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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. 199/06-07/ST/13-RA /6502 Date of Issue: 16.11.2021

ORDER NO. 21-22/2021-CX (WZ) /ASRA/Mumbai DATED 12.11.2021 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 : Commissioner of Central Excise, Pune III

Respondent : M/s Symantec Software India Pvt. Ltd.,
RMZ Icon, Block A, S.No.3/8 (part) + 3/12/1/2,
Baner Road, Pune 411 038.

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. PIII/RP/134-135/2013 dated 10.05.2013 passed by the Commissioner of Central Excise (Appeals-III), Pune.

ORDER

This revision application is filed by the Commissioner of Central Excise & Service Tax, Pune - III (here-in-after referred to as 'the Department') against the Order-in-Appeal No. PIII/RP/134-135/2013 dated 10.05.2013 passed by the Commissioner of Central Excise (Appeals - III), Pune. The said Order-in-Appeal dated 10.05.2013 decided two appeals filed against Orders-in-Original dated 20.12.2012 and 17.01.2013. The subject revision application is limited to the decision with respect to Order-in-Original dated 17.01.2013.

2. Brief facts of the case are that M/s Symantec Software India Pvt. Ltd., Pune (here-in-after referred to as 'the respondent') are engaged in the provision of various services and held Service Tax registration. The respondent also exported services. They filed a rebate claim under Notification no.11/2005-ST, dated 19.04.2005 issued under Rule 5 of the Export of Services Rules, 2005 for an amount of Rs.7,84,58,433/-, towards services exported by them for the month of June, 2011. The said claim was received by the Department on 27.06.2012.

3. The rebate sanctioning officer vide Order-in-Original No. R/24/STC/ PIII/2013 dated 17.01.2013 rejected part of the rebate claim amounting to Rs.3,09,93,190/- pertaining to two invoices both dated 29.07.2011. In both these cases the Respondent had received part payments as advances prior to the issue of the Invoice. The rebate sanctioning officer found that such payments were received on 02.06.2011 and 02.05.2011 and held that as per Rule 7(a) of the Point of Taxation Rules, 2011, the point of taxation would be the date on which payment is received, which in turn implied that the said date would be the 'relevant date' under Section 11B of the Central Excise Act, 1944. Having held so, the rebate sanctioning officer found that the rebate claim, to the extent of the payments received by them on 02.06.2011 and 02.05.2011 in respect of the said two invoices, were time barred and proceeded to reject the same.

4. Aggrieved, the respondent preferred an appeal against the Order-in-Original dated 17.01.2013 before the Commissioner of Central Excise (Appeals-III), Pune on the following grounds :-

(a) Notification no.11/2005-ST, dated 19.04.2005, under which the rebate claim was preferred, referred to 'services provided' as against 'to be provided'; thus relevant date would not be receipt of advances;

(b) The Export of Service Rules, 2005 would be applicable instead the Point of Taxation Rules, 2011 for determining the relevant date in the present case;

(c) The Point of Taxation Rules, 2011 only provided for collection and recovery of tax and hence the rebate sanctioning authority had erroneously relied on Rule 7 of the Point of Taxation Rules, 2011 to determine the relevant date of export;

(d) Notification no.11/2005-ST, dated 19.04.2005 was a self-contained scheme which laid down the conditions and procedure to be followed, which they had and were hence eligible for the rebate claimed.

5. The Appellate Authority vide Order-in-Appeal No. P III/RP/134-135/2013 dated 10.05.2013 allowed the appeal filed by the Respondent and modified the Order-in-Original dated 17.01.2013 by allowing further rebate of Rs.3,09,93,190/-, on the following grounds:-

(a) Clause (h) of Section 94(2) of the Finance Act, 1994 provided for rules to be made that deal with rebate of Service Tax and that since the Point of Taxation Rules, 2011 were made in exercise of powers conferred under clause (a) and clause (hhh) of Section 94(2) of the Finance Act, 1994, the same would not be applicable to the instant case;

(b) Rebate of Service Tax could be given only when the export has been completed, export invoice issued and the export proceeds received and hence for computing the period of one year specified under Section 11B of the Finance Act, 1994, the completion of all the above

elements, viz. receipt of payment as well as completion of provision of export and issuance of invoice has to be taken into account.

