CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Service Tax Appeal No. 85110 of 2020

(Arising out of Order-in-Appeal No. NA/CGST/A-I/MUM/156/2019-20 dated 30.08.2019/27.10.2019 passed by Commissioner of GST & Central Excise (Appeals), Mumbai-I)

M/s. Karanja Terminal & Logistics P Ltd **Appellant**
3rd floor, 13/14, Khetan Bhavan,
Flat No.198, Jamshedji Tata Road,
Churchgate, Mumbai 400 020.

Vs.

Asstt. Commissioner-Mumbai South **Respondent**
13th floor, Air India Building,
Nariman Point,
Mumbai 400 021.

AND

Service Tax Appeal No. 85457 of 2020

(Arising out of Order-in-Appeal No. NA/CGST/A-I/MUM/156/2019-20 dated 30.08.2019/27.10.2019 passed by Commissioner of GST & Central Excise (Appeals), Mumbai-I)

Asstt. Commissioner-Mumbai South **Appellant**
13th floor, Air India Building,
Nariman Point,
Mumbai 400 021.

Vs.

M/s. Karanja Terminal & Logistics P Ltd **Respondent**
3rd floor, 13/14, Khetan Bhavan,
Flat No.198, Jamshedji Tata Road,
Churchgate, Mumbai 400 020.

Appearance:

Shri Praveen K. Singh & Shri Rudrendra Singh, Advocates, for the Assessee
Shri Onil Shivdikar, Assistant Commissioner, Authorised Representative for Revenue

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/**85081-85082/2021**

Date of Hearing: 13.01.2021
Date of Decision: 13.01.2021

PER: SANJIV SRIVASTAVA

These appeals, one filed by M/s Karanja Terminal & Logistics Pvt Ltd (Service Tax Registration No AADCK9709QSD003) (hereinafter referred as appellant) and one filed by the revenue (hereinafter referred as respondent) are directed against the order in appeal no NA/CGST/A-I/MUM/156/2019-20 dated 30.08.2019/27.10.2019 of the Commissioner (Appeal) GST & CX, Mumbai–I. By the impugned order Commissioner (Appeal) held as follows:-

"7. In view of the above discussion and findings, I modify the Order in Original No CGST/Mum-South/Refunds/RKS/189-190/2018-19 dt 31.03.2019 passed by the Assistant Commissioner 9refund), CGST & CX, Mumbai South as under

(i) Out of the total amount of Rs 12,04,76,770/- involved in the two refund claims, I hereby sanction as amount of Rs 5,90,99,124/- and order the said amount to be paid to the appellants.

(ii) Rejection of Refund Claim to the extent of Rs 6,13,77,646/- is upheld.

The appeal filed by the appellants, M/s Karanja Terminal & Logistics Pvt Ltd., is partly allowed as above with consequential relief as per law."

2.1 The appellant filed the following two refund applications:

(a) on 27.10.2017 for Rs. 9,45,69,194 - on the grounds that vide office memorandum dated 9th May, 2016, issued by the Ministry of shipping (Port Wing), GOI, restoration of service tax exemption on construction, erection, commissioning or installation of original works pertaining to Port for the contracts entered prior to 1st March, 2015 was approved with retrospective effect;

(b) on 27.12.2017, for Rs. 2,59,07,576/- of the tax paid by his sub contractors.

2.2 The Assistant Commissioner (Refunds), CGST, Mumbai South video I-O No. CGST/MS/Refunds/RKS/189-190/2018-19 dated 31.03.2019 rejected the said refund claims in entirety, under the provisions of Section 11B of the Central Excise Act, 1944, as made applicable to Service Tax matters by virtue of Chapter V of Section 83 of the Finance Act, 1994, inter-alia, on the following grounds :

(a) Refund for the period 01.04.2015 to 29.02.2016 was time barred and not maintainable, in terms of Section 103 of the Finance Act, 1994 as the same had not been filed within 6 months from the date of the Finance Bill, 2016 received the assent of the President i.e. by 13.11.2016.

