

SPEED POST



F. No. 195/129-133/SZ/2018-R.A.
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue..31/01/23

Order No. 03-07/23-ST dated 31-01-2023 of the Government of India, passed by Shri Sandeep Prakash, Additional Secretary to the Government of India, under Section 35 EE of the Central Excise Act, 1944 read with Section 83 of Finance Act, 1994.

Subject : Revision Applications, filed under Section 35 EE of the Central Excise Act, 1944 read with Section 83 of Finance Act, 1994, against the Orders-in-Appeal Nos. 3 to 7/2017-CT dated 30.06.2017, passed by the Commissioner of Central Tax (Appeals-II), Bengaluru.

Applicant : M/s Arris Group (India) Private Limited, Bengaluru.

Respondent : The Pr. Commissioner of CGST & Central Excise, Bengaluru East, Bengaluru.

ORDER

Five Revision Applications, bearing Nos. 195/129-133/SZ/2018-RA all dated 05.07.2018, have been filed by M/s Arris Group India Pvt. Ltd., Bengaluru (hereinafter referred to as the Applicants) against the Orders-in-Appeal Nos. 3 to 7/2017-CT dated 30.06.2017, passed by the Commissioner of Central Tax (Appeals-II), Bengaluru.

2. Briefly stated, the Applicants herein filed rebate claims in respect of Service Tax and Education Cess paid on input services which are said to have been used in providing information technology software services exported by the Applicants, in terms of Rule 5 of Export of Service Rules, 2005 read with Notification No. 12/2005-ST dated 19.04.2005. The rebate claims were initially rejected by the then Deputy Commissioner of Service Tax (Audit), vide separate Orders all dated 14.09.2011. However, on an appeal filed by the Applicants herein, the Commissioner (Appeals), vide Order-in-Appeal No. 412/2012-ST dated 31.12.2012, remanded the matter to the original authority for de-novo consideration. In the remand proceedings, the original authority once again rejected the claims, which have been upheld, vide the impugned Orders-in-Appeal. The details are tabulated below:

SI. No.	OIO No. and date	Claim period	Amt. claimed (in Rs.)	Rejected Amt. (Rs.)
1	30R/2016 Dt. 15.02.2016	4/2010 to 6/2010	34,84,441/-	34,84,441/-
2	31R/2016 Dt. 15.02.2016	10/2009 to 12/2009	24,22,194/-	24,22,194/-
3	24R/2016 Dt. 12.02.2016	1/2010 to 3/2010	29,09,047/-	29,09,047/-
4	34R/2016 Dt. 15.02.2016	7/2010 to 9/2010	34,95,628/-	34,95,628/-
5	23R/2016 Dt. 15.02.2016	7/2009 to 9/2009	18,17,592/-	18,17,592/-

3. The revision applications have been filed, on identical grounds, inter-alia, submitting that primary conditions for claiming rebate, under Notification No. 12/2005-ST dated 19.04.2005, were satisfied; that requirement to file the declaration prior to the date of export with the jurisdictional Assistant Commissioner is only a procedural requirement; that beneficial provisions are to be interpreted liberally; and that interest is applicable if rebate is not allowed within three months.

4. Personal hearing in the matter was fixed on 04.01.2023, 13.01.2023 and 30.01.2023. In the personal hearing held on 30.01.2023, in virtual mode, Sh. Sivarajan, CA appeared for the Applicants and reiterated the contents of the RA. He submitted that the CENVAT credit though availed was reversed subsequently in 2014. Sh. Sivarajan, CA submitted that they would be filing Paper Book and Date Chart for condonation of delay on 30.01.2023. No one appeared for the Respondent department on any of the dates fixed for personal hearing nor any request for adjournment has been received. Therefore, it is presumed that the department has nothing to add in the matter. Paper Book, Date Chart and Synopsis have been submitted by the Applicants on 30.01.2023 after the hearing.

