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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuff Parade,
Mumbai- 400 005

F NO. 196/02/WZ/2022-RA / 0245 Date of Issue: 06.12.2023

ORDER NO. 18 /2023-ST (WZ) /ASRA/MUMBAI DATED 05.12.2023 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 : M/s. A. B. Bank Limited.

Respondent : The Commissioner of CGST & Cx, Mumbai South.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. IM/CGST A-I/Mum/297/18-19 dated 24.08.2018 passed by the Commissioner (Appeals-I), CGST & C.Ex. Mumbai.

ORDER

The Revision Applications are filed by M/s. A. B. Bank Limited. (hereinafter as "the Applicant") against the Order-in-Appeal No. IM/CGST A-I/Mum/297/18-19 dated 24.08.2018 passed by the Commissioner (Appeals-I), CGST & C.Ex. Mumbai.

2. Briefly stated, Applicant is engaged in the business of providing Banking & Other Financial Services. The applicant had filed a refund claim amounting to Rs.31,89,979/-, in terms of Notification No.39/2012-C.E.(NT) dated 20.06.2012 for the period April-2016 to Sept.-2016 which was rejected by the adjudicating authority under OIO No. JD/R- 245/2016 dated 28.02.2017. The Adjudicating Authority had rejected the refund claim amounting to Rs. 31,89,979/- on the ground that the Applicant had not filed declaration with the jurisdictional service tax officer and they have not fulfilled the conditions, limitations and procedures laid down under the Notification No.39/2012-ST dated 20-06-2012. Being aggrieved with the OIO, Applicant filed Appeal before the Commissioner (Appeals-I), CGST & C.Ex. Mumbai, who vide the impugned OIA rejected the Appeal and upheld the OIO.

3. Being aggrieved and dissatisfied with the impugned order in appeal, the Applicant has filed this revision Application under Section 35EE of the Central Excise Act, 1944 before the Government mainly on the following common grounds :

i. The Order-in-appeal passed by the Commissioner (A) is beyond the scope of order-in-original as well as the Show-cause Notice. Thus, the order-in-appeal is liable to be set aside.

ii. Without prejudice to the above, the applicant has exported services in terms of Rule 6A of the Service Tax Rules 1994.

iii. The present case is covered by the judgment in the case of Indian Overseas Bank 2018 (7) TMI 513 - CESTAT Chennai.

iv. During the impugned period of refund claim i.e. April 2016 to September 2016, the VOSTRO accounts of the foreign banks are not bearing any interest on the balance in the account. The applicant has stopped paying interest on the balance of account in VOSTRO accounts w.e.f. March 16. Copy of the VOSTRO account statement as specimen of discontinuing interest payment along with the declaration of the applicant. Therefore, foreign banks cannot be considered as account holder as accounts are not interest-bearing accounts. Therefore, place of provision of service will be determined by Rule 3 of POPS Rules. Place of provision will be the location of recipient which is outside India and thus the service will be export of service.

v. The para 5.9.3 of the CBEC Education Guide clarifies that services which are linked to or requiring opening and operation of bank account such as lending, deposit transfer, will only be covered under Rule 9(a) of the Place of Provision of Service Rules, 2012. The place of provision of service which are linked to an account will only be determined under Rule 9(a) of the Place of Provision of Service Rules, 2012. The place of provision of service in respect of all other services will be determined under Rule 3 of the Place of Provision of Service Rules, 2012. This is evident from the para 5.9.4. of the education guide itself. The para lists down services which are not in the ordinary course of business provided to an account holder. It is submitted that all the above services can be provided to the account holders bearing interest also. For e.g. advice on mergers and acquisitions and advice on corporate restructuring, money changing, merchant banking, etc. can always be provided to an account holder bearing interest. However, they have been kept outside the purview of Rule 9 only because these are not services which are linked to the operation of a bank account. Thus, it can be understood that the services which are directly linked to an account are only covered under the Rule 9. Where account opening is only incidental to the main service, such service will not be classified under Rule 9.

vi. From their agreement, it is evident that the bank provides service, on the instructions received from the foreign bank, of making payment to the exporter in India. The payment which the applicant makes is first reimbursed to it by the foreign bank. For this settlement, the ACU account of the foreign bank with the applicant is used. It is submitted that assuming that there was no such facility of ACU, even then the above transaction could have taken place between the applicant and the bank. In such case, the only difference would have been regarding the mode of settlement of payment which would have come through the Nostro account of the foreign bank in India with some other bank. Therefore, it is evident that there is no link between the service provided by the applicant and the bank account opened by the foreign bank. The account is only used for settlement of funds between the banks as per the ACU mechanism. The LC business and settlement of funds are two different things and therefore the two cannot be correlated. Thus, it is evident that the service provided by the applicant is not a service which is linked to the operation of a bank account. Therefore, the place of provision cannot be decided as per Rule 9 of the POPS Rules 2012. As per Rule 3, the place of provision will be the location of the service recipient which is outside India.

