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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
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Mumbai- 400 005

F. No. 198/17-23/WZ/2017-RA /1594 Date of Issue: 17.03.2023

ORDER NO.27-133/2023-CX(WZ)/ASRA/MUMBAI DATED 14.3.2023 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : Pr. Commissioner of CGST, Mumbai East.

Respondent : M/s. Polyplastics Marketing(India) Private Limited.

Subject : Revision Applications filed under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. MUM-SVTAX-002-APP-137 to 142-17-18 dated 19.06.2017 passed by the Commissioner (Appeals), Service Tax-II, Mumbai.

ORDER

1. These Revision Applications have been filed by the Pr. Commissioner of CGST, Mumbai East (hereinafter referred to as "the Applicant-Department") against the Order-in-Appeal No. MUM-SVTAX-002-APP-137 to 142-17-18 dated 19.06.2017 passed by the Commissioner (Appeals), Service Tax-II, Mumbai.

2. Brief facts of the case are that M/s. Polyplastics Marketing (India) Private Limited (hereinafter referred to as "the Respondent") is engaged in rendering of taxable services under the category of 'Business Support service'. They had filed six rebate claims totally amounting to Rs.53,52,114/- for export of services under Rule 6A of the Service Tax Rules, 1994 read with Notification No. 39/2012-ST dated 20.06.2012 during the period July 2012 to March 2015 to M/s. Polyplastics Asia Pacific(s) Pte Ltd., Singapore. The Rebate sanctioning authority rejected the rebate claims on the grounds that

a) Cenvat credit of the service tax and cess paid on input services had been availed;
b) the declaration as required under Notification No.39/2012-ST dated 20.06.2012 had not been filed in respect of input services actually required to be used in providing service to be exported.

Aggrieved, the Respondent filed an appeal with Commissioner (Appeals), who vide impugned Order-in-Appeal allowed it.

3.1 Hence, the Applicant-Department has filed the instant Revision Application on the following grounds:

The crux issue arising out of the instant case pertains to rejection of six rebate claims in respect of service tax paid on output services and claimed under Notification No. 39/2012-ST dated 20.06.2012 without following condition 2(e) prescribed under the Notification in as much as the respondent had claimed CENVAT credit on service tax paid on

input services and utilized the same. The utilization of credit of tax implies that it was used towards payment of tax on output service. The respondent did not even quote either the Rule 6(3) of Cenvat Credit Rules, 2004 while debiting the cenvat credit taken.

In the light of the above submissions, the Applicant-Department prayed to set aside the impugned order-in-appeal.

3.2 The Respondent has filed written submissions mainly on the following grounds:

a. The Assistant Commissioner in the grounds for application filed before Principal Commissioner (RA) has simply mentioned that condition in para 2(e) of Notification is not satisfied and thus rebate cannot be allowed. It is submitted that the respondent, while filing an appeal before Commissioner (A) had made detail submission by relying on various judgements of Tribunal, High Court and Supreme Court wherein it has been clearly stated that when tax is not payable but the same is paid by using Cenvat Credit, it amounts to reversal of Cenvat Credit. Also, they had cited the judgement of Honorable Supreme Court in the case of Bombay Dyeing & Manufacturing Co. Limited 2007 (215) ELT 3(SC) to state that subsequent reversal of credit amounts to non-taking of credit. These points were discussed by the Commissioner (A) in his order and were accepted and accordingly their appeal was allowed. It is submitted that the Assistant Commissioner has not made any effort to distinguish the said judgements relied up on by the respondent. Also, the Assistant Commissioner has not cited any case laws in his support which has either distinguished or over-ruled the judgements cited by respondent. Therefore, it can be seen that the revision application does not provide any logical reasoning for denying the rebate claim. Thus, in the interest of the natural justice, it is submitted that the application filed by the Assistant Commissioner should be set aside.

b. The only ground for filing the revision application by the department is that the respondent has utilised the cenvat credit as shown in the ST-3 return and thus condition 2(e) of the notification has not been

complied with. It is submitted that the respondent is not paying any service tax on the output service which can be evidenced from the invoices attached as annexure 1. It can be seen that the invoices do not mention any service tax charged or collected from the customers. Further, mentioning of utilising service tax for payment of output liability is only a case of wrong presentation in the ST-3 return. The practice followed by the respondent is that they choose a particular month from each six month with the highest turnover and claim refund of cenvat credit to the extent of service tax payable on turnover of that month subject to the availability of cenvat closing balance. For claiming refund, they show that the amount of service tax is payable on the turnover of that month and is paid through cenvat credit. This method was adopted upto the period ending September 2014. Copy of ST-3 return for the period April 2014-September 2014 is attached as annexure 2 to substantiate the same. Further, the respondent attaches as annexure 3 entry made in books of accounts for service provided in June 2014 showing that no liability of service tax is created in the books. Further, the respondent attaches as annexure 4 the entry showing reversal of cenvat credit and parking the same in a separate account till the refund is received for an amount of Rs 11,81,189/-. Thus, it is submitted that the respondent claims refund of service tax paid on input services but the same is shown as service tax payable which is only incorrect manner of presentation. Therefore, there is no cenvat utilised. The credit has been reversed for the purpose of claiming refund and thus condition of notification has been satisfied.

