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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
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F. Nos. 1886 Date of Issue: 09.02.2023

198/24/WZ/17-RA 198/02/WZ/18-RA 198/03/WZ/18-RA 198/31/WZ/18-RA 198/32/WZ/18-RA
198/82/WZ/18-RA 198/83/WZ/18-RA 198/111/WZ/18-RA 198/238-239/WZ/18-RA

ORDER NO.AK-53/2023-CX(WZ)/ASRA/MUMBAI DATED 08.2.2023 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 : Commissioner of Central GST, Pune-I.

Respondents : M/s. Eaton Industries Private Ltd.

Subject : Revision Applications filed under Section 35EE of the Central Excise Act, 1944 against the Orders-in-Appeal passed by the Commissioner (Appeals-I), Central Tax, Pune.

ORDER

1.1 Ten Revision Applications have been filed by the Commissioner of Central GST, Pune-I (hereinafter referred to as "the Applicant-Department") against the following Orders-in-Appeal passed by the Commissioner (Appeals-I), Central Tax, Pune:-

RA No.	O-I-A No./date	OIO No./date
198/24/WZ/17-RA	PUN-EXCUS-001-APP-166/17-18 - 13.07.17	PI/STD/R-IV/Rebate/EIPL/16-17 - 09.08.16
198/02/WZ/18-RA	PUN-EXCUS-001-APP-0326-0327/17-18 - 08.09.17	PI/STD/R-IV/40/Rebate/16-17 - 16.06.16
198/03/WZ/18-RA	PUN-EXCUS-001-APP-0326-0327/17-18 - 08.09.17	PI/STD/R-IV/371/Rebate/15-16 - 31.03.16
198/31/WZ/18-RA	PUN-EXCUS-001-APP-461-462/17-18 - 11.10.17	PI/STD/040/Ref/2017-18 - 07.06.17
198/32/WZ/18-RA	PUN-EXCUS-001-APP-461-462/17-18 - 11.10.17	PI/STD/167/Ref/2017-18 - 24.01.17
198/82/WZ/18-RA	PUN-EXCUS-001-APP-963/17-18 - 27.12.17	PI/STD/R-IV/T-III/100/Ref/16-17 - 14.9.16
198/83/WZ/18-RA	PUN-EXCUS-001-APP-1057/17-18 - 06.02.18	PI/D-II P/127/Ref/17-18 - 14.09.17
198/111/WZ/18-RA	PUN-EXCUS-001-APP-1149/17-18 - 13.03.18	PI/D-II P/213/Ref/17-18 - 03.10.17
198/238-239/WZ/18-RA	PUN-EXCUS-001-APP-119-120/18-19 - 20.6.18	PI/D-II P/291/Ref/17-18 - 08.12.17

1.2 In the application for condonation of delay filed alongwith some of the Revision Applications, the Applicant-Department has submitted that delay in filing the Revision Applications happened for the reason that due to introduction of CGST Act,2017, there were substantial changes in the Central Excise department. All over the country new Commissionerates were established and all the officers were transferred and were assigned new charges. The files were transferred to new Commissionerates according to their jurisdictions. For this reason, the Revision Applications could not be filed within the limitation period of three months from the date of receipt of OIA. Taking these reasons into consideration, the Government is condoning the delay and is taking up the matter for deciding on merits.

2. Brief facts of the case are that M/s. Eaton Industries Private Ltd., situated at 145, Off Mumbai-Pune Road, Pimpri, Masulkar Colony Road,

Pune – 411 018 (hereinafter referred to as "the Respondent") is engaged in rendering of taxable services under the categories of 'Consulting Engineer's service' and 'Management, maintenance or repair service'. They had filed separate rebate claims for export of services under Rule 6A of the Service Tax Rules, 1994 read with Notification No. 39/2012-ST dated 20.6.2012 during different time periods. The Rebate sanctioning authority rejected part of the rebate claims on the following grounds:

a) The declaration as required under Notification No.39/2012-ST dated 20.06.2012 had not been filed in respect of certain input services.
b) Some services were not qualified as input services under Rule 2(l) of the Cenvat Credit Rules, 2004.
c) In respect of some input services, the Respondent had claimed more rebate compared to the Service Tax amount mentioned in the declaration submitted by them. Such excess was found ineligible and rejected.