vii. Delayed filing of declaration is merely a procedural lapse and can be condoned.

viii. The contention that the credit has not been reversed was never raised in the SCN as well as in the OIO. It is submitted that the Commissioner (A) has travelled beyond the scope of SCN. It is well settled proposition of law that the SCN is the foundation of any proceeding and demand cannot be confirmed against an assessee on a ground which was not informed to them in the SCN itself.

ix. Without prejudice to the above, it is submitted that the applicant has not availed the Cenvat credit of the said payments. The applicant has booked the monthly payment of service tax directly into the refund

receivable account totally amounting to Rs 63,79,958/-. Then in the 50% amounting to Rs 31,89,979/- has been reversed in the said account in terms of Rule 6(3B) of the CCR 2004. The refund is claimed for the balance 50%. The entries for booking of amount in refund receivable account and reversal of 50% of the amount is attached as annexure 14. It is submitted that there was no entry made for any transfer of balance amount in the Cenvat credit account. The balance is still shown as receivable in the refund receivable account.

x. Applicant requested to set aside the impugned OIA and to allow the appeal in full, with consequential relief to the applicant.

4. A Personal hearing was fixed in this case on 22.06.2023. Mr. Archit Agrawal, CA appeared online on behalf of the Applicant. He submitted that delay in filing RA may be condoned. He further submitted that Notification 39 required to file a declaration which was filed one month after export. He further added this is a procedural requirement. He mentioned that this was only ground in OIO, Comm(A) has added another ground which is not permissible. He requested to allow the claim.

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

6. Government notes that the impugned order in appeal was received by the applicant on 06.10.2018 and the instant Revision Application was filed on 02.05.2022. They requested to condone the delay in filing this revision application on the following ground:

"The applicant, under a bona fide belief that the appeal lies before CESTAT, had filed an appeal before the CESTAT. During the hearing, the departmental representative raised the point of jurisdiction on the ground that the CESTAT does not have jurisdiction to hear the present matter in terms of section 86(2). The CESTAT accepted the contention of the departmental representative and pronounced that as per proviso to section 86(2) of the Finance Act 1994, since the matter relates to rebate of input

service used for export of service, the jurisdiction for appeal against the order of the Commissioner (A) lies with the Revision Authority and not CESTAT. It is therefore prayed that the delay in filing this application may kindly be condoned, and the application may kindly be heard on merits and oblige."

It is evident from the presented information that the applicant filed this revision application nearly within a week of receiving the CESTAT order dated 27.04.2022. Government notes that applicant has filed this revision application before 3 months when the time period spent in proceedings before CESTAT is excluded. According to the provisions of Section 35EE of the Central Excise Act, 1944, a revision application can be submitted within 3 months of the communication of the Order-in-Appeal, and any delay up to an additional 3 months can be condoned if justified reasons are provided. The Government acknowledges that the revision application was filed within the specified time limitation, and therefore, the delay is condoned.

7. Government finds that Applicant had filed refund claim under Notification 39/2012-ST dated 20.06.2012 for refund of service tax paid on input services used for export of services outside India. The procedure and conditions for sanctioning such refund claims are prescribed under Notification No.39/2012-ST dated 20.06.2012 for claiming refund of service tax paid on the services utilized for export of services. The adjudicating authority rejected the refund claim since the applicant had not filed declaration with the jurisdictional service tax officer and they have not fulfilled the conditions, limitations and procedures laid down under the Notification No.39/2012-ST dated 20-06-2012. Further, Appellate Authority rejected the Appeal on the ground that applicant has not exported any services related to the so-called input services. Government finds that issue to be decided in the case whether rejection of rebate by both the lower authorities is proper or otherwise.

7.1 Applicant argued that Appellate Authority has traversed beyond the scope of SCN. In this context, Government notes that the SCN was issued based on the following grounds:

"5. From the above, it is observed that the claimant not fulfilled the conditions and limitations laid down under Notification No. 39/2012-ST dated 20.06.2012 in as much as they have:

(1) failed to file declaration prior to export of service;

(2) failed to submit documentary evidence of services exported in terms of Rule 6A of the Service Tax Rules, 1994;

(3) failed to submit documentary evidence of receipt of payment against services exported."

The Adjudicating Authority solely rejected the rebate claim on the grounds of non-filing of the declaration prior to export of service. Subsequently, Applicant preferred Appeal before the Appellate Authority, who vide impugned OIA rejected the appeal and denied the rebate claim on the following grounds:

a) the applicant has failed to substantiate as to what services have been exported.

b) the place of provision of the service is in India as per Rule 9(a) and thus it is not export of service

c) The applicant has availed cenvat credit of the amount for which refund has been claimed and thus the condition of the notification is not satisfied

d) The declaration filed belatedly cannot be condoned

Government notes that the points (a to c) raised by the Appellate Authority were not part of the original charges outlined in the SCN. Further, it's important to highlight that the Adjudicating Authority's rejection of the rebate was solely based on point (d) – the belated filing of the declaration. The Department did not appeal against the original order; instead, it was the Applicant who preffered the appeal. Consequently, the matter under dispute pertained specifically to point (d) before the Appellate Authority. In this context, it is clear that the Appellate Authority exceeded the specified scope by introducing points (a to c).

