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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
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F.No.196/05/WZ/2023-RA 189 **Date of Issue:** ~~12.2023~~ 04.01.2024

ORDER NO. 19/2023-ST (WZ) /ASRA/MUMBAI DATED 29.12.2023 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 Hazel Mercantile Ltd,
Ashoka Shopping Centre,
181, 2nd Floor, GT Hospital Complex,
L.T. Road, Mumbai GPO,
Mumbai-400 001

Respondent: Commissioner of CGST & C. Ex, Mumbai South

Subject : Revision Application filed under Section 35EE of Central Excise Act, 1944 against the Order-in-Appeal No. SK/CGST/A-I/Mum/172/2023-24 dated 30.08.2023 passed by the Commissioner, (Appeals-I), GST & CX, Mumbai

ORDER

The Revision Application has been filed by the M/s Hazel Mercantile Ltd, Ashoka Shopping Centre, 181, 2nd Floor, GT Hospital Complex, L.T. Road, Mumbai GPO, Mumbai-400 001 (hereinafter referred to as the 'Applicant') against the Order-in-Appeal No. SK/CGST/A-I/Mum/172/2023-24 dated 30.08.2023 passed by the Commissioner, (Appeals-I), GST & CX, Mumbai.

2. The facts of the case in brief are that the Applicant, having Service Tax Registration, was engaged in the re-export of chemicals. The Applicant had filed four refund claims under Notification No 41/2012-ST dated 29.06.2012 in respect of service tax for the period October 2012 to September 2013 amounting to Rs. 1,86,74,690/-, paid on input services vis. Clearing and Forwarding services, Technical Testing & Analysis, Technical Inspection and Certification, Port Services, Storage and Warehousing Services and Bank charges which were utilised for the export of chemicals.

3. The Adjudicating Authority vide his Order in Original No. GS/02/2015 dated 23.02.2015 had rejected the claims.

4. Being aggrieved by the aforesaid Order-in-Original, the Applicant preferred an appeal before Commissioner (Appeals), who vide Order-in-Appeal No.IM/CGST/A-III/Mum/314/18-19 dated 27.08.2018, had rejected the appeal of the Applicant and upheld the impugned Order-in-Original.

5. Being aggrieved by the impugned Order-in-Appeal, the Applicant had preferred a Revision Application and the Revisionary Authority vide Order No. 11/2021-ST(WZ)/ASRA/Mumbai dated 30.06.2021 allowed the Revision Application and directed the rebate sanctioning authority to sanction the

rebate claims filed by the Applicant within a period of eight weeks of receipt of the order and that the Applicant should cooperate in the proceedings by submitting documents, if any, required by the original authority. The Revisionary Authority also directed that the Applicant be paid interest @ 6% p.a of the refund amount (as prescribed under Section 11BB of the Central Excise Act, 1944 (as applicable to Service Tax matter under Section 83 of the Finance Act, 1994, read with Section 174 of the CGST Act, 2017) from the dates immediately after the expiry of three months from the date of receipt of their refund application till the date of refund of duty.

6. Pursuant to the directions and order of Revisionary Authority cited supra, the refund claims were processed again and the Original Adjudicating Authority vide Order-in-Original No. CGST/MUM-SOUTH/DIV-II/Refunds/RD/23/2021-22 dated 18.08.2021 sanctioned the refund of Rs. 1,86,74,960/-under the provisions of Section 11B of the Central Excise Act, 1944, as made applicable to Service Tax matters under Section 83 of the Finance Act, 1994 and also sanctioned an interest of Rs. 80,66,968/- in accordance with Section 11BB of the Central Excise Act, 1944.

