SPEED POST

F. No. 196/05/ST/2021—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..11/01/22.....

Order No. 03 /ST/22 dated 10/01/22 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 Application filed under Section 35 EE of the Central Excise Act, 1944 read with Section 83 of Finance Act, 1994 against the Order-in-Appeal No. 271/ST/CGST-APPEAL-GURUGRAM/SG/2018 dated 31.01.2019 passed by the Commissioner (Appeals), CGST, Gurugram.

Applicant : M/s. Midland Credit Management India Pvt. Ltd., Gurugram.

Respondent : The Commissioner of CGST, Gurugram.

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ORDER

A Revision Application No. 196/05/ST/2021-R.A. dated 07.04.2021 has been filed by M/s Midland Credit Management India Pvt. Ltd, Gurugram (hereinafter called as the Applicants) against the Order-in-Appeal No. 271/ST/CGST-APPEAL-GURUGRAM/SG/2018 dated 31.01.2019, passed by the Commissioner (Appeals), CGST, Gurugram. The Commissioner (Appeals) has, on an appeal filed by the department, set aside the Order-in-Original No. 87/Refund/GST/Div-East-II/2018-19 dated 20.06.2018 passed by the Assistant Commissioner, CGST, Div-East-II, Gurugram.

2. Briefly stated, the Applicants herein, were registered under Service Tax for providing various taxable services. They filed two rebate claims pertaining to Swatch Bharat Cess (SBC) amounting to Rs. 7,15,747/-, (for January to March, 2017) and Rs.9,79,292/-, (for April to June, 2017), paid on input services used in the provision of export of services, in terms of Notification No. 39/2012-ST dated 20.06.2012. The rebate claims were sanctioned by the original authority, vide the aforesaid Order-in-Original dated 20.06.2018 which was reviewed and, subsequently, an appeal was filed by the department before Commissioner (Appeals) on the grounds that the Applicants had not filed prior declarations in terms of Para 3.1 of the notification no. 39/2012-ST dated 20.06.2012. The appeal filed by the departrment was allowed vide the impugned OIA.

3. The revision application has been filed, mainly, on the grounds that all the conditions laid down for grant of rebate have been fulfilled; that filing of declaration prior to export is only a procedural requirement; that the Commissioner (Appeals) has erred in holding that it is a substantial and mandatory requirement; that delay in filing of prior declaration is at best a procedural delay and, therefore, rebate should not be denied. Accordingly, it has been prayed that impugned order may be set aside and rebate may be allowed.

4. Personal hearing, in virtual mode, was held on 10.01.2022. Sh. Rakesh Nanda, Advocate appeared for the Applicants and requested that the Written Submissions dated 09.01.2022 may be taken on record. He reiterated the contents of the RA and the Written Submissions dated 09.01.2022. No one appeared for the respondent department nor any request for adjournment has been received. Hence, the matter is taken up for decision on the basis of facts available on records.

5. The revision application has been filed with a delay which is attributed to approaching wrong forum for filing the appeal, i.e., CESTAT. Delay is condoned.

6.1 The Government has carefully examined the matter. The present case relates to rebate of service tax paid on services exported, in terms of rule 6A of Service Tax Rules, 1994 read with notification no. 39/2012-ST dated 20.06.2012. The provisions of the said rule 6A and the

notification no. 39/2012-ST, as relevant to the present dispute, are extracted below:

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 services and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification."

Notification No. 39/2012-ST:

"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."

Thus, in terms of rule 6A, the rebate of service tax, paid on providing services that are exported shall be allowed subject to such "safeguards,

conditions and limitations", as may be specified. Further, on a plain reading, the provisions of para-3.1 of the notification no. 39/2012-ST relating to filing a prior declaration, i.e., a declaration prior to the date of export of service, read with para- 3.2, are in the nature of safeguards in as much as filing of the prior declaration enables the department to cause necessary verification, so as to satisfy itself that there is no likelihood of evasion of duty, service tax and cess, as the case may be. In the present case, therefore, by not filing the prior declaration, the Applicants have circumvented the safeguards subject to which the rebate is to be allowed in terms of rule 6A. As the sanction of rebate is subject to observance of the safeguards in para 3.1 and as, in the present case, these safeguards have not been observed, the rebate is not admissible.

6.2 To put it differently, the provisions of para 3.1, read with those of para 3.2 are not merely in the nature of 'procedure' but these are in the substantive nature of 'safeguards'. As such, the contention of the Applicant herein that the subject case is merely a case of procedural infraction is also not tenable.

6.3 The Commissioner (Appeals) has highlighted that the para 3.1 uses word "shall", which has been interpreted by the Hon'ble Courts to be mandatory. In this regard, the judgment of Hon'ble Supreme Court in the case of Khub Chand [1967 AIR 1074] has been relied upon. The Applicants have, on the other hand, contended that the word "shall" should be read as "may". The Government observes that while para 3.1 requires filing of a prior declaration, para 3.2 provides for verification of prior-declaration, so filed. Therefore, if the declaration under para 3.1 is

either not filed or is not filed on prior basis, the provisions of para 3.2 shall be rendered nugatory. It is trite that the cardinal principle of interpretation of statute is that the interpretation which would render a part of the legislation nugatory or otiose should be avoided.

6.4 The Applicants have relied upon the judgment of the Hon'ble Delhi High Court in the case of Wipro Limited vs UOI [2013 (2) TMI 385-Delhi High Court], in support of their case. The Government observes that the said judgment has been rendered by the Hon'ble High Court in respect of rebate under Rule 5 of the Export of Service Rules, 2005 read with notification no. 12/2005-ST dated 19.04.2005. The Rule 5 ibid reads as under:

"5. Rebate of service tax - Where any taxable service is exported, the Central Government may, by notification, grant rebate of service tax paid on such taxable service or service tax or duty paid on input services or inputs, as the case may be, used in providing such taxable service and the rebate shall be subject to such conditions or limitations, if any, and fulfilment of such procedure, as may be specified in the notification."

It is to be observed that as against rule 6A of the Service Tax Rules, 1994, where the grant of rebate is subject to "safeguards, conditions and limitations", as may be specified, the rule 5 of the Export of Service Rules, 2005 made the rebate subject to only "conditions or limitations". In other words, the difference between the provisions of rule 5 of the Export of Services Rules and those of rule 6A of Service Tax Rules, is that in terms of rule 6A, the rebate, in addition to 'conditions' and 'limitations', is also subject to the 'safeguards'. Further, the Hon'ble High Court has itself, in para 15 of its judgment, clarified that "*our decision rests on the facts of the case and on the peculiar nature of the business of the appellant and*

that we have not decided the broader question whether the requirement of paragraph 3 of the Notification No.12/2005-ST dated 19.04.2005 is merely procedural and hence directory or is substantive and hence mandatory."

6.5 The Applicants have also relied upon the judgment of a three judge bench of the Hon'ble Supreme Court, in the case of Mother Superior Adoration Convent [2021 (3) TMI 93-SC], in the background of the judgment of the Constitution Bench of Hon'ble Supreme Court in the case of Commissioner of Customs (Import), Mumbai Vs Dilip Kumar & Company [2018 (361) E.L.T. 577 (S.C.)]. The Government observes that in the case of Dilip Kumar & Company, the Constitution Bench has held that:

"52._ _ _ . (1) Exemption notification should be interpreted strictly; 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.

(2) When there is an ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject assessee and it must be interpreted in favour of the revenue."

Further, the ratio of the Mother Superior case, as laid down in para 27 of the judgment, is *"We must first ask ourselves what is the object sought to be achieved by the provision, and construe the statue in accord with such object. And on the assumption that if any ambiguity arises in such construction, such ambiguity must be in favour of that which is*

exempted." Therefore, the Hon'ble Supreme Court, in Mother Superior case, has, after noting the judgment in Dilip Kumar & Company, clarified that in case any ambiguity arises in construction of a beneficial exemption, the benefit of such ambiguity should be granted in favour of what is exempted. In the present case, there is no ambiguity whatsoever regarding the provisions of para 3.1. Therefore, the judgment in Mother Superior case is of no assistance to the Applicants herein. The Applicants are clearly in default of the safeguards specified under notification no. 39/2012-ST and have failed to discharge the burden of proving applicability, as required in terms of Dilip Kumar & Company (supra).

6.6 The other case laws relied upon are not applicable in view of the facts of the present case and discussions above.

7. In view of the above, the revision application is rejected.

(Sandeep Prakash)
Additional Secretary to the Government of India

M/s Midland Credit Management India Pvt. Ltd.,
28 P, Urban Estate, Sector 44,
Gurugram-122 002.

G.O.I. Order No. 03 /21-ST dated 10/01/2023

Copy to:-

1. The Commissioner, CGST, Gurugram, GST Bhavan, Plot No. 36-37, Sector-32, Gurgaon, Haryana – 122001.
2. The Commissioner (Appeals), CGST, Gurugram, 5th Floor, Mudit Square, Plot No. 24, Sector 32, Gurgaon, Haryana – 122001.
3. PA to AS(Revision Application).
4. Spare Copy.
5. Guard file.

5. Guard File.

ATTESTED

Ashish Tiwari

Assistant Commissioner (RA)