IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI

APPEAL NO. ST/86391/2018

(Arising out of Order-in-Appeal No. NA/GST A-III/MUM/310-312/17-18 dated 27.12.2017 passed by the Commissioner of GST & CX (Appeals-III), Mumbai.)

M/s Aircheck India Pvt. Ltd. Appellant

Vs.

CCGST, Mumbai West Respondent

Appearance:

Shri Makarand Joshi, Advocate for Appellant
Shri O.M. Shivdikar, Assistant Commissioner (AR) for Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 23.08.2018
Date of Decision: 14.02.2019

ORDER NO. **A/85292 / 2019**

Refusal to grant rebate on the whole of duty paid on excisable inputs and taxable input services for providing export of services to the appellant by the Commissioner (Appeals) is assailed in this forum by the appellant.

2. Appellant's case, in brief, is that it had submitted a refund claim before the Dy. Commissioner of Service Tax, Division IV, Mumbai-II for refund of accumulated CENVAT credit due to export of

service as per Rule 6A of Service Tax Rules, 1994 but the same was proposed to be rejected through a show-cause notice for non-submission of declaration as required under Notification No. 39/2012-ST dated 20.06.2012. Appellant's contention that the said Notification No. 39/2012-ST being beneficial legislation that encourages export of services and not an exemption notification, which is required to be followed strictly was unacceptable to the respondent-department for which appellant get no relief in the adjudication process and also from the Commissioner (Appeals) where it had challenged the adjudication order of refusal of refund and hence the appeal.

3. In the memo of appeal and during the course of hearing of appeal, the learned Counsel for the appellant Shri Makarand Joshi, in placing reliance on the case laws reported in 2010-TIOL-1307-CESTAT-AHM, 2013-TIOL-2480-CESTAT-AHM as well as other decisions, submitted that non-observance of procedural condition in the case is of technical nature and cannot be used to deny substantive concession. Referring to Notification No. 39/2012-ST, he also pointed out that Rule 2 provides for conditions and limitations for export of services and Rule 3 prescribes the procedure. The appellant could follow Rule 2 during the export of services, observance of Rule 3(1) in filing of declaration concerning description, quantity, value, rate of duty etc. of the inputs as well as inputs services actually required to be used in providing taxable service was almost impossible for the appellant to follow as it was engaged in data

monitoring service that involved capturing the radio, television, cable and newspaper data received online from foreign clients and processing the same in terms of identifying variable before making the same fit for export and the market for such monitoring of radio, television, cable stations is fluid for which it was almost impossible for the appellant to credit the number of units that could be processed and exported in any given month. He also asserted that by its reply dated 29.01.2014 made in response to the show-cause notice, appellant had made its stand clear to the Adjudicating Authority and during personal hearing before the Adjudicating Authority as well as Commissioner (Appeals) but those were disregarded by the Commissioner (Appeals). Learned Counsel for the appellant further submitted that the learned Commissioner (Appeals) had travelled beyond the scope of show-cause notice in holding that refund claim was time bar, despite the fact that date of remittance received in the foreign exchange and not the date of payment of export is to be taken as relevant date for the purpose of refund, which he also claimed to have not covered under the notification for which he pleaded to set aside the order passed by the Commissioner (Appeals).

4. Learned Authorised Representative for the department, in response to such submissions, has supported the reasoning and rationality found in the order of the Commissioner (Appeals) in stating that not only this refund claim but successive refund claims were also rejected by the Commissioner (Appeals) on some other grounds including the ground that refund claim was made for another period

i.e. from October, 2013 to March, 2014 but CENVAT credit for a different period was availed by the appellant which also violates conditions and limitations prescribed in the said Notification No. 39/2012-ST. He further argued that limitations of one year being statutory stipulation for claiming refund, reference to it in the adjudication order cannot be considered to have been beyond the scope of show-cause, since the respondent-department cannot go against the prescribed rule for which interference in the order of the Commissioner (Appeals) is uncalled for.

5. Heard from both sides at length, perused the case record, relied upon judgments, written note of submission made by the appellant alone. Appellant is an exporter of services as per Export of Service Rules, 2005 read with Rule 6A of Service Tax Rules, 1994. Export of service is entitled to get rebate of Service Tax or duty paid on input services or inputs. Vide Notification No. 39/2012-ST the Central Government directed that exporter of services shall be granted rebate of whole of the duty paid on excisable inputs or whole of Service Tax and cess paid on all taxable input services. The conditions and limitations are enumerated in para 2 and the procedure including presentation of claim for rebate is given in para 3. As found from the show-cause notice, appellant had made presented its claim in conformity to such procedure along with submission of documents, but it had not made a pre-declaration before the jurisdictional authority prior to the date of export, which appellant claims virtually to be imposable considering the nature of services provided by it i.e.

data analysis, category of which is referred in the preceding paragraph. Para 3.4 of the said notification under sub-para (b) indicates that the jurisdictional authority, **having regard to the declaration**, if satisfied that the claim is in order, shall sanction the rebate either in whole or in part but it is quite confusing if the same notification indicates the filing of declaration before export or declaration under 3.4(a)(c) that such taxable services has been exported in terms of rule 3 of the said rules, along with documents evidencing such export! Further there is no stipulation in the notification that if the declaration prior to export is not made, then the same cannot be made in a future date or that departmental authority cannot call for the same in a subsequent day. Primary reason for grant of such rebate to the exporter is to encourage them for generation of foreign exchange for the country, where procedural requirement which is the handmade justice delivery, should not act as a stumbling block when such an irregularity of procedure is remediable. The decided case laws placed by the appellant support these observations.

6. The other ground of rejection found in the Commissioner (Appeals) is that the claim was time barred as the period under dispute is between July, 2012 to September, 2012 while rebate claim was filed on 16.09.2013. In respect of export of service as has been held by the CESTAT Larger Bench, Bangalore in the case of *Commissioner of Central Excise & Service Tax Vs. Span Infotech India Pvt. Ltd.* reported in *2018-TIOL-516-CESTAT-BANG-LB* export of

service is completed only on receipt of the consideration in foreign exchange and therefore the date in Foreign Inward Remittance Certificate (FIRC) is relevant. Appellant's claim in his appeal memo that foreign exchange remittance for the period from July, 2012 to September, 2012 was received on 19.07.2012 and the date of filing of rebate claim was 16.09.2013, as found from the order of the Commissioner (Appeals). This being so, the refund claim having been filed on 16.09.2013 is within the period of limitation. Otherwise also, in view of the decision reported in 2016 (46) STR 858 (Tri.-Mumbai) in the case of Oceans Connect India Pvt. Ltd. Vs. Commissioner of Central Excise, Pune-III, in which Rule 5 and Section 11B were being analysed, refund filed on or after the last date of quarter, since to be filed on quarterly basis, is to be taken within the period of one year, since under Section 11B it cannot start on any date before the end of the quarter, the same has to be reckoned from next date when quarter ends. Therefore, without going into the intricacy of the issue as to if period of limitation can be invoked, if not cited in the show-cause as a ground for rejection of refund, there is no hesitation to hold a finding that appellant's refund claim was filed within the stipulated time. Hence the Order.

ORDER

7. The appeal is allowed and the order of the Commissioner of GST & CX (Appeals-III), Mumbai in Order-in-Appeal No. NA/GST A-III/MUM/310-312/17-18 dated 27.12.2017 refusing refund claim of appellant for Rs. 4,78,969/- is here by set aside. Appellant is entitled to get the refund upon submission of such declaration for the

disputed period and the respondent-department is duty bound to grant the necessary refund along with applicable interest within a period of three months from the date of receipt of this order.

(Pronounced in court on 14.02.2019)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad