem of co-relation and scrutiny of large number of documents was being faced in another scheme [Notification No. 41/2007-ST dated 06.10.2007] which

grants refund of service tax paid on services used by an exporter after the goods have been removed from the factory. In Budget 2009, the scheme was simplified by making a provision of self-certification [Notification No. 17/2009-ST] whereunder an exporter or his Chartered Accountant is required to certify the invoices about the co-relation and the nexus between the inputs/input services and the exports. The exporters are also advised to provide a duly certified list of invoices. The departmental officers are only required to make a basic scrutiny of the documents and, if found in order, sanction the refund within one month. The reports from the field show that this has improved the process of grant of refund considerably. It has, therefore, been decided that similar scheme should be followed for refund of CENVAT credit under notification No. 5/2006-CE (NT). The procedure prescribed herein should be followed in all cases including the pending claims with immediate effect.

3.2.2 Procedure : The exporter should, alongwith the refund claim, file a declaration containing the following details:

(Rs. in lakh)

	Details of goods/services exported on which refund of input credit is claimed	
S.No.	Details of shipping bill/Bill of export/export documents etc.	Details of input credit on which refund claimed
(1)	(2)	(3)

TABLE

No.	Date	Date of export order	Goods/service exported	Invoice No., date and Amount	Name of service provider/supplier of goods	Service tax/Central Excise Regn. No. of service provider/supplier of goods	Details of service/goods provided with classification under FA 1994/Central Excise Tariff	Service tax/Central Excise duty payable	Date and details of payment made to service provider
1.									
2.									

TABLE

Documents attached to evidence the amount of service tax paid	Total export during the period for which refund is claimed	Total domestic clearances during the period for which refund is claimed	Total amount of input credit claimed as refund
(4)	(5)	(6)	(7)

The declaration should be certified by a person authorized by the Board of Directors (in the case of a limited company) or the proprietor/partner (in case of firms/partnerships) if the amount of refund claimed is less than Rs.5 lakh in a quarter. In case the refund claim is in excess of Rs.5 lakh, the declaration should also be certified by the Chartered Accountant who audits the annual accounts of the exporter for the purposes of Companies Act, 1956 (1 of 1956) or the Income Tax Act, 1961 (43 of 1961), as the case may be.

The Assistant or Deputy Commissioner may, after verification of the fact that the input credit has been correctly claimed, sanction the refund on the basis of the declaration. In case there is a doubt about the correctness of the claim of CENVAT credit on any service, the undisputed amount may be refunded and the balance claim may be decided after following the dispute settlement process.

3.3 Quarterly refund claims [para 2(d) above] :

As regards the quarterly filing of refund claims and its applicability, since no bar is provided in the notification, there should not be any objection in allowing refund of credit of the past period in subsequent quarters. It is possible that during certain quarters, there may not be any exports and therefore the exporter does not file any claim. However, he receives inputs/input services during this period. To illustrate, an exporter may avail of Rs.1 crore as input credit in the April - June quarter. However, no exports may be made in this quarter, so no refund is claimed. The input credit is thus carried over to the July-September quarter, when exports of Rs.50 lakh and domestic clearances of Rs.25 lakh are made. The exporter should be permitted a refund of Rs.66 lakh (as his export turnover is 66% of the total turnover in the quarter) from the Cenvat credit of Rs.1 crore availed in April-June quarter. The illustration prescribed under para 5 of the Appendix to the notification should be viewed in this light. However, in case of service providers exporting 100% of their services, such disputes should not arise and refund of CENVAT credit, irrespective of when he has taken the credit, should be granted if otherwise in order. Such exporters may be asked to file a declaration to the effect that they are exporting 100% of their services, and, only if it is noticed subsequently that the exporter had provided services domestically, the proportional refund to such extent can be demanded from him.

