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, Cuffe Parade,
Mumbai- 400 005

F.No. 196/05/ST/13/1020 Date of Issue: 20/11/18

ORDER NO. 348 /2018-ST /ASRA/MUMBAI DATED 26.10.2018 OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944 (MADE APPLICABLE TO SERVICE TAX VIDE SECTION 83 OF THE FINANCE ACT, 1994).

Applicant : M/s Overseas Infrastructure Alliance (India) Pvt. Ltd.

Respondent : The Commissioner of Service Tax-I, Mumbai.

Subject : Revision Application 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.128 /BPS/MUM/2013 dated 10.04.2013 passed by the Commissioner of Central Excise and Service Tax (Appeals-IV), Mumbai -51.

ORDER

This Revision Application has been filed by M/s Overseas Infrastructure Alliance (India) Pvt. Ltd., Andheri (east), Mumbai – 400 099 (hereinafter referred to as "the applicant") against Order-in-Appeal No. 128/BPS/MUM/2013 dated 10.04.2013 passed by Commissioner of Central Excise and Service Tax (Appeals-IV), Mumbai.

2. The brief facts of the case are that the applicant were engaged in providing taxable service under the category of "Erection, Commissioning or Installation Services", "Technical Inspection and Certification Services", "Work Contract Services" "Design Service" and "Manpower Services" under Section 69 of the Finance Act, 1994. They filed rebate claims in form ASTR-1 for Rs.2,73,47,438/- (Rupees Two Crore Seventy Three Lakh Forty Seven Thousand Four Hundred and Thirty Eight only) and Rs.1,20,51,851/-(Rupees One Crore Twenty Lakh Fifty one Thousand Eight Fifty One only) on the grounds that they had exported Erection Commissioning or Installation Services on payment of service tax under Rule 5 of the Export of Service Rules,2005:-

3. The original adjudicating authority i.e Assistant Commissioner, Service Tax-I, Div-III, Mumbai vide Order in Original No. Refunds/SS/135/2011 dated 14.12.2011 and Refunds/SS/168/2012 dated 23.10.2012 sanctioned the rebate claims amount of Rs.1,46,06,035/-(Rupees One Crore Forty Six Lakh Six Thousand and Thirty Five) and Rs.1,14,26,364/- (Rupees One Crore Fourteen Lakh Twenty Six Thousand Three Hundred and Sixty Four) under Section 93A of the Finance Act, 1994 but rejected the rebate claim amounting to Rs.1,27,41,403/-(Rupees One Crore Twenty Seven Lakh Forty One Thousand Four Hundred and Three) and Rs. 6,25,487/- (Rupees Six Lakhs Twenty Five Thousand Four Hundred Eighty Seven) respectively under Section 93A of the Finance Act,1994 read with Section 11B of Central Excise Act, 1994 made applicable to service tax vide Section 84 of Finance Act, 1994. Out of total amount of Rs.1,27,41,403/- rejected by the Original adjudicating

authority vide Order in Original No. Refunds/SS/135/2011 dated 14.12.2011, an amount of Rs. 1,27,39,280/-was rejected as time barred and an amount of Rs. 2,123/-(Rupees Two Thosand One Hundred and Twenty Three) was rejected on account of invoices issued by the service provider not in the name of the applicant. Similarly, Out of total amount of Rs. 6,25,487/- rejected by the Original adjudicating authority vide Order in Original No. Refunds/SS/168/2012 dated 23.10.2012, an amount of Rs. 2,14,809/-was rejected as time barred and amount of Rs. 4,10,678/- was rejected by holding that the services such as 'rent a cab' and 'telecommunication service' was not having nexus with the output service.

4. Being aggrieved by the aforesaid Orders in Original the applicant preferred an appeal before Commissioner of Central Excise and Service Tax (Appeals-IV), Mumbai, who vide Order in Appeal No. Order-in-Appeal No. 128/BPS/MUM/2013 dated 10.04.2013 observed that

> *'11. Export of Service Rule, 2005 Rule 3(2) deal with the situation where it has been described the provisions of export of service. And it is held that in the case of export of service the relevant date is the date when the assessee has received payment of service exported and within one year from the date of receipt of the payment of service exported, the assessee is required to file the refund claim*
>
> *12. As per CBEC in their Circular No.344/34/2010-TRU dt.31.03.2011 (Para 9) it has been clarified that until the payment is received, the provision of service, even if all other conditions are met, would not constitute export. Therefore, the Appellants' rebate claim could not have been rejected on limitation;.*

4.1 The Commissioner (Appeals) in his impugned Order held that out of an amount of Rs.1,27,39,280/-rejected as time barred by the original adjudicating authority vide Order in Original No. Refunds/SS/135/2011 dated 14.12.2011, an amount of Rs.14,27,282/- was admissible to the applicant by reckoning the date of receipt of remittances as the relevant date for the purpose of computing one year's time limit under Section 11 B of the Central Excise Act, 1944. Commissioner (Appeals) also upheld the rejection of refund amount of Rs.

