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1. CENVAT Credit of tax paid on canteen services not allowed even if provided by the employer as a mandatory requirement

[M/s. Toyota Kirloskar Motor Private Limited vs the Commissioner of Central Tax (2021 (12) TMI 420 - SC Order]

The appellant is a Company engaged in the manufacture of motor vehicles and parts It had established a factory under the Factories Act, 1948 and is having a canteen facility within their establishment to provide food to the employees The contention of the appellant is that, the appellant is under an obligation to establish a canteen in the premises of the factory Expenses relating to canteen incurred by the appellant, including the cost of providing foodstuff and beverages, forms part of the accessible value of the final product manufactured by the company For providing food and beverages, the appellant engaged the services of outdoor catering. The service being an eligible 'input service' for the manufacturing, in terms of Rule 2 (of the CENVAT Credit Rules, 2004 the appellant is availing the CENVAT credit of the same Appellant received show-cause notice asking for the reversal of the CENVAT Credit Show cause notice was challenged before the appellate authorities including the High Court All the appellate court upheld the Department's view, consequently, the appellant approached Hon'ble Supreme Court

The Hon'ble SC has held that Rule 2 1 defining "input service ", post 01 04 2011 is very clear and the outdoor catering services, when used primarily for personal use or consumption of any employee is held to be excluded from the definition of "input service" and has denied the credit of on CENVAT Credit on canteen services.

Comments:

The said judgment is against all the favourable decisions passed by the Hon'ble CESTAT, wherein the Hon'ble CESTAT was allowing the input services. Thereby making a reverse of the developing jurisprudence. We would like to state that with due respect to Hon'ble SC, the court has missed a basic fact that an employer maintains a canteen due to mandatory requirements under the Finance Act rather than to provide personal facilities to employees

Section 17(5)(b)(i) of the CGST Act 2017 restricts ITC on outdoor catering except where it is provided as an obligation under any law. Notably, GST law is worded differently than the CCR as the latter used the phrase "when such services are used primarily for personal use or consumption of any employee: Hence ITC would be available on outdoor catering services irrespective of this ruling.

2. The TCS balance in the Electronic Cash ledger is not subject to Unjust Enrichment

[M/s Appario Retail Pvt Ltd V. Union of India - 2021-TIOL-2142-HC-Telangana-GST]

The Assessee had procured electronic goods from various vendors, due to which the Assessee had a high balance of ITC in their Electronic Credit Ledger. The Assessee was engaged in selling the electronic goods through an E-commerce Operator (ECO) and the output tax liability of the Assessee was discharged vide the Electronic Credit Ledger. Furthermore, the ECO before remitting the amount for the supply of goods effected through it to customers retains a percentage of the amount out of such consideration received and deposits such amount retained by the ECO with the Government in terms of Section 52 of the CGST Act. The said amount deposited is allowed to be claimed as credit by the Assessee in the electronic cash ledger of the Assessee, based on the statement filed by ECO in Form GSTR-8 in terms of Rule 67 of the Rules, 2017.

In this context, the Assessee had filed a refund application for October 2018, which was sanctioned to the Assessee. However, the Department had reviewed the said order sanctioning the refund and observed that the refund was sanctioned without examining whether the principle of "unjust enrichment" has been complied with as required under Section 54(5) read with Section 54(8) of the CGST Act and further directed the filing of an appeal before the Commissioner (i.e., the First Appellate Authority). After due process, the First Appellate Authority had rejected the refund application filed by the Assessee.

The Assessee, thereafter, filed a Writ Petition assailing the Order-in-Appeal rejecting refund of excess amount lying to the credit of electronic cash ledger of the Assessee. An interesting point dealt with in this case was as to whether the collection permitted under Section 52 partakes the character of ‘tax’ and it was contended by the Respondents that the same is not in the nature of a ‘tax’. The Hon’ble High Court had held that if the collection under Section 52 was not a ‘tax’, then such collection would have to be treated as without authority of law if the same does not partake the character of 'tax', which is only permitted to be levied and collected by the charging Section i.e., Section 9 of the CGST Act. Therefore, once the said amount is ‘tax’ which the supplier is entitled to take credit, the provisions of Section 54 are applicable for refund of the same.

Furthermore, there being a Circular No.**125/44/2019/GST**, dt.18.11.2019issued by the CBIC to the effect that the excess balance in the electronic cash ledger which includes the amount that has been collected by the ECO under Section 52 of the CGST Act from the net value of the consideration payable to the Assessee in respect of sales/supplies effected through it, as such amount paid to the Government is allowed as a credit in the electronic cash ledger of the Assessee under Section 49(1) of the CGST Act and such balance is eligible for a refund under Section 49(6) of the CGST Act. Therefore, the Assessee is entitled to claim a refund of the balance in the electronic cash ledger under proviso to sub-section (1) of Section 54 of the CGST Act.

With regard to the maintainability, the High Court observed that no GST Tribunal has been constituted and that the Assessee cannot be made to wait for an eternity to agitate its claim seeking a refund of the amount to which it is entitled to under the statute and also blocking its funds affecting its cash flows, merely because of the existence of (non-functional) alternate forum/remedy on paper.

Comments:

Once it is held that the amount collected by ECO and paid to the Government under Section 52(3) of the CGST Act, is tax, to which the supplier is entitled to take credit in his electronic cash ledger under sub-section (7) of Section 52, the provisions of Section 54 of CGST Act would apply for claiming refund of the same. The balance amount in the electronic cash ledger till it is appropriated by making a payment towards discharge of liability of tax, interest, or any other amount to the Government, would be the amount available to the 'registered person' in whose name the said electronic cash ledger is maintained. Therefore, the stand of the respondents that since the amount collected by ECO under Section 52 of the CGST Act is not paid by the petitioner by himself and, therefore, it is not entitled to claim a refund of the same, is misplaced.

3. The retrospective amendments in Section 140 of the CGST Act (both of which are notified and not notified) cannot have the effect of barring transition of credit Education Cess and other similar Cesses.

[M/s. Godrej and Boyce Mfg. Company Ltd v/s Union of India - 2021-TIOL-2112-HC-MUM-GST]

The Petitioner in the instant case had by way of a Writ Petition challenged a show-cause notice wherein it was alleged that the petitioner had "availed inadmissible transitional credit amounting to Rs.3,83,43,693/- [Ed Cess: Rs.1,46,47,191/-, S.H. Ed Cess: Rs.71,77,464/- & PLA: Rs.1,65,19,038/-] in their Trans-1 filed on December 26, 2017.

The Petitioner contended that the impugned notice proceeds on the footing that the transitional arrangement for taking Input Tax Credit in the cases of CESS such as Education Cess, Secondary & Higher Education Cess, and Krishi Kalyan Cess has been taken away by a retrospective amendment. However, on the date of its issuance of the notice the amendment(s) referred to in the notice had not come into force and, therefore, the impugned notice has been issued on an untenable legal premise; hence, it is without jurisdiction. Additionally, it was contended that the amendments introduced in Explanations 1, 2, and 3 to Section 140 being brought into force, the notice could not have been issued since the same suffers from a gross jurisdictional error, the petitioner is under no obligation to respond thereto.

In this context, the Court held that the mere introduction of Explanation 3 to Section 140 of the CGST Act, and making it operational with effect from February 1, 2019, would not clothe the respondent with the power to issue a show-cause notice on the premise that Education Cess, Higher Secondary Education Cess, and Personal Account Amounts are not included in Explanations 1 and 2. Further, it was observed that to sustain the validity and/or legality of the impugned show-cause notice, respondent no.3 could not have relied upon Explanation 3 exclusively to contend that cess is not included in 'eligible duties and taxes. As the law now stands, Explanation 3 does not have any application to sub-section (1) of Section 140.

The Court concluded that the present case is one where the impugned show-cause notice suffers from an error going to the root of the jurisdiction of respondent no.3 in assuming jurisdiction and is, accordingly, indefensible and liable to be set aside.

Comments:

As under the erstwhile indirect taxation regime, the issue of Cesses persisted with the onset of the GST regime. With the introduction of the GST regime, the Assesses were permitted to carry forward the accumulated balance of Cesses vide the TRAN-1 Form in consonance with the provisions of Section 140. However, by way of a retrospective amendment, the transition of the impugned cesses was debarred from carry-forward to the GST regime, as such leaving the substantial vested rights of the Assesses otiose. Furthermore, the Revenue is unable to produce any document or material to show that the amendments in Explanations 1 and 2 to Section 140 brought about by Section 28 of the Amending Act have been brought into force, and as such explanation 1 would not apply to Section 140(3). In this regard a Madras High Court decision in

the case of Sutherland Global Services reported in 2020-TIOL-192-HC-MAD-GST, the Madras High Court had disallowed the transition of the Cesses onto the GST regime.

Furthermore, in the facts of the instant case, where notices have been issued with regard to the transition of Cesses onto the GST regime, before the relevant date, the said notices could be contended to be without jurisdiction. Furthermore, there are a string of judicial decisions to the effect that refund of the accumulated Cesses may be made under the provisions of the erstwhile laws.

4. CBIC Circular, clarifying that fish meal used as raw materials for the manufacture of poultry feed is ultra vires and quashed. The exemption cannot be curtailed by a circular.

[Jenefa India V. Union of India-(2021-TIOL2119-HC-MAD-GST)

The Petitioner herein is a manufacturer of fish meal which comes in powder form. Vide Exemption Notification No.2/2017-CTR, under Sl. No.102, two entries i.e., 2301 & 2309, the product of the petitioner is exempted. However, the Revenue had issued a Circular No.80/54/2018-GST dated 31.12.2018 wherein it was clarified that the "fish meal" and other raw material used for making cattle/poultry / aquatic feed cannot be said to be exempted within the meaning of Exemption Notification No.2/2017 under Sl.No.102. Thereby, the Circular artificially bifurcates the said Entry 102 stating that only finished goods are exempted, therefore, tax is to be levied on these items at the rate of 5% and accordingly demanded the tax and pursuant to which, the officials from Directorate General of GST Intelligence had issued a summons and, therefore, the Petitioners are required to appear before the concerned officer of the Directorate General of GST Intelligence. It is in this context that the Petitioner has challenged the impugned Circular dated 31.12.2018.

In this case, the Court made the following observations:

- That, the Exemption Notification was issued by the Central Government and had the Central Government intended to take away the exemption provided in any particular type of goods or product covered under the four entries referred to, a fresh or additional amendment, showing the proper intention of the Central Government could have been issued.
- Furthermore, Section 168(1) clarifies that only for the purpose of uniformity in the implementation of the Act, orders or directions to the Central Tax Officers, as deemed fit,

may be issued by the Board. Therefore, most probably, such kinds of orders, instructions, or directions must be procedural, not substantive.

- That the exemption extended to the stakeholders is in the nature of a substantive right that cannot be abridged by way of a clarificatory circular issued by the Board under Section 168. Therefore, the impugned clarificatory Circular cannot override the exemption provided under the notifications.
- That if the exemption provided by the Central Government in issuing the Exemption Notification No.2/2017-CTR is to be revisited or reviewed and certain items have to be taken away from the purview of exemption, such exercise shall be undertaken either by the Parliament by making law as has been done in Finance Act, 2020 or by the Central Government by exercising their powers either under Section 11(1) of the CGST Act, 2017 or under Section 6(1) of the IGST Act, 2017, as under such exercise of powers only those Exemption Notifications No.2/2017 as well as the Amendment Notification No.28/2017 were issued, and only then, such kind of amendment could be made.

To conclude the Court held that, so long as the Petitioners make a finished product fish meal from their manufacturing units, they are entitled to enjoy the benefit of exemption as provided under Sl.No.102 of Exemption Notification No.2/2017-CTR dated 28.06.2017. Therefore, all consequential actions, if any taken on the part of the Revenue against the petitioners pursuant to the impugned Circular, would not stand in the legal scrutiny. Therefore, they were also declared to be invalid.

Comments:

In this case, the primary issue was as to whether an entry in an exemption notification can be restricted by way of issuance of a CBIC circular. It is settled law that Circulars issued by the Board are binding on the authorities however, a Circular issued by the Board cannot take up a parliamentary function of curtailing certain products from the scope and ambit of such exemption notification and the same has to be assumed to be a perfect expression of the legislative intent of the Parliament.

5. No power is vested with the authorities as well as Tribunal to condone the delay beyond the statutory period of limitation

[M/s Laxmi Electronics Moulds and Precision Engineering Pvt Ltd v. Union of India - 2021-TIOL-2107-HC-KAR-CUS]

The Petitioner in the instant case had imported capital goods under the EPCG scheme. The respondent vide Order-in-Original had confirmed the demand against the Petitioner on the ground that the petitioner has failed to furnish documents in support of the fulfillment of an export obligation. The Petitioner claimed that the said assessment order was not received by the petitioner and is said to have been dispatched by the department through RPAD. Thereafter on appeal before the Tribunal, the Tribunal affirmed the order passed by the Lower Adjudicating Authority on the ground that the said appeal was filed beyond the statutory period of limitation fixed under the statute. Aggrieved by which the Petitioner has assailed the Order passed by the CESTAT before the High Court.

The High Court, after hearing the contentions observed that the lower Appellate Authority, as well as the Tribunal, are fact-finding authorities and have meticulously examined the material on record in arriving at a finding that non-mentioning of O.C.No. 4066/2011 [the inter-department reference made in the register to be entered in the acknowledgment card] is not fatal for the delivery of the assessment order on the assessee.

It was further held that the request made by the petitioner to decide the issue on merits dehors the time-barred appeal would run counter to the well-established principles of law reiterated by the Apex Court in a catena of decisions. It was additionally held that there is no power was vested with the authorities as well as the Tribunal to condone the delay beyond the statutory period of limitation, in light of which the Writ Petition was dismissed.

Comments:

The High Court reiterated the well-settled principle of law that the Court can come to the rescue of the person who is vigilant about his rights and not to a person who sleeps over the matter and rises from the slumber at his convenience. Ignorance of the law is not a legal defence, and the assessee ought to be proactive in ensuring all claims against the department are made in a time-bound manner in the absence of any mitigating factors.

6. Validity of Provisional Assessment only 1 year – Banks to be directed accordingly

[Prime Cargo Movers and Logistics Pvt Ltd - 2021-TIOL2108- HC- MUM-CUS]

This was a case wherein the Customs authorities in the exercise of the power conferred by section 110(5) of Customs Act, 1962 provisionally attached the bank account of the petitioner.

However, the petitioner claims that the formal order of attachment was not served on the Petitioner.

The petitioner had requested its bank for making available a copy of the order, to which the petitioner received a response that it may contact Customs authorities directly for obtaining such order. It was further submitted that a period of over 1 year had elapsed from the date of such provisional assessment.

On hearing the matter, the Court observed that an order of provisional attachment ceases to be valid beyond 6 months of such order being made provided, however, its life has been extended in accordance with law at the end of six months to remain alive for a further period not exceeding 6 months (i.e., 1 year). In light of the same the said order of provisional attachment, by operation of law, has ceased to be in operation. In view of which the Revenue was directed to immediately communicate to the petitioner's banker that validity of attachment order has ceased, and that the petitioner is entitled to operate relevant bank account, which was under attachment within a period of 7 days.

Comments:

It has become a common practice of the department to provisionally attach assets and the same has severely handicapped the trade and industry (especially since the economy is still dealing with the impact of the Covid-19 pandemic) where businesses are already facing a severe cash-flow crunch. The lapse of the department and the submissiveness of Banks have effectively left the Assessees' vulnerable to high handedness of the Department.

7. Refund allowed for GST paid under the wrong head and on realization paid again correctly under proper head

[SBI Cards & Payment Services Limited vs UOI 2021-TIOL-2141-HC-P&H-GST]

The petitioner is a joint venture with the State Bank of India (SBI). The petitioner issues credit cards to the public and is a member of the Card Association which is essentially under the control of two global corporations called Visa and Master Card. A person who has a credit card issued by the petitioner at place 'A' can go to place 'B' and make some purchases where the vendor is affiliated to some other banks and the moment that purchase is logged, the other bank is bound to make the payment to that vendor and then to claim the same from the petitioner (who had issued the credit card to that person). It has to be appreciated that there may be hundreds and

thousands of such transactions taking place on daily basis and that entire data is collated, sieved, and then netted off by the servers of aforesaid Visa and Master Card which are located in Singapore. Daily, the balance is sent to all the member banks of the Card Association requiring them to make the necessary payments to those other members with whom they have a debit relationship on that date.

At the time before the GST regime had kicked in, the petitioner had one registration number for the erstwhile Service Tax which continued for the initial period under the new GST regime, and thereafter the petitioner obtained separate registration in all the 28 states. However, during the initial stage the complete break up of individual transactions was not available to the petitioner, and in the absence thereof for the period, April 2018 to December 2018 the petitioner paid Central Goods and Services Tax (CGST) and State Goods and Services Tax (SGST) of about Rs.108 crores approximately considering the transactions to be intra-state sales. The supply was reported under GSTR 1 and 3 B as a Business to Customer (B2C) supply as the GST registration number of the acquiring banks was not known.

However, later it was found out that the transactions were inter-state and IGST was liable to be paid Therefore, the petitioner made the payment under the correct head and made an application for a refund of the amount, however, the same was rejected by the assessing authority. The petitioner has invoked writ jurisdiction in the High Court against the rejection order passed by the authority.

The Hon'ble HC has held that in the present case, there is no dispute about the amount of tax, rather it was on the requirement of the respondents that the petitioner paid an additional amount of Rs 108 crores. The Court has considered the clarification issued by CBIC vide Circular No. 162/18/2021- GST dated 25.09.2021, wherein, it has been clarified that refund can be claimed in both cases where the inter-State or Intra State supply made by a taxpayer, is either subsequently found by the taxpayer himself as intrastate or inter-State respectively or where the inter-State or Intra State supply made by a taxpayer is subsequently found/ held as Intra State or inter-State respectively by the tax officer in any proceeding. Therefore, respondents are directed to refund Rs 108 crores approximately which was deposited earlier by the petitioner towards CGST and SGST

Comments:

This is a welcome decision as to the court as the court has provided the benefit of Section 77 of the CGST Act 2017.

8. Cancellation of registration on hyper-technical ground not tenable under law

[M/s CIGFIL Retail Pvt Ltd Vs. UOI [2021 (11) TMI 438 - Calcutta High Court]

The petitioner challenged the impugned order for cancellation of registration under GST under the provisions of Section 29(2) of the SGST Act on the ground that registration was obtained by documents void ab initio and that there was no existence of business at the declared place. The case of the petitioner is that the impugned order of cancellation of registration was purely on the technical ground of minor defect in the sub-let agreement regarding an allegation of the non-existence of the petitioner at the registered place. The petitioner contended that during Covid 19 it was carrying on business from some other places and during this period it had paid tax from time to time.

The Hon'ble High Court held that since it is not a case of tax evasion or causing revenue loss to the Government rather petitioner's activity of carrying on the business which cannot be called illegal, and it is creating revenue for the State as well as in helping the State to solve the problem of unemployment a little bit. Such type of drastic action by cancelling the registration of the petitioner on such hyper technical ground will not help the State rather it will cause revenue loss to the State as well as aggravate the unemployment problem. Therefore, the department was directed to consider the case afresh and to take a final decision by not taking a hyper-technical view and passing a reasoned and speaking order after giving the opportunity of hearing to the petitioner and verifying the existence of the petitioner at the premises

Comments:

This is a welcome decision for the industry at large as during the pandemic Covid period many of the businesses have opted for work from home and have vacated the premises to save rent.

9. Denial to the transition of credit for a clerical mistake may not be warranted

[Commr. Of Gst & C.E Vs. M/S Bharat Electronics - 2021-TIOL-2203-HC-MAD-GST]

The Revenue has filed the present appeal against the order of Learned Single Judge wherein the respondent was permitted to file a revised Form TRAN 1. The Revenue is of the view that the

respondent is not entitled to CENVAT credit as they have declared a sum of Rs.14,97,28,201/- in Column 5(b) of form TRAN-1 as "Balance Cenvat Credit". However, in Column 6 of form TRAN-1 with the heading "Cenvat admissible as Input Tax Credit", the respondent had instead of repeating the figures Rs.14,97,28,201/- mistakenly entered the figure of Rs.80,98,936/-, stated to be the credit pertaining to inputs lying in stock and towards certain services received before 30.06.2017, while the invoices were received in respect of the same after the said date.

The Hon'ble High Court held that there is substantial compliance with the requirements of Section 140 of the CGST Act which provides for the transition of credit under the erstwhile regime to GST. The submission of the Revenue that the inadvertent mistake in filling in the wrong figures in Column 6 of Form TRAN 1 would prove fatal to the respondent's claim of ITC could frustrate the very objective of extending the benefit of transition of the input tax credit from the erstwhile regime. The fact that GST was a new law and there were many initial hiccups which were taken cognizance of by the Legislature and Executive and remedial actions were duly taken, the denial to the transition of credit for a clerical mistake may not be warranted

Therefore, the order of the learned Single Judge directing Revenue to enable the assessee to file a revised Form TRAN 1 by the opening of the portal, is affirmed.

Comments:

This judgment was delivered on the point that the GST is a new law and there are many glitches in the portal. The benefit of ITC cannot be merely denied for merely a typographical error was made while filing the form GST Trans – 1.

10. Once Order of Assessment/Re-Assessment has attained finality – Not open to Revenue to contest Refund Application Filed

[M/S Brightpoint India Pvt. Ltd. Versus Commissioner of Customs Mumbai (Air Cargo Import) - 2021 (11) TMI 285 - CESTAT MUMBAI]

The issue involved in the present case is that whether a refund can be rejected on the ground that no appeal was filed against the Bills of Entry under Section 128 of the Customs Act, 1962, when the said Bills of Entry were re-assessed by way of amendment under Section 149 of the Customs Act, 1962.

The Tribunal observed that once the re-assessment is acceptable to both sides and if any refund arises out of said re-assessment, no question of filing the appeal arises. The Tribunal was of the

clear view that since the refund arising out of re-assessment of Bills of Entry, neither side has a grievance against such re-assessment of Bills of Entry, in view of which the refund is permissible.

Comments:

It is a common issue faced by the Industry and Trade, wherein Bills of Entry, duly re/assessed are accepted by the Customs Department. However, when the Assessee applies for a refund claim, basis, the assessment finalized vide the Bills of Entry, the Department has been seen to raise disputes regarding classification and eligibility to such refund. In this regard, it is relevant to note that Bills of Entry that are self-assessed would also fall within the ambit of an assessment under Customs Law and as such are appealable orders. In the absence of any appeal in that regard, the said assessment of the Bill of Entry is deemed to have attained finality. Thereby, once an order of assessment has not been appealed, it is deemed to have attained finality and to have been accepted by both sides, in such a scenario denial of refund citing issues with regard to the said classification adopted in the Bills of Entry, is not permissible.

11. Rule 14 of CCR, 2004 appropriate to determine whether the input service on which credit was taken was eligible or not

[The Commissioner, Customs and Central Excise, Hyderabad-Iv Versus M/S. Qualcomm India Pvt. Ltd. - 2021 (11) TMI 72 - Telangana High Court]

The assessee is, engaged in the provision of software-related services for design, development, and testing for enhancement and improvement of its group existing products and new products. The assessee is a 100% STP unit and had exported the entire output service to its group companies located abroad. This being the case the assessee had in its account accumulated CENVAT credit, which the Assessee was unable to utilize on account of export of services.

After due process, both the department as well as the Assessee had preferred appeals before the Tribunal, wherein it was observed that the refund benefit was denied to the assessee on the ground that there was no nexus between the input services and the output services exported. Furthermore, it was opined that Rule 14 of the CCR, 2004 empowers authorities to recover irregular availment of Cenvat Credit. The Tribunal held that as the availment of CENVAT credit by the appellant under Rule 3 of the Rules is not called in question, the denial to grant a refund under Rule 5 of the Rules without there being any proceedings initiated under Rule 14 of the Rules by seeking to deny the refund on the ground of the assessee had availed CENVAT credit on input services, which according to the revenue had no nexus with the output service, cannot be

held to be justified. Thereby holding that the assessee is entitled to a grant of refund of unutilized CENVAT credit.

Comments:

This order could be relevant for the refund claims rejected on the ground that input services do not have any nexus to the output services provided by the Assessee. The time to question the eligibility to Cenvat Credit is not to be done at the time of Filing Application for Refund, rather at the time of such availment.

12. Interest on refund of pre-deposit payable under Section 35FF of Central Excise Act, 1944, even if the deposit was paid through debit in Cenvat account.

[M/S Panacea Biotec Limited Versus Commissioner of Central Goods and Service Tax (East), New Delhi - 2021 (11) TMI 242 - Cestat New Delhi]

This was a case wherein the Appellant had received a favourable decision from the Tribunal. Thereafter the Appellant applied for a refund of the pre-deposit made along with interest. However, the Assistant Commissioner had only partly allowed the refund, citing that the balance amount is to be appropriated against the outstanding dues in some 48 other cases of the Appellant. On Appeal the first appellate authority had set aside the appropriation and granted a refund, however with regard to interest it was observed that the entire deposit was made through a debit from Cenvat Credit, and as such no interest is payable. The Assessee being aggrieved had preferred an appeal before the Tribunal.

The Tribunal held that Section 35FF provides for interest on the amount refundable to an assessee, pursuant to being successful in the appeal, does not make any distinction between pre-deposit made by way of cash/ LPA or by way of Cenvat credit account. Accordingly, the order of the first appellate authority was modified to the extent of denial of interest.

Comments:

In many instances, even ex-post the adjudication by the higher judicial fora, where the Assessee has secured favourable decisions, proceedings for many do not end at this stage. There is an additional procedure for the refund of pre-deposit made, which merely prolongs the effective adjudication time for an assessee. This is a useful decision for the Assessee to be compensated for the unintended lapses by the Department, although there is a statutory provision for the same, intervention of the Tribunal in this regard is seen in these cases.

13. The service provided by the Indian Subsidiary to its holding company abroad is considered as export of service

[L & T Sargent & Lundy Limited Versus C.C.E. & S.T. -Vadodara-I - 2021 (11) TMI 69 - CESTAT AHMEDABAD]

The appellant herein was an equally capitalized joint venture company of Larsen & Tuobro Limited, India, and Sargent & Lundy LLC, USA. The assessee was engaged in the provision of consulting engineering services. The undisputed facts herein were that L&T Sargent & Lundy Limited (appellant) was found to be providing services to (1) Larson and Toubro Electromech LLC (2) M/s Sargent & Lundy, both located outside India without charging service tax treating the same as export of services. The audit contended that the two service recipients are nothing but 'other establishments' of the appellant and, therefore, provision of services to them was not export of services in accordance with item (B) of Explanation 3 of clause (44) of section 65B of the Finance Act and rule 6A of Service Tax Rules. Based on the aforesaid assertions, the demand for service tax was raised against the appellant. The charges made in the Show Cause Notice are in two folds (i.e., (i) whether the service recipients were 'other establishments' of the appellant; and (ii) that the services provided by the appellant to Larson & Toubro Electromech LLC (Oman) and Sargent & Lundy, USA were exempted services.

After taking into consideration the submissions made, the Tribunal held that the fundamental charge that the service recipients are 'other establishments' of service providers in terms of rule 6A (f) and item (b) of Explanation 3 of clause (44) of section 65B of the Finance Act, 1994 is not established. Consequently, the services provided by the appellant qualify as Export of Services, under rule 6A of Service Tax Rules, 1994.

Thus, as the services provided by the appellant are export of services under rule 6A of Service Tax Rules, 1994, the same cannot be called 'exempted services' under clause 2(e) of the Cenvat Credit Rules, 2004. Since the services provided by the appellant are not exempted services, no demand of reversal of credit can be made under rule 6 of the Cenvat Credit Rule, 2004 and no liability can be fixed on the appellant.

Comments:

The issue of export of service and the condition relating to distinct establishments of the same entity by way of legal fiction has led to various disputes between the industry & the department. Even in cases where mere reimbursements on actuals are made from the Indian Holding Company to its branch offices located outside abroad, have faced Service tax demands, taking the reimbursement on actuals to form part of the consideration. Furthermore, the ratio held in this

case with regard to the legal fiction of distinct persons of the same establishments is a welcome clarification on the position of law and the same is a binding precedent of the Departmental Officers.