3.4 Incomplete invoices [para 2(e) above] :

In case of incomplete invoices, the department should take a liberal view in view of various judicial pronouncements by Courts. It had earlier been prescribed in circular No.106/09/2008-ST dated 11.12.2008 that the invoices/challans/bills should be complete in all respect. This circular was issued with reference to notification No.41/2007 dated 06.10.2007 as specific services eligible for refund under the notification has been specified. Thus, a stricter requirement exists under the said notification for ascertaining the actual service which has been used in the export of goods. In the case of refund under Rule 5, (i) so far as the nature of the service which has been received by the exporter can be ascertained; (ii) tax paid therein is clearly mentioned; and (iii) other details as required under rule 4(a) are mentioned, the refund should be allowed if the input service has a nexus with the service/goods exported as discussed earlier. In any case, the suggested Chartered Accountant's certificate should clearly bring out the nature of the service and this will assist the officer in taking a decision."

14. In support of their claim for refund of un-utilized credit, the following arguments have been advanced on behalf of the assessee appellants:-

(1) *The Foreign Trade Policy for EOU/ESTP/STP/BTP units states that such units shall be entitled to cenvat credit on service tax paid.*

(2) *The claims are restricted to cenvat credit which is attributable to taxable service and not for exempted service and that the apportionment has been done according to the formula prescribed.*

(3) *The inclusion clause in Rule 2 (1) of the Cenvat Credit Rules enlarges the meaning of input service.*

(4) *The refund of credit has been claimed in respect of input services which are only attributable to taxable services exported.*

(5) *The input services are covered under the definition as "activities relating to business".*

(6) *The expenses in respect of the impugned input services have been incurred for the purpose of business, on the ground of commercial expediency as a prudent businessman would do.*

(7) *Rule 5 of the Cenvat Credit Rules does not say to what extent the input services should be used for providing output services. Therefore, it is sufficient that even a thin line of nexus is established between the input service and the output service.*

(8) *When cost incurred in respect of the input service is included in the cost of the output service, it is clear that such input service is used for providing output service.*

(9) *There is no one to one correlation required between the input service and the output service.*

(10) *The criteria for eligibility of credit would be same whether the output service is domestically used or exported.*

(11) *Input services need not be used directly for or in connection with the provision of taxable service. It is enough if they are related to the provision of such service.*

(12) *Exported services should not be treated as exempted service as clarified in Board's Circular No. 868/06/2008-CX dated 09.05.2008.*

(13) *The assesseees do not have to prove usage of input service in rendering output service when avilment of credit on the same is not disputed earlier in the show cause notice or in the orders passed by the authorities below.*

(14) *The assesseees have availed credit on the impugned services and have disclosed the same in the periodic returns filed. Hence, they have subjected themselves to the scrutiny of the department on this score. Hence, it follows that the assesseees have passed the test of eligibility to the credit and therefore, the same cannot be questioned at the time of considering refund of unutilized credit.*

(15) *The extent and scope of the definition of input services has to be expounded in a liberal expansive way so as to include all activities relating to business.*

15. The appellants are also relying on the following case laws in support of their claim for refund of unutilized credit of service tax:--

(a) *Mahindra Sona Ltd. Vs. CCE, Nasik 2009 (15) STR 474 (Tri. - Mum.)* = ([2009-TIOL-571-CESTAT-MUM](#))

Cenvat credit of Service tax - Input services - Catering services received by manufacturer in canteen attached to factory - Issue settled by Larger Bench of Tribunal [2008 (12) S.T.R. 468 (Tribunal-LB)] = ([2008-TIOL-1634-CESTAT-MUM-LB](#)) holding that credit available where cost of food shown to be part of expenditure incurred by manufacturer with bearing on cost of production calculated on CAS-4 formula - Aspect not examined by lower authorities - Case fit for remand to ascertain whether Service tax paid formed part of cost of production - Rule 2(1) of Cenvat Credit Rules, 2004. [para 2]

(b) *CCE, Hyderabad Vs. Deloitte Tax Services India Pvt. Ltd. 2008 (11) STR 266 (Tri.-Bang.)* = ([2008-TIOL-629-CESTAT-BANG](#))

Cenvat credit of Service tax - Input service - Equipment hiring, professional consultation service, recruitment service, security service, telephone service, transport service, training service, facility operation service, courier service, cafeteria service and advertisement service - Impugned order concluded that impugned services can rightly be termed as 'input service' used by respondent to provide output service - Once they are input services and when output service taxable, then definitely entitled for credit - Credit allowed - Rule 2(1) of Cenvat Credit Rules, 2004. [para 5.2]