The summary of the Orders passed is as under:

OIO No./date	Period	Rebate claimed	Amount sanctioned	Amount rejected
PI/STD/R-IV/Rebate/EIPL/16-17 -09.08.16	Jul-Sep'15	3786731	3044874	741857
PI/STD/R-IV/40/Rebate/16-17 - 16.06.16	Apr-Jun'15	1267699	580084	687615
PI/STD/R-IV/371/Rebate/15-16 - 31.03.16	Jan-Mar'15	2166010	346916	1819094
PI/STD/040/Ref/2017-18 - 07.06.17	Apr-Jun'16	2413707	1693837	719870
PI/STD/167/Ref/2017-18 - 24.01.17	Jan-Mar'16	4985300	4458421	526879
PI/STD/R-IV/T-III/100/Ref/16-17 - 14.09.16	Oct-Dec'15	3196736	2079531	1117205
PI/D-II P/127/Ref/17-18 - 14.09.17	Jul-Sep'16	2653538	2138959	514579
PI/D-II P/213/Ref/17-18 - 03.10.17	Oct-Dec'16	3418677	2268917	1114098
PI/D-II P/291/Ref/17-18 - 08.12.17	Jan-Mar'17	2276288	2068695	207593

Aggrieved, the Respondent filed appeals for the amounts rejected. The Commissioner (Appeals) vide Orders-in-Appeal mentioned at preceding para1 allowed the appeals - some in entirety and some partially.

3.1 Hence, the Applicant-Department has filed the impugned Revision Applications mainly on the following grounds:

a) The benefit of notification no. 39/2012-S.T. dated 20.06.2012 is subject to conditions, limitations and procedures specified in the notification. It implies that if the conditions / limitations /procedures are not followed then the benefit will not be available.

b) The condition 2(e) & 2(f) show that no rebate will be granted if the CENVAT Credit is availed on input services on which rebate has been claimed. If rebate is granted then it shall be recovered along with interest.

c) The Cenvat Credit Rules 2004 have been notified under section 37 of the Central Excise Act, 1944 (1 of 1944) and section 94 of the Finance Act, 1994 (32 of 1994). Hence, they are equally applicable to Excise and Service Tax.

d) The Finance Act 1994 and the Service Tax Rules 1994 do not define the term input Service'. Hence, the definition given in Rule 2(l) of CCR 2004 will have to be taken.

e) Hence, the Commissioner (Appeal) has erred in holding that meaning of 'Input service' as defined in Cenvat Credit Rules, 2004 cannot be assigned to the input services used in the provision of output services which are exported for which rebate claim has been filed by the appellant.

f) The Clause 'C' of Rule 2(l) of CCR 2004 inter-alia specifically excludes outdoor catering. Hence, the outdoor canteen services provided in the present case cannot form an input service under the CCR 2004. Thus. the rebate on the said service is not admissible. In this regard reliance is placed on the judgement of Hon'ble CESTAT in the case of AET Laboratories vs C.C.E.Cus& S.T., Hyderabad-I-2016(42)S.T.R.720(Tri.-Bang).

g) A plain reading of the Notification No.3/2012-S.T. dated 20.06.2012 shows that the benefit of the said notification is subject to the following of the prescribed procedure laid therein. In the present case

prior to export the assessee had given a declaration about the following:-

description, value and the amount of service tax and cess payable on input services actually required to be used in providing service to be exported.

h) The correctness of the declaration by assessee was verified by the jurisdictional Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise prior to export. Hence, after the export of services it is not open to the assessee to claim more rebate than the declared input services.

i) The Commissioner (Appeals) has erred in relying on the judgment in the case of Jocund India Ltd. -2015(330) E.L.T. 805 (G.O.I) due to the following reasons:

