CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 85072 OF 2021

[Arising out of Order-in-Appeal No: DL/19/APPEALS THANE/ME/2020-21 dated 17th August 2020 passed by the Commissioner of GST & Central Excise (Appeals-Thane), Mumbai.]

Rosy Blue India Pvt Ltd
G Block, FC 6018, Bharat Diamond Course
Bandra-Kurla Complex, Bandra (E), Mumbai – 400 051 … ***Appellant***

versus

Commissioner of GST & Central Excise
Mumbai East
9th Floor, Lotus Infocentre, Near Parel Station
Parel (E), Mumbai - 400012 ***…Respondent***

APPEARANCE:

Shri Mahesh Raichandani, Advocate for the appellant

Shri Dilip M Shinde, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A /86123 /2022

DATE OF HEARING: 06/06/2022
DATE OF DECISION: 29/11/2022

PER: C J MATHEW

Arguing this appeal, Learned Counsel appearing for M/s Rosy

Blue (India) Pvt Ltd, contends that the challenge to order-in-appeal no. DL/19/APPEALS THANE/ME/2020-21 dated 17th August 2020 of Commissioner of GST & Central Excise (Appeals), Thane is limited to the finding therein that non-compliance with condition of debit of amount equivalent to refund claim in CENVAT credit account suffices to reject the claim preferred under rule 5 of CENVAT Credit Rules, 2004. The appellant, trading internationally in diamonds and other precious stones, also claimed to have rendered service to overseas clients and having utilised 'taxable service' on which credit of tax under Finance Act, 1994, as permissible, was availed and, owing to absence of domestic dealings, was constrained to opt for monetisation of such credit attributable to services deployed for undertaking export of services during the relevant quarter as provided for in rule 5 of CENVAT Credit Rules, 2004. Their application for refund of ₹ 69,09,322 and ₹ 37,08,888 on 6th January 2016 and 30th March 2016 respectively for the first two quarters of 2015 and of ₹ 19,04,374 on 2nd January 2017 for the first quarter of 2016 were, after issue of notice of deficiency, adjudicated to restrict evaluation of claim to ₹23,10,232, ₹ 9,04,049 and ₹ 19,04,374 respectively only to have that cumulative amount of ₹ 51,18,655 also rejected.

2. It would appear from the records that the appellant was not aggrieved by the curtailment of credit available for monetizing but

only by the rejection of the truncated eligibility; the consummation of the proceedings in appeal thereafter, uncontested by both sides, with order of remand to the original authority for re-computation of the refund amount was followed up, strangely enough, with a fresh claim for the restricted amount on 11th October 2018 instead of leaving it to the original authority to restore the application of 2016 and 2017 for fresh consideration.

3. In response to query thereafter about compliance with condition of debit in CENVAT credit account, appellant herein intimated that the entire balance of credit, as on 1st April 2016, had been written off, as evidenced by the return for the first half of 2016-17 and, in particular, by the closing balance and opening balance respectively, for asserting that to be substantive compliance. The sanctioning authority, taking note of the several conditions in notification no. 27/2012/CE (NT) dated 18th June 2012 for operationalising monetisation of eligible credit under rule 5 of CENVAT Credit Rules, 2004 and essentiality of paragraph 2(h) therein espoused in the remand order of the first appellate authority, discarded this proposition to hold insufficiency of compliance with the said condition and rejected the claim for sanction of ₹ 51,18,655 for the three quarters. The sustaining of this rejection in the impugned order has led to this appeal before us.

4. Notwithstanding the restricted framing of the dispute by Learned Counsel in oral submission and reproduced in the submissions, it was further adduced that the grounds of appeal, not being reproduced for the sake of brevity, was also to be deemed to be included therein. Several of the grounds of appeal are critical of the first appellate authority for allegedly not being appreciative of the limited remit of the dispute, the limited jurisdiction and, in the light of the failure to seek furnishing of further information, lack of competence to rely on insufficiency of submissions for upholding the rejection by the original authority. In view of the specific plea, during the oral argument, that procedural lapse, if any, which is rectifiable should not stand in the way of substantive benefit, such as refund, we would rather not dwell on the impropriety, as it appears to us, in an appellant couching criticism of an appellate decision in a manner calculated to cast aspersions on the personal competence of a senior official in the hierarchy. The latitude afforded by right to impugn findings in, and outcome of, an order in appeal is not to be construed as licence to resort to language, and expression, that is intemperate. Therefore, we propose to dwell only on the acceptability of the primary proposition of Learned Counsel along with ascertainment of sufficiency of documentary evidence for sanction of the refund and our unwillingness to dignify the other grounds is deliberately intentional.

5. According to Learned Counsel, the issue stands resolved in their favour by the decision of the Tribunal in *Silicon Image India Research & Development Private Limited v. Commissioner of Central Excise & Service Tax, Hyderabad (MANU /CH/0189/2017]* and in *BA Continuum India Pvt Ltd v. Commissioner of Service Tax-II, Mumbai [final order no. A/86656-86667/2018 dated 7th March 2018 in appeal no. ST/85693-85694/2015, 85485-85494/2018 against orders-in-appeal no. PD/842-843/ST-II/2014 dated 22nd December 2014 and no. PK/207, 316, 315, 215, 314, 313, 214, 212, 211, 213/ME/2017 of Commissioner of Service Tax (Appeals), Mumbai-II]* thus nullifying the relevance of the finding in the impugned order. Learned Authorised Representative drew our attention to the specifics of the several conditions subject to which only the refund of credit is to be released under rule 5 of CENVAT Credit Rules, 2004.

6. In the light of the decisions of the Tribunal as cited by Learned Counsel, it would appear that the mere failure to debit the amount, claimed as refund, in the CENVAT credit account, if rectified thereafter, is not fatal to the sanction. Nevertheless, the specifying of such condition in the impugned notification for the scheme of monetisation of accumulated credit to which exporters, of goods and services, are entitled is not merely academic but designed with the particular objective of ensuring that refund does not confer undue benefit has, nonetheless, not gone unnoticed in these decisions and to

which we shall refer presently. It is internationally acknowledged that domestic taxes are not to be carried beyond the domestic territory and tax administration systems provide for neutralisation in pursuance of that consummation. CENVAT credit account, maintained by manufacturer/provider of goods/services that, but for shipment/export out of the country, is leviable to duties/taxes at the stage of removal/provision, is the readily available inventory of duties/taxes subsumed in the value of the goods/services and, therefore, appropriately employable in processing the neutralisation, for implementation of the principle, whenever dutiable goods/taxable services are exported and, for that very reason, find themselves unable to utilise the attributable credit. A parallel mechanism, akin to section 75 of Customs Act, 1962, exists outside the ambit of rule 5 of CENVAT Credit Rules, 2004 for neutralisation of duties/taxes that, otherwise, would add to the value upon export of 'output service' that are not taxable.

7. The notification issued under rule 5 of CENVAT Credit Rules, 2004 regulates the handling of such refunds pertaining to services that, but for export, are taxable and one of the requirements therein, after the introduction of 'negative list' regime, is ascertainment that the transaction is in conformity with rule 6A of Service Tax Rules, 1994 as an essential condition for eligibility of refund under the scheme of monetisation. This was one of the issues framed in the

order of the first appellate authority directing remand on challenge by appellant herein after the initial rejection of application. And it is on their submission about activity undertaken by the appellant for eligibility that the first appellate authority had ruled on the inadequacy of the order impugned therein for failure to consider documentary evidence and upon which Learned Counsel bases the critique of the subsequent proceedings, including the impugned order, for not being limited to the restrictive nature of the remand ordered therein. At this stage, we take note, too, that, in the absence of appeal by either side against the said remand order, the terms therein is the framework within which the processing of the claim for refund and all appellate decisions thereafter were to be restricted. That the appellant chose to file a fresh claim of refund is another matter altogether as this appeal confines us to the impugned order arising from the remand.

8. The remand order states, in no uncertain terms, that

> *'6.…… From the above, it can be observed that a person exporting goods and services simultaneously, may submit two refund claims one in respect of course exported and other in respect of the export of services every quarter.*
>
> *6.1 In the instant case, I find that the appellant had exported the goods and claimed refund of input services which are used in the process of manufacturing the exported goods. Further, the appellant also claims that they have claim refund of Cenvat availed on input services used for export of output services i.e. bagging services. From this it is very clear*

that the appellant has filed single refund claim combining the details with respect of export of goods and services. Further, as claimed by the appellant the appellant filed refund under Rule 5 of Cenvat Credit Rules,2004 read with Notification No.27/2012-CE(NT) dated 18.06.2012, majorly for the input services used for the manufacture of excisable goods as approx. 78% of the goods manufactured and removed from the factory are exported and export of services only accounts for approx. 0.20% of export of goods.

6.4 Further, Notification No.27/2012-CE(NT) dated 18.06.2012 allows the manufacturer as well as provider of output service to claim refund under Rule 5 of Cenvat Credit Rules,2004 for every quarter. Hence, in my view, the appellant has correctly applied for refund claim under Notification No.27/2012-CE(NT} dated 18.06.2012 and the adjudicating authority has erred in rejecting the claim on the grounds that the appellant failed to comply the condition prescribed under at Rule 6(A)(c) of Service Tax Rules, 1994 as the appellant had exported manufactured goods as well as the output services i.e. bagging services also. Accordingly the impugned orders of the lower adjudicating authority rejecting the refund claims on this ground are not justifiable and liable to be set aside. Held Accordingly.'

before proceeding to decide on the second of the issues framed, *viz*., failure to furnish documentary evidence, thus

'7.1 In this connection, I find that the appellant contended that they had submitted all the documents to the adjudicating authority. However, the adjudicating authority, in the instant case, had not gone into the merits of the case and had not conducted proper enquiry/verification of the documents submitted by the

> *appellant and rejected their refund claim. It is also the fact that, in appeal, the appellant had produced all the documentary evidence supporting their claim and various judicial decisions in support of their contention. Therefore, the adjudicating authority to examine each parameter and each aspect regarding fulfillment of conditions and prescribed procedure in terms of Notification No, 27/2012-CE (NT) dated 18.06.2012 read with Rule 5 of Cenvat Credit Rules, 2004, before sanctioning the refund claim. On the other hand, the appellant to appear with all necessary documents called for by the adjudicating authority. Held Accordingly.,*

and on the third, and last, of the issues, *viz*., on submission of proof of having debited the claimed amount in the CENVAT credit account, thus

> *'8. Further, the adjudicating authority has also observed that the appellant failed to proof of debit entry of refund amount. However, I find that the appellant contended that the appellant submitted Cenvat register for the relevant period which cleared reflects the debit entry of refund amount. I find that the condition/limitation prescribed under para 2(h) is the basic condition to be fulfilled which is also stipulated in Form A and Annexure A-I to the impugned Notification read with Rule 5 of the Cenvat Credit Rules, 2004. The refund cannot be claimed without debiting the amount. However, in the present case, I find that the appellant has submitted the copy of Cenvat register and the adjudicating authority to verify the proof of debit entry before sanctioning the refund claim. Held Accordingly.'*

9. From the context of the remand order on non-conformity with

the pre-requisites of ‘export of service’ in Service Tax Rules, 1994 as held, initially, by the original authority, we take note that the first appellate authority had merely held the finding of non-conformity to be incorrect insofar as the ‘service’ is concerned. At the same time, it was also held that the applicant had filed a single claim for refund even as the scheme of monetisation, in rule 5 of CENVAT Credit Rules, 2004, prescribed separate consideration for export of goods and export of services. The setting aside of the initial order of rejection for erroneous consideration of one particular aspect is not, in our view, to be construed as approval of the validity of the entirety of claim as filed by applicant. It is but natural that the applicant interprets the remand order in a manner suited to them and as favouring them; nevertheless, that finding too having been set aside, was also to be re-adjudicated in the *de novo* proceedings. The lower authorities have not done so and such failure, in the normal course, would have prompted a further remand in disposing of this appeal. We park this aspect for the nonce as that would be contingent only upon the sole contention of the appellant revolving around a set of facts being resolved in favour of the appellant.

10. There is no doubt that the remand order takes note of the evidence furnished by the appellant to substantiate the claim of having complied with condition of debit of the CENVAT credit account by directing the original authority to scrutinise this submission once

again. There is also no doubt that the lower authorities, in proceedings pursuant to the remand order, have come to the conclusion that not carrying forward the balance of credit in the returns pertaining to the said period is not sufficient for accepting the claim of the appellant that procedural requirements had been complied with. The provisions in the notification for operationalizing of rule 5 of CENVAT Credit Rules, 2004 include debiting of the claim amount before submission of application for the same. There is a purpose behind this mandate: that the claimed amount would be erased from the credit account and, thus, not utilised even temporarily once monetization has been sought. We take note that the appellant has not clearly asserted, or produced evidence of, having retained that amount in balance all through. Indeed, on the contrary, it has been the contention of the appellant that the service tax returns for the period immediately after that for which the claim of refund had been preferred reflects writing off of the entire balance at one go after inclusion in the closing balance of the previous period and, premising on the proposition of resultant compliance, the appellant has made so bold as to allege deficiency in discharge of statutory responsibility by the lower authorities. We find ourselves unable to concur with this proposition of accounting neutrality that may, and only in specific circumstances to be ascertained by scrutiny of primary records, be in harmony with the intent of the said condition requiring debit in the CENVAT credit account and not as a general

rule.

11. Ideally, credit should be reversed as and when export takes place; however, with eligibility for refund arising only upon receipt of proceeds of export and the scheme having provided for filing of claim within a year thereafter, the dilution of ideal by shift to the quarter in which the claim is preferred is acceptable approximation. Therefore, the submission of the appellant would meet the test of sufficiency only by evincing continuous availability of such balance from the date of filing of the claim for refund till the date on which the opening balance reflected write-off of the entire credit as claimed by them. That such credit existed for the whole of this duration is not deducible from write-off and no amount of adamant insistence of such presumption can substitute for such evidence; the lower authorities cannot be held to have been perverse in implementation of the order of remand. The appellant is, squarely and singularly, responsible for failure to furnish proof of the required availability of credit till the date of write off and, in the absence of any such evidence even at this stage of appeal or even assurance of being ready and willing to do so, there is no scope for further ascertainment.

12. The decision of the Tribunal in *re Silicon Image Research & Development Private Limited* and in *BA Continuum India Pvt Ltd* have, no doubt, enumerated the principle that a rectifiable lapse in

procedure should not lead to denial of refund but the outcome therein has been decided on the fact of post-claim rectification. While concurring with the principle, we find that, on the facts made known in this appeal, material presented before us does not support extending that outcome in this dispute.

13. In view of the factual submission of the appellant before the lower authorities, as well as before us, not being demonstrative of substantive compliance with the condition of debit of the CENVAT credit or of promise of being able to, the other aspects of remand by the first appellate authority are rendered irrelevant. Consequently, we find no reason to hold the impugned order as contrary to the terms of the remand ordered in the first round of appeal. Accordingly, the appeal is dismissed.

(Order pronounced in the open court on 29/11/2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*