IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. IV

Appeal No. ST/56684-56686/2013-ST(SM)

[Arising out of Order-in-Appeal No. 52-54/S.Tax/D-II/13 dated 11.02.2013, by the Commissioner of Customs, Central Excise & Service Tax (Appeals), New Delhi].

M/s. Orient Craft Ltd. **....Applicants**

Vs.

C.C.E. & S.T. New Delhi **....Respondent**

Appearance:

Shri A.K. Jain, Representative for the Appellants
Shri S. Nunthuk, DR for the Respondent

CORAM:
Hon'ble Shri V. Padmanabhan, Member (Technical)

Date of Hearing: 18.01.2017

FINAL ORDER NO. 51924-51926/2017-ST(SM)

Per V. Padmanabhan:

These three appeals have been filed against the order in appeal dated 11.02.2013. The appellant is a manufacturer and exporter who was operating under 100% EOU scheme. They were manufacturing and exporting ready made garments and were availing the Cenvat Credit of service tax paid on input services under the Cenvat Credit Rules 2002 / 2004. The dispute pertains to the claims for refund filed by the appellant for encashing unutilized Cenvat Credit of input services used in the manufacture of the final product which was exported during the period 10.09.2004-31.03.2005. The refund claim was rejected by the original authority and the same was upheld by the impugned order. Aggrieved by these orders the present appeal has been filed.

2. With the above background, I have heard Shri A.K. Jain, General Manager of the appellant company and Shri S. Nunthuk, DR for the Respondent.

3. Shri A.K. Jain submitted that the refund has been rejected under Rule 5 of the CSR 2004. The Central Excise issued notification no. 5/2006 w.e.f. 14.03.2006, was issued in supersession of the earlier notification no. 11/2002 dated 01.03.2002 provides the machinery / procedure for grant of the refund. The earlier notification no. 11/2002 did not provide the mechanism for determining and claiming refund of Cenvat Credit on inputs when the final products are exported. When this was superseded by notification no. 5/2006, the machinery provisions for claiming refund on inputs as well as input services were provided. The refund claim for unutilized Cenvat credit of input services was rejected on the ground that the notification no. 5/2006 does not have any retrospective effect. Accordingly, for the period prior to 14.03.2006 the authorities below have held that refund under Rule 5 of the Cenat Credit Rules cannot be granted.

Shri Jain, further submitted that the notification no. 23/04-CE(NT) dated 10.09.2004 has already amended rule 5 of the Cenvat Credit Rules to provide for refund of credit not only on inputs but also input services used in the final products which are cleared for export. He further relied upon the decision of the Tribunal in the case of ***Fibres and Fabrics International Pvt. Ltd. Vs. CC Bangalore 2009 (02) LCX 0042*** in which an identical issue for identical period has been considered by the Tribunal and the refund on input services has been permitted. Accordingly, he prayed that the refund may be sanctioned in his case also for the period 10.09.2004 to 31.03.2005.

4. Ld. DR on the other hand, opposed the submissions made by him. He reiterated the findings in the impugned order and further, submitted that the notification no. 5/2006 which has been issued on 14.03.2006 cannot be presumed to be having retrospective effect. He relied upon the decisions in the case of ***Karvembu & Co. Vs. Under Secretary, Department of Revenue 2010 (20) STR 591 (Mad.) and in the case of CC Bangalore Vs. Spice Telecom 2006 (203) ELT 538 (SC)*** and submitted that as held by the Superior Judiciary, if any, notification issued subsequently does not state that it has retrospective effect, the same will be valid prospectively only. Accordingly, he submits that impugned order may be upheld.

5. The dispute pertains to the claim of refund for unutilized Cenvat Credit on input services used in the manufacture of final product which is cleared for exports. The refund claim has been made for the period 10.09.2004-31.03.2005. The notification no. 5/2006 has been issued w.e.f. 14.03.2006. This notification has provided the safeguards conditions and limitations for grant of refund of Cenvat Credit in respect of inputs as well as input services used in the manufacture of final product cleared for exports. It also has provided for refund of credit on output services which has been exported. The refund claims have been rejected by taking a view that the notification no. 5/2006 cannot be held to have

retrospective effect. Accordingly, in the absence of such a notification the lower authorities have held that refund cannot be granted.

6. The appellant's contention is that even though the notification specifying conditions and limitations have been issued only on 14.03.2006 the legal provisions for grant of such refund of input services has already been inserted in the statute vide notification no. 23/04-CE(NT) dated 10.09.2004. Accordingly, the claim of the appellant is that refund must be sanctioned. He has also relied upon the decisions of the Tribunal in the case of ***Fibres and Fabrics International Pvt. Ltd. (Supra).***

6. I have gone through the said decisions of the Tribunal. I find that the Tribunal has dealt with an identical matter of grant of refund of service tax paid on input services used in goods which are exported. While providing the sanction of such refund have been for period prior to 14.03.2006 the Tribunal held as follows:

> *"8. On a very careful consideration of the issue, we find that with effect from 10-9-2004, Rule 5 of Cenvat Credit Rules, provided for refund of Cenvat Credit on input or input service. The said rule is reproduced below:*
>
> *"Where any input service is used in the final products which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export, or used in providing output service which is exported, the Cenvat credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer or provider of output service towards payment of duty of excise on any final products cleared for home consumption or for export on payment of duty or service tax on output service and where for*

any reason such adjustment is not possible, the manufacturer or the provider of output service shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification :

Provided that no refund of credit shall be allowed if the manufacturer or provider of output service avails of drawback allowed under the Customs and Central Excise Duties Drawback Rules, 1995, or claims a rebate of duty under the Central Excise Rules, 2002, in respect of such duty."

8.1 Even though the rule allows it, at that time the relevant Notification was 11/2002. It did not provide the refund. The said notification is actually (i) prescribing safeguards and limitations issued under erstwhile Rule 5 or Cenvat Credit Rules, 2002. But, that notification was superseded by another notification 5/2006 dated 14-3-2006 providing refund of input credit also, which has been not utilized.

9. On a very careful consideration of the matter, in the present appeals, all the refund claim pertains to period prior to 14-3-2006. However, as on 10-9-2004 itself, we have already given the reproduction of Rule 5, the rule itself provides for the utilisation of the input credit and input service credit and where such input service credit or input credit cannot be utilized, then the same can be given as refund. So, there is indeed a provision. Just because the notification has not been issued at that time; we cannot deny the benefit provided in the Rule. Moreover, all the case-laws cited by the learned advocate point out that the notification dated 14-3-2006, would be applicable even to the period prior to it in view of the rule position, Rule 5 as it existed there. In these circumstances, we do not find any merit in the impugned order. Moreover, the Commissioner himself in an earlier order had taken a different view and that order has not been appealed against. The same has reached finality. In these circumstances, the impugned order has no merits, the same is set aside. We allow the appeals with consequential relief."

7. By following the cited decision of the Tribunal I set aside the impugned order and allow the appeals with consequential relief.

[Dictated and Pronounced in the open Court]

(V. Padmanabhan)
Member (Technical)

Bhanu