(c) The invoices against which the rebate was denied were dated 29.07.2011 and the rebate claim was filed on 27.06.2012, hence the claim was filed within the time limit prescribed.

6. Being aggrieved and dissatisfied with the impugned Order-in-Appeal, the Department has filed this Revision Application on the following grounds:-

(a) The Commissioner (Appeals) had erred in equating the rebate claim filed under notification no.11/2005-ST, dated 19.04.2005 with the refund claim filed under Rule 5 of the Cenvat Credit Rules, 2004 inasmuch as they had different conditions and parameters including formulae for computation of refund;

(b) The relevant date in the present case has to be determined as per the Point of Taxation Rules, 2011 which was the date of receipt of payment and hence the Adjudicating Authority had correctly denied the rebate pertaining to the invoices dated 02.06.2011 and 02.05.2011 as they were time barred.

(c) The Commissioner (Appeals) had failed to construe the provisions of Rule 7 of the Point of Taxation Rules, 2011 properly and had also failed to take cognizance of the Trade Facility Notice No.1/2020 while deciding the eligibility of the rebate which stated that the date of payment has to be considered as the relevant date.

(d) The presumption by the Commissioner (Appeals) that Rule 7 of the Point of Taxation Rules, 2011 does not refer to either Section 11B of the Central Excise Act, 1944 or notification no.11/2005-ST, dated 19.04.2005, is incorrect and devoid of merits.

(e) The Commissioner (Appeals) had failed to take cognizance of Trade Facility notice no.01/2010 dated 13.04.2010 issued by the Additional Commissioner, Office of the Chief Commissioner of Central Excise & Customs, Pune, which stated that the date of receipt of payment has to be treated as the 'relevant date' for the purpose of claiming rebate.

7. The Respondent, in response to the subject Revision Application have filed a reply dated 11.03.2014 wherein they have submitted that :-

(a) The Department had misconstrued the findings of the Commissioner (Appeals) inasmuch as, the Order-in-Appeal disposed of two appeals filed by the Respondents, of which one pertained to refund of unutilized Cenvat credit under notification no.5/2006-CE and the other pertained claim of rebate under notification no.11/2005-ST and hence the findings of the Commissioner (Appeals) could not be said to have equated both the above issues; that the Department had failed to consider the specific findings in the Order-in-Appeal with respect to notification no.11/2005-CE and hence the said application was liable to be rejected.

(b) The Revision Application was based on vague and unsubstantiated grounds and that the following findings of the Commissioner (Appeals) have not been challenged in the Revision Application:-

(i) Para 6 of the Order-in-Original observed that as per Section 11B of the Central Excise Act, 1944, the relevant date for filing of the rebate claim was the date when the 'services are provided for export', despite which the Adjudicating Authority had relied on Rule 7 of the Point of Taxation Rules, 2011;

(ii) The Point of Taxation Rules, 2011 was not made under clause (h) of Section 94(2) of the Finance Act, 1994 and hence could not be applied to determine the time bar aspect in respect of rebate claims;

(iii) It is a settled law that interpretation law which leads to an impossibility has to be discarded; that in the present case if the decision of the Original Adjudicating Authority, to hold the date of receipt of advance payment as the relevant date has to be accepted, then in those cases where the time gap between receipt of advance and export of services was more than one year, an exporter would be required to file claim for rebate even before export of services is completed.

(iv) The Commissioner (Appeals) had relied upon Order-in-Appeal No.PIII/RS/345/2011 dated 30.11.2011 to hold that rebate could be granted only when export of services was completed by way of issuance of invoice as well as receipt of export proceeds;

(c) The provisions of Section 11B of the Central Excise Act, 1944 when made applicable to rebate claim for export of services, the relevant date would be the date of export of services for calculating the period of limitation; that the notification under which the rebate claim was filed was a complete code in itself the same when read in conjunction with Section 11B of the Central Excise Act, 1944 indicates that a rebate application can be filed only on completion of provision of services for export and hence their claim was within the prescribed period of one year;

(d) In the present case, the taxable services were finally exported by them and the final payments were received on 29.07.2011 and therefore the date of services exported by them would be 29.07.2011;

(e) The Department, in the present Revision Application had itself admitted that the rebate claim had to be filed when the assessee had exported services and that the same was contradictory to the stand taken in the Revision Application that the date of the receipt of advances would be the relevant date for computation of one year and hence the Revision Application was liable to be rejected;

(f) The Trade Facility notice No.1/2010 dated 13.04.2010 itself provided that services must be exported for the applicability of Section 11B of the Central Excise Act, 1944, and in this case, since services were not exported on the date of receipt of advances, even by the said Circular, the rebate claim filed by them was within the limitation period.

(g) The Trade Facility Notice was not binding on the Commissioner (Appeals) as held in the case of CCE, Belapur vs H.M. Polycontainers [2006 (203) ELT 628 (Tri.)];

(h) Rule 7 of the Point of Taxation Rules, 2011 was not applicable to rebate claims as the same were made in exercise of powers under clause (a) and clause (hhh) of Section 94(2) of the Finance Act, 1994

and hence could not be made applicable to a notification which deals with export of services;

(i) It was not for the Department to impose additional conditions in the Notification which are otherwise not provided for and that any interpretation restricting the benefit or scope of the notification could not be adopted; that the interpretation adopted in the Revision Application lead to absurdity and unworkability of the rebate scheme and that it was settled law that any interpretation which leads to such a situation should be avoided.

(j) The substantive right to claim rebate arises under Rule 5 of the Export of Service Rules, 2005 read with the relevant notification and since they fulfilled all the conditions specified under the notification, rebate could not be denied as Rule 7 of the Point of Taxation Rules, 2011 did not affect their vested rights under the notification in any manner, thus requiring the Revision Application to be rejected.

8. Personal hearing in the matter was granted to the applicant on 03.10.2019, 11/18.01.2021 and 26.02.2021. However, no one appeared for the same. The Deputy Commissioner, Division IV (Kothrud), CGST, Pune – II Commissionerate, has on behalf of the Department, vide letter bearing F. No. VGN(30)Div.IV/RA-Symentec/174/17-18 dated 25.01.2021, reiterated the submissions made in the Revision Application and requested for the case to be decided on the basis of the grounds of appeal mentioned in the Revision Application.

9. Government has carefully gone through the relevant case records available in case files, the written submissions and also perused the impugned Order-in-Original dated 17.01.2013 and the Order-in-Appeal dated 10.05.2013.

8. Government observes that the impugned Order-in-Appeal dated 10.05.2013 disposed of appeals against two Orders-in-Original dated 20.12.2012 and 17.01.2013; and the subject Revision Application filed by

the Department is limited to challenging the decision of the Commissioner (Appeals) with respect to the Order-in-Original dated 17.01.2013.

10. Government observes that the Department has disputed the decision of the Commissioner (Appeals) to grant the rebate of Service Tax amounting to Rs.3,09,93,190/- in respect of two Invoices, both dated 29.07.2011, which was denied by the Original Adjudicating Authority.

11. Government observes that the Original Adjudicating Authority had held that Rule 7 of the Point of Taxation Rules, 2011 would be applicable in the instant case and as the Respondent had received certain amount of advances with respect to services covered by both the above said Invoices, the relevant date for computation of time limit of one year for filing of rebate claim as prescribed by Section 11B of the Central Excise Act, 1944, would be the date of receipt of advances. Government further observes that in view of the above interpretation, the Original Adjudicating Authority rejected the rebate claim to the extent of advances received by the Respondent on 02.06.2011 towards the services covered by the said invoices, as the rebate claim with respect to the said invoices was filed on 27.06.2012, which was beyond the prescribed limit of one year and held that the rebate claim to that extent was time barred.

