CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI
WEST ZONAL BENCH

Service Tax Appeal No. 89075 of 2018

(Arising out of Order-in-Appeal No. NA/GSTA-III/MUM/644/17-18 dated 28.03.2018 passed by the Commissioner of GST & CE (Appeals-III), Mumbai)

Vishay Semiconductor India Pvt. Ltd. .....Appellant
Unit no. 100, SDF IV, SEEPZ-SEZ,
Andheri (East), Mumbai

VERSUS

Commissioner of CGST & Central Excise, ...Respondent
Mumbai Central
4th Floor, CEx Bldg., Churchgate,
Mumbai

APPEARANCE:

Shri Kamal Sharma, Chartered Accountant for the appellant
Shri Nitin Ranjan, DC(AR) for the respondent

CORAM:
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: A/85163/2023

DATE OF HEARING : 23.11.2022
DATE OF DECISION : 09.02.2023

Per: AJAY SHARMA

This appeal has been filed against impugned order dated 28.03.2018 passed by the Commissioner of GST & Central Excise (Appeals-III), Mumbai by which the learned Commissioner (Appeals) rejected the appeal and upheld the order of the adjudicating authority.

2. The issue involved herein is whether the appellants are eligible for refund of Service Tax paid on specified services which

are wholly consumed within the SEZ as per notification no. 9/2009-ST dated 03.03.2009 as amended vide notification no.15/2009-ST dated 20.05.2009?

3. The facts leading to the filing of the instant appeal are stated in brief as follows. The appellant herein filed refund claim of ₹6,83,442/- for the period from 15th December 2009 to 30th June 2010 for Service Tax paid on the specified service used in relation to the authorised operations in the SEZ under notification (supra). The adjudicating authority vide order-in-original dated 27.12.2010 sanctioned refund claim amounting to ₹4,88,315/- and rejected the claim for the amount of ₹1,95,127/-. Out of the total rejected claim, ₹187/- was on account of being not mentioned in the list of approved services, ₹3863/- pertaining to club and association services was rejected on the ground of no nexus with the export and ₹1,91,007/- was rejected on the ground that the input services were wholly consumed within SEZ which were unconditionally exempted from payment of Service Tax and therefore not eligible for refund as per provisions of notification (supra). Against the rejection of refund claim, the appellant filed appeal before the learned Commissioner (Appeals), but during the course of argument confined them only qua the rejection of refund claim of ₹1,91,007/- and the Commissioner (Appeals) vide impugned order dated 28.03.2018 rejected the appeal and upheld the order of the adjudicating authority.

4. Learned Chartered Accountant appearing on behalf of the appellant submits that the claim of refund which is wholly consumed within SEZ cannot be denied if the Service Tax has been paid on it. He further submits that once the Service Tax is paid to the government, the eligibility of refund cannot be denied. According to learned Chartered Accountant, the notification cannot override the substantial benefit available to the assessee under the SEZ Act and in support of his

submission, learned Chartered Accountant placed on record the decisions of the Tribunal in the matter of *EON Kharadi Infrastructure Pvt. Ltd. vs. CCE, Pune III 2015 (39) STR 267 (Tri-Mumbai)*, *M/s. Barclay Technology Centre India Pvt. Ltd. vs. CCE Pune III 2015-TIOL-82-CESTAT-MUM* and one decision in their own case on similar issue in the matter of *M/s. Vishay Semiconductor India Pvt. Ltd. vs. CC,GST, Mumbai Central* which was decided by this Tribunal vide final order no. A/86782/2019 dated 20.09.2019. Per contra learned Authorised Representative appearing on behalf of Revenue supported the findings recorded in the impugned order and placed reliance on the decision of this Tribunal in the matter of *Everest Industries Ltd. vs. CCE Meerut I* 2013 (31) STR 189 (Tri-Del).

5. Heard rival submissions and perused the case records, synopsis/written submission and case laws placed on record by the respective sides. In order to appreciate the issue involved herein, it is better to peruse the notifications involved herein and the relevant extract of the same are reproduced hereunder:-

> *"Notification No. 9/2009-S.T. -*
>
> > *"……..hereby exempts the taxable services specified in clause (105) of section 65 of the said Finance Act, which are provided in relation to the authorised operations in a Special Economic Zone, and received by a developer or units of a Special Economic Zone, whether or not the said taxable services are provided inside the Special Economic Zone, from the whole of the service tax leviable thereon under section 66 of the said Finance Act :*
> >
> > *Provided that -*
> >
> > *(a)……..*
> >
> > *(b)……..*
> >
> > *(c) the exemption claimed by the developer or units of Special Economic Zone shall be provided by way of refund of service tax paid on the specified services used in relation to the authorized operations in the Special Economic Zone……"*

xxx *xxx* *xxx*

Notification No. 15/2009-S.T. -

"In the said notification, -

(A) in paragraph 1, in the proviso, -

the sub-paragraph (c), the following shall be substituted, namely:-

(c) the exemption claimed by the developer or units of Special Economic Zone shall be provided by way of refund of service tax paid on the specified services used in relation to the authorised operations in the Special Economic Zone except for services consumed wholly within the Special Economic Zone;"

6. I have gone through the SEZ Act, 2005 and its section 26 (i)(e) specifically provides that all services imported into the SEZ to carry out authorised operation in SEZ shall be exempted. Further in terms of section 51 of the SEZ Act the provisions of the SEZ Act shall have overriding effect over all provisions of any other law for the time being in force and it is settled legal principle that any rule or notification cannot override the Act. Otherwise also the issue involved herein is no longer *res integra* in view of the decision of this Tribunal in the matter of *EON Kharadi Infrastructure Pvt. Ltd.* (supra) in which the Tribunal on an identical issue while deciding in favour of assessee held as under:-

"4.1 I note that the SEZ Act, 2005, under Section 26(i)(e), provides that all services imported into the SEZ to carry on authorized operations in SEZ shall be exempted. Further Section 51 of this Act gives overriding effect over other Acts. This being the legal position, the condition of Notification No. 15/2009 that refund is only admissible to services which are not wholly consumed within the SEZ cannot nullify the overriding provisions of Section 51 of the SEZ Act. The law makers made different schemes, one for granting refund of tax paid on services exported into

SEZ and, the other for granting outright exemption to services which are provided to be wholly consumed within the SEZ. If the service provider pays Service Tax on the service provided and wholly consumed within an SEZ unit, the recipient is bound to get refund unless assessment at the end of service provider was re-opened and refund was given to the service providers. This view is supported by the Hon'ble Supreme Court's decision in the case of Commissioner of Central Excise v. MDS Switchgear Ltd. - 2008 (229) E.L.T. 485 (S.C.).

4.2 Notification No. 9/2009 exempts taxable service provided to SEZ units. Once refund is provided for under this notification, the provisions of statute under Section 11B of the Central Excise Act as made applicable to the Finance Act, 1994, comes into play. Therefore, refund cannot be denied under the Act for procedural infraction of having paid the Service Tax which ought not to have been paid by the service provider. The matter already stands decided in the case of Intas Pharma Ltd. v. Commissioner of Service Tax, Ahmedabad - 2013 (32) S.T.R. 543 (Tri.-Ahmd.).

4.3 A point was raised by the learned AR that the appellants are managing various units outside of SEZ who provide services to the appellants. And by paying Service Tax on the service provided to the SEZ unit, they managed to encash unutilized Cenvat credit through the pattern of first paying Service Tax in their unit outside of SEZ and then enabling the SEZ unit to take refund. I find that such practice cannot be held to be violating the legal framework under which recipient unit in SEZ cannot be made to suffer tax incidence. It was also argued by the learned AR that in the case of Everest Industries Ltd. [2013 (31) S.T.R. 189 (Tri.-Del.)], the Principal Bench had rejected the refund claims under similar set of facts. I find that the facts in that case are different. In that case the issue was refund of Cenvat credit under Rule 5 of Cenvat Credit Rules in respect of input services used in the manufacture of final products cleared for export. The Tribunal held that anybody other than SEZ unit cannot be allowed to claim in benefit under SEZ Act and benefit of refund

of accumulated Cenvat credit on inputs used in manufacture of goods supplied to the SEZ units cannot be given. The facts of that case being at variance with the present case, I reject the contention of the learned AR."

7. So far as the reliance placed by learned Authorised Representative in the matter of *Everest Industries Ltd.* (supra) is concerned, I find that the facts in that decision were different. Therein the refund of Cenvat Credit (Service Tax) under Rule 5 of Cenvat Credit Rules, 2004 in respect of input services used in manufacture of final products cleared for export was involved, in which it has been held by the Tribunal that the benefit of refund of accumulated Cenvat Credit on inputs used in manufacture of goods supplied to the SEZ units cannot be given whereas, in the instant matter it is the refund of Service Tax which is in issue and which as per SEZ Act the appellant was not liable to pay and in appellant's own case in Final Order no. A/86782/2019 dated 20.09.2019, this Tribunal has held that various input services which are wholly consumed within the SEZ, the Service Tax paid on such services cannot be denied as refund in view of the principles of law laid down by the Tribunal in the matter of *M/s. Barclay Technology Centre India Pvt. Ltd. (supra)*.

8. In view of the discussion made hereinabove, the impugned order is set aside and the appeal filed by the appellant is allowed with consequential relief, if any, as per law.

(Pronounced in open Court on 09.02.2023)

(Ajay Sharma)
Member (Judicial)

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