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

Service Tax Appeal No. 85246 of 2020

(Arising out of Order-in-Appeal No. SM/265 to 269/Appeals-II/ME/2019 dated 21.11.2019 passed by Commissioner of GST & Central Excise (Appeals-II), Mumbai)

M/s. Rosy Blue India Pvt. Ltd. **Appellant**
G Block, FC 6018,
Bharat Diamond Course,
Bandra-Kurla Complex,
Bandra (E), Mumbai 400 051.

Vs.

Commissioner of GST & C.Ex., Mumbai East **Respondent**
3rd floor, CGST Bhavan, Plot No. C-24,
Sector-E, Bandra-Kurla Complex,
Bandra (E), Mumbai 400 051.

WITH

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Bandra (E), Mumbai 400 051.

Appearance:

Shri Mahesh Raichandani, Advocate, for the Appellant
Shri Dilip Shinde, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/**87019-87022/2021**

Date of Hearing: 18.10.2021
Date of Decision: 18.10.2021

PER: SANJIV SRIVASTAVA

These appeals are directed against order-in-appeal No. SM/265 to 269/Appeals-II/ME/2019 dated 21.11.2019 passed by Commissioner of GST & Central Excise (Appeals-II), Mumbai. By the said order, the Commissioner (Appeals) has set aside the order of the adjudicating authority rejecting the five refund claims, as detailed below:-

Sr. No.	Appeal No.	Order-in-Original No.	Refund claimed (Rs.)
1	V2(A)119/CGST/ ME/2018	ME/REF/DC/RY/490/2017-18 dated 29.01.2018	13,56,340/-
2	V2(A)120/CGST/ ME/2018	ME/REF/DC/RY/457/2017-18 dated 23.01.2018	8,44,880/-
3	V2(A)121/CGST/ ME/2018	ME/REF/DC/RY/458/2017-18 dated 23.01.2018	18,10,280/-
4	V2(A)170/CGST/ ME/2018	ME/REF/DC/RY/604/2017-18 dated 21.02.2018	53,94,150/-
5	V2(A)73/CGST/ME/2019	ME/REF/AC/SM/45/2018-19 dated 94.01.2019	22,33,616/-

2.1 The appellants have filed refund claims in terms of Rule 5 of Cenvat Credit Rules.

2.2 These refund claims were rejected by the adjudicating authority stating as follows:-

"8. In order to avail Cenvat credit of service tax paid on the input service it is necessary that the same should qualify as input service in terms of definition of Input service as given by the Cenvat Credit Rules, 2004. Rule 2(l) defines "input services" means any service used by a provider of output service for providing an output service: or used by a manufacturer whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal. Further, output service has been defined under Rule 2(p) of Cenvat Credit Rules, 2004 – means any service provided by a provider of service located in the taxable territory but shall not include a service:- (1) specified in section 66D of the Finance Act (2) where the whole of service tax is liable to be paid by the recipient of service. I find that the goods i.e. cut & polished diamonds exported by the claimant is classifiable under ch. 7102 having tariff rate Nil as per the Central Excise Tariff Act, 1985. I also find that the claimant has not followed the obligations prescribed under the Rule 6 of Cenvat Credit Rules, 2004.

9. Further, the assessee has also not complied with one of the conditions of export of services prescribed under Rule 6A of Service Tax Rules, 1994. The assessee being a manufacturer of cut & polished diamond and the process amounting to manufacture is covered under Section 66D of the Finance Act, *1994, the assessee has failed to comply the condition prescribed under Rule 6A(c) of export of services.*

10. In view of the above discussions & findings, I hold that since the assessee has not fulfilled the conditions prescribed under Rule 6 of Cenvat Credit Rules, 2004, Rule 6A of Service Tax Rules, 1994 and Notification No.27/2012.CE(NT) dated 18.06.2012, as amended, they are not eligible for total refund claim of Rs.53,94,150/- (Rupees Fifty Three Lakh Ninety Four Thousand One Hundred Fifty only)."