2,123/- on account of invoices issued by the service provider were not in the name of the applicant.

4.2 In respect of Order in Original No. Refunds/SS/168/2012 dated 23.10.2012, Commissioner (Appeals) observed that an amount of Rs. 2,14,809/- rejected by the original adjudicating authority was beyond the period of one year from the date of receipt of the foreign remittance certificate and therefore upheld the rejection of the same as inadmissible being barred by limitation. However, Commissioner (Appeals) in his impugned order found that the Cenvat Credit availed in respect of Rent-a-Cab amounting to Rs.3,59,667/- and on Telephone/Mobile services amounting to Rs.51,011/- was eligible to the applicant as refund.

5. Being aggrieved by Order-in-Appeal No. 128/BPS/MUM/2013 dated 10.04.2013 the applicant has preferred the present Revision Application under Section 35 EE of Central Excise Act, 1944 made applicable to Service Tax vide Section 83 of the Finance Act, 1994 (as amended by the Finance Act, 2012) before Central Government on the grounds as enumerated below.

5.1 Time Limit of one year prescribed under Section 11B of CEA, 1944 is not applicable to rebate claim under Notification No. 11/2005-ST.

5.2 Rule 5 of Export of Service Rules, 2005 (in short 'ESR, 2005') provides for rebate of tax paid on taxable services exported as per Notification issued by the Central Government. The Notification No. 11/2005-ST dated 03/03/2005 issued in pursuance of Rule 5 of ESR, 2005, prescribes conditions, limitations and procedures and other details elaborately. Para 2 of the said Notification, which provides for Conditions and limitations and Para 3, which provides for Procedure do not provide for any time limit within which the rebate claim should be made nor provides for applicability of time limit specified under Section 11B of CEA 1944.

5.3 It is well settled that, any law or stipulation prescribing a period of limitation to do or not to do a thing after the expiry of period so stipulated, has the consequence of creation and destruction of rights and, therefore, must be specifically enacted and prescribed

therefore. Reliance to this effect has been placed upon the following decisions, which were not considered and discussed by the Learned Appellate Authority, while passing the OIA;

- Collector vs. Raghuvar (India) Limited 2000 (118) ELT 311 (SC).
- Rajul Textiles Mills (P) Ltd. vs. CCE, Surat 2008 (231) ELT 166 (Tri-Ahmd.)

5.4 The Appellate Authority failed to appreciate that, the Notification No. 11/2005-ST is a Notification to be implemented in a manner specified therein and therefore, it has to be treated as a Complete Code by itself and the time-limit specified under Section 11B of CEA, 1944 cannot be taken as the time-limit for the purpose of granting rebate under the said Notification. The reliance to this effect has been placed on following decision;

- Dorcas Market Makers Pvt. Ltd. vs. CCE 2012 (281) ELT 227 (Mad.)
- Amee Castor and Derivatives Ltd. vs. Commissioner — 2010 (17) STR 582 (Tribunal)
- LGW Ltd. vs. Commissioner — 2010 (19) STR 825 (Tribunal)
- Commissioner of C. Ex. & Customs, Surat-I vs. Swagat Synthetics 2008 (232) ELT 413 (Guj.)

5.5 The Appellate Authority failed to appreciate that, Section 11B of CEA, 1944 though provides for refund of tax, which includes rebate of tax on export of services, the same is not beginning with Non Obstante Clause and therefore, the said Section cannot override the Notification No. 11/2005-ST, which is Self-Contained Code, exclusively prescribing conditions, limitations and procedure to claim rebate on export of services. The rebate of tax is claimed under Notification No. 11/2005-ST which is special provision and provision under Section 11B of CEA, 1944 is a general provision dealing with refund 9f tax under various circumstances. It is settled law of the land that, special provisions shall prevail upon the general provisions. The reliance to this effect has been placed on following decisions;

- *J.K. Cotton Spinning and Weaving Mills Co. Ltd. v. State of Uttar Pradesh* - AIR 1961 SC 1170; • U.P. State Electricity Board v. Hari Shankar Jain - 1978-2-LLJ 399 at pp 404-405;

- Superintendent Central Excise, Surat v. Vac Met Corporation (P) Ltd. -1985 (22) ELT 330 (S.C.) = AIR 1986 SC 1167;

- M/s. Atul Glass Industries (P) Ltd. v. Collector of Central Excise - 1986 (25) ELT 473 (S.C.) = AIR 1983 S.C. 1730 at 1736

5.6 Even if it is presumed that, the limitation period provided in Section 11B of CEA, 1944 is applicable to Notification No. 11/2005-ST still the same is a procedural requirement. Right to claim rebate of tax, which flows from Rule 5 of ESR, 2005 and Notification No. 11/2005-ST cannot be destroyed by failure to apply for rebate of tax within one year time prescribed under the statute. Reliance to this effect is placed upon the following decision;

- Uttam Steel Ltd. vs. UOI (2003) 158 ELT 274 (Bom). • STI India Ltd. vs. Commissioner of Cus. & C. Ex., Indore 2009 (236) ELT 248 (M.P.)

6. A personal hearing held in this case was attended to by Shri V.K. Singh, Consultant on behalf of the applicant and reiterated the submissions made in Revision Application and also further written submissions filed during the personal hearing. It was pleaded that the instant Revision Applications be allowed and the Order of the Commissioner (Appeals) be set aside. In its further written submissions filed, the applicant contended that:

6.1 Rule 5 of Export of Service Rules, 2005 (In short 'ESR, 2005') *provides for rebate of tax paid on taxable services exported* as per Notification issued in pursuance Rule 5 of ESR, 2005. Para 2 of the said Notification, which provides *for conditions and Limitations* and Para 3 , which provides for Procedure, do not provide any time limit within which the rebate claim should be made nor provide for applicability of time limit specified under Section 11B of CEA, 1944.

6.2 It is well settle that, any law or stipulation prescribing a period of limitation to do or not to do a thing after the expiry of period so stipulated, has the consequence of creating and destruction of rights and therefore, must be specifically enacted and prescribed, therefore. Reliance in this regard is placed on the following decisions.

(i) Collector Vs. Raghuvar (India) Limited 2000 (118) ELT 311 (SC). In this case Hon'ble Apex Court while dealing with a question whether 6 months time limit prescribed under Section 11A of Central Excise Act would be applicable or under Rule 57-I of the Central Excise and salt Rules, 1944 for the recovery from the manufacturer. The manufacturer took a defence that the recovery could be made under Section 11 A of the CEA within 6 months and not under Rule 57-I and that the claim of the department was beyond 6 months, the amount could not be recovered. The Supreme Court held Section 11 A of the Central Excise and Salt Act, 1944 would have no application to any action taken under Rule 57-I of the Central Excise and Salt Rules, 1944 and Rule 57-is not in any manner subject to section 11 A. The above judgment makes it clear that Rule act independently and any action taken under the rule to be considered independently.

(ii) Rajul Textile Mills (P) Vs. CCE, Surat 2008(231) WLT 166(Tri. Ahmd.)

6.3 The Hon'ble High Court of Madras has in the case of M/s. Dorcas Marketing Makers Pvt. Ltd. Vs. Commissioner of Central Excise — 2012 (281) E.L.T. 227 (Mad) while considering the applicability of Section 11B of the Central Excise Act, 1944 with respect to claim for rebate under Notification No.19 of 2004 issued under Rule 18 of Central Excise Rules, 2002 has held that ~~once~~ Rule 18 of the Central Excise Rules give the power to authorities to issue

notification prescribing conditions, limitations and procedures, the same have to be followed. What is not prescribed in the notification cannot be imported into the said notification. When the statutory notification issued under Rule 8 does not prescribe ay time limit, Section 11B is not applicable and based on which the benefit cannot be denied.

[This judgment is also confirmed by Division Bench as reported at 2015(321) E.L.T 45 (Mad.).

Reliance is also placed on the judgment in the case of STI India Ltd. Vs. CCE, Indore-2009(236) ELT 248 (M.P.)

6.4 The applicant therefore prayed that Order-in- Appeal confirming rejection of rebate claim of Rs. 1,15,26,807/- under Notification No.11/2005-ST on account of time bar, be set aside and rebate claim granted with consequential relief.

7. Government has carefully gone through the relevant case records available in case files, perused the impugned Orders-in-Original and Order-in-Appeal and considered oral & written submissions made by the applicant in their Revision Application as well as during the personal hearing.