7. Aggrieved with the order, the Respondents filed an appeal before the Commissioner, (Appeals-I), GST & CX, Mumbai, who vide Order-in-Appeal No. SK/CGST/A-I/Mum/172/2023-24 allowed the appeal filed by the Respondents and set aside the Order-in-Original. The Appellate Authority at para 11.1 and 11.2 of the Order-in-Appeal has held as under:

> *"11.1 I find that in their respective orders, the Adjudicating Authority and the Commissioner (Appeals), have not disputed the fact that the Respondent has submitted documents pertaining to input services utilised towards exports of goods. However, at the time of processing the said refund claims they found that the Respondent had similar type of domestic clearances also and the input services, in respect of which they had claimed refund, were also utilised towards their domestic clearances. It was clearly pointed out that the Respondents were importing various chemicals and petro chemicals in bulk*

which was being stored in terminal tanks in port areas and thereafter, it was being sold to their domestic as well as overseas buyers on the basis of High Sea Sales and Transfer of Ownership under Bond. The Respondents have stated that during this process they were utilizing Clearing & Forwarding Services, Technical Testing & Analysis Services, Technical Inspection and Certification Services, Port Services, Storage & Warehousing Services, Services. The input service invoices furnished by the Respondent show the total service tax amount paid in respect of the service used for export along with domestic clearances. It is obvious that as soon as the chemical was imported, the same was stored in terminal tanks for which the owner of the said tanks would raise Invoices at the end of the month for charging the storage rent. During a given month, chemicals were supplied/sold to domestic as well as overseas buyers but the owner raises a consolidated Invoice. Since, refund of service tax paid on input service is restricted to export of goods only, hence the payment of service tax attributed domestic clearances must be deducted from total service tax amount so as to ascertain the exact amount of refund entitled to the Respondent. Since this case pertains to re-export of chemicals stored at Port area, all the above mentioned input services (Clearing & Forwarding Services, Technical Testing & Analysis Services, Technical Inspection and Certification Services, Port Services, Storage & Warehousing Services, Banking Services) are also utilized for import and domestic clearances. For example, port charges are to be paid at the time of import itself and at the time of export also. Thus, if part quantity of goods are not exported (ie, sold to domestic buyers) then the Respondent is not entitled for refund of the total service tax paid on such port services. I do not find any discussion in the orders of Revisionary Authority as well as Refund Sanctioning Authority regarding segregation of the service tax component attributed to domestic clearances. In view of above, in order to ascertain exact amount of refund claim, the Respondent should provide documentary evidence like tank farm report, tank dips report, stock receipts and issue reports, stock inventory, etc. on the basis of which the refund amount should be calculated and verified by the Refund Sanctioning Authority. The Respondent is entitled to get refund in respect of the input services utilized for export of goods after deduction of the service tax amount incurred in respect of domestic clearances

11.2 I find that in case of High Sea Sales, the chemicals are not imported by the Respondents but the same are sold to other person before reaching the customs clearances of India, and the said other person may import the chemicals or re-export the chemicals, hence in such circumstances the Respondent is neither importer nor exporter. Accordingly, any input service being utilized for High Sea Sales does not get entitled for consideration for refund matters."

8. Now, once again being aggrieved by the Order of the Appellate Authority, the Applicant has filed this Revision Application afresh on the following grounds

8.01. That the impugned order is ex-facie illegal, without jurisdiction and in gross judicial indiscipline and otherwise untenable and liable to be set aside;

8.02. That the AA failed to appreciate that the order sanctioning refund was passed by the OAA in implementation of the order dated 30.06.2021 passed by the Revisionary Authority and it was neither open for the OAA nor AA to overreach the orders passed by the Revisionary Authority;

8.03. That vide the earlier Order-in-Appeal dated 27.08.2018, the AA had upheld the rejection of the refund claims filed by the Applicant, inter alia, based on the findings that the Applicant had not submitted sufficient documents to determine the portion of the service tax pertaining to the input services which were actually utilised and were attributable to the exported goods as against those utilised towards domestic clearances and pursuant to filing a Revision Application, the Revisionary Authority was pleased to allow the application of the Applicant;

8.04. That the Revisionary Authority, after perusing the records of the case, at Para 11,12 and 14 of the order gave a categorical finding that all the requisite documents proving that the subject input services were utilised for the export of goods were submitted by the Applicant;

8.05. That no further proceedings were taken by the Respondent against the order of the Revisionary Authority and the orders of the Revisionary Authority has become final and binding upon the department;

8.06. That pursuant to the above order, the OAA sanctioned the entire refund amount along with interest and that the AA purportedly re-examined the same

issue and set aside the refund in gross violation of the orders of the Revisionary Authority;

8.07. That the AA has acted as an appellate authority against the order of the Revisionary Authority as evident from the observations of the AA at Para 11.1 of the OIA;