7.2 Furthermore, Government notes that it is a well settled proposition of law that the Show Cause Notice (SCN) serves as the cornerstone of any

proceeding, and a demand cannot be validated against an assessee based on a ground that was not explicitly communicated to them in the SCN itself. There are several Judgements wherein it was held that the Order of the Commissioner (A) cannot travel beyond the order of the adjudicating authority:

i. FACTSET SYSTEMS INDIA PVT. LTD. 2017 (3) G.S.T.L. 239 (TRI. - HYD.)

ii. MAVENIR SYSTEMS PVT. LTD. 2012 (27) S.T.R. 510 (TRI-BANG)

8.1 Regarding the argument that the Applicant failed to file a declaration before exporting the service, Applicant has submitted that the amount of rebate (value of input services) is paid to the banks only out of the consideration i.e. commission received and hence, the value of such input services availed would depend upon the quantum of the export of service and therefore, it is not possible to give a declaration prior to the export of Banking and Financial services. Therefore, it was difficult for them to ascertain the value of the input services and complete with the requirement "prior" to the date of export, except for the description of services. In this regard, Government notes that procedural requirements should not impede the process, especially when such procedural irregularities are rectifiable. Though later, Applicant has filed the said declaration. In case of Aircheck India (P) Ltd 2019 (24) GSTL 204, CESTAT has held that the notification no 39/2012-ST does not state that if the declaration is not filed prior to export, the same cannot be filed after the export also. Further, the CESTAT held that when the export is legitimate, procedural irregularities can be ignored. The relevant extract is as:

"**5.** Heard from both sides at length, perused the case record, reliec upon judgments, written note of submission made by the appellant alone. Appellant is an exporter of services as per Export of Services Rules, 2005 read with Rule 6A of Service Tax Rules, 1994. Export of service is entitled to get rebate of Service Tax or duty paid on input services or inputs. Vide Notification No. 39/2012-S.T., the Central Government directed that exporter of services shall be granted rebate of whole of the duty paid on excisable inputs or whole of Service Tax and Cess paid on all taxable input services. The conditions and limitations are enumerated in para 2 and the procedure including presentation of claim for rebate is given in para 3. As found from the show cause notice,

applicant had not made a pre-declaration before the jurisdictional authority prior to the date of export, which applicant claims virtually to be impossible considering the nature of services provided by it. Para 3.4 of the said notification under sub-para (b) indicates that the jurisdictional authority, *having regard to the declaration,* if satisfied that the claim is in order, shall sanction the rebate either in whole or in part but it is quite confusing if the same notification indicates the filing of declaration before export or declaration under [Para] 3.4(a)(c) that such taxable services has been exported in terms of Rule 3 of the said rules, along with documents evidencing such export! Further there is no stipulation in the notification that if the declaration prior to export is not made, then the same cannot be made in a future date or that departmental authority cannot call for the same in a subsequent day. Primary reason for grant of such rebate to the exporter is to encourage them for generation of foreign exchange for the country, where procedural requirement which is the handmade justice delivery, should not act as a stumbling block when such an irregularity of procedure is remediable. The decided case laws placed by the applicant support these observations."

8.2 Further, Government notes that there are several judgments wherein the courts have condoned the delay in filing the declaration prior to exports and have allowed the benefit of the notification if other conditions are satisfied. The following judgments as relied upon by the Applicant are relevant to the case in hand and supports his argument:

1) TACO FAURCIA DESIGN CENTER P. LTD. 2015 (38) S.T.R. 654 (Tri. - Mumbai)

ii) WIPRO BPO 2013-29-STR-545 (Del HC)

iii) CONVERGYS INDIA PVT LTD 2009-16-STR 198 as approved by Punjab and Haryana High Court.

9. In view of the above discussions, Government sets aside the Order-in-Appeal No. IM/CGST A-I/Mum/297/18-19 dated 24.08.2018 passed by the Commissioner (Appeals-I), CGST & C.Ex. Mumbai. Adjudicating Authority is directed to disburse the same within 8 weeks of the receipt of this order.

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

ORDER No. 18/2023-ST (WZ) /ASRA/Mumbai Dated 05.12.23

To,

1. M/s. A.B. Bank Limited, 41-42, Liberty Building, New Marine Line, Mumbai, Maharashtra-400021.
2. The Commissioner of CGST& CX, Mumbai South Zone, 13th and 15th Floor, Air India Building, Nariman Point-400021.

Copy to:

1. The Commissioner(Appeals-I),Cgst &C.Ex., Mumbai, 9th Floor, Piramal Chambers, Jijibhoy lane, Lalbaug, Parel, Mumbai-400012.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard file.