5. The Applicants have filed a condonation of delay application urging that they had initially filed appeals against the impugned Order-in-Appeal before CESTAT, which have been rejected by CESTAT, South Zonal Bench, vide Final Order Nos. 20407-20411/2018 dated 22.03.2018, as not maintainable. Date Chart has been subsequently submitted indicating that subject revision applications have been filed within a period of six months, after excluding the period spent in pursuing remedy in CESTAT, i.e. wrong forum. Delay is condoned.

6.1 The Government has carefully examined the matter. The Commissioner (Appeals) has upheld the rejection of the rebate claims on the following grounds:

- (i) As per condition para 2(e) of the Notification No. 12/2005-ST dated 19.04.2005, no CENVAT credit should be availed on input and inputs services of which rebate has been claimed. The Applicants have not complied with this condition of the notification.
- (ii) Para 3.1 of the said notification prescribes that the claimant shall file a declaration prior to date of export of the taxable services with the jurisdictional Assistant Commissioner of Central Excise describing the taxable services 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; and (b) description, value and the amounts of Service Tax and Cess payable on input services actually required to be used in providing taxable services to be exported. The Applicants had not filed such declarations in respect of any of the 05 rebate claims.

6.2.1 The Applicants have not denied that they had indeed availed the CENVAT credit on the input services in respect of which subject rebate claims have been filed. The Commissioner (Appeals) has correctly pointed out that this is in contravention of

condition 2(e) of the Notification No. 12/2005-ST dated 19.04.2005, compliance whereof is mandatory. The Government observes that in respect of Rule 18 of the Central Excise Rules, 2002 read with Notification 19/2004-CE(NT), the Hon'ble Bombay High Court has, in the case of UM Cables vs. Union of India {2013 (293) ELT 641 (Bom.)}, held that the conditions and limitations for the grant of rebate are mandatory. Similar view has been taken by various other High Courts as well. Ref. Jubilant Life Sciences Ltd. {2016 (341) ELT 44 (Allahabad)}, Raj Petro Specialties {2017 (345) ELT 496 (Gujarat)}, Triputi Steel Traders {2019 (365) ELT 497 (Chattisgarh)}, Haldia Petrochemicals Ltd. {2019 (368) ELT 502 (Calcutta)}. Government observes that the provisions of Rule 18 ibid and those of Rule 5 of the Export of Service Rules, 2005 are identical. Therefore, the ratio of UM Cables (supra) and other decisions of various High Courts applies on all fours to the present case as well. As such, the subject findings of Commissioner (Appeals) are unexceptionable.

6.2.2 The Applicants have, at this stage, submitted that while they had availed the CENVAT credit on the input services in respect of the subject rebate claims, the CENVAT credit so availed has been reversed in 2014. It is their contention that since the CENVAT credit has been reversed, they have complied with the conditions of the notification. At the outset, Government observes that this plea has been taken for the first time at this stage, even when the Applicants had the occasion to bring this out at the stage of de-novo adjudication by the original authority and at the appellate stage with the Commissioner (Appeals). No reasons are forthcoming as to why this claim was not made before the original authority or the appellate authority. It is also relevant to notice that the rebate claims pertain to the period of July 2009 to June 2010 whereas the CENVAT credit is claimed to have been reversed in 2014, i.e., much after the rebate claims were filed and, in fact, much after these were originally rejected by the original authority. It is trite to say that the applicability of statutory provisions and the notifications has to be examined with reference to the relevant time period. As already brought out, the rebate claims pertain to the period July 2009 to June 2010. These were decided in 2011. It is an admitted position that the Applicants were not in compliance with the condition 2(e) of the notification at the relevant time.

6.2.3 Further, if subsequent reversal (after more than 04 years) was to be treated as non-avilment and, therefore, in compliance with the notification, it would create an iniquitous and anomalous situation. The rebate claims, not sanctioned within the time specified in the Finance Act, 1994 read with the Central Excise Act, 1944, are liable to be paid along with interest. As pointed out and claimed by the Applicants in the subject revision applications, the period of computation of interest would commence with reference to the original date of filing of the claim. Thus, if the Government were to be persuaded to treat the alleged reversal to be in compliance of the condition 2(e) of the Notification No. 12/2005-ST dated 19.04.2005, the

Applicants herein will be eligible for interest with reference to the original date of filing of the rebate claims on which dates they were not in compliance with the conditions of the notification.

