CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 1

SERVICE TAX APPEAL No. 51162 of 2018
(Arising out of Order-in-Appeal No. 77/Central Tax/Appl-II/Delhi/2017, dated 27.12.2017 passed by Commissioner of Central Tax (Appeals-II), Delhi)

Commissioner of Central Excise, Customs .. APPELLANT
Central Goods & Service Tax, Delhi-I,
2nd & 3rd floors, Plot No. 2B,
EIL Annexee Building,
Bhikaji Cama Place,
NEW DELHI – 110 066.

Vs.

Blackberry India Private Limited .. RESPONDENT
Unit No. 216, 2nd floor,
Square one, C-2 District Centre,
Saket,
NEW DELHI – 110 017.

APPEARANCE:
Shri P. Juneja, Authorised Representative for the Appellant.

Ms. Priyanka Rathi, Advocate for the respondent

CORAM: HON'BLE Mr. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE Mr. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. 51556/2019

DATE OF HEARING: 25.10.2019
DATE OF DECISION: 25.10.2019

[ORDER PER: Mr. P. Venkata Subba Rao)

1. This appeal is filed by Revenue against Order-in-Appeal No. 77/Central Tax/Appl-II/Delhi/2017, dated 27.12.2017.

2. Heard both sides and perused the records.

3. The Respondent is registered with the Central Excise Department and is engaged in export of services. They have also availed CENVAT Credit as per CENVAT Credit Rules, 2004. Rule 5 of these Rules permits a manufacturer who exports his goods or a service provider who exports services to claim refund of the CENVAT Credit which was used in exported goods or exported services, subject to the procedure, conditions and limitations notified by the Board. These procedure and conditions were prescribed as Notification No. 27/2012-CE (NT), dated 18.06.2012. Among the conditions in this Notification is para 3 (b) which stipulates "the application in the Form A along with the documents specified therein and enclosures relating to the quarter for which refund is being claimed shall be filed by the claimant **before expiry of the period specified in Section 11B of the Central Excise Act, 1944".**

4. The appellant filed refund claims in respect of the services which they exported during the period July 2012 to March 2013 in three claims. The original authority allowed part of the refund and rejected part of the refund on the ground that the claims were filed beyond the period of limitation specified in Section 11B. Aggrieved, the appellant appealed before the first appellate authority who allowed their appeal. Hence this appeal by the Revenue.

5. Section 11B of the Central Excise Act, 1944 has been drafted to prescribe a procedure for claiming of refund of Central Excise duty under various circumstances, within one year from the relevant date. The relevant date has been defined in the explanation to this Section for various purposes. As far as the export of services is concerned, no relevant date was prescribed in this Section because this was meant for refund of duty of excise and not export of services. Since the Notification No. 27/2012-CE(NT), dt. 18.06.2012 required the claim to be made before the expiry of a period specified under Section 11B and this section does not specify what is the relevant date in case of export of services, the Tribunal has, in a series of decisions, held that relevant date in case of export of services is the date of realisation of the foreign exchange. The reason for this is the export of

services is not complete until the foreign exchange is realised as per Rule 3(2)(b) of "Export of Services Rules, 2005". Therefore, unless the foreign exchange is realised, the export is not complete and therefore the relevant date must be the date of realisation of foreign exchange.

6. Subsequently, Notification No. 14/2016-CE(NT), dated 01.03.2016 was issued by CBEC specifying the same condition, as a modification to the original Notification No. 27/2012-CE(NT), dt. 18.06.2012. This Notification reads as follows:

> "In exercise of the powers conferred by rule 5 of the CENVAT Credit Rules, 2004, the Central Board of Excise and Customs hereby makes the following amendment in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 27/2012 – C.E. (N.T.) dated 18th June, 2012, published in the Gazette of India, Extraordinary , Part II, Section 3, Sub-section (i) *vide* number G.S.R. 461(E), dated the 18th June, 2012, namely:-
>
> In the said notification, in Paragraph 3, for clause (b), the following shall be substituted, namely:-
>
> "(b) The application in the Form A along with the documents specified therein and enclosures relating to the quarter for which refund is being claimed shall be filed as under:
>
> (i) in case of manufacturer, before the expiry of the period specified in section 11B of the Central Excise Act, 1944 (1 of 1944);
>
> (ii) in case of service provider, before the expiry of one year from the date of –
>
> (a) **receipt of payment in convertible foreign exchange, where provision of service had been completed prior to receipt of such payment; or**
>
> (b) issue of invoice, where payment for the service had been received in advance prior to the date of issue of the invoice.".

7. In the present case, the exports were made prior to 2016 amendment. The lower authority, reckoning the date of export invoice as the relevant date, rejected part of the claim while the first appellate authority relying on the order of the Tribunal in the case of Contata Solutions [2017(51)STR 423 (Tri.-All.)] has held that the relevant date is the date of realisation of foreign exchange. Accordingly, the claims were not time barred in this case and he allowed the appeal.

8. The present appeal is filed by the Revenue on the ground that since the exports pertain to prior to the issue of Notification No. 14/2016-CE(NT), Dt. 01.03.2016, specifying the date of realisation of foreign exchange as the

relevant date, it falls under the residuary category in Section 11B "in any other case, the date of payment of duty". Since Export of Services are exempt, the date of invoice must be considered as the relevant date. According to the Revenue, the first appellate authority has erred in holding that the date of realisation of foreign exchange is that relevant date.

9. Ld. DR reiterated the above submissions. Ld. Counsel for the appellant supported the impugned order.

10. We have considered the arguments. We find that there is no case in which Section 11B mandates that the date of invoice must be considered as the relevant date. The residual category under section11B is the date of payment of duty. In this case there is no payment of duty at all. If this residual category is considered, the relevant date will never begin. If the department's argument has to be accepted, the refund can be claimed at any time. In order to avoid such absurd conclusions, the Tribunal has considered as to what constitutes an export of service under the Export of Service Rules and concluded that the date of realisation of foreign exchange must be the relevant date. If the export is not complete, the exporter of services is not entitled to claim refund under Rule 5 of CCR 2004. Therefore, harmoniously reading the Export of Services Rules and Section 11B of Central Excise Act, 1944, the Tribunal has held a view that in case of export of services, the relevant date must be the date of realisation of foreign exchange. We find that CBEC has also subsequently come to the same conclusion and issued Notification No. 14/2016-CE(NT), dated 01.03.2016, removing the lacuna in the initial Notification No. 25/2012-CE, dt. 18.06.2012 and bringing it in harmony with the decisions of the Tribunal.

11. In the light of the above, we find it is extremely surprising that the Revenue has now come up with this appeal asking for the order of the first appellate authority to be set aside, when the order has been issued following the ratio of the orders of the Tribunal as judicial discipline requires. There is

not even a suggestion in the appeal memorandum that the case is distinguishable from the case law relied upon by the first appellate authority.

12. To sum up (a) the Commissioner (Appeals) has only followed the orders of the Tribunal, (b) the CBEC has also modified their notification subsequently harmonising it with the decision of the Tribunal; (c) there are no difference on the facts of the case law relied upon by the Commissioner (Appeals) in the present case and (d) there is nothing in Section 11B to reckon the date of invoices as the relevant date as prayed for in this appeal by the Revenue.. The appeal is therefore frivolous and has been filed without any application of mind.

13. Accordingly, the appeal is dismissed with consequential reliefs, if any, to the Respondent herein.

(Operative portion of the order pronounced in open court on conclusion of hearing)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

Vrg
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