8. Government observes that Original adjudicating authority had rejected the refund claims of the applicant amounting to Rs.1,29,54,089/- (Rupees One Crore Twenty Nine Lakhs Fifty Four Thousand Eighty Nine only) holding them as time barred by reckoning the relevant date for filing the refund claim from the date when the service was provided by the applicant. Whereas Commissioner (Appeals) in his impugned Order held that an amount of Rs.14,27,282/- (Rupees Fourteen Lakh Twenty Seven Thousand Two Hundred Eighty Two only) was admissible to the applicant by reckoning the date of receipt of remittances as the relevant date for the purpose of computing one year's time limit under Section 11 B of the Central Excise Act, 1944. Commissioner (Appeals) has thus upheld the rejection of refund amount of

Rs.1,15,26,807/-(Rupees One Crore Fifteen Lakh Twenty Six Thousand Eight Hundred and Seven only) on account of time bar.

9. Government further observes that it is the contention of the applicant that *Rule 5 of Export of Service Rules, 2005 (in short 'ESR, 2005') provides for rebate of tax paid on taxable services exported as per Notification issued in pursuance of Rule 5 of ESR, 2005. Para 2 of the said Notification, which provides for conditions and Limitations and Para 3 , which provides for Procedure, do not provide any time limit within which the rebate claim should be made nor provide for applicability of time limit specified under Section 11B of Central Excise Act, 1944.* In support of its contention the applicant has also relied on the case laws mentioned in paras 7.2 and 7.3 supra.

10. Government observes that issue of limitation period / time bar has been discussed by the Tribunal in its Order 18-12-2013 [2014 (34) S.T.R. 890 (Tri. - Mumbai)] in the case of 5 in the following words:

> " *We notice that the provisions of Section 11B of the Central Excise Act, 1944, which deals with refund of excise duties has been made applicable to Service Tax vide Section 83 of the Finance Act, 1994. This would imply that the time-limit of one year from the date of payment of tax for filing of the refund claim would apply in respect of Service Tax refunds also. Even if it is argued that there is no specific time-limit set out in Notification 11/2005-S.T., it is a settled position in law that though the law is silent on the time-limit applicable, a reasonable time-limit has to be read into the law. The decision of the Hon'ble Apex Court in the case of Citadel Fine Pharmaceuticals and the Hon'ble Bombay High Court in the case of Everest Flavours Ltd. and other decisions of the Hon'ble Apex Court relied upon by the Revenue would support this contention.*

11. Government also observes that while dealing with the issue whether limitation of one year is applicable to the rebate claims filed under Rule 18 and Notification No. 19/2004, GOI in its Order No. 366-367/2017-CX, dated 7-12-2017 [2018 (15) G.S.T.L. 476 (G.O.I.)] observed as under:-

> "**5.** *Coming to the applicant's contention that the time limitation of one year is not applicable to the rebate claims filed under Rule 18 and*

Notification No. 19/2004, the Government finds no legal force in this argument as for refunds and rebate of duty [under] Section 11B of the Central Excise Act is directly dealing statutory provision and it is clearly mandated therein that the application for refund of duty is to be filed with the Assistant/Deputy Commissioner of Central Excise before expiry of one year from the relevant date. Further in explanation in this Section, it is clarified that refund includes rebate of duty of Excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India. In addition to time limitation, other substantive and permanent provisions like the authority who has to deal with the refund or rebate claim, the application of principles of undue enrichment and the method of payment of the rebate of duty, etc., are prescribed in Section 11B only. Whereas Rule 18 is a piece of subordinate legislation made by Central Government in exercise of the power given under Central Excise Act whereby the Central Government has been empowered to further prescribe conditions, limitations and procedure for granting the rebate of duty by issuing a notification. Being a subordinate legislation, the basic features and conditions already stipulated in Section 11B in relation of rebate duty need not be repeated in Rule 18 and the areas over and above already covered in Section 11B have been left to the Central Government for regulation from time to time. But by combined reading of both Section 11B [of Central Excise Act, 1944] and Rule 18 of Central Excise Rules, 2002 it cannot be contemplated that Rule 18 is independent from Section 11B of the Act. Since the time limitation of 1 year is expressly specified in Section 11B and as per this section refund includes rebate of duty, the condition of filing rebate claim within 1 year is squarely applicable to the rebate of duty when dealt [with] by Assistant/Deputy Commissioner of a Division under Rule 18. Thus Section 11B and Rule 18 are interlinked and Rule 18 is not independent from Section 11B. This issue regarding application of time limitation of one year is dealt [with] by Hon'ble High Court of Bombay in detail in the case of M/s. Everest Flavour v. Union of India, 2012 (282) E.L.T. 481 wherein it is held that since the statutory provision for refund in Section 11B specifically covers within its purview a rebate of Excise duty on goods exported, Rule 18 cannot be independent of requirement of limitation prescribed in Section 11B. In the said decision the Hon'ble High Court has differed from the Madras High Court's decision in the case of M/s. Dorcas Market Makers Pvt. Ltd. [2015 (321) E.L.T. 45 (Mad.)] and even distinguished Supreme Court's decision in the case of M/s. Raghuvar (India) Ltd. [2000 (118) E.L.T. 311 (S.C.)]. Hence, the applicant's reliance on the decision in the

case of M/s. Dorcas Market Makers Pvt. Ltd. is not of much value. The above averment of the applicant based on the above decisions clearly amounts to saying that a rebate claim can be filed at any time without any time-limit which is not only against Section 11B of the Central Excise Act but is also not in the public interest as per which litigations cannot be allowed for infinite period".

12. Hon'ble High Court Madras while dismissing writ petition filed by Hyundai Motors India Ltd. [reported in 2017 (355) E.L.T. 342 (Mad.)] and upholding the rejection of rebate claim filed beyond one year of export in its order dated 18.04.2017 cited the judgment of same Hon'ble High Court Madras In Delphi-TVS Diesel Systems Ltd. v. CESTAT, Chennai, reported in 2015 (324) E.L.T. 270 (Mad.), which held that Rules cannot prescribe over a different period of limitation or a different date for commencement of the period of limitation. The relevant Paragraph of the order is extracted hereunder :-

> "8. *For examining the question, it has to be taken note of that if a substantial provision of the statutory enactment contains both the period of limitation as well as the date of commencement of the period of limitation, the rules cannot prescribe over a different period of limitation or a different date for commencement of the period of limitation. In this case, sub-section (1) of Section 11B stipulates a period of limitation of six months only from the relevant date. The expression "relevant date" is also defined in Explanation (B)(b) to mean the date of entry into the factory for the purpose of remake, refinement or reconditioning. Therefore, it is clear that Section 11B prescribes not only a period of limitation, but also prescribes the date of commencement of the period of limitation. Once the statutory enactment prescribes something of this nature, the rules being a subordinate legislation cannot prescribe anything different from what is prescribed in the Act. In other words, the rules can occupy a field that is left unoccupied by the statute. The rules cannot occupy a field that is already occupied by the statute."*

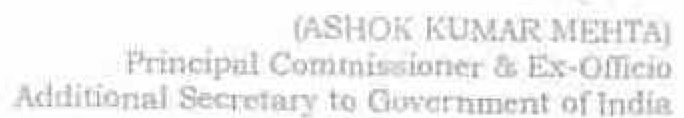
13. Government, applying the ratio of the aforesaid judgment holds that once the statutory enactment prescribes something of this nature, the rules being a subordinate legislation cannot prescribe anything different from what is prescribed in the Act. Therefore, the case laws relied upon by the applicant also cannot be made applicable to the instant case.

14. In view of the judgements discussed at para 11, 12 & 13 supra, Government is of the considered opinion that Section 11B of the Central Excise Act, 1944, which deals with refund of excise duties and which has been made applicable to Service Tax vide Section 83 of the Finance Act, 1994 precisely applies to the refund claims filed under Notification No. 11/2005-ST dated 03/03/2005 by the applicant. Hence the impugned order of the Commissioner of Central Excise (Appeals) upholding the rejection of refund amount of Rs.1,15,26,807/-(Rupees One Crore Fifteen Lakh Twenty Six Thousand Eight Hundred and Seven only) on account of time bar is required to be upheld.

15. In view of above discussion, Government finds no infirmity in Order in Appeal No.128/BPS/MUM/2013 dated 10.04.2013 passed by the Commissioner of Central Excise and Service Tax (Appeals-IV) and hence upholds the same.

16. Revision Application is thus dismissed being devoid of merit.

17. So, ordered.



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

ORDER No. 348/2018-ST (WZ) /ASRA/Mumbai Dated 26-10-2018

To,

M/s Overseas Infrastructure Alliance (India) Pvt. Ltd.,
401, K.K.Square, Cardinal Gracious Road,
Chakala, Andheri (East), Mumbai 400 099.

ATTESTED

S.R. HIRULKAR
Assistant Commissioner (R.A.)

Copy to:

1. The Commissioner of CGST & CX Mumbai (East),.
2. The Commissioner CGST (Appeals-II), Mumbai,
3. The Deputy / Assistant Commissioner Division-I, CX Mumbai (East),

4. Shri Vijai K Singh, Consultant, Office No.1, Sai Pooja CHS, Near Jankalyan Bank, Om Nagar, Andheri (E), Mumbai 400 059.
5. Sr. P.S. to AS (RA), Mumbai.
6. Guard file.
7. Spare Copy.