CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHANDIGARH
REGIONAL BENCH
COURT No. I (E-Hearing)

Service Tax Appeal No. 42 of 2012

(Arising out of Order-in-Appeal No. 409-411/BK/GGN/2011 dated 30.09.2011 passed by Commissioner of Central Excise (Appeals), Delhi-III, Gurgaon)

M/s. Optum Global Solutions India Pvt. Ltd. **Appellant**
12^{th} & 14^{th} floor, Tower-B, Sector-39,
Gurgaon 122 003, Haryana.

Vs.

Commissioner of Service Tax, Delhi **Respondent**
17-B, IAEA House, M.G. Road,
I.P. Estate, New Delhi 110 002.

AND

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Commissioner of Service Tax, Delhi **Respondent**
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I.P. Estate, New Delhi 110 002.

Appearance:

Shri Vinayak Mathur, Advocate, for the Appellant
Ms. Swati Chopra, Authorised Representative, for the Respondent

CORAM:

HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. 60821-60822/2021

Date of Hearing: 22.03.2021
Date of Decision: 22.03.2021

PER: SANJIV SRIVASTAVA

Appellants have preferred these appeals against the Order in Appeal No 409-411/BK/GGN/2011 dated 30.09.2011 of the Commissioner (Appeals), Gurgaon. By the impugned order

Commissioner (Appeals) had disposed of three appeals filed by the Appellant rejecting the same on various grounds stated in the impugned order.

1.2 Out of the three appeals disposed by the Commissioner (Appeal) by this common order we have taken up two appeals which were filed by the Appellants before the Commissioner (Appeals), namely against order in original No 90/SK/GGN/ST/2010 dated 06.12.2010 and order in original No CE-20/ST/DIII/RER/Ref/3226 dated 13.08.2010. Since the issues involved in these two appeals are identical they have been taken up for consideration simultaneously.

2.1 Appellants have preferred the refund claim in terms of Rule 5 of CENVAT, Credit Rules, 2004. While sanctioning the refund claim for the part amount as claimed by the appellant, adjudicating authority held the remaining part to be barred by limitation.

2.2 The appellants preferred the appeal against rejection of the part refund claim before the Commissioner (Appeal), which has been rejected as per the impugned order. Hence these appeals before us.

3.1 We have heard Shri Vinayak Mathur, Advocate, for the Appellant and Ms Swati Chopra, Authorized Representative for the revenue.

4.1 While rejecting the part refund claim on the ground of limitation, adjudicating authority has recorded as follows:

"On conjoint reading of these aspects vis-à-vis the subject claim it is clear that the services have been rendered on a monthly basis. Further given the conditions stipulated in Rule 4A read with the agreement it becomes clear that the 1 year period stipulated in Section 11B ends after 1 year from the date of invoice and therefore the subject claim is time barred.

Further I find that the time limit for filing the refund claim Section 11B is absolute and any delay cannot be condoned even by the Tribunal. This aspect has been made clear in one case, *where the appellants paid the service tax before the service was rendered to the client and on that ground contented that the amount deposited with government was only a provisional deposit and not service tax, and hence the time limit under Section 11 B would not apply. The Tribunal rejected the appeal – Brite Neon Singh Vs. A.C. Service Tax Cell. Similarly, where the Commissioner (Appeal) limited the refund amount to the period of one year prior to the date of refund application, the Tribunal held that the Commissioner (Appeal) was justified in limiting the refund claim and that even the Tribunal could not waive the time limit – Durga Chemical Agency vs. CCE.*

With regard to contention of the assessee that the date of claim should be calculated with the end of the relevant quarter, I find that there is no intention to that effect in the notification. Whenever there was an intention the government has specified to that effect. A suitable example is 41/07 where it has been clarified vide Circular No. 112/06/2009-ST dated 12.03.09 that the time limit of 60 days should be reckoned from the date of export.

With respect to the case law CCE (Ahmd) vs. Anjani Synthetics Limited cited by the assessee, I find that the main ground of the assessee is that the ratio of the judgment speaks about non applicability of Section 11B to cases of refund of un-utilized CENVAT Credit. The subject case is covered under Notification No. 5/2006-CE(NT) which specifically provides that Section 11B of Central Excise Act, 1944 is made applicable in all refund claims filed under this notification. Therefore, the ratio does not apply in the present case. Further I find that the other case laws submitted by assessee have not yet attained finality.

IV. It is therefore appears that the notification envisages that refund should be filed before the expiry of the period specified in Section 11B of Central Excise Act, 1944, in the instant case the date of issue of invoice is the relevant date and therefore export invoices for the period July 07 and August 07 is barred by limitation of time as the date of submission of the refund claim is 30.09.2008."

4.2 We find that the issue has been considered by the larger bench in the case of Span Infotech India Pvt Ltd [2018-TIOL-516-CESTAT-BANG-LB] and larger bench has held as follows:

"10. After considering the provisions of the Notifications issued under Rule 5 of the CCR, we note that there is a specific condition that the refund claims are required to be filed within the period specified under Section 11B. Consequently, we are of the view that completely ignoring the provisions of Section 11B may not be appropriate. This view is supported by the decision of Hon'ble Madras High Court in the case of GTN Engineering (supra) wherein Hon'ble High Court has disagreed with the view expressed by Hon'ble Karnataka High court in the case of mPortal (supra) that Section 11B will have no application with respect to refund under Rule 5 of CCR.

11. The definition of relevant date in Section 11B does not specifically cover the case of export of services. Hence, it is necessary to interpret the provisions constructively so as to give it meaning such that the objective of the provisions; i.e. to grant refund of unutilized CENVAT credit, is facilitated. By reference to the Service Tax Rules, 1994 as well as the successor provisions i.e. the Export of Service Rules, 2005, we note that export of services is completed only with receipt of the consideration in foreign exchange. Consequently, the date of Foreign Inward Remittance Certificate (FIRC) is definitely relevant. The Hon'ble Andhra Pradesh high Court has held that the date of receipt of consideration may be taken as relevant date in the case of Hyundai Motors [2015(39) STR 984 (AP)] = 2015-TIOL-739-HC-AP-ST.

12. The related question for consideration is whether the time limit is to be restricted to the date of FIRC or can be considered from the end of the quarter. The Tribunal in the case of Sitel India Ltd. (supra) has observed that the relevant date can be taken as the end of the quarter in which FIRC is received since the refund claim is filed for the quarter.

13. Revenue has expressed the view that relevant date in the case of export of services may be adopted on the same lines as *the amendment carried out in the Notification No.27/2012, w.e.f. 01/03/2016. Essentially after this amendment the relevant date is to be considered as the date of receipt of foreign exchange. While this proposition appears attractive, we are also persuaded to keep in view the observations of the Hon'ble Supreme Court in the case of Vatika Township (supra), in which the Constitutional Bench has laid down the guideline that any beneficial amendment to the statute may be given benefit retrospectively but any provision imposing burden or liability on the public can be viewed only prospectively. Keeping in view the observations of the Apex Court, we conclude that in respect of export of services, the relevant date for purposes of deciding the time limit for consideration of refund claims under Rule 5 of the CCR may be taken as the end of the quarter in which the FIRC is received, in cases where the refund claims are filed on a quarterly basis."*

4.3 Since the issue is squarely covered by the decision of the larger bench in the favour of appellants, respectfully following the decision of larger bench we decide these appeals accordingly.

5.1 The appeals are allowed setting aside the impugned order to the extent it is in respect of the two order-in-original referred to in para 1.2, supra.

(Order pronounced in the open court)

(Ashok Jindal)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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