8.08. The Applicant has relied upon the decision of the Apex Court in the case of Union of India v. Kamalakshi Finance Corporation Ltd. [1991 (55) ELT 433 (SC)], the Hon'ble Supreme Court at Para 6 of the order held as under:

> *6. The High Court has, in our view, rightly criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities; The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department in itself an objectionable phrase and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assesses and chaos in administration of tax laws.*

8.09. The Applicant has also relied upon the recent judgment of the Hon'ble Bombay High Court in Globus Petroadditions Pvt. Ltd. v. Union of India [2022

(64) GSTL 54 (Bom.)], wherein the adjudicating authority failed to sanction refund by indirectly challenging the order passed by the Appellate Authority.

8.10. That the purported rejection of the refund claim filed by the Applicant by the impugned order, seeking to overcome the order dated 30.06.2021 passed by the Revisionary Authority, is completely untenable and illegal;

8.11. That it was not open for the Learned Commissioner (Appeals) to examine the correctness of the orders of the Revisionary Authority or deny refund on the grounds allegedly not examined or discussed by the Revisionary Authority in its order dated 30.06.2021;

8.12. That from a perusal of paragraphs 11 and 12 of the said order, it is clear that the Revisionary Authority, after observing the reason for rejection of claim by the lower authorities, has categorically held that the Applicant has submitted sufficient documentary evidence to proving nexus of all the services, in respect of refund is claimed by the Applicant, with the export of goods;

8.13. That the entire refund claim pertains to the service tax paid on input services which were used exclusively for the export of goods and no portion of the refund claim pertains to any input services used for domestic clearances;

8.14. That the purported ineligibility of refund in respect of high seas sales is beyond the scope of the appeal as the show cause notice dated 11.09.2014 did not propose to reject any portion of the refund claim on the ground that the same pertained to high seas sales made by the Applicant;

8.15. That it is a settled position in law that the show cause notice is the foundation of the case of the department and no authority can go beyond the allegations made in the show cause notice.

8.16. The Applicant has placed reliance on the following judgments wherein the orders travelling beyond the scope of the show cause notice were quashed and set aside:

(i) Commr. of C. Ex., Nagpur vs. Ballarpur Industries Ltd., [2007 (215) ELT 489 (SC)]
(ii) Commr. of C.Ex., B'lore vs. Brindavan Beverages (P) Ltd.[2007 (213) ELT 487 (SC)]
(iii) Commr of C. Ex., Bhubaneshwar vs. Champdany Ind, [2009 (241) ELT 481 (SC)
(iv) Commr. of Customs vs. Toyo Engineering India Ltd., [2006 (201) ELT 513 (SC)]
(v) Caprihans India Ltd. vs. Commr. of Central Excise, [2015 (325) ELT 632 (SC)]

Under the circumstances the Applicant prayed that the OIA dated 30.08.2023 be quashed and set aside and allow the refund claim alongwith interest or any order deemed fit in the facts and circumstances of the case be issued

9. Personal hearing in the case was scheduled for 29.11.2023 or 06.12.2023. Shri Suyog Bhave of PDS Legal, the Advocates for the Applicant informed on e-Mail that the counsel briefed to represent the Applicant was pre-occupied with matters before the Hon'ble Bombay High Court and requested for the personal hearing to be scheduled for 30.11.2023. Shri Suyog Bhave and Shri Alekshendra Sharma, both Advocates appeared for the personal hearing on 30.11.2023 on behalf of the Applicant and reiterated the earlier submissions. They further reiterated that this matter had come up for the second time before the RA. They submitted that Commissioner (Appeals) order is perverse and has travelled beyond the earlier order of the Revision Authority. They further submitted that issues of domestic clearances or high seas sale were never part of the directions of the earlier RA order. They requested to set aside the order as complete correlation of export with full details was already submitted. They referred to Bombay High Court Order in

the case of Globus Petroadditions Pvt Ltd [2022 (64) G.S.T.L 54(Bom)]. No one appeared for the personal hearing on behalf of the Respondent.

10. Government has gone through the relevant case records available in the case file, perused the Order-in-Original and the impugned Order-in-Appeal and considered the oral and written submissions made by the Applicant.

10.1. Government observes the instant case has arisen pursuant to the earlier order of the Revisionary Authority dated 30.06.2021, directing the rebate sanctioning authority *'to sanction the rebate claims filed by the Applicant'*. Government, at that point in time, had concurred with the earlier order of the AA wherein, the AA had accepted that the Applicant would be eligible for refund of export of the service tax paid on taxable services utilized for re-export of the chemicals. Government had concluded that the Applicant had exported the goods by using taxable input services for export of the goods and had submitted all the requisite documents/explanations to the original authority for sanctioning the said refund claim which was admissible.

10.2. Government observes that as mentioned by the OAA in the Order-in-Original in the instant case, Government, prior to issue of the directions, as mentioned in Para 10.1 supra, had also sought information from the Respondent whether any personal hearing was sought by the Respondent and had also given the Respondent an opportunity to make additional submissions, which were not elaborated in the earlier OIO and OIA, which were met with a response from the Respondent that *'No fresh submissions are being made in the subject matter and the case may be decided on merit'* Government notes that it was in this backdrop that directions to grant rebate and interest was issued.

10.3. While the Original Adjudicating Authority has rightly adhered to the directions of the Government and sanctioned the rebate claim alongwith interest, the Appellate Authority has erred in belatedly disputing the sanction of the rebate in the instant case by seeking to deduct the payment of service tax attributed to domestic clearances from the total service tax amount and also on input services being utilized for 'High Seas sales' despite the said aspects being examined before the issue of the revision order directing to grant the rebate with consequential benefit.

11. Be that as it may, Government observes that in terms of Section 35EE of the Central Excise Act, 1944, any person aggrieved by any order passed under Section 35A, where the order is in the nature referred to in the first proviso to sub-section (1) of section 35B, annul or modify such order.

11.1. Thus the Revision order, being a modification of an order of the AA, the revision orders give finality to the issue and are not appealable and the only recourse to being aggrieved by a Revision Order is by way of filing a writ petition before the jurisdictional High Court.

11.2. The Respondent, having decided not to file a writ petition in the instant case, is deemed to have accepted the Revision Order dated 30.06.2021 and adjudicating/appellate authorities are bound to abide by the directions of the Revision Order.

12. The Respondent in the instant case, despite the directions in the earlier Revision Order about the admissibility of the claims which have been correctly followed up by the Adjudicating Authority while passing a detailed and reasoned order, has chosen to litigate the issue about the same claims, which

if accepted would lead to continuous and endless cycle of litigation which would not be in the interest of justice.

13. Government relies on the ratio of the judgement of the High Court of Judicature at Bombay in the case of Global Petroadditions Pvt Ltd vs. UOI [2022(64) GSTL 54(Bom)] and the judgement of the Apex Court in the case of UOI vs. Kamlakshi Finance Corporation [1991(55) ELT 433 (SC)].

14. In view of the above discussion, Government sets aside the Order-in-Appeal No SK/CGST/A-I/Mum/172/2023-24 dated 30.08.2023 passed by the Commissioner, (Appeals-I), GST & CX, Mumbai and upholds the Order-in-Original No. CGST/MUM-SOUTH/DIV-II/Refunds/RD/23/2021-22 dated 18.08.2021 passed by Original Adjudicating Authority.

15. The Revision Application is decided on the above terms.

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

ORDER NO. 19 /2023-ST (WZ) /ASRA/MUMBAI DATED 29.12.2023

To,

M/s Hazel Mercantile Pvt Ltd,
Ashoka Shopping Centre,
181, 2nd Floor, G.T.Hospital,
L.T.Road, Mumbai GPO, Mumbai 400 001

Copy to :

1) The Pr. Commissioner of CGST & C.Ex, Mumbai South, 13th and 15th Floor, Air India Building, Nariman Point, Mumbai 400 021.

2) The Commissioner (Appeals-I), GST & CX, Mumbai, 9th Floor, Piramal Chambers, Jijibhoy Lane, Lalbaugh, Parel, Mumbai 400 012.
3) PDS Legal, 86, 8th Floor, Mittal Chambers, Opp CR2 Mall, Nariman Point, Mumbai 400 021.
3) Sr. P.S. to AS (RA), Mumbai.
4) Notice Board.
5) Spare copy.