

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad**

REGIONAL BENCH-COURT NO.3

Service Tax Appeal No. 10307 of 2023-DB

(Arising out of Order in Appeal AHM-EXCUS-001-APP-143-2022-23 dated 25/01/2023 passed by the Commissioner (Appeals) Central Excise & Central GST-Ahmedabad)

ADANI POWER MUNDRA LIMITED

Adani Corporate House Shantiram,
S G Highway, Ahmedabad,
Gujarat-382421

.....Appellant

VERSUS

**Commissioner of Central Excise and
Service Tax - AHMEDABAD-I**

C.EX Bhavan, Ahmedabad,
Gujarat-380015

.....Respondent

APPEARANCE:

Shri Rahul Patel, Chartered Accountant appeared for the Appellant
Shri Rajesh R Kurup, Superintendent (AR) appeared for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR**

FINAL ORDER NO. 12764/2024

DATE OF HEARING: 23.09.2024
DATE OF DECISION: 21.11.2024

RAMESH NAIR

The issue involved in the present case is that whether the Ld. Commissioner (Appeals) is right in remanding the matter of refund amounting to Rs.5,03,71,491/-to examine the refund under Notification No.12/2013- ST dated 01.07.2013 applicable to the SEZ units without giving conclusive finding on the issue of non taxability of service of ocean freight which is covered by the Hon'ble Gujarat High Court judgment in the case of SAL Steel Limited on the ground that the matter is pending before the Supreme Court.

2. Shri Rahul Patel, Ld. Chartered Accountant appearing on behalf of the appellant at the outset submits that the appellant have filed the refund claim on the ground that the ocean freight on which the service tax was paid and refund was sought, therefore the ocean freight itself is not taxable in the

light of SAL Steel Limited. He submits that the Ld. Commissioner (Appeals) without any conclusive filing on the ocean freight being not taxable, remanded the matter to the adjudicating authority to examine the refund claim in terms of Notification No.12/2013- ST dated 01.07.2013. Therefore, the order of the Commissioner (Appeals) to this extent is absolutely illegal and contrary to the judgment given by the Hon'ble Gujarat High Court in the case of SAL Steel Limited. He submits that merely because the matter of SAL Steel Limited against the Hon'ble Gujarat High Court judgment pending before the Supreme Court, the refund on this count cannot be withheld. He submits that since as per the SAL Steel judgment the service tax paid by the appellant is itself not correct. Hence, the same is refundable without taking recourse to Notification No.12/2013-ST. He placed reliance on the following judgments:-

- SAL Steel Limited v. Union of India 2019 (9) TMI 1315 - Gujarat High Court
- 3E Infotech v. CCE – 2018 (7) TMI 276 - Madras High Court
- Commissioner of Service Tax, Ahmedabad v. Kiri Dyes and Chemical Limited - 2023 (3) TMI 1400- CESTAT Ahmedabad
- Commissioner of Service Tax v. Kiri Dyes & Chemicals Ltd 2023 (9) TMI 305-SC Order
- Synergy Seaports Pvt Ltd v. CCE – 2024 (9) TMI 684-CESTAT Ahmedabad

3. Shri Rajesh R Kurup, Ld. Superintendent (AR) appearing on behalf of the Revenue, reiterates the findings of the impugned order.

4. On the careful consideration of the submissions made by both the sides and perusal of the record, we find that though the Ld. Commissioner (Appeals) has remanded the matter to the adjudicating authority for reconsideration of the refund claim in respect of service tax paid on ocean

freight under the provision of Notification No.12/2013- ST but the grievance of the appellant is that as per the SAL Steel judgment of Hon'ble Gujarat High Court the service tax itself was not payable. Hence, they are seeking refund on the ground that the service on which the service tax was paid itself is not liable to service tax. We agree with the submission of the Ld. Counsel that if the service i.e. ocean freight itself is held non taxable then the question of processing the refund under Notification No.12/2013-ST does not arise. We find that Ld. Commissioner (Appeals) while remanding the matter given the finding which is as under:-

"7. Regarding the issue of refund amounting to Rs.5,03,71,491/- in respect of the service tax paid on Ocean Freight under reverse charge, it is observed that the adjudicating authority has rejected the refund claim on the grounds that in terms of the judgment of the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. Vs. UOI-1997 (89) ELT 247 (SC) the only way to get refund of taxes held to be unconstitutional is by filing Writ Petition or Civil Suit.