c. Without prejudice to the above it is a settled law that when tax is not payable on the output but the same has been paid using Cenvat Credit in such cases it amounts to reversal of Cenvat Credit. They rely on the judgment in the case of M/s. Pyrotech Control (India) Pvt. Limited 2016 (12) TMI 835 - CESTAT New Delhi wherein the department had alleged that the process carried out by the appellant does not amount to the process of manufacture. Therefore, no duty was payable on the

final product arising from such processing and thus cenvat credit is not allowable. However, the Tribunal held that if the manufacturer has paid duty on such final product by cenvat credit, it has been held that such payments amounts to reversal of credit. They also rely upon the following judgments

- Stumpp Scheule & Somappa Ltd v/s Commissioner of Central Excise, Bangalore-12005 (191) ELT 1085
- Rico Auto Industries Ltd v/s Commissioner of Central Excise, New Delhi-III 2003 (157) ELT 170 (Tri. Del)
- Commissioner of Central Excise & Customs, Vadodara v/s Narmada Chematur Pharmaceuticals Ltd. 2005 (179) ELT 276 (SC)
- Commissioner of Central Excise, Ahmedabad v/s Narayan Poly Plast 2005 (179) ELT 20 (SC)
- Silvasa Wooden Drums v/s Commissioner of Central Excise, Vapi, 2005 (184) ELT 392 (T)
- Orion Ropes (P) Ltd. v. CCE - 2006-TIOL-391-CESTAT-MUM
- Orbit Bearing (1) Pvt. Ltd. v. CCE - 2006-TIOL-1637-CESTAT-Mum.
- Ajinkya Enterprises 2013 (294) ELT (203) Bom.

d. The Assistant Commissioner in para 6(i) of the Order has given categorical findings that the services provided by the appellants is an 'export of service', in as much as all the conditions specified in Rule 6A of the Service Tax Rules, 1994 have been complied with. Thus the 'export of service' is not a matter of dispute. Further, the claimant have also submitted the invoices of input service providers and also the details of bank statement under which payments have been made to the input service providers, to substantiate that the Service Tax and Cess has been paid to the input service providers. It is therefore submitted that substantial condition of 'export of service' and payment of tax to 'input service providers' have been complied with, 'It has been consistently held that ones the substantial conditions have been complied with, the rebate of tax should not be denied. The respondents rely on the following judgments:

- Cotfab Exports 2006 (205) ELT 1027 (GOI)
- Union of India v. Suksha International & Nutan Gems & Anr, 1989 (39) E.L.T.503(S.C.)
- Union of India v. A. V. Narasimhalu - 1983 (13) E.L.T. 1534 (S.C.)
- Formika India v. Collector of Central Excise 1995 (77) E.L.T. 511 (S.C.)
- Mangalore Chemicals and Fertilizers Ltd. v. Deputy Commissioner, 1991 (55) E.L.T. 437 (S.C.).

e. The provisions of Section 11B of the Central Excise Act, 1944 have been made applicable to the Service Tax vide Section 83 of Chapter V of the Finance Act, 1994. As per Section 66B of the Finance Act, 1994, the Service Tax is payable on rendering of services in a taxable territory. The services therefore shall be rendered in a taxable territory and the place of provision of rendering the service is determined as per Place of Provision of Service Rules, 2012. In view of this, it is submitted that in case for any reason the claim cannot be sanctioned under Notification No. 39/2012 — ST it should be sanctioned under Section 11B of the Central Excise Act, 1944.

f. As per Article 265 of the Constitution of India, tax can be retained by the Government only to the extent it can be levied and collectable as per the provisions of the respective Act. The tax amount which cannot be collected cannot be legally retained by the Government. The claimant relies on the following cases:

- Jain Irrigation Systems Ltd. 2015 (9) TMI 688 - CESTAT Mumbai
- Northern Minerals Ltd. 2007 (216) E.L.T. 198 (P & H)

In the present case, as explained above, there is no tax payable on export of services under section 66B. Therefore, when tax is not as per the statute, the Government has no right to retain such amount paid by the claimant. Thus the same shall be refunded to the claimant in any case.

4.1 Personal hearing in the case was fixed for 13.01.2023. S/Shri Piyush Chhajed and Ajay Telisara, representing the Respondent, attended the hearing and submitted a written submission and a paper book. They further submitted that Department has filed RA against the Order of Commissioner (Appeals) on the grounds that Cenvat has been availed. They submitted that they have not availed double benefit. They requested to maintain the Order passed by the Commissioner (Appeals).

4.2 No representative from the side of the Applicant-Department appeared for the personal hearing nor has any written communication been received from them in the matter.

5. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal.

6. Government observes that the main issue involved in the instant Revision Application is to determine as to whether there was any lapse in following the condition No. 2(e) of the Notification No. 39/2012-S.T. dated 20.06.2012 by the respondent?

7.1 Government observes that the concerned Rule 6A(2) of the Service Tax Rules,1994, reads as under:

> *6A. Export of services -*
>
> *(2) Where any service is exported, the Central Government may, by notification, grant rebate of service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification.*

7.2 Government observes that the Notification No. 39/2012-ST dated 20.06.2012, has been issued under Rule 6 of the Service Tax Rules,1994, and it stipulates following conditions:

> *2. Conditions and limitations:-*
>
> (a) *that the service has been exported in terms of rule 6A of the said rules;*
>
> (b) *that the duty on the inputs, rebate of which has been claimed, has been paid to the supplier;*
>
> (c) *that the service tax and cess, rebate of which has been claimed, have been paid on the input services to the provider of service; Provided if the person is himself is liable to pay for any input*

services; he should have paid the service tax and cess to the Central Government.

(d) *the total amount of rebate of duty, service tax and cess admissible is not less than one thousand rupees;*

(e) *no CENVAT credit has been availed of on inputs and input services on which rebate has been claimed; and*

(f) *that in case,-*

(i) *the duty or, as the case may be, service tax and cess, rebate of which has been claimed, has not been paid; or*

(ii) *the service, rebate for which has been claimed, has not been exported; or*

(iii) *CENVAT credit has been availed on inputs and input services on which rebate has been claimed,*

the rebate paid, if any, shall be recoverable with interest in accordance with the provisions of section 73 and section 75 of the Finance Act, 1994 (32 of 1994)

8.1 Government observes that as per the impugned Notification, the respondent was eligible for rebate of service tax paid on input services used in providing the service exported by them subject to compliance of stipulated conditions. The impugned Order-in-Original do not mention about violation of any of the conditions other than the condition mentioned at para 2(e) of the Notification (supra). In this regard, Government observes that the Respondent has contended that – '*Further, mentioning of utilising service tax for payment of output liability is only a case of wrong presentation in the ST-3 return. The practice followed by the claimant (respondent) is that the claimant chooses a particular month from each six month with the highest turnover and claims refund of cenvat credit to the extent of service tax payable on turnover of that month subject to the availability of cenvat closing balance..... Thus, it is submitted that the claimant claims refund of service tax paid on input services but the same is shown as service tax payable which is only incorrect manner of presentation. Therefore, there is no cenvat utilised. The credit has been reversed for the purpose of claiming refund and thus condition of notification has been satisfied.*'

8.2 Government observes that the Applicant-Department has not contested the above contention of the respondent nor has it placed on record

any evidence showing any misutilization of Cenvat credit availed by the respondent for domestic clearance etc. resulting in double benefit to them. Government also observes that the Applicant-Department has not raised any doubts as regards duty paid character of the input services or their utilisation by the respondent in providing the services exported.

8.3 Thus, Government concludes that though the respondent had not prepared the ST-3 Returns for the relevant period in proper manner, it is not proved that it resulted in any undue benefit to them or they had any intention to defraud the exchequer.

9. As regards the contention of the Applicant-Department that *the claimant did not even quote either the Rule 6(3) of Cenvat Credit Rules, 2004 while debiting the cenvat credit taken*, Government observes that the Rule 6(3) of the Cenvat Credit Rules, 2004, requires a service provider who provides both non-exempted and exempted service to pay an amount as specified therein towards common Cenvat credit availed. However, Rule 2(e) ibid, which defines 'exempted service' excludes a service which is exported in terms of Rule 6A of the Service Tax Rules,1994. Thus, no reversal under Rule 6(3) ibid is required towards export of services. Hence, Government does not agree with this contention of the Applicant-Department.

10. In view of the findings recorded above, Government finds no infirmity in the Order-in-Appeal No. MUM-SVTAX-002-APP-137 to 142-17-18 dated 19.06.2017 passed by the Commissioner (Appeals), Service Tax-II, Mumbai.

11. The Revision Application is disposed of on the above terms.

Shrawan 14/3/23

(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

ORDER No.127-133/2023-CX(WZ)/ASRA/Mumbai dated 14.3.2023

To,
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Copy to:

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2. Pr. Commissioner of CGST, Mumbai East
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Notice Board.