IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing/Decision:15/16.05.2017/
16/15.05.2017

Service Tax Appeals Nos.688 of 2010 and 959 of 2010-SM

[Arising out of Order-in-Appeal No.64(DK)ST/JPR-I/2010 dated 18.02.2010 in Appeal No.166(DK)ST/JPR-I/2010 dated 31.03.2010 in Appeal No.ST/959/2010, passed by the Commissioner of Central Excise (Appeals), Jaipur-I]

M/s.Noble Grain India Pvt. Ltd. Appellant

Vs.

CCE, Jaipur-I Respondent

Appearance

Shri S.C. Kamra/Shri N.D. Dubey, Advocate for the appellant.
Shri G.R.Singh and Shri K. Poddar, DR for the respondent.

Coram: Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order Nos.53519-53520/2017

Per B. Ravichandran:

These appeals are against orders dated 23.02.2010 and dated 31.03.2010 of Commissioner (Appeals), Jaipur. As both the appeals deal with eligibility of the appellants for refunds in terms of notification no.41/2007-ST, they are taken up together for decision. The appellants are engaged in export of soya extraction meal and were registered with the Service Tax Department. They have filed refund claims for service tax paid by them on various services availed in connection with the export of their goods; in terms of Notification No.41/2007-ST dated 6.10.2007. The Original Authority processed the claims and issued orders dated 31.12.2008 and 5.5.2009. He rejected the claims of Rs.740,382/- and Rs.2,26,141/- on various grounds. On appeals, the Commissioner (Appeals) substantially upheld the findings of the Original Authority.

2. Contesting the findings of the lower authorities, ld. Counsel for the appellants submitted that the claims were rejected without proper examination and on invalid grounds. The service tax paid on various input services are rightly claimed as refund in terms of the above notification. Ld. Counsel also relies on the various decided cases in support of his submission.

3. Ld. AR reiterated the findings of the lower authorities.

4. I have heard both the sides and perused the appeals records.

5. It is noticed that the refund claims were rejected on various grounds. These grounds are examined taking into consideration the applicable legal provisions, facts as submitted by the appellants and applicable case laws.

6. Amounts of Rs.1,03,580/- and Rs.55,837/- were rejected on the ground that the provider of service was registered with the Department as C & F Agent and as such, refunds towards service tax paid for availing CHA services are not admissible. Here, I note that the Board vide clarification dated 12.03.2009 specifically mentioned that the above mentioned notification provides for exemption by way of refund. Such refund does not require verification of the registration certificate of the provider of service. The refund should be granted, if otherwise found eligible. I find that rejection of refund on the ground mentioned by the lower authorities is not sustainable.

7. Amounts of Rs.1,67,616/- and Rs.72,601/- were rejected as no evidence was available that the said service tax was deposited by the service provider under the category of "port services" . I note that the said service tax has been paid by the appellants on Terminal Handling Charges (THC), documentation charges, etc. It is by now a well settled proposition that THC, bill of lading charges, documentation charges, etc. are covered under port services and tax paid on such services are eligible for refund under the said notification. Reference can be made to the decision of the Tribunal in **SRF Ltd. – 2015 (40) STR 980 (Tribunal-Delhi). Sun City Arts Exporters - 2016 (45) STR 411 (Tribunal-Delhi), Shivam Exporters – 2016-TIOL-376-CESTAT-Delhi** and various other decisions. Reference can also be made to the decision of the Hon'ble Gujarat High Court in the case of **AIA Engineering Pvt. Ltd. – 2014 (36) STR 1236 (Gujarat).** Considering the ratio adopted in these decisions, I find that the appellants are eligible for refund of service tax paid on terminal handling charges, documentation charges for handling of cargo inside the port before the export out of the country. The Original Authority should verify the supporting documents and sanction the amount.

8. An amount of Rs.84,558/- was rejected on the ground of limitation. It was held by the lower authorities that the claim was filed beyond 60 days from the last date of the quarter during which the goods were exported out of the country. Here, I note that as per proviso 1 (c) of notification no.41/2007-ST refund of service tax can be claimed only when the exporter has paid service tax to the service provider. The appellants submitted that for the exports during the period Jan. 2008 to March,

2008, the CHA submitted their bills only in March, 2008. The said bills were settled in May/June, 2008. As such, the refund claims have been filed within time considering the payment of service tax to the service provider. I note that one of the basic conditions, without which no claim can be filed, is payment of service tax. In other words, only because the exporter pays service tax on the specified services availed for exporting goods he is coming under the ambit of the said notification, to claim refund. The right to file claim arises upon payment of service tax. Accordingly, the period of computing limitation for preferring claim should accordingly be referred to such payment. The Tribunal in the case of **CCE Vs Pacific Leather Finishers, 2016(43) STR 273 (Tribunal- All)** held, in a similar set of facts dealing with limitation under the same notification, that the right to claim refund under notification 41 of 2007 ST crystallized when the service tax was paid by the exporter. Accordingly, the limitation should be referred to that date. The Tribunal relied on the decision of Hon’ble Delhi High Court in **Sony India Pvt. Ltd. 2014 (304) E.L.T. 660 (Delhi)**. In the said case, the Hon’ble High Court examining the limitation with reference to refund of Special Additional Duty (SAD) of customs held that such refund can be filed only upon payment of sales tax and accordingly such payment of tax only gives rise to right to claim the refund of SAD from customs authority. The said decision of the High Court was maintained by the Hon’ble Supreme Court by dismissing Special Leave Petition (SLP) filed by the Revenue **2016(337) E.L.T A 102 (SC)**. The conditions mentioned in the notification are to be read harmoniously so that they will not result in conflict with each other. As the refund will rise only on payment of service tax, the claims filed within the period of limitation calculated from such payment, should be considered as filed in time.

9. The Original Authority also rejected some part of the claims on the ground that the refund pertains to sister unit of the appellant in Akola. The appellants pleaded that the CHA, who provided services with reference to export, is common to both units. As the goods were cleared from their Kota unit, they are eligible for service tax paid on CHA services. The documents will support the linkage of payment of service tax to the clearance of export goods from their Kota unit. This may be verified by the Original Authority.

10. The Original Authority also held that the appellants failed to furnish some of the invoices for scrutiny. The appellants pleaded that they have provided copies of the invoices to the Commissioner (Appeals) along with statements giving details of invoices issued by service provider. It is the case of the appellant that they have all the supporting documents in respect of input service availed by them.

11. An amount of Rs.3,16,261/- was rejected on the ground that the said export was not made by the appellant but the same was made by Merchant Exporter, M/s. Surya Vinayak Industries Ltd. It is seen that the appellants had entered into an agreement with the said Merchant exporter and as per the arrangement, the appellants paid for CHA services and accordingly, claimed refund of service tax. The port services were actually paid by Merchant Exporter and for which, the appellants did not claim any refund. The bills raised by CHA will indicate that the service tax for the services have been paid by the appellants. I note that as long as

the appellants' goods were exported and the appellants suffered service tax on the specified services, they are entitled for refund.

12. Service tax paid on inspection and certification service and technical testing and analysis services were rejected on the ground that the appellants did not file supporting evidences in terms of the said notification. It is noted that the inspection and certification service was availed by them in terms of the written agreement, which required pre-export inspection and certification of the export cargo. The purchase contract was also submitted by the appellants. Similarly, for testing and analysis service, the bills raised by the service provider indicate that their registered office address is in Indore. They have supporting documents linking up the service tax payment with the export cargo.

13. In respect of services availed from M/s. Liladhar Passo Forwarders Pvt. Ltd. as Customs House Agent, the claim was rejected on the ground that the details required for processing claim is not available in the documents submitted by the appellants. The appellants categorically stated that the invoices issued by CHA contained a footnote with details of exporter of goods such as SB, gross quantity, net quantity, port of shipment , B.L. date, date of proforma invoice, etc. Since it is a bulk cargo, the actual quantity will be known only after loading of cargo in the ship. The appellants submitted that all documents can be linked to the service tax payment and export cargo. In certain cases, Kandla Port Trust raised invoices in the name of CHA. However, the appellants have supporting evidence to indicate that the charges paid by CHA are with reference to their export cargo only. Similarly, in respect of the services provided by Shakti Clearing Agency, the

appellants submitted that the good were cleared from Kota Plant for export through Kandla Port. The CHA issued invoices in the name of appellants' Mumbai office. The documents can be linked to export made by the appellants.

14. Considering the detailed submissions made by the appellants and as examined by me, in respect of various grounds of rejection, I note that the Original Authority has not examined the claims in right perspective before rejecting them. I find it fit and proper to set aside the impugned orders and to remand the matter back to the Original Authority to decide the claims of the appellants afresh in line with the observations recorded above. The appeals are allowed by way of remand.

[Order dictated & pronounced in open court]

(B. Ravichandran)
Member (Technical)

Ckp.