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

REGIONAL BENCH- COURT NO.3

Excise Appeal No. 12610 of 2013

(Arising out of OIO-24/CEX/DEMAND/NIRMA/COMMR-I/2013 dated 02/07/2013 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-I)

Nirma Limited ......**Appellant**
Village : Alindra,
Taluka : Savli,
Vadodara, Gujarat

VERSUS

C.C.E. & S.T.-Vadodara-i ....**Respondent**
1st Floor...Central Excise Building,
Race Course Circle,
Vadodara, Gujarat - 390007

WITH

Service Tax Appeal No. 10610 of 2013

Service Tax Miscellaneous (ORS) Application No. 10001 of 2023

(Arising out of OIA-PJ/511/VDR-I/2012-13 dated 27/02/2013 passed by Commissioner of Central Excise-VADODARA-I)

Nirma Limited ......**Appellant**
Village : Alindra,
Taluka : Savli,
Vadodara, Gujarat

VERSUS

C.C.E. & S.T.-Vadodara-i ....**Respondent**
1st Floor...Central Excise Building,
Race Course Circle,
Vadodara, Gujarat - 390007

APPEARANCE:
Shri Amal Dave, Advocate for the Appellant
Shri Rajesh 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. A/ 10388 - 10389 /2023

DATE OF HEARING: 13.02.2023
DATE OF DECISION: 03.03.2023

RAMESH NAIR

The brief facts of the case are that the appellant in total deposited Rs. 82,33,666/- as service tax under RCM on the amount paid towards technical knowhow under the head of IPR services. The appellant availed cenvat credit of such amount consequent to that they received show cause notice proposing to deny such cenvat credit on the ground that since the appellant paid R& D cess on the IPR service, service tax was not payable as per notification no. 17/2004- ST and hence since service tax was not payable the appellant is not eligible for cenvat credit. The appellant reversed Rs 40,57,595/- and since the tax was not payable filed the refund claim of such amount of Rs. 40,57,595/- on the grounds that the tax was paid erroneously. Against this refund claim the appellant received another show cause notice proposing to deny the refund claim on the ground that the appellant did not submit evidence to establish that the benefit of notification no. 17/2004- ST was available to them. The appellant have therefore filed 2 appeals before this tribunal whereby Appeal No. ST/10610/2013 is for the rejected refund claim of Rs. 40,57,595/- and Appeal No. E/12610/2013 is for cenvat credit which was denied to the appellant on the ground that since service tax was not payable the appellant was not eligible for cenvat credit.

2. Shri Amal Dave, Learned Counsel appearing on behalf of the appellant submits that it is the case of revenue that appellant are not liable to pay service tax on RCM for the reason that they have paid the R& D cess. He submits that the service tax of Rs. 40,57,595/- is refundable without any objection. Therefore, on this count the rejection of refund claim is incorrect and illegal. As regard the issue of cenvat credit on the service tax paid on the ground that the same is not admissible as the service tax is exempted under Notification No. 17/2004- ST he submits that this notification is not unconditional therefore, it is the option of the appellant whether to avail such exemption notification therefore, if the appellant wish not to avail the exemption the payment of service tax is correct and legal. Consequently, the appellant is entitled for cenvat credit.

2.1 He, without prejudice, further submits that even though the service tax is not payable for any reason but the assessee pays the service tax, the same is available as cenvat credit to the assessee. He submits that in the Cenvat Credit Rules there is no bar to allow the cenvat credit in such a situation therefore, the appellant are rightly entitled for cenvat credit.

3. Shri Rajesh K Agarwal, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both sides and perused the records. First we are taking up the Appeal No. E/ 12610/2013-DB which is on the issue of availment of cenvat credit in respect of service tax paid on reverse charge. The revenue has denied the cenvat credit on

the ground that since the service is exempted under notification no. 17/2004-ST as the appellant have paid the R& D cess, therefore, the tax paid on such exempted service cannot be allowed as cenvat credit. For ease of reference Notification No. 17/2004 - ST is reproduced below:-

> *"Service tax on holder of intellectual property right — Effective rate of duty*
>
> *In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service provided by the holder of intellectual property right to any person, in relation to intellectual property service, from so much of the service tax leviable thereon under section 66 of the said Act, as is equivalent to the amount of cess paid towards the import of technology under the provisions of section 3 of the Research and Development Cess Act, 1986 (32 of 1986) in relation to such intellectual property service."*

From the above Notification No. 17/2004-ST it can be seen that the same is conditional one. Whether there is a compulsion to avail conditional notification or not the same is provided under Section 5 A of Central Excise Act the same is reproduced below:-

> ***"SECTION [5A. Power to grant exemption from duty of excise. —*** *(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon :*
>
> ***Provided*** *that,……………*
>
> *[(1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods.]"*

From the above Section 5 A it is clear that the assessee is bound to avail an unconditional (absolute) notification but there is no compulsion to avail a conditional notification. As per the above provision the appellant enjoys the option of availing the conditional notification or not. Therefore, if the appellant have paid the Service tax without availing Notification No. 17/2004-ST the same is not objectionable and the payment of service tax is legal and correct. Consequently, the cenvat credit on such service tax paid Can also not be disputed.

4.1 Without prejudice, we also find that in catena of case laws it is held that even though the service tax on any service is not payable but assessee pays the service tax the recipient is entitled for the cenvat credit. We take support from the following judgments:-

- Commissioner of C.Ex, Chennai – I vs. CEGAT, Chennai- 2006 (202) ELT 753 (Mad.)
- CCE & Cus. Vs. Purity Flexpack Ltd. – 2008 (9) STR 125 (Guj.)
- Commissioner vs. Neuland Laboratories Ltd – 2015 (319) ELT A140 (A.P.)
- M/s. Inductotherm Pvt. Ltd. – Final Order No. A/11073/2019 dated 05.07.2019- CESTAT Ahmedabad.

4.2 As per our above discussion and finding the appellant are entitled for the cenvat credit of the total amount paid as service tax. Accordingly, the impugned order in appeal no E/12610/2013 is set aside and this appeal is allowed.

5. Since we allowed entire amount of cenvat credit of the service tax paid by the appellant there is no question of further refund as claimed in appeal no. ST/10610/2013. Accordingly this appeal is dismissed as infructuous. MA also stands disposed of.

(Pronounced in the open court on 03.03.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

C.L. MAHAR
MEMBER (TECHNICAL)

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