- Fact and circumstances are different
- The issue in that case was related to the benefit under notification no. 21/2004-C.E.(N.T.) which related to be benefit under Central Excise.
- The issue involved in that case was not that the details in the declaration of input services given prior to the export were at variance with the details of input services submitted at the time of rebate

j) The Commissioner (Appeals) has erred in not appreciating the settled law that prescribed procedure has to be followed for claiming benefit of a notification. In this regard reliance is placed on the following judgments:-

- Collector of C.Ex., Ahmedabad Vs Cadilla Laboratories (P) Ltd.- 2002(142) E.L.T. 279(S.C).
- Indian Oil Corporation Ltd. Vs Commissioner of C.Ex., Vadodara- 2012(276) E.L.T. 145(S.C).

In the light of the above submissions, the Applicant-Department prayed to set aside the impugned order-in-appeal.

3.2 The Respondent has filed written submissions mainly on the following grounds:

a. As per Section 35EE(2) of the Central Excise Act, 1944, Revision Application needs to be filed within 3 months from the date of communication of the order to the Applicant. In the instant cases, the Revision Applications have been filed beyond the period of 3 months prescribed under Section 35EE(2). Accordingly, the Revision Application should be considered as barred by limitation and be set aside.

b. Notification 39/2012-ST dated 20th June 2012 granted rebate of whole of the duty paid on excisable inputs or the whole of the service tax and cess paid on all input services (herein after referred to as 'input servlces'), used in providing service exported in terms of rule 6A of the said rules, to any country other than Nepal and Bhutan, subject to the conditions, limitations and procedures. We wish to submit that while all other terms have been defined by the Notification in Explanation 1 and 2 above, it is not stated that the term 'input Service' means Input Service as defined under Rule 2 of the CENVAT Credit Rule 2004. In fact, by stating - (herein after referred to as 'input services) — the Notification defines the Input Services by itself as — Input Services used in providing taxable services exported. Thus, definition of 'Input Service' under CENVAT Credit Rules 2004 is not relevant in case of rebate of service tax under the abovementioned Notification at all and the rebate claim cannot be disallowed on the ground that an input services does not qualify as such in terms of the said definition, as long as the said service is used in providing taxable services exported. The use of canteen service in providing output services exported has not been disputed or contested by the Revenue. Accordingly, the rebate claim of Service tax paid on canteen services ought to be allowed.

c. The key resource used in export of our taxable output services is our employees. Outdoor catering services are essential to keep our employees refreshed and energized which in turn helps improve the

performance of the employees resulting in good quality and timely supply of services. Reliance is placed on the ruling in case of M/s. Hindustan Coca Cola Beverages Pvt. Ltd. v/s CCE, Nashik -2014 - TIOL-2460-CESTAT-MUM. In addition, there are further judgments as listed below wherein the credit on the outdoor catering service has been allowed by the various courts:

- M M Forge Limited and other vs. CCE, 2015-TIOL-1693-HC-MAD-CX
- Gateway Terminals India [Pvt.] Limited Vs.CCE, 2015-TIOL-1471CESTAT-MUM
- Resil Chemicals Pvt. Limited vs. CCE, 2015 (1) TMI 948
- Imagination Technologies India Pvt. Limited vs. CCE, 2011-TIOL-719-CESTAT-MUM
- CCE vs. Lucas TVS Limited, TOG-1162-CESTAT-CHN-2015
- Hindustan Coca-Cola Beverages Pvt. Limited vs. CCE, 2015 (38) STR 129 (CESTAT-Mum)

d. Services not specifically included in pre-export declaration nonetheless stand covered under the head 'other services' in the pre-export declaration filed by us. The non-inclusion of certain services in the pre-export declaration or indicating lesser amount in the declaration than the amount claimed as rebate are merely procedural lapses and hence, should be considered as a condonable defect as per below mentioned judicial precedents:

