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

REGIONAL BENCH-COURT NO. 3

Excise Appeal No. 10832 of 2019 - DB

(Arising out of OIA-VAD-EXCUS-002-APP-572-573-2018-19 dated 07/01/2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-I)

A Schulman Plastic India Pvt Ltd ....**Appellant**
Plot No 12 GIDC Manjusar
Vadodara, Gujarat

VERSUS

Commissioner of C.E. & S.T.-Vadodara-II ......**Respondent**
1st Floor... ROOM NO.101,
New Central Excise Building,
Vadodara, Gujarat- 390023

APPEARANCE:
Shri Dhruvank Parikh, Chartered Accountant for the Appellant
Shri R K Agarwal, Superintendent (AR) for the Respondent

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

Final Order No. 13123/2024

DATE OF HEARING: 22.08.2024
DATE OF DECISION: 10.12.2024

RAMESH NAIR

The brief facts of the case are that the appellant M/s. Schulman Plastics India Pvt. Ltd. GIDC Manjusar, Vadodara, on being pointed out by the Audit Officers, during the course of audit under Final Audit Report No. 25/2018-19. The appellants have paid the Service Tax on reverse charge basis, on the receipt of service namely Management, Technical Consultancy, Maintenance & repair, Manpower Recruitment, commission, GTA and legal consultancy services for an amount of Rs. 45,32,123/- for the period prior to 01.07.2017 i.e. before the GST regime. Similarly, they have also paid service tax on reverse charge basis on the ocean freight for the period April-2017 to June 2017 for an amount of Rs. 13,97,310/-. These service tax were paid by the appellant suo-moto without any contest and they have proposed these payment under Section 73(3) of Chapter 5 of the Finance Act, 1994 whereby the issuance of show cause notice and penalty was waved.

1.1 Since, this amount of service tax was paid after 01.07.2017 but for the period prior to 01.07.2017, the same amount was eligible as Cenvat credit under the existing Law i.e. Cenvat Credit Rules, 2004 and the same was not eligible for taking input tax credit under GST. The appellants have filed refund claims in terms of Section 142 (3) of CGST Act, 2017. The department has issued two show cause notices both dated 06.09.2018, whereby the said refund claim was proposed to be rejected on the ground that the appellant in terms of Section 142 (8)(a) of CGST Act, 2017 not eligible for refund. Both the show cause notices were adjudicated vide Orders-In-Original No. REB/46/A.Schulman/Dn.V/2018-19 dated 29.10.2018 and No. REF/47/A.Schulman/Dn.V/2018-19 dated 29.10.2018, whereby the refund was rejected. In the adjudication order, the ground for rejection is that first appellant is not entitled as per the Section 142 (8) (a) of CGST Act, 2017 and since, the appellant have paid the service tax and opted for waiver of show cause notice in terms of Section 73(3) of the Finance Act, 1994, the appellant is not eligible for refund.

1.2 Being aggrieved by the Orders-In-Original appellant have filed the appeal before the commissioner (Appeals) against both the adjudication orders dated 29.10.2018 which were rejected by Order-In-Appeal No. VAD-EXCUS-002-APP-572-573-2018-19 dated 07.01.2019. The Learned Commissioner (Appeals) rejected appeal on the following grounds: -

1) Since the appellant have paid the service tax interest and penalty opted for Section 73 (3) of Finance Act, 1994 question of seeking of Cenvat credit does not arise. Consequentially, appellant seeking credit in terms of Section 142 (6) (a) of CGST Act, 2017 is liable to be rejected.

2) The Act of payment of penalty by the appellant signifies that their case has attracted the exceptions of provision of Rule 9(bb) of Cenvat Credit Rules, 2004. According to which since, the service tax was paid by reason of fraud, collusion or willful misstatement or suppression of facts or contravention of any of the provisions of the Finance Act of the Rules made thereunder with intend to evade payment of service tax, the credit is not admissible.

3) Since, the service tax was paid after 01.07.2017 they are not eligible for Cenvat credit as per Cenvat Credit Rules, 2004 as the applicability of the Cenvat Credit Rules cannot be extended to the period on or after 01.07.2017.

1.3 Being aggrieved by the Order-In-Appeal appellant filed the present appeal.

2. Shri Dhruvank Parikh, Learned Chartered Accountant appearing on behalf of the appellant submits that the appellant have paid service tax on the reverse charge mechanism which is for the period prior to 01.07.2017 when the Cenvat Credit Rules, 2014 was in force. Accordingly, the appellant is eligible for Cenvat credit of the service tax paid on reverse charge basis. Since, after 01.07.2017 it is not possible to utilise the Cenvat credit, the provision for cash refund is made under Section 142 (3) of CGST Act. Therefore, the appellant is legally eligible for refund of Cenvat credit, of service tax paid under reverse charge mechanism. It is a settled position that even if the service tax is paid after 01.07.2017 but the same pertains to the period prior 01.07.2017, the same is eligible for Cenvat credit for the period prior to 01.07.2017 and since the same cannot be utilised due to GST regime, the same is eligible for refund under Section 142 (3).

2.1 As regard the ground for rejection made by the Learned Commissioner (Appeals) under Rule 9(1)(bb) of Cenvat Credit Rules, 2004. He submits that firstly, no show cause notice was issued for demanding the service tax by invoking any suppression of fact, willful misstatement, fraud, collusion, etc. Therefore, the Rule 9(1)(bb) is not applicable.

2.2 He alternatively submits that in the present case the service tax was paid on reverse charge basis by the appellant being a service recipient and whereas the bar for availment of Cenvat credit as per Rule 9 (1) (bb) is applicable only in respect of the supplementary invoice, bill or challan issued by a provider of output service, which is not the case in the present appeal as the Cenvat credit was taken on the challan whereby the service tax was paid by the appellant being a recipient of service and not on the documents issued by a provider of service. For this reason Rule 9 (1) (bb) is not applicable.

2.3 He further submits that the appellant have paid that service tax, interest and penalty and declared under Section 73(3) which has been accepted by the department. Had the department of the view that there is a suppression, misstatement or fraud,, etc. the claim of the appellant under Section 73(3) could not have accepted by the department as in such case in terms of Section 73(4), the appellant would not have been eligible for waiver of show cause notice of in terms of Section 73(3) of the Finance Act. For this reason, also Rule 9 (1) (bb) of Cenvat Credit Rules, 2004 is not applicable.

2.4 As regard the rejection of refund claim on the ground that in terms of Section 142 (8), the appellant is not eligible for refund. He submits that Rule 142 (8) is not relevant for the purpose of refund of Cenvat credit availed in terms of Cenvat Credit Rules, 2004.

2.5 In respect of submission, he placed reliance on the following judgments: -

- Pacific Harish Industries Limited vs. Commissioner of Central Excise & ST, Surat vide final order No. A/111904/2019 dated 10.10.2019 CESTAT- Ahmedabad
- Ineos Styrolution India Ltd. vs. C.C.E. & S.T. Vadodara-l vide final order No. 10217/2022 dated 07.03.2022 CESTAT- Ahmedabad
- KKALPANA INDUSTRIES INDIA LTD, NILKAMAL LTD Vs COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX vide final order No. A/11077-11079/2022 dated 25.08.2022 CESTAT- Ahmedabad
- Swami Construction vs. C.C.E. & S.T.- Vadodara-l vide final order No. A/10558/2022 dated 20.05.2022 CESTAT- Ahmedabad
- Nissan Motor India Private Ltd. vs. Commissioner of Service Tax vide final order No. 40344-40345/2019 dated 21.02.2019 CESTAT-Ahmedabad
- Polygenta Technologies Ltd. vs. Commissioner of Central Excise, Nashik-l vide final order No. A/91734/2017 dated 29.12.20217 CESTAT-Ahmedabad
- M/S. 99 GAMES ONLINE PVT. LTD., M/S. GLOBAL DELIGHT TECHNOLOGIES PVT. LTD. VERSUS COMMISSIONER OF CENTRAL EXCISE & CENTRAL TAX, COMMISSIONERATE MANGALORE vide final order No. 20073-20074/2019 dated 11.01.2019 CESTAT- Ahmedabad
- THE PRINCIPAL COMMISSIONER, CENTRAL GOODS & SERVICES TAX, MEERUT VERSUS M/S NEERU ENTERPRISES (E.O.U. - UNIT-II) vide final order No. 70046/2023 dated 17.08.2023
- M/s. Columbia Machine Engineering India Pvt. Ltd. vs. C.C.E. & S.T. VADODARA-I vide final order No. A/12863/2018 dated 11.12.2018 CESTAT- Ahmedabad
- Commissioner of C.Ex., Visakhapatnam vs. Tirupathi Fuels Pvt. Ltd.- 2017 (7) GSTL 142 (A.P.)

3. Shri R K Agrwal, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. We have carefully considered the submission made by both the sides and perused the records. We find that the show cause notice proposed the rejection of the appellant's refund claim made under Section 142(3) invoking Section 142 (8) of CGST Act, 2017 which reads as under:-

> ***Section 142(8) in The Central Goods and Services Tax Act, 2017***
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> *"(8)* ***(a)*** *where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day, under the existing law, any amount of tax, interest, fine or penalty becomes recoverable from the person, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act;*
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> ***(b)*** *where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day, under the existing law, any amount of tax, interest, fine or penalty becomes refundable to the taxable person, the same shall be refunded to him in cash under the said law, notwithstanding anything to the contrary contained in the said law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 and the amount rejected, if any, shall not be admissible as input tax credit under this Act."*

From the plain reading of the Section 142 (8), it provides that if any duty pertaining to the period prior to 01.07.2017 is paid, the same shall not be available as an input tax credit under this Act, means CGST Act.

4.1 In the present case the appellants have not claimed input tax credit in respect of the service tax paid for the period prior 01.07.2017. Therefore, on this ground, the refund was wrongly proposed to be rejected. As Section 142 (8) is only in respect of input tax credit not for Cenvat credit. For the purpose of refund of Cenvat credit which pertains to the period prior 01.07.2017, the special provision was made for cash refund under Section 142 (3) of CGST Act. Therefore, the invocation of Section 142 (8) of CGST Act, 2017 is misplaced.

4.2 We find that the adjudicating authority rejected the claim also on additional ground that the appellants have paid the service tax admitting their liability and opted for Section 73(3) of the Finance Act, 1994. We find that firstly, there is no charge in the show cause notice for rejection of claim with reference to Section 73 (3). Therefore, this ground in the adjudication order travelled beyond the scope of show cause notice, for this reason itself, on this ground rejection of claim is incorrect and illegal.

4.3 Without prejudice we find that Section 73(3) is admission of the service tax liability and payment made therefore will not affect the admissibly of the Cenvat credit of such service tax. Had appellant claimed the refund of service tax paid by them the same can be barred under Section 73(3) which is not the case here. After payment of service tax, the appellant is eligible for Cenvat credit. Therefore, only because they opted for payment of service tax under section 73(3), admissibility of Cenvat credit cannot be questioned.

4.4 We find that the Learned Commissioner (Appeals) has gone once step ahead and also rejected the refund claim on the ground of Rule 9 (1) (bb) of Cenvat Credit Rules, 2004 whereas the same is not the allegation in the show cause notice. Therefore, the learned commissioner (Appeals) also decided the issue which was not arising either from show cause Notice or from the order-in-original. Therefore, the learned commissioner (Appeals) also decided Refund under Section 142(3) on the ground which is not arising from the order. Hence, the order-in-appeal also travelled beyond the scope of either show cause notice or the order-in-original.

4.5 Without prejudice to the above we find that the appellant have paid service tax admittedly and opted for section 73(3) of the Finance Act, 1994. This proposal has been accepted by the department and no show cause notice was issued that means the revenue has accepted the payment of service tax under Section 73(3) which provides that the service tax paid under Section 73(3) is without having any ingredient of suppression of facts, willful misstatement , collusion , fraud, etc. Had there been an allegation of department on the above ingredients, the proposal of the appellant could not have been excepted as the same is barred in the term of Section 73(4) of Finance Act, 1994 which has not been invoked by the department. Therefore, it is an established fact in the present case that there is neither any charge of suppression of fact, willfull, misstatement, etc. nor any adjudication thereon. As the appellant have neither been issued any show cause notice nor was any order passed. In this undisputed fact Rule 9(1) (bb) of Cenvat Credit Rules, 2004 doesn’t apply. Moreover, it is a settled Legal position that Rule 9 (1) (bb) is not applicable in case of payment of service tax under reverse charge basis. For the ease of reference Rule 9 (1) (bb) is reproduced below:-

> ***"RULE 9. Documents and accounts****. — (1) The CENVAT credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the basis of any of the following documents, namely :-*
>
> > *[(bb) a supplementary invoice, bill or challan issued by a provider of output service, in terms of the provisions of Service Tax Rules, 1994 except where the additional amount of tax became recoverable from the provider of service on account of non-levy or non-payment or short-levy or short-payment by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Finance Act or of the rules made thereunder with the intent to evade payment of service tax; or]"*

4.6 From the plain reading of the Rule 9 (1) (bb), it is clear that same is applicable only in case when the supplementary invoice, challan,etc., are issued by the service provider. In the present case since the service tax was paid by the appellant under reverse charge basis, there is no invoice, challan issued by the service provider on which the credit was taken. In the present case it is the appellant's own bank challan through which the service tax was paid. For this reason also Rule 9 (1) (bb) is clearly not applicable in the present case. The judgments relied upon by the appellant are directly applicable on all the issues in the present case.

5. Accordingly, we are of the view that appellant is eligible for refund under Section 142(3) of CGST Act, 2017. Therefore, the impugned order is set aside. Appeal is allowed.

(Pronounced in the open court on 10.12.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

Raksha