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

APPEAL NO. ST/87564 & 87570/2018

(Arising out of Order-in-Appeal No. SK/GST (Audit-II)/Mum/39 & 40/Appeals Raigad/2018 dated 09.03.2018 passed by the Commissioner of CGST & CX (Audit-II), Mumbai.)

M/s Hettich Competence Services Pvt. Ltd. Appellant

Vs.

Commissioner of CGST, Belapur Respondent

Appearance:

Shri Rajiv Lutha, C.A. for Appellant
Shri Sudhir B. Mane, Assistant Commissioner (AR) for Respondent

CORAM:

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

Date of Hearing: 29.10.2018
Date of Decision: 20.03.2019

ORDER NO. A/85552-85553/2019

Order of Commissioner (Appeals) rejecting refund of unutilised CENVAT credit on the ground that Section 109 of Finance Act, 2013 provided that amount paid under Voluntary Compliance Encouragement Scheme (VCES), shall not be refunded under any circumstances, is being assailed by the assessee-appellant.

2. Factual backdrop of this case is that appellant has been engaged in rendering back office and support services such as IT and ITES support, programming and administration, data processing, HR management etc. to it's various clients located outside India. It had declared certain tax dues under VCES, 2013 and availed CENVAT credit which remained unutilised as services rendered were all exported. It sought for refund of such credit for the period from October, 2013 to December, 2013 & January, 2014 to March, 2014 for Rs.5,40,671/- & Rs. 5,16,919/- respectively. Both the refund claims were rejected vide two Orders-in-Original and Order-in-Appeal against which two separate appeals, as above, are preferred against the order of Commissioner (Appeals).

3. In the memo of appeal and during the course of hearing of the appeal, learned Counsel for the appellant Shri Rajiv Lutha, C.A. submitted that Section 109 states that any amount paid in pursuance of such declaration shall not be refundable under any circumstances was erroneously understood by the adjudicating authority and Commissioner (Appeals) as non-entitlement of CENVAT credit and non-extension of refund provision under the CENVAT Credit Rules, 2004 despite the fact that Board vide its clarificatory Circular No. 170/5/2013-ST dated 8.08.2013 had allowed admissibility of CENVAT credits except that payment of tax dues under the scheme could not be made from CENVAT credit and had to be paid in cash. In citing case laws reported in *2017 (3) TMI 864 – CESTAT, Hyderabad* and *2016 (7) TMI 91* of the same CESTAT, Hyderabad, as well as

referring to CESTAT's order reported in *2017 (7) TMI 412 CESTAT, Mumbai* coupled with Master Circular on show-cause notice dated 10.03.2017 issued by the department of Revenue, he argued that such rejection of refund should not have been made without following principles of natural justice in issuing show-cause notice to the appellant, for which order of the Commissioner (Appeals) is required to be set aside.

4. Learned Authorised Representative for the respondent-department, supported the reasoning and rationality of the order passed by the Commissioner (Appeals) and drawn attention of this Bench to the observation made by the Commissioner (Appeals) in para 7.4 of his order, where he categorically stated that Section 109 has overriding effect over Rule 5 of CENVAT Credit Rules, 2004 and clarificatory CBEC Circular dated 08.08.2013 cannot come to the rescue of the appellant, for which interference in the order of Commissioner (Appeals) by the Tribunal is uncalled for.

5. Heard from both sides at length and perused the appeal record, provision of law as well as clarificatory circular. A conjoint reading of Section 107 and 109 of Finance Act relating to Service Tax payment under VCES, 2013 would clearly reveal that if any amount paid in pursuance of such declaration made under Section 107, the same shall not be refundable under any circumstances which would indicate that if any amount is paid in excess during such voluntary disclose, the same would not be refunded and it has never debarred

the assessee from claiming refund if it is otherwise entitled to. Had it been such, then the opening sentence of Section 109 would not have been "any amount paid in pursuance of a declaration made under sub-section (1)" since sub-section (1) says about the person making <u>declaration</u> to the designated authority on or before 31.12.2013, obviously about his tax dues as defined in Section 105 sub-clause (e). To avoid such confusion regarding availment of CENVAT credit, CBEC Circular dated 08.08.2013 acts as an aid. At Sr. No. 17 & 18 of the said Circular, it has been clearly mentioned that admissibility of CENVAT credit on inputs and input services used for provision of output services in respect of which declaration has been made shall continue to be governed by the provision of CENVAT Credit Rules, 2004. When CENVAT credit is admissible, the same can either be utilised by way of adjustment of future tax dues or taken back if remained unutilised for a specific period. Therefore, except that payment of tax dues under VCES cannot be made through CENVAT credit available to the assessee, rest of CENVAT Credit Rules, 2004 is applicable, even though duty liability is discharged through voluntary disclosure scheme. Therefore, the order of the Commissioner (Appeals) rejecting refund of unutilised CENVAT credit to the appellant, that to without providing it an opportunity of being heard, is an erroneous order and the same is required to be set aside. Hence the order.

6. Both the appeals are allowed and the order passed by the Commissioner of CGST & CX (Audit-II), Mumbai vide order dated

09.03.2018 is hereby set aside. Appellant is entitled to get the refund of Rs. 5,40,671/- & Rs. 5,16,919/- as unutilised CENVAT credit accrued to it on payment of tax dues under VCES. The same be refunded with applicable interest by the respondent within three months of communication of this order.

(Pronounced in court on 20.03.2019)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad