CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Service Tax Appeal No. 52704 of 2018-SM

(Arising out of Order-in-appeal No. 38/ST/DLH/2015 dated 20.07.2015 passed by the Commissioner of Service Tax, New Delhi).

M/s Smart Cube India Pvt. Limited **Appellant**
37, Hauz Khas Village, Hauz Khas
New Delhi-110016.

VERSUS

Commissioner of Central Excise and Customs, Central Goods & Service Tax **Respondent**
Room No. 203, 17-B, M. G. Marg
I.A.E.A., I.P. Estate, New Delhi.

APPEARANCE:

Shri Puneet Agarwal & Shri Bharat Agarwal, Advocates for the appellant
Ms. Tamanna Alam, Authorised Representative for the respondent

CORAM:
HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 51482/2019

DATE OF HEARING/DECISION: 08.07.2019

ANIL CHOUDHARY:

The issue in this appeal is whether the refund of cenvat credit under Rule 5 of Cenvat Credit Rule read with Notification No. 5/2006-CE (NT) have been rightly refused to the appellant.

2. This is the second round of litigation. In the first round of litigation the matter reached before the Commissioner (Appeals) who

vide Order-in-Appeal No. 256&325/S. Tax/Appeal/D-II/2010 examined the following parameters:

(a) Whether the refund claim has been filed in time and with correct jurisdictional authority.

(b) Whether it is the fact that the services rendered during material period and claimed to be exported is that of 'Market Research Agency Service'.

(c) Whether the services rendered during the material period qualifies as export within definition of Export of Service Rules, 2005.

(d) Whether the input services on which credit has been claimed and refund has been sought, have actually been used in providing output services during the material period.

(e) Whether the input services on which credit has been claimed and refund has been sought, qualifies as input services within the definition of Rule 2(1) of Cenvat Credit Rules, 2004.

(f) Whether the payment has been received in convertible foreign exchange as against services exported."

3. Learned Commissioner (Appeals) decided each of the aforementioned issues in favour of the appellant and thereby remanded to the adjudicating authority with the following observation/direction:

> "In addition to the above discussions, I find that the procedural lapses should be dealt separately. In this regard I rely upon the judgment of the case of Sambhaji & Ors. Vs. Gangabai & ors. AIT-2008-428-SC, wherein it was held that 'A procedural law should not ordinarily be construed as mandatory. Procedural law is always subservient to and is in aid to justice. Interpretation which eludes or frustrates recipient of justice not be followed' and thus condone procedural lapses done by the appellant.
>
> As discussed above, the impugned orders have been passed without proper appreciation of evidences available on record. In view of this, I direct the original authority to re-examine the claims in view of the above findings, after giving an opportunity of being heard to the appellants and pass a speaking order, on each and every part of the claim. The appeals are disposed off, accordingly."

4. Learned Counsel for the appellant states that in view of the finding recorded by the Commissioner (Appeals), the only scope of remand to the adjudicating authority was to verify and reconciliation of the same with the bills raised for the service exported and accordingly pass the order.

5. In the second round of litigation before the adjudicating authority as is evident from para 11 of the order, the adjudicating authority have held that the appellant fulfilled both the conditions under the Export of Service Rules, 2005, that is, the service have been exported from India to outside India and the appellant has received convertible foreign exchange, and the amount remitted id matching with the amount of bills raised for the period. This observation was related to the period January to March, 2007. For the balance period pending under dispute i.e. September 2007 to March, 2009 the claim has been rejected on the ground that the registered premises of the appellant situated at Building No. 3, Chandiwala Estate, Maa Anand Mai Marg, Kalkaji, New Delhi-19 have been closed /locked by the Municipal Corporation. Thus, it is not established whether the appellant has rendered the output services or not and thus was pleased to reject the claim for the period from 09.08.2007. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals) who was pleased to reject the appeal by upholding the finding in the order-in-original as the premises has been locked w.e.f. 09.08.2007, hence, appellant could not have rendered services thereafter. Being aggrieved, the appellant is before this Tribunal.

6. Learned Counsel for the appellant pointed out from the finding recorded by the Commissioner (Appeals), in first round of litigation being order-in-original dated 15.04.2011, have been pleased to hold that the appellant have rendered the services received outside India during the period under dispute after going through all the relevant documents and remittances received, and accordingly has held that appellant did export the services and have received the remittance. Further, in the second round under the scope of remand, the order-in-original passed, is hit by the doctrine of merger, as the issue is already decided by the Commissioner, could not have been opened by the adjudicating authority in the second round. Accordingly, he prays for allowing of the appeal.

7. Learned Authorised Representative for the Revenue has relied upon the impugned order. He also vehemently emphasised that the Commissioner (Appeals) in the first round has made open remand keeping all the issues open. Accordingly, the adjudicating authority has passed the reasoned order, and the question of violation of principles of doctrine of merger, does not arise.

8. Having heard and on going through the facts on record, I am satisfied that in the order-in-appeal in the first round, passed by the Commissioner (Appeals), it is crystal clear that the scope of remand was limited to reconciliation of FIRC with the bills of export of service. Accordingly, I hold that the order of the court below in the second round is hit by the 'doctrine of merger' and accordingly the same is set aside to the extent it have disallowed the appeal for the period

from September, 2007 onwards for the financial year 2007-08 - 2008-09. Further, in view of the finding recorded in the first and second round it is evident that there is no further dispute with regard to reconciliation of FIRC, in view of the categorical finding recorded in para 11 of the impugned order. In this view of the matter, the appeal is allowed and the appellant is held entitled to refund for the period 2007-08 to 2008-09. The adjudicating authority is directed to disburse the refund within a period of 45 days from the date of receipt of copy of this order alongwith interest as per Rules.

(Dictated and pronounced in open Court).

(Anil Choudhary)
Member (Judicial)

Pant