CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

REGIONAL BENCH – COURT NO. IV

Service Tax Appeal Nos. 40274 to 40277 of 2013-DB

(Arising out of Order-in-Appels Nos. CMB-CEX-000-APP-272 to 275-2012, dated 09.01.2012 passed by the Commissioner of Customs, Central Excise & Service Tax (Appeals), Coimbatore)

M/s.Ugam Solutions SEZ Pvt. Ltd.
CHIL-SEZ,
India Land KGISL, Tech Park, Block A,
1st Floor, Village: Keeranatham, Saravanampatty
Coimbatore – 641035.Tamil Nadu **: Appellant**

VERSUS

Commissioner of Central Excise & Service Tax
Coimbatore II Division
Elgi Buildings, Trichy Road
Coimbatore 641018, Tamil Nadu **: Respondent**

APPEARANCE:

None for the Appellant

Ms. K. Komathi, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI C J MATHEW, MEMBER (TECHNICAL)
HON'BLE SHRI P DINESHA, MEMBER (JUDICIAL)

FINAL ORDER NOs. 41241-41244 / 2020

DATE OF HEARING: 11/12/2019

DATE OF PRONOUNCEMENT: 18/11/2020

Per: C J Mathew

The issue in these appeals of M/s Ugam Solutions SEZ Pvt Ltd is the availability of option for units in special economic zones to secure exemption from tax on services by refund under rule 5 CENVAT Credit Rules 2004 instead of recourse to exemption under section 26 of Special Economic Zones Act, 2005. The appellant availed CENVAT credit of taxes discharged by their service providers and contends that, as an exporter, they are eligible for privileges available in CENVAT Credit Rules, 2004. Aggrieved by the upholding of the rejection of their claim for refund in orders-in-appeal no. CMB-CEX-000-APP-272 to 275-2012 dated 9th January 2012 of Commissioner of Customs, Central Excise & Service Tax (Appeals), Coimbatore, they are in appeal before us.

2. During the period from April 2010 to March 2011, appellant procured services on which tax of ☐ 51,83,236/- was included in the billing of the provider of service and, having availed the CENVAT credit thereof instead of resorting to procedure prescribed in notification no. 9/2009-ST dated 3rd March 2009, sought refund under rule 5 of CENVAT Credit Rules, 2004 intended for neutralizing taxes borne by vendors

of goods or services whose customers are outside the country. Before the first appellate authority, their contention was that resort to another procedure recognized in law should not disentitle them from being granted the refund available to exporters. Reliance was placed on the decision of the Tribunal in *Tata Consultancy Services Ltd v. Commissioner of Central Excise & ST (LTU), Mumbai* [*2012-TIOL-1034-CESTAT-MUM*].

3. None appeared for the appellant and it is seen from the records that they were not being represented on former occasions too. As the resolution of this appeal lies within the narrow compass of eligibility to avail credit under CENVAT Credit Rules, 2004 for, if they are, all privileges thereon must necessarily be available to them, we are of the considered opinion that the appeal can be disposed off *ex parte* after taking note of the grounds of appeal as well as the submissions made by Learned Authorised Representative which, substantially, reflect the findings

of the first appellate authority for affirming the rejection of the claim.

4. 'Special economic zones' are governed by a special enactment that is comprehensive enough to statutorily preclude reference to any other statute for operation of the scheme. Till 2003, exemptions from duties of central excise on domestic procurement and from duties of customs on imported inputs were accorded by notifications under section 5A of Central Excise Act, 1944 and section 25 of Customs Act, 1962 while clearances into the domestic territory entailed chargeability to duties of central excise under a distinct scheme envisaged in section 3 of Central Excise Act, 1944. As yet, exemptions from tax under Finance Act, 1994, a levy that was restricted to such services as were enumerated in section 65(105) of Finance Act, 1994 and in existence for a mere eight years, was not of much concern to many business establishments. Before the Special Economic Zones Act, 2005 was brought into force, the scheme was administered for a brief *interregnum* from 2003 under chapter XA of

Customs Act, 1962. This substitution was in pursuance of a paradigm shift in the scheme that deemed the zones to be 'outside the customs territory' for 'zero rating' of tariff instead of treatment as manufacturers who exclusively cater to foreign markets and permitted to be assessed differently when clearing in the domestic market. These features were carried over into the new governing statute enacted in 2005 and brought into force, along with Special Economic Zones Rules, 2006, on 10th February 2006.

5. Special Economic Zones Act, 2005 provides for primacy in the event of conflict arising from implementation of any other statute. Further, by deeming the zone to be outside 'customs territory', the operation of Customs Act, 1962 and Central Excise Act, 1944 were excluded. Registration under Finance Act, 1994 is not a requirement for carrying out 'authorized operations' in the zone as, except when services were provided by such unit to recipients in 'domestic tariff area', as defined in section 2(i) of Special Economic Zones Act, 2005, and there being no provision parallel

to dutiability of goods under section 30 of Special Economic Zones Act, 2005, all aspects of transactions in relation to service providing units were covered by Special Economic Zones Act, 2005. It also may not out of place to note that rule 47 of Special Economic Zone Rules, 2006 does envisage rendering of service to the domestic tariff area and rule 48 thereof prescribes procedure for assessment to duty on such activity.

6. With the implementation of Special Economic Zones Act, 2005, exemption from duties of central excise and duties of customs on goods procured by units in special economic zones continued to be administered as seamlessly as in the past. The legacy of existing procedures and the certifiability of arrival of goods at the premises within special economic zones sufficed for avoidance of any controversy in the administration of the new scheme. By now, however, the enumeration of taxable services in section 65(105) of Finance Act, 1994 had increased and, moreover, in enactment of a comprehensive law the inclusion of all taxable events, including rendering of services, was

inevitable. Furthermore, the ‘greenfield’ units to be set up in the new zones were entitled freedom from tax even at the establishment stage which, necessarily, involved procurement of taxable services for which exemptions had to be granted.

7. Here it is important to note that, even as the special statute was being enacted, the scheme of levy of tax on services did not find it necessary to define ‘exports’, either for exemption, as tax liability was restricted to territory of India with consideration in convertible foreign currency being indicator of provision of service outside India, or for refund permissible under rule 5 of the newly notified CENVAT Credit Rules, 2004. Even in notifying the Export of Service Rules, 2005, the definition of export was intended for extending the privilege of refund under rule 5 of CENVAT Credit Rules, 2004 and it was only in 2006, when parallel provision for taxation of services procured from outside India by section 66A of Finance Act, 1994 was notified, that the definition of ‘exports’ in Export of Service Rules, 2005 was adopted as the determinant for exemption by

including section 93 of Finance Act, 1994 as an additional authority for Export of Service Rules, 2005. In these circumstances, the necessity of exemption of tax on services provided to units in special economic zones, though addressed by inclusion in section 26 of Special Economic Zones Act, 2005, lacked the rigour that inhered in exemption accorded to goods procured from abroad or from the domestic market. The administration of legislative intent to exempt services procured from 'persons liable to tax' appeared ready to capsize on the rock of scheme of the tax as prevailing. Complicating the situation was the entrustment of administration of Special Economic Zones Act, 2005 to the Ministry of Commerce whose notifications issued, or Rules framed, under section 26 of the enactment, for benefit of entities recognized by its Development Commissioners were intended for assessees registered, under Finance Act, 1994, with field formations of Department of Revenue. These providers were loath to bear the risk of recovery from them in the event of any controversy and the intended beneficiaries were left, thereby, in the cold. In these circumstances, issue of notification no. 9/2009-ST dated 3rd March 2009 was conceptualized as the only practicable solution. The roots of the present dispute lie therein.

8. The foundation of the impugned claim for refund is the tax discharged by providers of service to the appellant as sufficing for entitlement to take credit under rule 3 of CENVAT Credit Rules, 2004 and the eligibility, as exporter, to refund of such credit. It is, therefore, to CENVAT Credit Rules, 2004 that we must turn our attention to.

9. Rule 3 of CENVAT Credit Rules, 2004 permits credit of duty/tax on 'input'/'input service' in the hands of provider of 'output'/'output service' which, by definition, excludes 'exempted goods'/'exempted service' from its ambit. Doubtlessly, under rule 6 of CENVAT Credit Rules, 2004, exports are excluded from categorization as exempted as are supplies to units in special economic zones; that latter, however, does not advance the case of the appellant as it is intended to benefit the domestic provider of service for availment

of credit at its end. Consequently, the touchstone for determination of the impugned dispute is the conformity of 'exports' effected by the appellant with 'exports' within the scheme of tax on services. Till 1st July, 2012, 'exports', for the purpose of Finance Act, 1994, was the trifurcated categorization in Export of Service Rules, 2005 which was, thereby, exempted from levy without being construed as 'exempted service' under CENVAT Credit Rules, 2004.

10. While the provider of service to the appellant would be covered by the exclusion from 'exempted services' and, thereby eligible under rule 3 of CENVAT Credit Rules, 2004, the appellant, as unit in a special economic zone, may be hard put to find the same resonance. 'Export', as defined in section 2 of Special Economic Zone Act, 2005, comprises three elements that is more in consonance with international conventions that does not even bear any semblance to 'taxable services' which were trifurcated for acknowledgement as 'exports' under Export of Service Rules, 2005. Furthermore, units in special economic

zones issued with Letter of Approval (LoA), by the competent authority under Special Economic Zones Act, 2005, for undertaking 'authorized operations' are recognized as providers of service within the contours of section 2(z) of Special Economic Zones Act, 2005 read with rule 76 of Special Economic Zones Rules, 2006. Therefore, not only are the 'exports' rendered by the appellant, as unit operating under Special Economic Zones Act, 2005, incompatible with 'exports' acknowledged in Export of Service Rules, 2005 but also no less divergent is the 'service' that the appellant renders from 'taxable service' within the meaning of section 65(105) of Finance Act, 1994. Nor do the two statutes provide for a mechanism that could recognize the 'export' effected/'service' under Special Economic Zones Act, 2005 rendered by the appellant within the meaning assigned under scheme of taxation of services. This unbridged gap, therefore, mandates nothing less than mutually exclusive coverage under one or the other of the enactments. As the appellant is a unit under Special Economic Zones Act, 2005 that, in terms of section 51 of the Act, prevails over Finance

Act, 2005, simultaneous coverage under CENVAT Credit Rules, 2004 is not available.

11. The claim, founded upon eligibility to exemption afforded by notification no. 9/2009-ST dated 3rd March 2009 which, having been issued by Department of Revenue, places the appellant, as per their contention, on the same level as any exporter, is not only not tenable in view of the mutual exclusion that has been noted *supra* but also must be viewed in terms of its provenance. The said notification, birthed from the compulsion for monitorial oversight to obviate leakage of revenue and affording comfort from the threat of having section 73 of Finance Act, 1994 invoked, is mere procedural amplification that, in the light of section 26 of Special Economic Zones Act, 2005 read with section 51 therein, rendered the authority of section 93 of Finance Act, 1994 redundant and superfluous. That redundancy precludes any claim for privilege of exemption claimed therefrom by the appellant. The claim of statutory support for equivalence with exporter of service operating in the

'domestic tariff area' is non-existent. The appellant, having opted for jurisdiction of one enactment, cannot claim coverage under another that encompasses a different definition of 'service' and 'export' with the argument of similitude. Further, as the scheme under which the appellant operates confers benefit of exemption without having to, indirectly, resort to such even exigency of circumstances for substantive implementation does not come to their assistance.

12. The decisions relied upon in the grounds of appeal do not apply to the present set of circumstances. In both the decisions, the eligibility for claim under rule 5 of CENVAT Credit Rules, 2004 has not been upheld by the Tribunal but, on the contrary, the disputes were remanded back to the original authority for fresh determination of eligibility for refund under section 11B of Central Excise Act, 1944 and only on the plea of the appellants therein that exemptions of duty, not having been granted under section 26 of Special Economic Zone Act, 2005, should be returned as refund for not being leviable.

13. As the appellant herein has sought approval of their claim for eligibility for refund under rule 5 of CENVAT Credit Rules, 2004 and by voluntary abnegation of eligibility under section 26 of Special Economic Zones Act, 2005, we do not consider it appropriate to follow the remand ordered in the cited decisions. Accordingly, the appeals are dismissed.

(Pronounced in the open court on ***18/11/2020****)*

(P DINESHA)	**(C J MATHEW)**
MEMBER (JUDICIAL)	**MEMBER (TECHNICAL)**

ksr

	DRAFT			Remarks
	I	II	III	
Date of dictation	11.12.2019			
Draft Order - Date of typing	11.12.2019			
Fair Order Typing	11.12.2019			
Date of numbering and date of dispatch	11.12.2019			