

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 51111 of 2022 [SM]

[Arising out of Order-in-Appeal No. 280(SM)/ST/JPR/2021 dated 19.08.2021 passed by the Commissioner of Central Excise & CGST (Appeals), Jaipur]

M/s. ITC Limited

Rajputana Palace Hotel,
Palace Road, Jaipur,
Rajasthan - 302006

...Appellant

VERSUS

**Commissioner of CGST,
Jaipur-I**

NCR Building, Statue Circle,
C-Scheme, Jaipur,
Rajasthan- 302005

...Respondent

APPEARANCE:

Mr. Anurag, Advocate for the Appellant

Ms. Tamanna Alam, Authorized Representative for the Respondent

CORAM: HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING/DECISION: **08.06.2022**

FINAL ORDER No. 50511/2022

DR. RACHNA GUPTA

The appellant herein is a provider of taxable service. The appellant had availed and utilized Cenvat Credit of Rs.2,74,997/- in exclusively exempted services during the period December, 2008 to September, 2009. The said credit was proposed to be recovered vide Show Cause Notice No.2797 dated 26.12.2019. The proposal was accepted vide Order-in-Original dated 31.03.2012.

Commissioner (Appeals) had upheld the said order on 29.11.2013. An appeal against the said order in appeal was filed before this Tribunal. Meanwhile, the appellant had deposited the amount of Rs.274997/- vide the challan dated 17.11.2015. During the initial stage of said appeal vide an Interim Order dated 12.01.2016, the said amount was held to be an amount as deposited under section 35 F of Central Excise Act, 1944 read with Section 83 of Finance Act, 1994 (the amount of pre-deposit). The said appeal was finally allowed vide Final Order No.52537/2018 dated 18.07.2018. Pursuant to said order that the appellant filed an application dated 12.03.2019 seeking refund of the aforesaid amount of pre-deposit. The request of the said application has been rejected initially vide Order-in-Original No. 262 dated 19.06.2020. Appeal thereof has been rejected by Commissioner (Appeals) vide Order No. 280/2021 dated 17.08.2021. Still being aggrieved, the appellant is before this Tribunal to assail the said order.

2. I have heard Mr. Anurag, Id. Counsel for the appellant and Ms. Tamanna Alam, Id. D.R. for the Revenue.

3. Id. Counsel for the appellant has impressed upon that interim order of this Tribunal dated 12.01.2016, where the amount in question, has specifically been held to be an amount of pre-deposit made under section 35 F of Central Excise Act. It is submitted that question of rejection of refund of said amount does not at all arise, refund rather flows *ipsofacto*. Id. Counsel has laid emphasis upon two circulars of Department itself. Para 26 of Circular No.1053/2/2017 dated 10.03.2017 and has also relied upon

Circular No.984/8/2014 dated 16.09.2014 para 5, 6 & 7 thereof. The rejection of refund specifically on the ground of unjust enrichment is also highly objected for the reason that the amount in question is an amount of pre-deposit instead of being the amount of duty. The order under challenge is accordingly, prayed to be set aside and appeal is prayed to be allowed. Ld. Counsel has laid emphasis upon the following case law:-

1. P.R. Commissioner of CGST, New Delhi vs. EMMAR Mgf. Construction Pvt. Ltd. Reported in 2021 (55) GSTL 311 (Tri. – Del.)

4. Per contra, Id. D.R. has relied upon the order in appeal, specifically to the findings in paragraph 7.1 and 7.2. The appeal is accordingly, prayed to be dismissed.

5. After hearing the rival contentions and perusing the record, it is observed that the refund claim of the appellant has been rejected on two counts.

- (i) That the amount was actually deposited on the behest of recovery notice of the Department.
- (ii) In terms of section 12 B of Central Excise Act a presumption of law exists about every person who has paid the duty on excise on any goods shall be deemed to have passed on the full incidents of such duty to the buyers of such goods.

6. To appreciate these findings, the correctness thereof, following are few admitted facts to be taken into consideration:-

- (1) Vide the order of this Tribunal the amount, the refund whereof was sought, has been held to be an amount paid in compliance with the provisions of Section 35 F of the Act i.e. amount of Rs.2,74,997/- is held to be the amount of pre-deposit as was made at the time of filing appeal before this Tribunal in the year 2014-15 challenging the confirmation of demand of said amount allegedly being wrongly utilized credit.
- (2) Though the amount was deposited as an amount of service tax pursuant to the recovery notice of the Department. However, this Tribunal vide Final Order dated 18.07.2018 has found no justification for demanding the reversal of the entire service tax credit amounting to Rs.2,74,997/- availed by the appellant. It was held to have been rightly availed.

7. Both these admitted facts are sufficient to hold that the amount in question is nothing but an amount of pre-deposit under Section 35 F of the Central Excise Act. The said amount is required to be refunded consequent upon the order of the Appellant Authority in terms of Section 35 FF of the Act. The section reads as follows:-

Section 35FF. Interest on delayed refund of amount deposited under Section 35F. –

Where an amount deposited by the appellant under section 35F is required to be refunded consequent upon the order of the appellate authority, there shall be paid to the appellant interest at such rate, not below five per cent. and not exceeding thirty-six per cent. per annum as is for the time being fixed by the Central Government, by notification in the Official Gazette, on such amount from the date of payment of the amount till, the date of refund of such amount.

Provided that the amount deposited under section 35F, prior to the commencement of the Finance (No. 2) Act, 2014, shall continue to be governed by the provisions of Section 35FF as it stood before the commencement of the said Act.

8. In addition, the Circulars as relied upon by the appellant are Department's own document. With respect to refund of pre-deposit, the Department is also conscious as follows:-

"26. Refund of pre-deposits:-(i) Where the appeal is decided in favour of the party/assessee, he shall be entitled to refund of the amount deposited along with the interest at the prescribed rate from the date of making the deposit to the date of refund in terms of Section 35FF of the Central Excise Act, 1944.

9. These findings are sufficient to hold that irrespective the amount was deposited on the behest of recovery notice of the Department it ultimately was an amount under section 35 F which was to be refunded in terms of section 35 FF and in terms of the aforesaid circulars. The appellant was otherwise held not liable to reverse the credit it being rightly availed. No appeal was filed by the Department against the said order. The issue is otherwise no more *res integra*. Hon'ble Apex Court also in the case of **Sandvik Asia Ltd. Vs. Commissioner of Income Tax, Pune reported in 2006 (196) ELT 0257 (S.C.)** has held that any amount deposited during investigation pending litigation is *ipso facto* an amount of pre-deposit and even interest is payable on such amount to the assessee being successful in appeal from the date of deposit till the date of refund. This Tribunal also has followed the said decision in the case of **Parle Agro (P) Ltd. V. Commissioner, CGST – 2021- TIOL-306-CESTAT-All.**

10. Coming to the another ground of rejection i.e. the case of unjust enrichment. Once it has already been held that the amount in question was an amount of pre-deposit and the amount was not the liability in the form of duty/tax to be paid by the appellant, the question of invoking presumption of section 12 B of Central Excise Act about passing of the incidence of such amount does not at all arise. Section 12B can be invoked if and only if the amount in question is an amount of duty. As already held by this Tribunal during the first round of litigation vide Final Order No.52537/2018 dated 18.07.2018 that the appellant was not liable to pay the amount for which the reversal was proposed vide the earlier Show Cause Notice. The amount was not the amount of duty. It has been held to be an amount of pre-deposit vide Order dated 12th January, 2016. Accordingly, I am of the opinion that section 12B has wrongly been invoked by Commissioner (Appeals). He is also observed to have failed to appreciate para 26 (ii) of Circular dated 10th March, 2017 which reads as follows:-

"26. Refund of pre-deposits:-(i) Where the appeal is decided in favour of the party/assessee, he shall be entitled to refund of the amount deposited along with the interest at the prescribed rate from the date of making the deposit to the date of refund in terms of Section 35FF of the Central Excise Act, 1944:

(ii) Pre-deposit for filing appeal is not payment of duty. Hence, refund of pre-deposit need not be subjected to the process of refund of duty under Section 11B of the Central Excise Act, 1944. Therefore, in all cases where the appellate authority has decided the matter in favour of the appellant, refund with interest should be paid to the appellant within 15 days of the receipt of the letter of the appellant seeking refund, irrespective of whether order of the appellate authority is proposed to be challenged by the Department or not."

11. The Tribunal also in the case of **National Organic Chemical Industries Ltd. Vs. Commissioner of Customs (Import) Mumbai – 400001 reported in 2021 (6) TMI 713 – CESTAT, Mumbai** has held as follows:-

"10. That pre-deposit is to be excluded from the test of 'unjust enrichment', and for obvious reasons, is common ground as is evident from Circular No. 984/8/2014-CX, dated 16th September, 2014 of Central Board of Excise & Customs stating categorically that this is not tantamount to payment of duty and that

'5.2... .. Hence, refund of pre-deposit need not be subjected to the process of refund of duty under Section 11B of the Central Excise Act, 1944 or Section 27 of the Customs Act, 1962....'

12. In view of entire above discussion, it is held that both the grounds of rejection of the refund of appellant are not sustainable. Commissioner (Appeals) has committed an error while invoking the wrong provisions and while wrongly interpreting the decision of Hon'ble Apex Court. The order accordingly, is hereby set aside. Appeal stands allowed. Appellant is held entitled for the refund of Rs.2,74,997/- alongwith the interest at the rate of 12% from the date of deposit till the date of realization. It is also directed that the refund be sanctioned in a period not later than two months from the date of receipt of this order. Appeal is allowed

[Dictated and pronounced in the open Court]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita