

REGISTERED SPEED POST



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, Cuff Parade,
Mumbai- 400 005

F.No.196/07/ST/14-RA/1262

Date of Issue: 28.03.2022

ORDER NO. 30/2022-ST(SZ)/ASRA/Mumbai DATED 28.03.2022 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 EMC Software and Services India Private Limited,
Bangalore

Respondent : Commissioner of Service Tax, Bangalore

Subject : Revision Applications filed under section 35EE of the
Central Excise Act, 1944 (made applicable to Service
Tax vide Section 83 of the Finance Act, 1994) against
the Order in Appeal No. 705/2013 dated 03.12.2013
passed by The Commissioner of Central Excise (Appeal-
II), Bangalore

ORDER

This Revision Application has been filed by M/s EMC Data Storage Systems India Pvt. Ltd., Bagmane World Technology Centre, K.R.Puram, Marathahalli Ring Road, Mahadevapura, Doddanekundi Village, K.R. Puram, Hobli, Bangalore - 560048 (hereinafter referred to as 'the applicant') the Order in Appeal No.705/2013 dated 03.12.2013 passed by The Commissioner of Central Excise (Appeal-II), Bangalore

2. The brief facts of the case are that the applicant had filed a rebate claim of Rs.1,30,49,068/-(Rupees One Crore Thirty Lakh Forty Nine Thousand Sixty Eight only) for the period from March 2007 to March 2008, on 31.03.2009 under Notification 11/2005 dated 19.04.2005. The claim was filed on the ground that the claimant provided Business Auxiliary Services Consultancy Services to various clients situated outside India and that during the claim period they have exported the said services under Rule 3 of the Export of Services Rules, 2005.

3. The Assistant Commissioner of Service Tax, Division-III, Bangalore vide Order in Original No.36/2010 dated 08.02.2010 rejected the said rebate claim on the following grounds:

- Limitation of time prescribed under Section 11B of Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994;
- Inapplicability of the provisions of Export of Service Rules, 2005 to the services exported due to lack of documentary evidences;
- Failure to produce the documentary evidences on payment of service tax on services stated to have exported.

4. On being aggrieved by the aforesaid Order in Original, the applicant preferred an appeal before Commissioner of Central Excise, (Appeal-II), Bangalore who vide Order in Appeal No. Order-in-Appeal No.705/2013 dated 03.12.2013 rejected the appeal of the applicant and upheld the impugned Order in Original on the following grounds :

- The rebate claim filed is well beyond the time limit as prescribed under Section 11B of the Central Excise Act, 1944 and the Order-in-Original has decided the matter very rightly so;
- There is no running account of the Cenvat Credit leading to export tax debits by payments through cenvat credit. In the cash payments also there is no running account furnished by the applicant to prove link of export service tax payment with export invoices on continuous basis.
- Since there was a single entry of payment of service tax after almost a year of rendering of service, a doubt has been cast on the claim that services were exported on payment of service tax.

5. Aggrieved by the said Order-in-Appeal, the applicant has preferred the present Revision Application mainly on the following grounds:

5.1 That the Appellate Authority has not appreciated the merits of the rebate application filed and decided the matter solely on the ground of limitation and without giving due consideration to the grounds of appeal filed and the relevant provisions of service tax legislation. The fulfilment of all substantive conditions for grant of rebate has not been disputed by the Appellate Authority.

5.2 Section 11B of the Central Excise Act, 1944 read with Section 83 of Finance Act, 1994 lays down the limitation period of one year from the relevant date. In the instant case the only clause which can be made applicable is residual clause (f) of Explanation B to Section 11B for calculating the 'relevant date'.

5.3 That the Appellate Authority's reliance on the Hon'ble High Court in case of Uttam Steel Ltd. Vs Union of India - 2003 (158) E.L.T. 274 (Bom.) is bad in law as the Hon'ble High Court has held that the limitation prescribed under Section 11B only deals with the procedural law and not the substantive law.

5.4 That the Courts have held and the CBEC in Circulars dated 21.12.2007 and 30.12.2008 has clarified that in case service tax refund rebate the limitation of time has to be calculated from the date of payment

of service tax and the Appellate Authority has in the operating part of the impugned order conceded to the aforesaid view.

5.5 That in the instant case the period of limitation is to be computed from the date of payment of tax in cash / through debit in CENVAT Account and it is a well settled view that in case where payment of duty is made by way of debit in the CENVAT account the date of payment should be considered as the date on which the CENVAT account is debited. Thus the claim of rebate of service tax filed by them is well within the time limitation.

5.6 That the governing provision of service tax rebate claims viz. Export of Service Rules 2005 and Notification 11/2005, nowhere prescribes that service tax needs to be paid on a continuous basis. Accordingly, the aforesaid observations of the Appellate Authority holding that service tax payment after a year (and not on a continuous basis) would not be considered as export upon payment of tax, is alien to the service tax legislation and governing provisions for rebate of service tax.

5.7 That they have paid interest on account of delay in payment of service tax. Accordingly, in absence of any governing provision prescribing that delay in payment of tax would make an exporter ineligible to claim rebate of service tax on services exported, and given that they have made good the delay in tax payment by payment of interest, the impugned order to the extent of rejecting the rebate claim on this ground deserves to be quashed.

6. A personal hearing in this case was held on 16.01.2020. Shri Sachin Agarwal and Ravi Kapoor, Authorized Representatives, duly nominated by the applicant appeared for hearing before the then Revisionary Authority and argued that they filed a rebate claim for the period from March 2007 to March 2008, on 31.03.2009 under Notification 11/2005 dated 19.04.2005; that there is no specific time-limit set out in Notification 11/2005-S.T., for filing a Rebate claim of Service Tax; that payment of service tax in this case was delayed and paid in the month of May 2008 and rebate claim was filed on 31.03.2009; that they rely on

Tribunal Mumbai's Orders in Vodafone Cellular Ltd. [2014(34) S.T.R. 890 (Tri.-Mumbai)] and Volkswagen India Pvt. Ltd. [2016(41)S.T.R. 716 (Tri.Mumbai)] wherein it is held that the relevant date has to be the date of payment of Service Tax. In view of the same the Authorized Representatives pleaded that the instant Revision application be allowed and the Order of the Commissioner (Appeals) be set aside.

6.1 Subsequently fresh personal hearing was scheduled on 06.07.2020, 03.12.2020, 02.02.2021, 16.02.2021, 18.03.2021, 25.03.202, 22.04.2021 and 06.01.2022. However, no one appeared for personal hearing on any of the dates fixed for hearing. Since sufficient opportunity for personal hearing has been given in the matter, the case is taken up for decision on the basis of the available records.

7. Government has carefully gone through the relevant records available in case files and also perused the impugned Order-in-Appeal.

8. Government observes that the dispute in the present case is regarding admissibility of rebate of service tax paid on services exported by the applicant. The Appellate Authority has upheld the order of the original adjudicating authority rejecting the claim for rebate of the service tax paid on the services exported.

8.1 Government finds that at this juncture it is pertinent to examine Section 86 of the Finance Act, 1994 which deals with appeals to the Hon'ble Tribunal; the same is reproduced below:-

"Section 86. Appeals to Appellate Tribunal. -

(1) Save as otherwise provided herein an assessee aggrieved by an order passed by a Principal Commissioner of Central Excise or Commissioner of Central Excise under section 73 or section 83A by a Commissioner of Central Excise(Appeals) under section 85, may appeal to the Appellate Tribunal against such order within three months of the date of receipt of the order.

*Provided that where an order, relating to a service which is exported, has been passed under section 85 and the **matter relates to grant of rebate of service tax on input services, or rebate of duty paid on inputs, used in providing such service**, such order*

shall be dealt with in accordance with the provisions of section 35EE of the Central Excise Act, 1944(1 of 1944).

Provided further that all appeals filed before the Appellate Tribunal in respect of matters covered under the first proviso, after the coming into force of the Finance Act, 2012(23 of 2012), and pending before it up to the date on which the Finance Bill, 2015 receives the assent of the President, shall be transferred and dealt with in accordance with the provisions of section 35EE of the Central Excise Act, 1944(1 of 1944)."

[Emphasis supplied]

8.2 A plain reading of Section 86 of the Finance Act, 1994 indicates that the power for Revision of Orders of the Commissioner (Appeals) by the Central Government, as provided for by Section 35EE of the Central Excise Act, 1944, is limited to those matters which relate to *grant of rebate of service tax or duty paid on input services which were used in providing a service which was exported*. As discussed above, the instant issue pertains to rebate of service tax paid on the services exported and not on inputs/input services used for providing the same and hence Government notes that in terms of Section 86 of the Finance Act, 1994, it does not have jurisdiction over any matter relating to the same.

9. In view of the above, Government dismisses the subject Revision Application as the same is non-maintainable due to lack of jurisdiction.


(SHRAWAN KUMAR)

Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. 30/2022-ST(SZ) /ASRA/Mumbai DATED 21.03.2022

To,

1. M/s EMC Software and Services India Private Limited,
Bagmane World Technology Centre, K.R.Puram
Marathahalli Ring Road, Mahadevapura, Doddanekundi Village,
K.R. Puram, Hobli,
Bangalore - 560048

Copy to:

1. The Principal Commissioner of Goods & Services Tax, Bengaluru East, TTMC BMTC Bus Stand Complex Hal Airport Road Domluru, Bengaluru-560071.
2. The Commissioner of Central Goods & Services Tax, Bengaluru Appeals-I, Traffic & Transit Management Centre : BMTC Bus Stand : Hal Airport Road, Dommaluru, Bengaluru-560071
3. Sr. P.S. to AS (RA), Mumbai
4. Notice Board
5. Spare copy.