12. Government observes that the Commissioner (Appeals) held that the Point of Taxation Rules, 2011 having been made in exercise of powers conferred under clause (a) and clause (hhh) of Section 94(2) of the Finance Act, 1994, the said rules would not be applicable to the instant case as it was Clause (h) of the said Section which provided for rules to be made that deal with rebate of Service Tax. The Government further observes that the Commissioner (Appeals) held that rebate of Service Tax could be given only when the export has been completed, export invoice issued and the export proceeds received and hence for computing the period of one year specified under Section 11B of the Finance Act, 1994, the completion of all the above elements, viz. receipt of payment as well as completion of provision of export and issuance of invoice, has to be taken into account and hence held that

the rebate claim dated 27.06.2012 in respect of Invoices both dated 29.07.2011, was within the time limit prescribed and proceeded to allow the rebate of Rs.3,09,93,190/-, earlier denied by the Original Adjudicating Authority.

13. Government notes that in the present case, it is not in dispute that the services covered by the Invoices dated 29.07.2011 were exported, the Original Adjudicating Authority categorically confirms the same in his Order dated 17.01.2013. The limited issue before the Government is the determination of the 'relevant date' for the computation of the one year limit prescribed by Section 11B of the Central Excise Act, 1944 for filing of the rebate claim.

14. Government finds that the relevant portion of the Point of Taxation Rules, 2011 as it stood at the relevant time reads as follows :-

> *"In exercise of the powers conferred under clause (a) and clause (hhh) of sub-section (2) of section 94 of the Finance Act, 1994, the Central Government hereby makes the following rules* ***for the purpose of collection of service tax and determination of rate of service tax****, namely, - ...."*
>
> [Emphasis supplied]

At this juncture, the Government notes that it becomes pertinent to examine the portion of Section 94 of the Finance Act, 1994 relevant to the present issue. The same is reproduced below:-

> ***" 94. Power to make rules.*** *– (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Chapter.*
>
> *(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:*
>
> *(a) collection and recovery of service tax under section 66 and 68;*
>
> .....
>
> *(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;*

.....

(hhh) the date for determination of rate of service tax and the place of provision of taxable service under section 66C;..."

A harmonious reading of the above extracts clearly indicate that the Point of Taxation Rules, 2011 is limited to laying down the rules for the purpose of collection of service tax and determination of rate of service tax, as it has been made in exercise of the powers granted vide clause (a) and clause (hhh) of Section 94(2) of the Finance Act, 1994. The power to make rules pertaining to rebate of service tax paid, has been specifically provided by clause (h) of the Section 94(2) of the Finance Act, 1994. It can be seen from the above that the Point of Taxation Rules, 2011 has not been made in exercise of the powers granted under clause (h) of Section 94(2) of the Finance Act, 1994 and hence it is clear that the same cannot be made applicable to the instant case which involves rebate of service tax paid. In view of the above, the Government observes that decision of the Commissioner (Appeals) to hold that Rule 7 of the Point of Taxation Rules, 2011 would not be applicable in the present case for determination of the 'relevant date', is proper.

15. Government observes that the rebate claim in question has been filed under notification no.11/2005-ST, dated 19.04.2005 which has been issued in exercise of the powers conferred by Rule 5 of the Export of Service Rules, 2005. Government further observes that Rule 5 of the Export of Service Rules, 2005 provides that when any taxable service is exported, the Central Government may, by notification grant rebate of service tax paid on such service and the same shall be subject to conditions or limitations, if any, and fulfilment of procedure, as may be specified in the notification. Government has perused notification no.11/2005-ST, dated 19.04.2005 and finds that the only conditions specified therein are that the taxable services should have been exported in terms of Rule 3 of the said rules; payment for such export should have been received in India in convertible foreign exchange and that the service tax, rebate of which has been claimed, has

been paid on the service exported. Government finds that it is not in dispute that the conditions of the said notification have been fulfilled.

16. Government finds that vide Section 83 of the Finance Act, 1994 certain provisions of the Central Excise Act, 1944, including Section 11B which deals with claims for refund, including rebate, of duty paid, have been made applicable to service tax, as they apply to duty of excise. Section 11B of the Central Excise Act, 1944 provides that any person claiming refund/rebate of duty may make an application for refund to the Assistant/Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in the form and manner prescribed. The appropriate portion of Explanation 'B' to Section 11B(5) which provides the meaning of 'relevant date' is reproduced below:-

> *(B) "Relevant date" means, -*
>
> *(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable material used in the manufacture of such goods, -*
>
> *(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or*
>
> *(ii) if the goods are exported by land, the date on which such goods pass the frontier, or*
>
> *(iii) if the goods are exported by post, the date of dispatch of goods by the Post Office concerned to a place outside India; .....*

A reading of the above extract clearly indicates that 'relevant date' as provided for by Section 11B of the Central Excise Act, 1944, irrespective of the mode of transport/transfer, is the date on which the actual export takes place. Government observes that in such case, the date of receipt of advances, as held by the Original Adjudicating Authority, cannot, by any stretch of imagination, be held to be the relevant date for computing the limit of one year for filing the rebate claim, as the export, clearly, is yet to take place. The Government further observes that this position is reiterated in the Export of Service Rules, 2005 and the notification no.11/2005-ST, dated 19.04.2005 too, wherein for the purposes of grant of rebate the

primary condition is that the services should be exported. The Government finds force in the reasoning put forth by the Commissioner (Appeals) that in the present case, if the decision of the Adjudicating Authority to hold the date of receipt of advance payment as the relevant date has to be accepted, then in those cases where the time gap between receipt of advance and export of services is more than one year, an exporter would be required to file claim for rebate even before export of services is completed, and, such interpretation of the law which leads to an impossibility has to be discarded. In view of the above, the Government finds that the decision of the Commissioner (Appeals) to hold the date of the invoice as the 'relevant date' for computation of the one year time limit to be proper, as in the case of export of service, issuance of the invoice in respect of the service provided, would be the correct indicator that the service stands exported, which is the primary requisite for claiming rebate as laid down by the Section, Rules and the notification issued in this regard.

17. Government observes that the Department in the subject Revision Application has contended that the Commissioner (Appeal) erred in not relying on Rule 7 of the Point of Taxation Rules, 2011 and had failed to take cognizance of the Trade Facility notice no.01/2020 dated 13.04.2020 issued by the Additional Commissioner, Office of the Chief Commissioner of Central Excise & Customs, Pune. The non-applicability of the Point of Taxation Rules, 2011 to this case has been discussed above and as such the challenge to the Order-in-Appeal on this ground does not survive. The Government also notes that the contention of the Department that the Commissioner (Appeals) had erred in equating the rebate claim filed under notification no.11/2005-ST, dated 19.04.2005 with the refund claim filed under Rule 5 of the Cenvat Credit Rules, 2004 is not correct. The Government finds that the Commissioner (Appeals) has at para 15, amongst others, clearly discussed and provided cogent reasons for allowing the rebate claim filed under notification no.11/2005-ST, dated 19.04.2005. As regards the issue of taking cognizance of Trade Facility notice no.01/2020 dated 13.04.2020, Government finds that the same is not binding on the Commissioner (Appeals), as held by the Tribunal in the case of CCE,

Belapur vs H.M. Polycontainers [2006 (203) ELT 628 (Tri)]. Further, this Facility Notice nowhere mentions that realization of value of services would apply to advance payments. Implications of such a scenario have been discussed above. Thus, Government finds that the grounds of the Revision Application are devoid of merits.

18. In view of the findings recorded above, Government finds no reason to annul or modify the Order-in-Appeal No. PIII/RP/134-135/2013 dated 10.05.2013 passed by the Commissioner of Central Excise (Appeals - III), Pune.

19. The Revision Application is dismissed.

Shrawan 12/11/21

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

ORDER No. 27/22/2021-CX (WZ) /ASRA/Mumbai dated 12.11.2021

To,

The Commissioner of CGST & CX, Pune – II,
GST Bhavan, 41A, Sasoon Road,
Pune - 411 001.

Copy to:

1. M/s Symantec Software India Pvt. Ltd., RMZ Icon, Block A, S.No.3/8 (part) + 3/12/1/2, Baner Road, Pune 411 038.
2. The Commissioner of GST & CX, (Appeals-III), Pune, F-Wing, 3rd Floor, GST Bhavan, 41/A, Sassoon Road, Pune-411 001.
3. The Deputy/Assistant Commissioner, Division IV, (Kothrud), Pune- II, 1st floor, GST Bhavan, 41/A, Sassoon Road, Pune-411 001.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Notice Board.