6.2.4 It is also evident from the two rounds of proceedings before the authorities below as well as those before the CESTAT that the Applicants herein have been throughout unsuccessfully attempting to present these rebate claims as refund claims filed under Rule 5 of the CENVAT Credit Rules, 2004. The second round of proceedings before the lower authorities and the proceedings before the CESTAT have been held much after the alleged reversal of CENVAT credit. Thus, on one hand the Applicants have claimed that they have reversed the credit but on the other hand they have been claiming the refund of the very same credit. Since refund would be permissible only if the credit is available in the CENVAT credit account, it is evident that the Applicants either made a misrepresentation before the lower authorities and CESTAT or are making a misrepresentation before the Government at revision stage. The subject contention of the Applicants is not acceptable for this reason as well.

6.3 As regards non-filing of declaration in terms of para 3.1 of the said notification dated 19.04.2005, the Applicants have contended that it is merely a procedural infraction and, therefore, rebate cannot be denied on this ground. However, the Government observes that, as per para 3.2 of the said notification, the declaration filed under para 3.1 is required to be verified by the Assistant/Deputy Commissioner of Central Excise and, if necessary, by calling for any relevant information or samples of inputs etc. It is only if after such verification, the Assistant/Deputy Commissioner is satisfied that there is no likelihood evasion of duty or Service Tax, he may accept the declaration. Therefore, it is apparent that the provisions of para 3.1 and para 3.2 of the notification are interlinked. When read together these provisions are not merely in the nature of 'procedure' but these are in the substantive nature of 'safeguards'. Merely because these 'safeguards' have been listed under Head Note 'procedure', it cannot impart them the tenor of 'procedure' simpliciter. Hence, the contention of the Applicants herein that the subject case is only a case of procedural infraction is not tenable. Further, a Constitution Bench of the Hon'ble Supreme Court has, in the case of Commissioner of Customs, Mumbai vs. Dilip Kumar & Co. {2018 (361) ELT 577 (SC)}, held that exemption notification should be interpreted strictly and the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification. In the present case, the Applicants are clearly in default of the safeguards specified under the Notification No. 12/2005-ST dated 19.04.2005 and have, therefore, failed to discharge the burden of proving applicability of the said notification in their case.

6.4 The case laws relied upon by the Applicants are not applicable in the facts of the present case.

6.5 In view of the above, the Government does not find any merit in the subject revision applications and these are liable to be rejected.

7. The revision applications are rejected for the reasons aforesaid.


(Sandeep Prakash)

Additional Secretary to the Government of India

M/s Arris Group India Pvt. Ltd.,
"The Senate", 3rd Floor, #33/1,
Ulsoor Road, BBMP Ward No. 81,
Bengaluru-560042.

G.O.I. Order No. 03-07/23-ST dated 31-01-2023

Copy to: -

1. The Pr. Commissioner of CGST & Service Tax, Bengaluru East, TTMC/BMTC Bus Stand Complex, Hall Airport Road, Domlur, Bengaluru-560071.
2. The Commissioner of Central Tax (Appeals-II), Traffic & Transit Management Centre, BMTC Building, 4th Floor, Above BMTC Bus Stand, Domlur, Old Airport Road, Bengaluru-560071.
3. M/s Kunal Wadhwa, M/s Pricewaterhouse Coppers Pvt. Ltd., 6th Floor, Tower D, The Millenia, 1 & 2 Murphy Road, Ulsoor, Bengaluru-560008.
4. PA to AS (Revision Application).
5. Spare Copy.
6. Guard File.
7. Notice Board.

ATTESTED



31.01.2023

(लक्ष्मी राघवन)
(Lakshmi Raghavan)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi