IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

S.T.Appeal No.75397/18

Arising out of O/A No.195/S.Tax I/Kol/2017 dated 25.08.2017 passed by Commr. of CGST & Central Excise (Appeals I), Kolkata

M/s Vikram Solar Pvt. Ltd.

...APPELLANT(S)

VERSUS

Commr. of CGST & Central Excise, Kolkata North

RESPONDENT (S)

APPEARANCE

Shri Bhaskar Thakkar, C.A. for the Appellant (s)
Shri H.S.Abedin, Asstt. Commr. (A.R.) for the Revenue

CORAM:

SHRI P. K. CHOUDHARY, HON'BLE JUDICIAL MEMBER

DATE OF HEARING : 20.02.2019
DATE OF PRONOUNCEMENT : 09.05.2019

FINAL ORDER NO.75500/2019

Per Shri P. K. Choudhary :

The present appeal is filed by the appellant against the Order-in-Appeal No.195/S.Tax I/Kol/2017 dated 25.08.2017.

2. The brief facts of the case are that the appellant, *inter-alia*, is engaged in the manufacture of Solar Photovoltaic Modules classifiable under Chapter 85 of the First Schedule to the Central Excise Tariff Act, 1985 and rendering services of erection, commissioning, installation and works contract services. The appellant availed specified services used in relation to the authorized operations of the SEZ Unit. Since services availed by the SEZ Unit are eligible for refund in terms of Notification No.12/2013-ST dated 01.07.2013, the appellant filed

refund claim for the period 01.07.2014 to 30.09.2014. The dispute is whether the refund claims are to be filed within one year from the date of payment or from the end of the quarter, for which payments were received. In terms of Clause 3 (iii)(f) of Notification No.12/2013-ST dated 01.07.2013, the SEZ shall submit only one claim of refund under this Notification for every quarter. It is the case of the appellant that there is lack of clarity on the overlapping period and they have interpreted the said condition as one year from the end of the quarter and have made an application accordingly. The Adjudicating Authority sanctioned refund of Rs.2,97,179//- and rejected the balance amount as not eligible for refund. On appeal, the ld.Commissioner (Appeals) upheld the adjudication order and rejected the appeal. Hence the present appeal before the Tribunal.

3. The ld.Counsel appearing on behalf of the appellant submits that the substantial requirement of the Notification for grant of refund is receipt of services by the SEZ Unit on payment of service tax. He also submits that as long as this requirement is met, other procedural deviations can be condoned as the procedure has been stated only to facilitate verification of substantive requirement . It is not in dispute that the services, which have been received by SEZ Unit for authorized operations and service tax has been paid thereon. The ld.Counsel further submits that Clause 3 (e) of Notification No.12/2013-ST dated 01.07.2013, provides that the Assistant Commissioner or the Deputy Commissioner of Central Excise, shall permit the appellant to file the

application even beyond the period of limitation. Accordingly, the delay in filing of the refund claim, if any, should be considered by the authorities below. The ld.Counsel, however, submits that the Appellant Company has only one work and/or factory at the relevant period, which is located at Special Economic Zone, Sector 2, Falta, 24 Parganas (South), West Bengal-743504 and the Company has its registered office at Tobacco House, 4th Floor, 1 Old Court House Corner, Kolkata-700001. He further submits that the Refund Sanctioning Authority was unjustified in reducing the refund claim by deducting the proportionate amount of input tax credit attributable to goods sold to DTA market, which was never claimed by them as refund. Accordingly, the amount of refund claimed, pertains only to the SEZ Unit for authorized and common operations and there is no question of distribution in terms of Rule 7 of Cenvat Credit Rules, 2004 as has been held by the Refund Sanctioning Authority.

4. The ld.D.R. for the Revenue reiterates the order of the lower authorities.

5. I have heard both sides extensively and perused the appeal records.

6.1 I find that in the present case, the refund application relates to the period July, 2014 to September, 2014. The refund application was filed by the Appellant on 30.09.2015. The Ld. Counsel of the Appellant had relied on Para 3(III)(e) of the Notification No. 12/2013-ST dated 01.07.2013, which provides that a refund application shall be filed within one year from the end of the month in which actual payment of service tax was made by a SEZ unit to the registered service provide. Moreover, sub clause(f) of the Para 3(III) of the impugned provides that a SEZ unit is required to submit only one claim of refund for every quarter.

6.2 I also find that the refund application had been submitted within one year from the end of the quarter and not within one year from the end of the month as stipulated. It is observed that while Clause (f) of Paragraph III of the said Notification requires Appellant to file one application for every quarter at the same time Clause (e) of Paragraph III of the said Notification requires application to be filed within one year from the date of payment to the service provider. The provisions seem to be overlapping in nature for example, if a SEZ unit pays service tax to service provider in the month of July, 2014, the corresponding refund application has to be filed within July, 2015. In such scenario, the provisions of filing a single refund application for every quarter gets diluted. Thus, the situation desires and/or demands a SEZ unit to technically file refund application, which does not seem to be the intention of legislature, which categorically provides time limit of one year.

6.3 In order to deal with such scenario inter alia involving refund of overlapping period, Clause (e) of Paragraph III of the said Notification empowers the Assistant Commissioner/Deputy Commissioner to permit extended period of time for filling refund application.

6.4 It has been observed that the lower authority has not considered the extended period of time particularly in lieu of overlapping provisions arising out of conjoint reading of Clause (e) & (f) of Paragraph III of the said Notification and disallowed the refund application on the ground of time barred, which is against the principal of natural justice. Moreover, there is no finding in the order of Adjudicating Authority or Appellate Authority that the service tax has not been paid to the service provider. The legislature requires no service tax to be charged to a SEZ unit and hence procedural provisions needs to be interpreted considering spirit and intensions of the legislature.

6.5 In the light of overlapping in the impugned Notification, I am of the view that the adjudicating authority has not considered such technical and practical aspects, nor is there a finding in this regard. Accordingly, as the refund application has been filed within the end of the quarter from one year, such delay should be condoned and consequential refund allowed.

6.6 In respect of methodology adopted by the Appellant in claiming refund of service tax in respect of common input services, it is the argument of the Appellant's Counsel that they have taken refund of service tax only in respect of SEZ units including it's DTA sale, which forms part of the authorized operation. Whereas the adjudicating authority and the Appellate authorities have considered only service tax paid proportionate to the turnover of physical export made from SEZ and did not consider turnover of DTA sale in terms of Clause (a) of Paragraph III of the said Notification.

6.7 The lower authority in his Order-in-Original considered total turn over to the tune of Rs. 3,97,67,03,391/- as denominator and only physical export from SEZ to the tune of Rs. 1,43,16,85,269/- as numerator. As per the Appellant's contention the numerator should also comprise of DTA sale, being part of authorized operation to the tune of Rs. 2,54,50,18,122/-. Thus, the question of dispute is whether DTA sales made from SEZ unit shall form part of turnover of SEZ unit for the purpose of calculating proportionate amount of refund attributable to common input services as per provisions of Clause (a) of Paragraph III of the Notification Number 12/2013-ST dated 01.07.2013.

6.8 Notification Number 12/2013-ST dated 01.07.2013, is a governing notification providing exemption of service tax by way of refund to SEZ units and developer of SEZ. Preamble of the said notification categorically allows exemption by way of refund of service tax on services received by a unit located in special economic zone (SEZ unit and/or a developer of SEZ and used for the authorized operation. Accordingly, there are two specific conditions which need to be fulfilled in order to claim such exemption by way of refund.

- Firstly, the unit located in SEZ or SEZ developer shall receive services on which service tax is levied and paid.
- Secondly, such services should be used for Authorized operation.

Further, vide Notification Number 7/2014-ST dated 11.07.2014 an explanation has been added to Clause(e) of Paragraph III of the said Notification, which provides that a service shall be treated as used exclusively for the authorized operation, if the service is received by the SEZ unit under an invoice in the name of such unit and the service is used only for furtherance of authorized operation of SEZ.

6.9 In the instant case, the Appellant had paid service tax of Rs. 8.82.495/- to the service providers **raising invoices with the address of SEZ unit.** Thus, in terms of explanation to Clause (e) of Paragraph III of the said Notification amended vide Notification Number 7/2014-ST dated 11.07.2014, the refund of service tax to the extent of said amount is **exclusively for SEZ unit** and used for authorized operation in SEZ. There is no dispute on this count from the end of Respondent. Summary of refund claimed during the second quarter is as follows :

TABLE-A

Particulars	**Note**	**Amount (Rs.)**
Credit exclusively used for Authorized operations in SEZ Unit	A	8,82,495/-
Common Credit used for Authorized operations proportionate between sales of SEZ Unit and Administration office	B	8,44,349/-
Total Refund claimed for the Quarter	**C = A +B**	**17,26,844/-**

6.10 Service Tax on services bearing address of head office to the tune of Rs. 8,44,349/-, being common input service invoiced to Head Office is point of contention of the revenue. These common services are received by the company as a whole and cannot be earmarked to a specific location and/or unit as these are common in nature. In order to deal with such situation of proportionate refund of common services, provisions have been specified in Paragraph III of the said Notification, which provides that:

> *"the refund of service tax on (i) the specified services that are **not exclusively** used for authorized operation, or (ii) the specified services for which ab-initio exemption is admissible but not claimed, shall be allowed subject to the following procedure and conditions".*

Thus, services which are common in nature **not exclusively** used for authorized operation have to be dealt in a manner prescribed. Clause (a) of Paragraph III of the said Notification provides that the service tax paid on specified services that are common to the authorized operation in an SEZ and the operation is domestic Tariff Area (DTA units) shall be distributed amongst the SEZ unit and DTA units in the manner as prescribed in Rule 7 of Cenvat Credit Rules. Moreover, it further provides that for the purpose of distribution, the turnover of the SEZ unit shall be taken as the turnover of authorized operation during the relevant period. Summary of the annual turnover of the Company for the Financial Year, 2014-2015 is as follows :

TABLE - B

Particulars	**Note**	**Amount (Rs.)**
Total Trading Sales	A	2,12,10,28,656/-
Total Turnover from Authorized operations (Export from SEZ)	B	1,43,16,85,269/-
Total Turnover from Authorized operations (DTA sales from SEZ)	C	2,54,50,18,122/-
Total Turnover from Authorized operations	**D=B+C**	3,97,67,03,391/-
Total Turnover from Sale of Services	E	9,63,78,901/-
Total Turnover	**F=A+D+E**	6,19,41,10,948/-

6.11 In the instant case, it is the argument of the Appellant's Counsel that they do not have any DTA units, however, they do have DTA operations wherein they are providing erection and commissioning service. Moreover, DTA sale undertaken by them forms part of authorized operation, in terms of provisions of SEZ Act.

6.12 As per Section 2(C) of the Special Economic Zone Act, 2005, the term authorized operation has been defined to mean operations which may be authorized under Sec-section (2) of Section 4 and sub-section (9) of Section 15 of the said Act. Further, on cogent reading of these provisions, authorized operation means operations which a development Commissioner authorized under Letter of Intent issued to a SEZ unit. Sale to a DTA unit from SEZ unit to carry out authorized operation.

6.13 In the light of the said governing principals arising from SEZ Act, 2005 and rules made thereunder, Notification No. 12/2013-ST dated 01.07.2013 has been introduced. The preamble of the said Notification categorically and specifically allows service tax refund used for authorized operation. Further, service tax invoice bearing SEZ unit address has been deemed as used exclusively for SEZ and irrespective of its usage and accordingly, full and complete refund of service tax have been specified. For service tax invoices bearing different address than that of SEZ unit, being non exclusive in nature, refund on proportionate basis calculated in terms of Rule 7 of CCR has been provided. Summary of reversal during the 2nd Quarter is as follows :

TABLE - C

Particulars	**Note**	**Amount (Rs.)**
Turnover of Trading sales in 2nd Quarter	G	1,52,62,550/-
Total Turnover for 2nd Quarter	H	70,95,17,991/-
Total Service Tax for 2nd Quarter	I	9,41,175/-*
Reversal of service tax pertaining to Trading Turnover for Q2	**J=I*G/H**	**96,826/-**
Proportionate Credit for Authorized Operations claimed as refund	**K=I-J**	**8,,44,349/-**

*Aggregate common credit for the quarter July, 2014 to September, 2014

6.14 In the light of the above discussions, turnover of DTA sale shall be considered as part of authorized operation and forms an integral part of turnover of SEZ unit for the purpose of calculating proportionate refund of service tax used for the authorized operation. Thus, the lower authority has wrongly considered DTA sale from SEZ unit as part of DTA operation for the purpose of calculating proportionate service tax refund on common input services.

6.15 In the instant case, the appellant had claimed refund of Rs. 8,44,349/- out of total common input services tax of Rs. 9,41,175/- for the Quarter ended 30th September, 2014, based on total turnover of the company and turnover of SEZ unit. The proportion carried out by the Appellant is in consonance to the provisions of Rule 7 of the CCR.

6.16 As the Appellant had already made proportionate amount as per the provisions of Rule 7 of Cenvat Credit Rules , 2004 and thereafter, claimed refund of applicable portion, it transpires that the Appellant had not claimed refund of service tax paid in proportionate to the DTA operation and hence it is as per the Clause (a) of Paragraph III of the said Notification.

7. I also observe that the present dispute has been settled by the judgement of the Hon'ble Supreme Court in Civil Appeal No.3327 of 2007 in the case of Commissioner of Customs (Import), Mumbai Vs. Dilip Kumar and Company and Others reported in 2018 TIOL 302 SC-CUS-CB. The relevant observations of the said judgement are reproduced below :

> "**38**. We will now consider another Constitution Bench decision in *Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal, (2011) 1 SCC 236* **=** ***2010-TIOL-95-SC-CX-CB*** [hereinafter referred as 'Hari Chand Case' for brevity]. We need not refer to the facts of the case which gave rise to the

questions for consideration before the Constitutional Bench. K.S. Radhakrishnan, J., who wrote the unanimous opinion for the Constitution Bench, framed the question, viz., whether manufacturer of a specified final product falling under Schedule to the Central Excise Tariff Act, 1985 is eligible to get the benefit of exemption of remission of excise duty on specified intermediate goods as per the Central Government Notification dated 11.08.1994, if captively consumed for the manufacture of final product on the ground that the records kept by it at the recipient end would indicate its "intended use" and "substantial compliance" with procedure set out in Chapter 10 of the Central Excise Rules, 1994, for consideration? The Constitution Bench answering the said question concluded that a manufacturer qualified to seek exemption was required to comply with the preconditions for claiming exemption and therefore is not exempt or absolved from following the statutory requirements as contained in the Rules. The Constitution Bench then considered and reiterated the settled principles qua the test of construction of exemption clause, the mandatory requirements to be complied with and the distinction between the eligibility criteria with reference to the conditions which need to be strictly complied with and the conditions which need to be substantially complied with. The Constitution Bench followed the ratio in Hansraj Gordhandas Case (supra), to reiterate the law on the aspect of interpretation of exemption clause in para 29 as follows-

"The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute

and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, thought at times, some latitude can be shown, if there is failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption."

39. The Constitution Bench then considered the doctrine of substantial compliance and "intended use". The relevant portions of the observations in paras 31 to 34 are in the following terms -

"31. Of course, some of the provisions of an exemption notification may be directory in nature and some are mandatory in nature. A distinction between the provisions of a statute which are of substantive character and were built in with certain specific objectives of policy, on the one hand, and those which are merely procedural and technical in there nature, on the other, must be kept clearly distinguished...

Doctrine of substantial compliance and "intended use"

32. The doctrine of substantial compliance is a judicial invention, equitable in nature, designed to avoid hardship in cases where a party does all that can reasonably be expected of it, but failed or faulted in some minor or inconsequent aspects which cannot be described as the "essence" or the "substance" of the requirements. Like the concept of "reasonableness", the acceptance or otherwise of a plea of "substantial compliance" depends upon the facts and circumstances of each case and the purpose and object to be achieved and the context of the prerequisites which are essential to achieve the object and purpose of the rule or the regulation. Such a defence cannot be pleased if a clear statutory prerequisite which effectuates the *object and the purpose of the statute has not been met. Certainly, it means that the Court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was enacted and not a mirror image type of strict compliance. Substantial compliance means "actual compliance in respect to the substance essential to every reasonable objective of the statute" and the Court should determine whether the statute has been followed sufficiently so as to carry out the intent of the statute and accomplish the reasonable objectives for which it was passed.*

33. A fiscal statute generally seeks to preserve the need to comply strictly with regulatory requirements that are important, especially when a party seeks the benefits of an exemption clause that are important. Substantial compliance with an enactment is insisted, where mandatory and directory requirements are lumped together, for in such a case, if mandatory requirements are complied with, it will be proper to say that the enactment has been substantially complied with notwithstanding the non-compliance of directory requirements. In cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty. The doctrine of substantial compliance seeks to preserve the need to comply strictly with the conditions or requirements that are important to invoke a tax or duty exemption and to forgive non-compliance for either unimportant and tangential requirements or requirements that are so confusingly or incorrectly written that an earnest effort at compliance should be accepted.

34. The test for determining the applicability of the substantial compliance doctrine has been the subject of a myriad of cases and quite often, the critical question to be examined is whether *the requirements relate to the "substance" or "essence" of the statute, if so, strict adherence to those requirements is a precondition to give effect to that doctrine. On the other hand, if the requirements are procedural or directory in that they are not of the "essence" of the thing to be done but are given with a view to the orderly conduct of business, they may be fulfilled by substantial, if not strict compliance. In other words, a mere attempted compliance may not be sufficient, but actual compliance with those factors which are considered as essential."*

8. By respectfully following the ratio as laid down by the Hon'ble Supreme Court, the impugned orders are set aside. The appeal filed by the appellant is allowed with consequential benefit.

(Pronounced in the open Court on 09.05.2019)

Sd/

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

mm