- Convergys India Services Pvt. Limited vs. CCE [2012 (25) STR 251]
- CST. Ahmedabad v. S. Mohanlal Services reported in 2010 (18) S.T.R. 173 (Tri.Ahmd.)
- Commissioner v. Convergys India Pvt. Ltd. — 2010 (20) S.T.R. 166 (P & H)
- Wipro Limited vs. Government of India [2013-TIOL-119-HC-SEL-ST]
- Shell India Marketing Pvt. Limited vs CCE. [2012 (10) TMI 34 (HC)]

e. All the judicial precedents cited above are squarely applicable to the present case, as they deal with procedural non-compliance of delayed filing of pre-export declaration or non-filing of pre-export declaration. As the said rulings have been pronounced by honorable Punjab & Haryana High Court and honorable Delhi High Court, the principle laid down by them cannot be disregarded and accordingly, the procedural lapse of non-inclusion of certain service categories of short

amount disclosed in certain categories as compared to actual amount incurred should be condoned.

f. The following decisions also support the submission that a mere procedural lapse cannot take away a substantive benefit:

- Kamakhya Steel Ltd. vs. CCE 2000 (121) ELT 247 (Tri-Mumbai)
- Archana Syntex Ltd. V. CCE, 2005 (191) E.L.T. 545 (Tri.-Mumbai)
- Aadithya Chemicals v. CCE9 Chennai, 2005 (191) E.L.T. 530 (Tri. Chennai)
- CCE, Vapi vs Unimark Remedies Ltd 2009-TIOL-357
- Kothari Infotech Ltd v. Commissioner of Central Excise, Surat — [2013] 38 taxmann.com 298 (Ahmadabad — CESTAT)
- Mannubhai & Co. vs. Commissioner of Service Tax (2011)(21)STR(65)CESTAT (Ahmadabad)
- Mangalore Fertilizers & Chemicals Vs Deputy Commissioner 1991 (55) ELT 437
- CST Delhi vs. Keane Worldzen India Pvt. Ltd. 2008 - TIOL -496 - CESTAT -DEL: 2008 (10) STR 471 (Tri. - Del)

g. Further pre-export declaration can only contain an estimation of input services along with estimated amount, since the nature of business is dynamic and specifically, in case of provision of services, there is no set formulae of input vis a vis output as laid out in a Bill of Material for manufacture of goods. Thus, an estimation or projection of input services and amount thereof can always vary from the actuals. Such variation cannot be considered even as a procedural lapse and needs to be accepted as a common business situation. This view is also supported by High Court rulings in case of Convergys and Wipro supra. Accordingly, the Service tax rebate disallowed on the ground of incorrect pre-export declaration ought to be granted.

4.1 Personal hearing in the case was fixed for 19.12.2022. Shri Narendra Vaidya, Manager (Taxation), representing the Respondent attended the hearing and submitted that in all these Claims, part of the amount was rejected by the original authority on the ground that declaration not being accurate and services like canteen service not being input service. He further submitted that the Commissioner (Appeals) has allowed most of their claims. He reiterated earlier submissions. He requested to maintain the Orders passed by the Commissioner (Appeals).

4.2 No representative from the side of the Applicant-Department appeared for the personal hearing nor has any written communication been received from them in the matter.

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

6. Government observes that the main issues involved in the instant Revision Application are whether rebate claim can be rejected for – (a) lapses in following the laid down procedure under Notification No. 39/2012-S.T. dated 20.06.2012 and (b) due to ineligibility of certain input services as per Rule 2(l) of Cenvat Credit Rules, 2004?

7.1 Government observes that the concerned Rule 6A(2) of the Service Tax Rules,1994, reads as under:

> *6A. Export of services -*
>
> *(2) Where any service is exported, the Central Government may, by notification, grant rebate of service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification.*

7.2 Government observes that the Notification No. 39/2012-ST dated 20.06.2012, has been issued under Rule 6 of the Service Tax Rules,1994, and it stipulates following conditions, limitations and procedure:

> ***2. Conditions and limitations:-***
> (a) *that the service has been exported in terms of rule 6A of the said rules;*
> (b) *that the duty on the inputs, rebate of which has been claimed, has been paid to the supplier;*
> (c) *that the service tax and cess, rebate of which has been claimed, have been paid on the input services to the provider of service;*

Provided if the person is himself is liable to pay for any input services; he should have paid the service tax and cess to the Central Government.

(d) *the total amount of rebate of duty, service tax and cess admissible is not less than one thousand rupees;*

(e) *no CENVAT credit has been availed of on inputs and input services on which rebate has been claimed; and*

(f) *that in case,-*

(i) *the duty or, as the case may be, service tax and cess, rebate of which has been claimed, has not been paid; or*

(ii) *the service, rebate for which has been claimed, has not been exported; or*

(iii) *CENVAT credit has been availed on inputs and input services on which rebate has been claimed,*

the rebate paid, if any, shall be recoverable with interest in accordance with the provisions of section 73 and section 75 of the Finance Act, 1994 (32 of 1994)

3. ***Procedure.***

3.1 Filing of Declaration.- *The provider of service to be exported shall, prior to date of export of service, file a declaration with the jurisdictional Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, specifying the service intended to be exported with,-*

(a) *description, quantity, value, rate of duty and the amount of duty payable on inputs actually required to be used in providing service to be exported;*

(b) *description, value and the amount of service tax and cess payable on input services actually required to be used in providing service to be exported.*

3.2 Verification of declaration.- *The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall verify the correctness of the declaration filed prior to such export of service, if necessary, by calling for any relevant information or samples of inputs and if after such verification, the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise is satisfied that there is no likelihood of evasion of duty, or as the case may be, service tax and cess, he may accept the declaration.*

8.1 Government observes that the impugned Orders-in-Original do not mention about violation of any of the conditions or limitations stipulated at para 2 of the Notification (supra). As regards procedural lapse of not mentioning some of the input services in the pre-export declaration filed as per para 3.1 of said Notification (supra), Government observes that the Respondent has contended that the services were mentioned under the head "other services" in the pre-export declaration. Government also observes that the Applicant-Department has not raised any doubts as regards use of these input services by the Respondent in providing the services exported.

8.2 As regards the other procedural lapse of excess refund claimed on input services as compared to amount mentioned in pre-export declaration, Government observes that the Respondent has contended that they had filed pre-export declaration based on their earlier experience, however the input services cannot be envisaged in advance as it was based on the requirement of customers. The services in question were received and utilized by the Respondent for export of service. The value of these services was included in the value of services exported. Hence, based on some provisional declaration, claim amount of input services cannot be denied. Once again, Government observes that the Applicant-Department has not raised any doubts as regards use of these input services by the Respondent in providing the services exported or inclusion of their value in export value.

8.3 Government observes that in numerous court cases it has been decided that "substantial benefit cannot be denied because of procedural lapses" including the ones relied upon by the respondent and Appellate Authority viz. Convergys India Services Pvt. Ltd., Wipro Limited, Jocund India Ltd. The case law of Cadila Laboratories (P) Ltd. relied upon by the Applicant-Department is not found applicable in the instant matter as in the said case, the Apex Court had observed that to avail exemption under Notification No. 144/65-C.E., dated 4th September, 1965, *the law enjoined that the procedure stipulated in Rule 56A had to be followed.* The relevant para 4 of said case law is reproduced hereunder:

4. We have heard the Counsel for the parties. The exemption is sought under the aforesaid notification which was issued under Rule 8(1) of the Central Excise Rules. Though this notification was issued in 1965 a proviso was inserted with effect from 1st August, 1980, in this notification which reads as follows:

"Provided that in relation to the exemption under this notification, the procedure set out in Rule 56A of the aforesaid rules is followed."

Thus, following of stipulated procedure was a pre-condition to the entitlement of exemption unlike in the impugned Notification No.39/2012-ST dated 20.06.2012 where *'Conditions and limitations'* and *'Procedure'* are laid down separately. Likewise, in the IOCL case also, the matter related to non adherence of stipulated Conditions in proviso to Notification No. 75/84-C.E. dated 1.3.1984 and hence is not applicable in the instant matter. Thus, Government concludes that whereas stipulated 'Conditions' are to be mandatorily complied, to avail the benefit of a Notification, the laid down procedure is to facilitate in availing the benefit of the Notification and thus any lapse in following it is condonable.

9.1 Government observes that the Respondent has contended that *'the Notification defines the Input Services by itself as — Input Services used in providing taxable services exported. Thus, definition of 'Input Service' under CENVAT Credit Rules 2004 is not relevant in case of rebate of service tax under the abovementioned Notification at all and the rebate claim cannot be disallowed on the ground that an input services does not qualify as such in terms of the said definition, as long as the said service is used in providing taxable services exported.'* Government does not agree with this contention. It is well settled that any Notification/Circular/Instruction cannot override a statute. To cite one such case law - in a recent judgment in a matter relating to GST, the Hon'ble Gujarat High Court had occasion to deal with the powers that can be given effect through a delegated legislation, in its judgment dated 23.01.2020 in the case of Mohit Minerals Pvt. Ltd. vs. UOI [2020(33)GSTL 321(Guj.)] which was subsequently affirmed by Hon'ble Apex

Court [2022 (61) G.S.T.L. 257 (S.C.)[19-05-2022]]. Para 151 of the said judgment is reproduced below:

> *"151. It is a settled principle of law that if a delegated legislation goes beyond the power conferred by the statute, such delegated legislation has to be declared ultra vires. The delegated legislation derives power from the parent statute and not without it. The delegated legislation is to supplant the statute and not to supplement it."*

The inference that follows from the judgment of the Hon'ble High Court is that any delegated legislation derives its power from the parent statute and cannot stand by itself. Further, the condition 2(e) of the impugned Notification *'no CENVAT credit has been availed of on inputs and input services on which rebate has been claimed'*, make the applicability of rules made under Cenvat Credit Rules, 2004 (CCR,2004) to the Notification obvious. Therefore, the definition of input service as given in CCR,2004, has been rightly resorted to while interpreting the impugned Notification by the Applicant-Department.

9.2 Government observes that as the definition of 'input service' under Rule 2(l) of the CCR,2004, clearly excludes certain services, rebate of service tax paid on such services would be inadmissible. In the instant case, on this ground rebate of 'Canteen service' has been rightly rejected by the original authority, as the 'Outdoor Catering Service' is primarily used for consumption by employees and is covered under exclusion clause (C) of Rule 2(l) of CCR,2004. The case laws quoted by the applicant are not applicable in the instant case as in those cases maintaining canteen within factory premises for workers was a statutory requirement under the Factories Act, 1948/ Dock workers (safely, health & welfare) Regulation, 1990. Similarly, the 'Rent a Cab' service is also covered under exclusion clause (B) of Rule 2(l) of CCR,2004 hence rebate of same has also been rightly rejected.

Thus, Government concludes that except for services which are not falling under the purview of the exclusion clause of definition of 'input service' under Rule 2(l) of CCR,2004, rebate of tax involved in other services

used in providing the services exported, need to be allowed overlooking the procedural lapses.

10. In view of the findings recorded above, Government modifies the impugned Orders-in-Appeal and allows the impugned Revision Applications in respect of admissibility of rebate claims concerning services falling under exclusion clause of Rule 2(l) of CCR,2004.

11. The Revision Applications are disposed of on the above terms.

Shrawan 8/2/23

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

ORDER No. MA-53/2023-CX(WZ)/ASRA/Mumbai dated 08.2.2023

To,
M/s. Eaton Industries Pvt. Ltd.,
145, Off Mumbai-Pune Road,
Pimpri, Masulkar Colony Road,
Pune – 411 018.

Copy to:

1. Commissioner of Central GST & Customs,
   Pune-I Commissionerate,
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   41/A, Sassoon Road, Pune – 411 001.
2. Sr. P.S. to AS (RA), Mumbai
3. Guard file
4. Notice Board.