CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO.405

Service Tax Appeal No. 88134 of 2018

(Arising out of Order-in-Appeal No. MUM-DGPM-WRU/APP-139 & 140/2017-18 dated 23/04/2018 passed by the Principal Additional Director General, DGPM, Customs Central Tax, WRU, Mumbai)

M/s Zycus Infotech Pvt. Ltd. ....Appellant
Plot No. GJ-07, SEEPZ, SEEPZ
SEZ, Andheri (East)
Mumbai, Maharashtra-400 096

VERSUS

C.S.T.-SERVICE TAX-I ....Respondent
MUMBAI
14th Floor Air India Building, Nariman Point,
115...M.K. RD...OPP. Churchgate Stadium,
Mumbai, Maharashtra 400 021

APPERANCE:

Shri Sachin Chitnis, Advocate for the Appellant
Shri Saikrishna Hatangadi, Asst. Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO. A/86284 / 2019

Date of Hearing: 25.04.2019
Date of Decision: 19/07/2019

PER: AJAY SHARMA

This Appeal has been filed assailing the order dated 23/04/2018 passed by the Principal Additional Director General, DGPM, Customs Central Tax, WRU, Mumbai in Order-in-Appeal No. MUM-DGPM-WRU/APP-139 & 140/2017-18.

2. The issue to be decided is whether the appellant is entitled for the refund claimed by them on the specified services used in relation to the authorised operations in the Special Economic Zone under notification No. 17/2011-ST dated 1.3.2011 which has been rejected only on the basis that CST/VAT has also been charged by the supplier and therefore it is the sale of goods and not service?

3. The Appellants are engaged in the business of *software development* and rendering *information and technologies software services* carrying out the operations from the Special Economic Zone (SEZ). For the period 1.1.2012 to 31.3.2012, the Appellant filed refund claim of the amount of Rs. 4,24,192/- on 27.12.2012 under Notification No.17/2011-ST, dt. 1.3.2011, for Service Tax paid on the specified services used in relation to the authorised operations in the SEZ. On examination of the refund claim, the refund claim for the amount of Rs. 2,00,376/- was rejected. Out of this rejection, the major portion i.e. Rs.1,51,348/- pertains to availing of ITC by the Appellant in respect of software on the ground that the supplier has charged CST/VAT also alongwith the Service Tax. Accordingly a show cause notice dated 23.10.2013 was issued to the Appellants for rejection of refund claim for the amount of Rs.2,00,376/- and the same was adjudicated by the Assistant Commissioner, Refunds, Mumbai by which the rejection was upheld vide Order-in-Original dated 6.12.2013. The same was upheld by the learned Commissioner vide impugned order dated 23.4.2018.

4. According to Appellants, out of the said rejection they had accepted disallowance of refund of Rs.49,028/- towards the input

services which were not approved by the SEZ authorities and are now concerned with the rejection of the amount of Rs.1,51,348/- only which was rejected on the ground that the Appellant had availed ITC in respect of software which is classified as goods.

5. The learned counsel for the Appellant submits that the Appellants have used ‘Information technology Software Service’ which is specified as taxable services u/s. 65 (105) of Finance Act, 1994, chargeable to tax u/s. 66 ibid and used the same for authorised operations in SEZ, therefore they have complied with the conditions specified in the aforesaid notification. He further submits that the learned commissioner erred in rejecting the claim only on the ground that in the invoice CST/VAT has been charged. According to him u/s. 65(105)(zzzze) it is nowhere mentioned that when VAT or CST has been charged in an invoice, the transaction amounts to sale of goods and therefore Service Tax cannot be charged on it. He also submits that as the amount of service tax is charged by the service provider and paid by the appellant therefore the appellant is entitle to get the refund of the said amount irrespective of whether CST/VAT is charged or not. Per contra learned Authorised Representative appearing for the Revenue reiterated the findings recorded in the impugned order and prayed for dismissal of the Appeal.

6. I have heard learned counsel for the Appellant and learned Authorised Representative for the Revenue and perused the records of the case including the synopsis filed by the learned counsel. Since the disallowance of the amount of Rs. 49028/- has been accepted by

the learned Counsel, therefore I will confine this order only to the disallowance of Rs. 1,51,348/-. It is not disputed that the refund claim of Rs.1,51,348/- has been rejected only on the ground that the invoices shows that the supplier charged 5% CST which, according to the department, is applicable only in case of goods and not service. Both the authorities below failed to notice that in the invoices both CST as well as Service Tax has been charged by the supplier. While going through the impugned order I find that the abovementioned submissions were raised by the Appellant before the 1st Appellate Authority also and is recorded in paragraphs 3 and 6 respectively of the impugned order, but those were not dealt with by the said authority while passing the impugned order. In the impugned order after extracting the findings recorded by the Adjudicating Authority, the 1st Appellate authority simply agreed with the findings of the lower authority without discussing or giving any findings on any of the submissions raised by the Appellant before the 1st Appellate Authority. I have also seen the invoice in question which has been filed by the appellant alongwith the Appeal Memo and it is not disputed that the service tax of the amount of Rs. Rs.1,51,348/- has also been charged by the supplier. It is true that if the supplier has charged service tax and the assessee has paid the same, they the assessee is eligible for the Cenvat Credit. But this important aspect has also not been dealt with in the impugned order although as per the learned Counsel the Invoice was produced before the 1st Appellate Authority. Be that as it may, in my view the impugned order is a non-speaking order. Therefore without going into the merits of the contentions raised herein, I am setting aside the impugned order only to the extent of rejection of the amount of Rs.1,51,348/- and remanding the matter back to the 1st Appellate Authority with a direction to decide the Appeal after following principles of natural justice and also after dealing with all the contentions raised by the Appellant.

7. The Appeal is therefore allowed by way of remand.

(Order pronounced in the open Court on 19/07/2019)

(Ajay Sharma)
Member (Judicial)

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