(b) Refund claim was eligible to be sanctioned only to the service provider and not to the party being the service recipient. The Adjudicating Authority concurred that if the Service tax paid was presumed to have been erroneously paid, in terms of Rule 6(4A) of the Service Tax Rules, 1994, the service provider i.e. sub contractors who had had made such erroneous excess payment to the Government account were only entitled to adjust such erroneously paid service tax towards their subsequent tax liability within the stipulated period prescribed therein. Therefore, the party was not lawfully entitled to claim refund of any of the said service tax amount;

(c) The relevant date for claiming Service Tax refund was the date of payment made by the party, and since the claim was made on 27.10.2017, an amount of Rs. 6,13,77,646/- pertaining to the period prior to 27.10.2016 was time barred;

(d) Since output services in the instant case were fully tax exempt, the party was not eligible for availing the above said Service tax and Cesses paid on Inputs and Input services as CENVAT credit in terms of Rule 6(1) of the CENVAT Credit Rules, 2004;

(e) As stipulated under rule 15(1) of the CCR Rules, 2017, all the said CENVAT credit cannot be retained or treated as CENVAT credit w.e.f. 01.07.2017 in post-GST period and as such there was no question of refund of CENVAT Credit;

(f) Refund of CENVAT credit was permissible only for exports as provided under Rule 5 of the CCR, 2004, which was not the case in the present matter;

2.3 Being aggrieved by the said O-1-O, the party preferred an appeal before the appropriate appellate authority, which has been disposed of by the Commissioner (Appeals) vide the impugned order referred to in para 1, supra.

3.1 We have heard Shri Praveen K Singh & Rudrendra Singh, Advocates for the Appellants and Shri O M Shivdikar, Assistant Commissioner, Authorized Representative for the revenue.

3.2 Counsel for the Appellant submit that -

- the amounts which they claim as refund was paid by them to their service providers, and they had also claimed the credit of the amount paid as service tax to their sub contractors.
- after the introduction of the GST regime, they have transferred this CENVAT Credit as ITC credit to their GST Input Tax Credit Ledger, for which proper Trans-1 claim was made and ITC credit allowed.
- On discovery of the erroneous payment of service tax by them to their sub contractors, they had filed these refund applications claiming the refund of the service tax erroneously paid by them.
- Since they are claiming the refund of the Service Tax erroneously paid by them hence the same is not an application for refund as per the Notification No 9/2016-ST dated 01.03.2016, read with Section 103 of the Finance Act, 2016, as per which the refund application was to be filed within the six months from the dated of assent of the Finance Act, 2016 by the President but was an application which was filed by them as per Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.
- Since they claim the refund as per Section 11B of the Central Excise Act, 1944, it should be governed by the provisions of that Section and not the period of limitation as provided by the Section 103 of the Finance Act, 1994.

- Further for claiming the refund they had reversed the ITC Credit to the extent of amount claimed as refund in cash in terms of Section 11B. Out of the total credit reversed by them by the impugned order, part cash refund of the credit reversed by them has been allowed and part rejected.

3.3 Arguing for the revenue learned Authorized Representative while re-iterating the submissions made in the department appeal stated as follows:

- Special provisions were incorporated by the Finance Act, 2016 while giving retrospective effect to the notification No 09/2016-ST, prescribing that all the refund applications for the tax paid should be made within six months from the date of assent of Finance Act, 2016.
- Section 11B of the Central Excise Act, 1944 is not pari materia with the Section 103 and therefore the appellants is bound to comply with and/ or satisfy the compliance of sub section (3) of Section 103 of the Finance Act, 1994 and was bound to make an application within six months from the date of assent of President.
- The condition under which the exemption or the benefit is given needs to be strictly construed.
- Definition in Section 11B of Central Excise Act, 1944 is not unreasonable just because it does not include the time of knowledge on the part of the assessee that the duty paid by him was legally not payable.

4.1 We have considered the impugned order along with the submissions made in appeals, during the course of arguments on appeal and in the written submissions filed by both sides.

4.2 Undisputedly the appellant in the present case is the service recipient, who has paid the service tax against the invoices issued to them by the service providers. The service providers have in turn collected the service tax and deposited the same as per the assessment made by them in their ST-3 return. These ST-3 returns which are self assessed have been filed by the service provider and there is no appeal filed by any person aggrieved by the said self assessment order. Assistant Commissioner has in his order in original recorded as follows:

“17. Further, the claimant has submitted ST-3 returns of their major Vendors M/s ITD Cementation India Limited and M/s Sahara dredging limited from which it is seen that the service tax amount collected by the claimant vendors has been paid the Government also. The claimant has also submitted an undertaking from their major Vendors ITD Cementation India Limited that during the period from 1st April 2015 to June 2017 they have provided construction services for berth and approach structure, back up yard and other facilities and received remuneration from the claimant against their Tax invoices. Further, M/S. ITD cementation India Limited gave undertaking that they have not claimed and nor will be claiming any refund from the Service Tax/GST department for the service tax amount charged to the claimant.

18. In view of the above it is clear that the doctrine of unjust enrichment is not applicable in the instant case as the claimant has sought refund for the taxes paid by them to their vendors against the service which is exempted and no service tax is to be levied on the said service. Since the service provider charged service tax to the claimant on the invoices issued to them and the claimant has paid service tax to their vendors and thus the ultimate tax burden is borne by the claimant only

19. The claimant has submitted the ST-3 return for the Period April 2014 to June 2017. Also a reconciliation statement is submitted by the claimant reconciling the Cenvat Credit received/taken directly on input services. The same is illustrated below:

Year	*Period*	*Date of CENVAT Credit taken & Filing ST return date*	*Service Tax*	*Edu. Cess*	*SHEC*	*KK Cess*	*Total*
2014-15	*From April to September*	*27th October 2014*	-	-	-	-	-

2014-15	*From October to March*	*25th April 2015*	*80,434*	*16,066*	*8,043*		*1,04,543*
2015-16	*From April to September*	*25th October 2015*	*-*	*-*	*-*		*-*
2015-16	*From October to March*	*2nd June 2016*	*5,11,78,015*	*2,181*	*1,091*		*5,11,81,287*
2016-17	*From April to September*	*14th October 2016*	*98,77,368*	*-*	*-*	*2,14,448*	*1,00,91,816*
2016-17	*From October to March*	*28th June 2017*	*3,47,34,367*	*-*	*-*	*12,39,632*	*3,59,73,999*
2017-18	*From April to June*	*7th September 2017*	*2,22,79,306*	*-*	*-*	*8,45,819*	*2,31,25,125*
		Gross Total	***11,81,49,490***	***18,247***	***9,134***	***22,99,899***	***12,04,76,770***

From the above reconciliation statement and ST-3 returns submitted by the claimant it is seen that the claimant has taken Cenvat Credit of Rs.12,04,76,770/- in their ST-3 returns on input services received during the period April-2014 to June 2017.

20. The claimant has carry forward the Cenvat Credit of Rs. 12,04,76,770/- from Service Tax Regime to GST Regime while filing Trans-1. From the foregoing it appeared that on the one hand the claimant was seeking the refund of the said amount and on the other hand that they are not debiting the said amount from their accounts and are carrying it forward to the GST regime by way of filing the Trans-1 return. In due course, the claimant has reversed the amount of Rs 2,59,07,576/- and Rs. 9,45,69,194/- by generating the Refund application vide ARN No. AD270717037731V dated 07.02.2018 and ARN NO. AB271217366942T dated 07.02.2018 respectively under Refund *of ITC accumulated due to inverted tax structure. On realization that they have wrongly reversed the credit taken under Trans-1 by generating the refund application under inverted tax structure entry, the claimant has requested to reject their refund application and thus withdraw their application of GST refund. Accordingly, vide two separate Rejection order under FORM-GST RFD-06 both dated 03.10.2018 were issued to the claimant and credit of Rs. 2,59,07,576/- and Rs. 9,45,69,194/- re-credited to the claimant Electronic Credit ledger. Subsequently, the claimant debited the credit of Rs. 12,04,76,770/- (Rs. 9,45,69,194/- vide debit entry no. D12710180574658 dated 24.10.2018 and Rs. 2,59,07,576/- vide debit entry no. D12710180573497 dated 24.10.2018) by way of filing the Form GST DRC-03, in the GSTIN , wherein an assessee is allowed to make voluntary payment under Section 73(5) of the Act. I find that the claimant filled the DRC-03, debiting an amount of Rs. 12,04,76,770/- (Rs. 9,45,69,194/- vide debit entry no. D12710180574658 dated 24.10.2018 and Rs. 2.59,07,576/- vide debit entry no. D12710180573497 dated 24.10.2018) from his Credit ledger, stating reason thereof that they are reversing the said amount as they have applied refund claims in respect of the said amounts. I also find that the same is reflected in the claimant's electronic credit ledger."*

4.3 During the course of hearing, we made specific query from the counsel for the appellants as to what is their status vis a vis the payment of service tax. Counsel admitted that they are the

- service recipients and not the service providers;
- they have paid the service tax against the invoices issued to them by the service providers;
- they have taken the CENVAT Credit of the Service Tax paid by them as per the invoices issued to them by the service providers;
- service provider has assessed the service tax due and accordingly filed his ST-3 return as per law;
- the self assessed returns have not been challenged by the service provider or them in appeal before the appellate authority.

4.4 In case of ITC Ltd. [2019 (368) ELT 216 (SC)], Hon'ble Supreme Court has clearly held that refund application is not maintainable in the case where the duty has been paid as per the assessment order (including self assessment) which has not been challenged by way of an appeal before the appropriate order, and the assessment order is set aside in appeal, stating as follows:

"41. It is apparent from provisions of refund that it is more or less in the nature of execution proceedings. It is not open to the authority which processes the refund to make a fresh assessment on merits and to correct assessment on the basis of mistake or otherwise.

42. It was contended that no appeal lies against the order of self-assessment. The provisions of Section 128 deal with appeals to the Commissioner (Appeals). Any person aggrieved by any decision or order may appeal to the Commissioner (Appeals) within 60 days. There is a provision for condonation of delay for another 30 days. The provisions of Section 128 are extracted hereunder :

"128. Appeals to Commissioner (Appeals). — (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Principal Commissioner of Customs or Commissioner of Customs may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order :

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

(1A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing :

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf.”

43. As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression ‘Any person’ is of wider amplitude. The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of re-assessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self-assessment. The order of self-assessment is an order of assessment as per Section 2(2), as such, it is appealable in case any person is aggrieved by it. There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, self-assessment is not found to be satisfactory, an order of re-assessment has to be passed under Section 17(4). Section 128 has not provided for an appeal against a speaking order but against “any order” which is of wide amplitude. The reasoning employed by the High Court is that since there is no lis, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in Escorts (supra).

44. The provisions under Section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which self-assessment has been made. In other words, the order of self-assessment is required to be followed unless modified before the claim for refund is entertained under Section 27. The refund proceedings are in the nature of execution for refunding amount. It is not assessment or re-assessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, re-assessment is not permitted nor conditions of exemption can be adjudicated. Re-assessment is permitted *only under Section 17(3)(4) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually amount to an order of assessment or re-assessment in case the Assistant Commissioner or Deputy Commissioner of Customs while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under Section 27. In Hero Cycles Ltd. v. Union of India - 2009 (240) E.L.T. 490 (Bom.) though the High Court interfered to direct the entertainment of refund application of the duty paid under the mistake of law. However, it was observed that amendment to the original order of assessment is necessary as the relief for a refund of claim is not available as held by this Court in Priya Blue Industries Ltd. (supra).*

45. Reliance was also placed on a decision of Rajasthan High Court with respect to service tax in Central Office Mewar Palace Org. v. Union of India - 2008 (12) S.T.R. 545 (Raj.). In view of the aforesaid discussion, we are not inclined to accept the reasoning adopted by the High Court, that too is also not under the provisions of the Customs Act.

46. The decision in Intex Technologies (India) Ltd. v. Union of India has followed Micromax (supra). The reasoning employed by the High Courts of Delhi and Madras does not appear to be sound. The scope of the provisions of refund under Section 27 cannot be enlarged. It has to be read with the provisions of Sections 17, 18, 28 and 128.

47. When we consider the overall effect of the provisions prior to amendment and post-amendment under Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act.

48. Resultantly, we find that the order (s) passed by Customs, Excise, and Service Tax Appellate Tribunal is to be upheld and that passed by the High Courts of Delhi and Madras to the contrary, deserves to be and are hereby set aside. We order accordingly. We hold that the applications for refund were not maintainable. The appeals are accordingly disposed of. Parties to bear their own costs as incurred."

4.5 Counsel for the appellant submitted that what they are claiming is the refund of the accumulated CENVAT Credit which has accumulated in their credit account for the reason of the payment of service tax which was not due from them. The argument of the counsel though appears attractive but needs to be rejected at the first instant itself, because as per the CENVAT Credit rule the refund of accumulated CENVAT Credit is permitted only as per the Rule 5 of the CENVAT Credit Rules, 2004 and definitely the case under consideration cannot be said to be the case in terms of Rule 5.

4.6 Appellant submitted for getting the refund applications processed they had reversed the entire amount claimed as refund by them from their Input Tax Credit Ledger under GST regime. This fact is not in dispute. In fact the details of the debits made by the appellants from their ITC Ledger, have been recorded by the Assistant Commissioner in his order. Since we hold that the refund applications as such are not maintainable, Assistant Commissioner should consider restoring the input tax credit so debited by the appellant to them if permissible in the GST Law. This tribunal has held in case of Wave Mechanics Pvt Ltd [2019-TIOL-3178-CESTAT-BANG], as following in case of such debit entries made by the claimant for making the refund applications,-

"6.1 Further, I find that as far as rejection of cash refund by both the authorities is concerned, there is no infirmity and I uphold that said findings. Further, the findings of the original authority that the amount of refund claim would lapse under Section 142 of Central Goods and Services Tax Act, 2017 is not tenable in law, since there was no dispute about the fact that at the time of filing of refund claim, the appellant had debited the

whole amount in their Cenvat account as required by the then Notification No. 27/2012, dated 18-6-2012 and when the GST was introduced, there was no amount lying in the balance in the appellant's record. Further, provision to sub-section (3) of Section 142 of Central Goods and Services Tax Act, 2017 is not applicable in the present case. The appellants are entitled to take the re-credit of the Cenvat for which they had filed the refund claims and the said amount will not lapse as per Section 142 of the Central Goods and Services Tax Act, 2017."

4.7 The decision of Bangalore Bench in the case of Wave Mechanics, supra was followed by us in the case of Alumatic Cans Pvt. Ltd. [Final Order No A/85937/2020 dated 02.12.2020].

4.8 In the additional submissions filed, Appellant have relied upon the following decisions to argue that the amount of the CENVAT credit should be refunded to them in cash,

- Thermax Ltd [2019 (31) GSTL 60 (GUJ)];
- Toshiba Machine (Chennai) Pvt Ltd [2019 (27) GSTL 216 (T- Chennai)]
- Rawatwasia Ispat Udyog Pvt Ltd [2019 (26) GSTL 196 (T-Chandigarh)]
- Oswal Castings Pvt Ltd [2019 (24) GSTL 649 (T-Chandigarh)]
- SMG International [2019 (21) GSTL 446 (T-Chandigarh)]

We do not find any merits in the submissions made by the Appellants, as the cases, which are referred above are the cases in which dispute with regards to the CENVAT Credit has been adjudged subsequent to changeover from the previous regime of Central Excise and Service Tax to the regime of GST. In all the cases the refund application or the rebate claim was filed before 01.07.2017 and determined subsequent to that date. It is not so in the present case. In the case of the appellant the CENVAT credit was available in the book of accounts of the appellant and had been carried forward by them to the GST regime, in manner as provided under the GST Law. The appellants for the processing of the refund claims have not debited the CENVAT account, but have debited the amounts from their Input Tax Credit Ledger. Hence in our view there is no case for cash refund of the amounts debited from the Input Tax Credit Ledger.

5.1 In view of the discussions we dispose of the appeals holding that refund claims are not maintainable, the matter is remitted back to the original authority for considering allowing the re-credit of the amounts of ITC Credit debited by the Appellant for the processing of these refund applications, if permissible under the GST Law.

5.2 Appeals are disposed of accordingly.

(Order pronounced in the open court)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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