7.1 It is observed in this regard that the appellant has filed the claim for refund under Notification No 12/2013 ST dated 01.07.2013. In terms of the said Notification, services received by a unit located in the SEZ or Developer of SEZ, and used for authorized operation are exempted from the whole of the service tax in terms of Notification No 12/2013-ST dated 01.07.2013. If the admissible exemption is not claimed ab inito, refund of the service tax paid is admissible subject to the conditions prescribed in the said Notification. Accordingly, the appellant had claimed refund of the service tax paid on Ocean Freight, under reverse charge, in terms of the said Notification. Therefore, irrespective of the constitutional validity of the levy of service tax on Ocean Freight, which is before the Hon'ble Supreme Court on an appeal by the department in the case of SAL Steel Ltd., the appellant are eligible to refund of the service tax paid in respect of the services used in the SEZ for authorized operations in terms of the said Notification. Therefore, the adjudicating authority ought to have examined the refund claim filed by the appellant on merits.

7.2 In the instant case, it is observed that it is not disputed that the Ocean Freight services have been received and used in the SEZ by the appellant. Accordingly, the appellant are eligible for refund of the service tax paid on Ocean Freight, subject to fulfillment of the conditions specified in Notification No.12/2013-ST dated 01.07.2013. There is no finding in the impugned order as to whether the appellant have fulfilled the condition specified in the said Notification. Also in the absence of the requisite documents and details, it is not possible for this authority to decide on this aspect. Therefore, the matter pertaining to the refund claim amounting to Rs.5,03,71,491/- is remanded back to the adjudicating authority only for the limited purpose of verifying the documents and ascertaining whether the appellant have satisfied the conditions specified in the said Notification to determine their eligibility to

refund of the service tax paid on Ocean Freight under reverse charge. The appellant are directed to submit the relevant documents and details, in support of their claim for refund, before the adjudicating authority within 15 days of the receipt of this order."

4.1 From the aforesaid findings of the Ld. Commissioner (Appeals) it is observed that the matter was remanded to the adjudicating authority with a direction that the refund claim should be examined subject to fulfillment of the condition specified in Notification No.12/2013 –ST. However, as regard the issue of SAL Steel Limited, he has not given any final conclusion on that issue and directed the adjudicating authority to examine the refund under Notification No. 12/2013- ST. we find that once the levy of service tax on ocean freight itself was held unconstitutional and thus, the ocean freight is not liable to service tax the refund claim ought to have been decided on this issue itself on the basis of Hon'ble Gujarat High Court judgment in the case of SAL Steel Limited. In view of the non levy of service tax on ocean freight, there is no question of processing the refund claim under Notification No.12/2013- ST. The said provision will come into picture only when the service received by SEZ unit is statutorily service tax paid and therefore, the said service tax is refundable under Notification No.12/2013-ST. however, in the present case, we are of the clear view that since the service of ocean freight was held by the Hon'ble Jurisdictional High Court of Gujarat as unconstitutional and appellant was not liable to pay service tax on ocean freight, they are eligible for refund claim without following the refund process under Notification No.12/2013-ST.

4.2 As regard the decision of SAL Steel Limited (supra) by the Hon'ble High Court of Gujarat the same is extracted below:-

"58. In view of the aforesaid discussion, the writ application succeeds and is hereby allowed. The Notification Nos.15/2017- ST and 16/2017-ST making Rule 2(1)(d)(EEC) and Rule 6(7CA) of the Service Tax Rules and inserting Explanation-V to reverse charge Notification No.30/2012-ST is struck down as ultra vires Sections 64, 66B, 67 and 94 of the Finance Act, 1994; and consequently the proceedings initiated against the writ applicants by way of show cause notice and enquiries for collecting service tax from them as

importers on sea transportation service in CIF contracts are hereby quashed and set aside with all consequential reliefs and benefits."

4.3 This Tribunal as regard the issue of levy of service tax on ocean freight passed the judgment in the case of Commissioner of Service Tax, Ahmedabad vs. Kiri Dyes & Chemicals Ltd. wherein, considering the judgment of Hon'ble High Court of Gujarat in the case of SAL Steel Limited passed the following order:-

"The issue involved in the present case is whether the appellant is liable to pay service tax on the service on Ocean Freight or otherwise.

2. Shri Sanjay Kumar, learned Superintendent (AR) appearing on behalf of Revenue/ Appellant submits that though this issue is decided by Hon'ble Gujarat High Court in the case of SAL Steel Limited but the Revenue has preferred SLP before the Hon'ble Supreme Court therefore, this matter may be kept pending till outcome of Hon'ble Supreme Court judgment.

3. Shri R.R. Dave, learned Consultant appearing on behalf of the respondent/ Assessee submits that learned Commissioner (Appeals) following the judicial discipline by relying upon the Hon'ble Gujarat High Court in the case of SAL Steel Limited allowed the appeal of the respondent therefore, there is no infirmity in Order-in-Appeal and the Revenue's appellant is not maintainable. As regards the Revenue's contention that the Revenue's appeal is pending before the Hon'ble Supreme Court in the case of SAL Steel Limited, he submits that there is no stay against the Hon'ble Gujarat High Court order. He placed reliance on the Hon'ble Supreme Court decision in the case of Union of India vs. Mohit Minerals Pvt. Limited – 2022 (61) GSTL 257 (SC).

4. I have carefully considered the submissions made by both the sides and perused the record. I find that the issue whether Ocean Freight/ Sea Transportation service is liable to service tax or otherwise has been decided by jurisdictional High Court of Gujarat in the case of SAL Steel Limited. As regards the Revenue's appeal pending before the Hon'ble Supreme Court against the aforesaid decision, I find that there is no stay against the said High Court judgment. In view of this position, I find no infirmity in the impugned order which was passed relying on the jurisdictional High Court judgment in the case of SAL Steel Limited. Accordingly, following the Hon'ble Gujarat High Court decision in the case of SAL Steel Limited, the impugned order is upheld and the Revenue's appeal is dismissed. Cross objection is also disposed of."

4.4 The above decision of this Tribunal has been upheld by dismissing the Revenue's Appeal which is reproduced below:-

"ORDER

Delay condoned.

We have heard learned counsel for the appellant.

The Civil Appeal is dismissed.

Pending application(s), if any, shall stand disposed of."

4.5 In the recent judgment of the Division Bench of this Tribunal in the case of Synergy Seaports Pvt Ltd on the issue of refund in the light of the Hon'ble Gujarat High Court in the case of SAL Steel Limited the following judgment was passed:-

"4. We have carefully considered the submissions made by both the sides and perused the records.

4.1 We find that the refund application was filed by the Appellant on 23.11.2020 in pursuance of decision of Hon'ble Gujarat High Court in case of SAL Steel Ltd. dated 06.09.2019 referred to supra. In this view of the fact, the revenue authorities were of the view that the refund claim filed by the Appellant is time barred as per the provisions of Section 11B of the Central Excise Act, 1944 made applicable to Finance Act, 1994 vide Section 83 of the Finance Act, 1994.

4.2 We find that Hon'ble Supreme Court dismissed the civil appeal filed by the revenue department on 01.09.2023 in case of M/s. Kiri Dyes & Chemicals Ltd. reported in 2023 (9) TMI 305 - SC holding that levy of service tax is not maintainable. Therefore, it was possible for the Appellant to file the refund claim within one year from 01.09.2023 i.e. up to 31.08.2024. Admittedly in the facts of the present case the Appellant have filed the refund claim on 23.11.2020 i.e. much before 31.08.2024. Our observation is fortified with the fact that the show cause notice dated 28.12.2020 in the present case itself has recorded that the revenue department did not accept the decision of Hon'ble Gujarat High Court in case of SAL Steel Ltd. supra and revenue department preferred further appeal before Hon'ble Supreme Court. Therefore, rejection of refund application filed by the Appellant on this count is not sustainable.

4.3 We further find force in the arguments of the Appellant that the refund claim is now squarely covered within the provisions of Section 142(3) of the CGST Act, 2017 which reads as under:

"(3) Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 (1 of 1944):

Provided that where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse:

Provided further that no refund shall be allowed of any amount of CENVAT credit where the balance of the said amount as on the appointed day has been carried forward under this Act."

4.4. Section 142(3) of the CGST Act, 2017 deals with refund claim for the CENVAT credit, any duty etc. for the refund claims filed before introduction of GST laws and also after the introduction of GST laws. It further states that except the provisions of sub section (2) of Section 11B of the Central Excise

Act, 1944 no other provisions would apply to such refund claim. We also find force in the reliance placed by Ld. Counsel on the decision of Hon'ble Bombay High Court in case of *Combitic Global Caplet Pvt. Ltd.* reported in 2024 (6) TMI 498 – Bombay High Court wherein it is observed as under:

"11. In our view, Section 142(3) of the Act is very clear in as much as, it says "every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law and any amount eventually accruing shall be paid in cash ..". It is very widely worded in as much as it uses the expression "CENVAT credit" and also "any other amount paid". Even if, we take it that petitioner has made voluntary deposit, that amount has to be shown as CENVAT credit in the account of petitioner. In the alternative, it would certainly come under the category "or any other amount paid". Therefore, either way the amount paid by petitioner, admittedly, has to be refunded. In fact, it is also admitted that an amount of Rs.10,48,11,737/- is refundable to petitioner.

The credit of refund is the only issue because Mr.Adik, as an officer of this court and in fairness, agreed that Government cannot retain any amount without any authority of law.

12. Sub-Section (3) of Section 142 of the Act very clearly says "any amount eventually accruing shall be paid in cash". In the circumstances, we are of the opinion that respondents ought to have directed the sanctioning authority to refund the amount of duty refundable to petitioner in cash instead of credit in CENVAT account, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944.

13. Therefore, Rule made absolute in terms of prayer clauses (a) and (b) of both petitions, which are quoted above.

14. The amount shall be paid together with accumulated interest in accordance with law within four weeks of this order being uploaded."

4.5. It may be noted here that the time limit of one year from the "relevant date" for filing of refund claim is only in Section 11B(1) of the Central Excise Act, 1944. The provisions of Section 142(3) of the CGST Act, 2017 states that only provisions of sub-section (2) of Section 11B of the Central Excise Act, 1944 is to be looked in to process the refund. For this reason also the rejection of the refund claim in the facts of the present case is not sustainable.

4.6. Respectfully, following the observations made by Hon'ble Bombay High Court we are of the considered view that the Appellant is entitled to refund of service tax paid by them on the ocean freight during the period of dispute in the present case even in terms of Section 142(3) of the CGST Act, 2017.

4.7. The case cited by the Ld. Authorized Representative in his written submissions has not considered the above provisions of CGST Act, 2017 which are considered by Hon'ble Bombay High Court and therefore, the decisions cited by Ld. Authorized Representative are not useful in the facts of the present case.

5. *In view of the above, we set aside the impugned order and allow the appeal filed by the Appellant holding that the Appellant are entitled to refund of service tax paid by them on ocean freight charges during the period of dispute. Appeal filed by the Appellant is allowed in above terms with consequential relief, if any."*

In view of the above judgments, it is clear that the ocean freight is not liable to service tax. Therefore, the appellant is eligible for the refund only on the ground of the non taxability of the ocean freight itself. Therefore, the refund can be processed without taking recourse to Notification No.12/2013-ST.

5. Accordingly, we are of the view that appellant is eligible for the refund of Rs.5,03,71,491/-. Hence, the impugned order stands modify to above extent, the appeal is allowed with consequential relief.

(Pronounced in the open court on 21.11.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)