(c) *CST Delhi Vs. Convergys India Pvt. Ltd.* [2009-TIOL-888-CESTAT-DEL](#)

The eligibility to the credit of the duty paid on inputs and the credit of tax paid on input services are not contingent on whether the services are exported or not it is incidental that the respondent is exporting the services as of now. They could as well be rendering, or may render in future, the same services to domestic customers. They could be partly providing the said services to domestic customers and could be partly exporting services. In all the situations, the criteria for the eligibility of the credit will be the same. It is clear that there cannot be two different yardsticks, one for permitting credit and the other for eligibility for granting rebate. Whatever credit has been permitted to be taken, the same are permitted to be utilized and when the same is not possible there is provision for grant of refund or as rebate.

(d) *Dell International Services (I) (P) Ltd. Vs. CCE, Bangalore Final Order No. 835 - 837/2009* 835 - 837/2009 dated 23.6.2009 (Tri-Bang.) = ([2009-TIOL-1957-CESTAT-BANG](#))

It is also not in dispute that the appellants utilized the various input services, which had already been enumerated in the submission of the appellants. Once the taxable service is exported and various input services have been utilized for providing the output service the appellants could be entitled for the rebate, which is equal to the service tax paid on the input services. Going by the definition of the 'input service' under Rule 2(1) of the CENVAT Credit Rules, 2004 the service utilized by the appellants for providing output service can indeed be considered as input services. We also take note that the definition of 'input service' indicates that the interpretation should be done in a liberal way in view of the phrase 'activities relating to business'. There cannot be any dispute that the input services rendered by the appellants are all activities relating to the output services exported by the appellant. Moreover, on going through the records, we are satisfied that the appellants had fulfilled the five conditions of Notification No. 12/2005 already enumerated in the submission of the appellants. In these circumstances, the impugned orders do not have any merit. The appellants are entitled for the rebate in respect of all the rebate claims filed by them during the relevant period. In view of the above findings, we allow the appeals with consequential relief.

(e) *CCE, Mumbai Vs. GTC Industries Ltd. 2008 (12) STR 468 (Tri. - LB)* = ([2008-TIOL-1634-CESTAT-MUM-LB](#))

Cenvat credit of Service tax - Input service - Outdoor catering service in canteen of manufacturer - Credit denied holding such service not covered under input service definition as not specifically specified in second part of definition under Rule 2(1) of Cenvat Credit Rules, 2004 - Expenses towards canteen and provision of subsidized canteen forms part of cost of production as evident from para 4.1 of CAS-4 - Mandatory on part of factories to provide canteen facility and failure attracts prosecution and penalty under Section 92 of Factories Act, 1948 - Service tax on outdoor catering service paid by manufacturer whether subsidised food provided or not - Cost of food forms part of expenditure incurred having bearing on cost of production - Outdoor caterer providing catering services is input service relating to business - Cenvat credit admissible - Rules 2(1) and 3 ibid, [para 9]

(f) *CCE, Bangalore Vs. Motherson Sunni Electric Wires* [2010-TIOL-144-CESTAT-BANG.](#)

The fact that the appellants used the inputs is not in doubt. It is also not disputed that the appellants had exported the impugned goods and the refund is only in respect of the input credit attributable to the inputs utilized in the export goods. It is not necessary to prove one-to-one correlation of inputs with that of export goods. We agree with the learned Commissioner (Appeals) that there is no such requirement under the CENVAT Credit Rules, 2004. He had also come to the conclusion based on the figures that the respondent is not in a position to utilize the credit availed on inputs used in the manufacture of goods, which were exported under bond and which are getting accumulated from time to time. He has correctly applied Rule 5 of CCR, which provides for sanction of refunding cash in respect of goods exported under bond/letter of undertaking. Moreover, the issue is settled in terms of the decisions of the Tribunal cited by the learned counsel for the respondents. The OIO and the Appeal of the Department are also beyond the scope of the Show Cause Notice.

(g) *Victor Gaskets India Ltd. Vs. CCE, Pune 2008 (10) STR 369 (Tri. - Mum.)* = ([2008-TIOL-409-CESTAT-MUM](#))

Canteen facility, although not specifically stated in the list of activities in the definition of input service, yet it is an activity relating to business as this facility is provided exclusively to employees in the factory. Canteen facility is beneficial for workers as they are served food stuff at concessional rates and it is they who are engaged in the business of appellants which is nothing but manufacture of goods. In any case, canteen facility can also be said to be used by manufacturer indirectly, it is only for the benefit of employees who play a significant role in the activity of manufacture. Provision of canteen is also mandatory as per Factories Act, 1948. [paras 7, 8,11]

(h) *Indian Rayon & Industries Ltd. Vs. CCE, Bhavnagar 2006 (4) STR 79 (Tri. - Mum.)* = ([2006-TIOL-1152-CESTAT-MUM](#))

Cenvat credit of Service tax - Service tax paid on mobile phone is available as credit to eligible service providers of output service and manufacturers in absence of any express prohibition under Cenvat Credit Rules 2004, applicable during the material time - Board's old Circular No. 59/8/2003-S.T., dated 20-6-2003 cannot be pressed into service against appellants - Rules 4(1) and 4(7) ibid, [paras 3, 4, 5]

(i) *Capiq Engineering Pvt. Ltd.* [2008-TIOL-1967-CESTAT-AHM.](#)

"There is no requirement of one to one co-relation between the input service and the final product - refund cannot be denied on the ground that the input service is of general nature which could be used for several quarters."

(j) CCE, Nasik Vs. Cable Corporation of India Ltd. [2008-TIOL-1180-CESTAT-MUM](#)

"Service Tax - Scope of inclusive part of definition of 'input service' much larger than just 'being used directly or indirectly in relation to manufacture' - Hiring of cars for transportation of employees to the factory - Service is used indirectly in relation to the manufacture or as part of business activity - Any facility provided to employees will result in greater efficiency and promotion of business - Rent-a-Cab Service is an Input Service and CENVAT credit available -Revenue appeal rejected."

(k) ABB Ltd. Vs. CCE, Bangalore 2009 (15) STR 23 (Tri. - LB) = ([2009-TIOL-830-CESTAT-BANG-LB](#)) - stayed by Hon'ble Bangalore High Court.

Cenvat credit of Service tax - Input service - Goods Transport Agency service - Outward freight for transportation of final product from place of removal whether an input service - Expression "activities relating to business" covers transportation upto customer's place and word "relating" widens scope - Credit not deniable relying on coverage of outward transportation upto place of removal in inclusive clause - No restriction on "activities relating to business" being related to main or essential activities - All activities relating to business fall under input service - Input service not restricted to services specified after expression "such as" as it is purely illustrative - Transportation of goods to customer's premises is an activity relating to business and credit of Service tax thereon admissible - Rules 2(1) and 3 of Cenvat Credit Rules, 2004.

16. It is significant that on behalf of one of the respondent assessee namely Caterpillar Logistics, it is submitted that they themselves have compiled a negative list of services in respect of which the service tax refund has not been claimed by them. The services on their negative list are as follows: -

(1) Group Insurance (Group Medical Policy Premium)

(2) Travel - Air Ticket - Both Domestic and International

(3) Canteen

(4) Building Maintenance

(5) Bank Charges

(6) Car Hire Charges - for people other than employees (only service tax on car hire charges to bring employees to work and take them back is claimed as refund)

(7) Service tax on expenditure incurred towards entertainment

(8) Courier charges

(9) Motor vehicle insurance

(10) Fixed Assets Insurance

(11) Service tax on Security charges towards deputing security at the accommodation provided by the company for executives.

(12) Service tax on hiring of drivers for driving cars are not claimed.

(13) Professional services like consultancy charges related to income tax etc., are not claimed.

17. Ms. Sudha Koka, Ld. SDR, appearing for the department states that the orders passed by the lower appellate authority are not legal and proper for the following reasons: -

(a) The orders do not take into account the conditions laid down under Notification No. 5/06-CE(NT) dated 14.03.2006, which are relevant for allowing refund of unutilized credit of service tax.

(b) Rule 2 (1) of Cenvat Credit Rules, 2004 deals with what credit is admissible to a provider of output services. Only that part of such credit which is attributable to the provision of exported output services can be allowed as refund. The burden is on the assessee to establish which part of the credit is attributable to provision of exported output services and also to prove that the conditions set out in the notification are fulfilled.

According to her, the assessee has filed the refund claims without complying with the conditions set out under the notification No. 5/06. She states that the assessee has also not shown that the claimed services have actually been used in the export of services.

18. The Ld. SDR argues that the lower appellate authority has not examined the restrictive nature of the notification No. 5/06 and also the provisions of Rule 5 of Cenvat Credit Rules, 2004, which governs the refund un-utilized credit. The said rule requires that the input services must have been used in providing output services. She also cites the following decisions in support of the department's case: -

(1) *Tata Consultancy Services Vs. State of Andhra Pradesh 2004 (178) ELT 22 (S.C.) = (2004-TIOL-87-SC-CT-LB)*

Ordinarily statute has to be literally construed and such construction cannot be denied merely because consequence of such interpretation leads to penalty.

(2) *Gujarat State Fertilizer Co. Ltd. Vs. UOI 2009 (233) ELT 187 (Guj.) = (2009-TIOL-37-HC-AHM-CUS)*

If language of statute is capable of plain meaning without doing any violence to the language, it is not open to add any word.

This is so as to give meaning which the court thinks more appropriate.

(3) *Commissioner of Income Tax Vs. Tara Agencies 2007 (214) ELT 491 (S.C.) = (2007-TIOL-124-SC-IT)*

Intention of legislature- It has to be gathered from language used in the statute which means that attention has to be paid to what has been said as also to what has not been said. Statute as it is to be interpreted. Reading into it which legislature in its wisdom has deliberately not interpreted is impermissible.

(4) *CCE, New Delhi Vs. Avis Electronics Pvt. Ltd* 2000 (117) ELT 571 (Tri.-LB) = ([2002-TIOL-394-CESTAT-DEL-LB](#))

Tribunal not to supplement or add word to the rules when a particular thing is directed to be performed in that manner itself and not otherwise.

(5) *Mihir Textiles Ltd. Vs. Collector of Customs, Bombay* 1997 (92) ELT 9 (S.C.)

Exemption/Benefit dependent upon satisfaction of certain conditions cannot be granted unless such conditions are complied with, even if such conditions are only directory

(6) *Indian Aluminum co. Ltd. Vs. Thane Municipal Corporation* 1991 (55) ELT 454 (S.C.)

Interpretation of statute- Exemption or concession- condition-precedent-Non Observance of even a procedural condition not to be condoned if likely to facilitate commission of fraud and introduce administrative inconveniencies.

(7) *Sarabhai M Chemicals Vs. CCE, Vadodara* 2005 (179) ELT 3 (S.C.) = ([2004-TIOL-104-SC-CX](#))

Interpretation of statutes- Exemption notification - conditions for exemptions have to be strictly construed

(8) *UOI Vs. Ganesh Metal Processors Industries* 2003 (151) ELT 21 (S.C.)

Interpretation of Exemption notification- Where language used is unambiguous nothing is required to be added or included in the same so as to arrive at the presumed intention of the legislature-language of explanation V to notification No. 175/86-CE being clear and not making any distinction between types of payments received by exporters to Nepal, no such distinction is to be made in its interpretation (para 6)

(9) *Maruti Suzuki Ltd. Vs. CCE, Delhi - III* 2009 (240) ELT 641 (SC) = ([2009-TIOL-94-SC-CX](#))

(i) Cenvat/Modvat - Input, scope of - Crucial requirement that all goods "used in or in relation to the manufacture of final products" qualify as "input" - Expression not a standalone item but to be read in entirety as "used in or in relation to manufacture of final product whether directly or indirectly and whether contained in the final product or not" - Inputs falling in inclusive part must have nexus with manufacture of final product - Functional utility of item would constitute relevant consideration - All the three parts of definition, namely specific, inclusive and place of use to be satisfied before an input becomes an eligible input - Rule 2(g) of Cenvat Credit Rules, 2002 - Rule 2(k) of Cenvat Credit Rules, 2004. - Unless and until the said input is used in or in relation to the manufacture of final product within the factory of production, the said item would not become an eligible input. The said expression "used in or in relation to the manufacture" have many shades and would cover various situations based on the purpose for which the input is used. However, the specified input would become eligible for credit only when used in or in relation to the manufacture of final product, [paras 10,14,16]

(ii) Functional utility of item would constitute relevant consideration - None of the categories in inclusive part would constitute relevant consideration per se unless crucial requirement of being "used in or in relation to the manufacture" stands complied - Definition to be read in its entirety - Rule 2(g) of Cenvat Credit Rules, 2002 - Rule 2(k) of Cenvat Credit Rules, 2004. [para 16]

(iii) Cenvat/Modvat - Packing material - Item to be used in course of manufacture of final product - Mere fact that item is a packing material whose value is included in assessable value of final product not entitles manufacturer to take credit - Rule 2(g) of Cenvat Credit Rules, 2002 - Rule 2(k) of Cenvat Credit Rules, 2004. [para 14]

(iv) Cenvat/Modvat - Inputs used in electricity generation -Electricity generation is an ancillary activity which is anterior to process of manufacture of final product - Activity comes within ambit of definition of inputs because it is integrally connected with manufacture of final product - Rule 2(g) of Cenvat Credit Rules, 2002 - Rule 2(k) of Cenvat Credit Rules, 2004.

(10) *M/s. Chemplast Sanmar Ltd. Vs. CCE, Salem 2010 (250) ELT 46 (Tri.- Chen.) = (2010-TIOL-180-CESTAT-MAD)*

The services which are used by the manufacturer after completion of the manufacturing, and for sale of the goods cannot, therefore, be considered as input service in or in relation to manufacture as the rules framed by the Government have to conform to the rule making powers contained in the statute under Section 37(2) of the Central Excise Act, 1944.

19. We have considered the submissions made from both sides as well as the case records, the cited case laws and the Circular dated 19.01.10. We note at the outset that all these appeals relate to cases of export made by export oriented units. We also note the anxiety of the Government as reflected in the Circular dated 19.01.10, that the Government wants to refund the accumulated input credit to the exporters and zero-rate the exports.

20. In the said circular, note has been taken regarding use of different phrases in the relevant rules and notifications. In addition, we find that the expression used in the Act is also different. As pointed out in para-6 above, the legislature uses the expression services consumed under Section 94 (ee) and (eee). The rules made taking recourse to the statutory provisions contained in the Act and the notifications issued there under have to be interpreted in the context of the expression used in the Act.

21. All the rules of procedure are the handmaid of justice as held in *Kailash V. Nanku - AIR 2005 SC 2441*. In the *State of Punjab and another V. Shamala Murari and another, (1976) 1 SCC 719*, Apex Court approved in no unmistakable terms the approach of moderating into wholesome directions what is regarded as mandatory on the principle that Procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. In *Ghanshyam Dass and others V. Dominion of India and others (1984) 3 SCC 46*, the Court reiterated the need for interpreting a part of the adjective law dealing with procedure alone in such a manner as to subserve and advance the cause of justice rather than to defeat it as all the laws of procedure are based on this principle. It is settled principles of law that the courts when called upon to interpret the nature of the provision, may keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.

22. Language employed in subordinate legislation alone most often is not decisive, but regard must be had to the extent, subject-matter and object of the statutory provision in question, in determining whether the same is in consonance with legislative mandate. No rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience to the statutory provision. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered. For ascertaining

the real intention of the Legislature the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequence, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered. Rule cannot be interpreted de hors the legislation and particularly in fiscal jurisprudence if Rule departs from legislative intent that may cause peril to public revenue.

23. We find that as a part of the Budget proposal this year some amendments have been made **Notification No. 5/06-CE(NT) dated 14.03.06**, issued under Rule 5 of the Cenvat Credit Rules, 2004, has been retrospectively amended as follows:-

(1) The words "in relation to" have been added in main condition (a) of the Notification.

(2) The word "in" contained in main condition (b) of the said Notification has been replaced with "for".

(3) The illustration given in condition 5 of the Appendix to the Notification has been deleted.

We, however, find that neither the Act, nor the Rules have been retrospectively amended.

24. Some prospective amendments have also been made to the said **Notification No. 5/06-CE(NT) dated 14.3.06**, requiring certification of details relating to refund claim including certification by a Chartered Accountant.

25. These changes, do not alter the fact that the expression used in the Finance Act, 1994, speaks of services consumed for providing a taxable service and the expressions used in the Cenvat Credit Rules, 2004 and in the Notification issued there under are different. The Rules and Notifications issued under the enabling power under the Act cannot expand the mandate given under the enactment and cannot make provision for allowing credit in excess of what is stipulated under the law. The rule making authority can frame rules covering a lesser area than what it is empowered to do but cannot go beyond the limits provided under the statute and make rules covering a greater area.

26. While we fully appreciate and support the idea that the refunds in respect of unutilized and accumulated credit should be sanctioned to the exporters as expeditiously as possible, without any delay, no refund can be granted under the rules and the notifications in respect of services other than the services consumed for providing output service in view of the express language used in the statute. The Board's Circular dated 19.01.10 cited before us does not have the effect of amending the statute and cannot be seen as authorizing sanction of refund if the credit of service tax does not relate to services consumed for providing the output service. The officials sanctioning refund have to, therefore, necessarily examine if the credit relates to services consumed for providing the output service in view of the statutory provision unless the statute is amended.

27. In the course of hearing of these appeals, both sides confirmed that since the appellants are export oriented units and are exporting the services, no examination has been done at the time the credit has been taken as to whether such credit is admissible in terms of the statutory provision and the rules and notifications made thereunder. It was argued before us that in the case of *CST Delhi Vs. Convergys India Pvt. Ltd. (supra)*, it has been held that there cannot be two different yard sticks, one for permitting credit

and the other for eligibility for granting rebate and that whatever credit has been permitted to be taken, the same should be permitted to be utilized and if such utilization is not possible, refund or rebate should be granted. We entirely agree with the said decision that whatever credit has been permitted to be taken, the same should be permitted to be utilized and if that is not possible, refund or rebate should be granted in case of export of output services. However, in these cases, it was clearly admitted by both sides that initially the credit was taken by the appellant exporters on their own and the admissibility of such credit was not examined by the field officials at that stage since there was no duty payment involved on the output service exported and therefore, no assessments were made. Accordingly, we hold that before granting refund the field officials will be at liberty to verify the admissibility of the credit.

28. The next question that arises is whether a particular service can be considered as an input service for a particular output service or not. As stated earlier and reflected in the Table in para-3, the original authority has allowed the refund for certain services holding those services to be input services. Since neither side has appealed against the decisions of the original authority in regard to these services, we express no opinion about the same. The services listed in column 4 of the Table are the ones in respect of which the lower appellate authority has allowed refund and the department has come in appeal to the Tribunal. The services under column 5 of the Table are the ones in respect of which neither the original nor the appellate authorities have allowed refund and therefore, the assessee appellants are in appeal claiming refund in respect of those services.

29. We note that certain opinions have been expressed in an illustrative manner in the Circular dated 19.01.10, stating that some of the services named therein can be considered as input services and certain others cannot be so considered. We are of the view that no such hard and fast rule can be made nor can the same be binding on the adjudicating and appellate authorities. It is a different matter that in respect of export goods, exemption from paying service tax on certain services received and used by the exporter has been granted under Notification No. 17/09-ST dated 7.7.09. But we note that no such legally binding notification has been issued by the Government to provide similar relief in respect of export of services. In the absence of such a specific legal notification, these cases of claim of refund of un-utilized credit would necessarily be required to be adjudicated by the field officers in the light of the statutory provisions including provisions contained in the rules and notifications issued thereunder. After analyzing the various services listed in the Table in para-3, we find that a decision has to be taken by the field officials regarding eligibility of not only a particular service as an input service, but also the service received under a particular invoice must be shown to have been consumed for providing output service exported. In other words, it is not only necessary to verify that a particular kind of input service is consumed for providing a particular kind of output service but it is necessary to ensure that the eligible service received under various invoices have actually gone into consumption for providing the exported output service in question and not utilized for other purposes.

30. Moreover, the tests laid down by the Hon'ble Supreme Court in the case of Maruti Suzuki (supra) have also to be kept in view. The Hon'ble Supreme Court has held in the said case that the definition of the word "input" can be divided into three parts namely a) specific part, b) inclusive part, and c) place of use. The Hon'ble Supreme Court also referred to integral connection with the ultimate production, the dependence test and the functional utility test in the said decision in the context of deciding what can be an input. We are of the view that while deciding what is an eligible input service for a specific output service, the claimed input service should also be required to meet the tests specified in the afore-cited decision of the Hon'ble Supreme Court, though the same were rendered in the context of goods rather than services. Further, it would also have to be kept in view that the Hon'ble Supreme Court has held in the case of Maruti Suzuki (supra) as follows:-

"Mere fact that the item is a packing material whose value is included in the assessable value of final product will not entitle the manufacturer to take credit."

The process undertaken by the appellant assessee to produce the exported output service may also have to be examined to determine what input services have been consumed in the process following the decision of the Hon'ble Supreme Court rendered in the case of *CIT-U, New Delhi Vs. Oracle Software India Ltd. - 2010 (250) ELT 161 (S.C) = (2010-TIOL-04-SC-IT)*, though the same was rendered in the context of 'manufacture'.

31. We also note that the services for which refund has been claimed include almost all kinds of services received by the appellants. Some of the appellants have claimed refund of service tax paid on insurance services, chartered accountant's services, courier services, etc. On the other hand, one of the appellants before us has put these services on the negative list stating that they are not claiming refund of service tax paid on such services. In other words, they do not consider these services to be input services consumed for providing output services. Further, the same appellant has claimed refund of service tax paid on security agency, services but has put service tax on security charges paid towards deputing security at the accommodation provided by the Company for the executives on the negative list. Similarly, they have claimed refund in respect of car hire service for transporting employees to office but not claimed refund of service tax paid on car hire charges for people other than employees. These examples go to show that no decision can be made allowing or disallowing refund of service tax for an input service as a whole but the admissibility of credit relating to each transaction has to be examined to arrive at the quantum of refund to be allowed. Obviously, this is a task that would require examination of details which have not been furnished by the appellant assessee. Perhaps, considering the magnitude of work involved in such examination, the Circular dated 19.01.10, provides for a procedure for filing refund claim along with certified details including certification by a chartered accountant who statutorily audits the annual accounts of the exporter. It also provides for verification by the Asst./Dy. Commissioner that input credit has been correctly claimed.

32. We are therefore, of the view that though the Circular has been issued on 19.01.10, the procedure prescribed thereunder for examining refund claims should also be applied to the pending cases for expeditious examination and sanction of the claimed refunds.

33. In view of our finding as above, we pass the following order:-

(1) The impugned orders are set aside and all the 12 appeals are remanded to the original authority for fresh decision. This will not, however, allow re-opening of the refund amounts sanctioned at the level of original authority against which no appeals have been filed.

(2) The appellants/respondent assessee shall be required to furnish declarations containing the details as prescribed under the Circular dated 19.01.10 before the original authority in respect of refunds of unutilized credit claimed by them. Such declarations should be accompanied by the certificates prescribed under the said Circular dated 19.01.10.

(3) The original authority shall examine the claims afresh in the light of the statutory provisions including the rules and notifications in force and also taking into account the retrospective changes made as a result of the Budget proposals as and when these are enacted and decide the refund claims expeditiously by applying the tests laid down by the Hon'ble Supreme Court in the case of *Maruti Suzuki (supra)*.

(4) The original authority shall keep in view the safeguards, conditions and limitations prescribed under Rule 5 of the Cenvat Credit Rules, 2004 and will scrutinize the refund claims in the light of such provisions and in particular the refunds granted should be limited to amounts as determined to be proportionate to the export turnover.

34. Before passing fresh orders, the appellants/respondent assessee shall be afforded reasonable opportunity of hearing by the original authority. All the 12 appeals are allowed by way of remand in the above terms.

(Order pronounced in the open Court on 19.3.10)