2.3 Against this order, the appellants have preferred appeals before the Commissioner (Appeals). While allowing the appeals, the Commissioner (Appeals) remanded the matter back to the adjudicating authority as per the order referred to in para 1 above. Aggrieved by the said order, the appellants have preferred these appeals before us.

3.1 We have heard Shri Mahesh Raichandani, Advocate, for the appellant and Shri Dilip Shinde, Assistant Commissioner, Authorised Representative, for the Revenue.

3.2 Arguing for the appellant, learned counsel submits that he has no grievance against the order of the Commissioner (Appeals) remanding the matter back to the adjudicating authority. However, his grievance is against paras 8.3 and 9 of the impugned order as the findings recorded in these paras are in respect of the issues that were never before the Commissioner (Appela). His appeals are intended only to the extent of deleting the findings recorded by the Commissioner (Appeals) in these paragraphs.

3.3 Learned AR reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in the appeals and during the course of argument.

4.2 Paras 8.2, 8.3 and 9 of the impugned order are reproduced below:-

"8.2 Hence, the appellant has correctly applied for refund claim under Notification No. 27/2012-CE(NT) dated 18.06.2012 and the adjudicating authority has erred in rejecting the claim on the ground that the appellant failed to comply the condition prescribed under at Rule 6(A)(c) of Service Tax Rules, 1994. The impugned orders of the lower adjudicating authority rejecting the refund claims on this ground are not justifiable and is liable to be set aside. Held accordingly.

8.3 Regarding the argument of the adjudicating authority that the appellant failed to provide the copy of the agreement with the overseas client, copy of FIRC's, copy of Export invoice, CA certificate in Annexure A-I and other supporting documents which are required to be filed along with refund claim as per Notification No.27/2012.CE(N.T) dated 18.06.2012, as amended. I find that the appellant has contended that they had submitted all the documents to the adjudicating authority as per Notification No. 27/2012. However, the adjudicating authority, in the instant case, has not gone into the merits of the case and did not conduct enquiry/verification of the documents submitted by the appellant and rejected the documentary evidences supporting their claim concluding various judicial decisions in support of their contention.

9. The adjudicating authority has also observed that the appellant failed to provide proof of debit entry of refund amount in the Cenvat register. However, I find that the appellant has submitted copies of Cenvat Register for the relevant periods which clearly reflects the debit entry of refund amount which required verification. I find that the conditions/limitations prescribed under para 2 (h) is the basic condition to be fulfilled which is also stipulated in Form A and Annexure A-I to the impugned Notification read with Rule 5 of the Cenvat Credit Rules, 2004. The refund cannot be claimed without debiting the amount. However, in the present case, I find that the copies of Cenvat Credit Register mentions debit entries as under, which required verification by the adjudicating authority.

..............."

4.3 The grievance of the appellant against the order is in respect of paras 8.3 and 9. In our view, the ends of justice will be met if these two paras are deleted and the remaining part of the order of the Commissioner (Appeals) upheld.

4.4 After deleting these two paras, we uphold the remand order passed by the Commissioner (Appeals) to the adjudicating authority for consideration of the refund claims in terms of the provisions of the law and the documents submitted along with the refund claims and during the proceedings before the adjudicating authority. However here we may point out that interpreting sub section 3, Section 11 B of Central excise Act, 1944, Hon'ble Apex Court has in case of Mafatlal Industries [1997 (89) ELT 247 (SC)] held as follows:

"***82.****A good amount of debate took place before us on the question whether sub-section (3) makes Section 11B exhaustive of all kinds of refund claims including those which are refundable as a consequence of appellate/revisional order and/or as a consequence of orders made by the High Court/Supreme Court. Sri Nariman pointed out that in Rule 11 (as it was in force during the period August 6, 1977 to November 17, 1980), sub-rule (3) expressly provided that "where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf" and that sub-section (3) of Section 11B, before its amendment in 1991, was also in identical terms. But, Sri Nariman says, sub-section (3) of Section 11B has now been dropped; there is no corresponding provision in Section 11B as it now stands, which means, says the counsel, that even a refund claim arising as a result of an appellate order or an order of a court has also got to be made under and in accordance with sub-sections (1) and (2) of Section 11B and will be disposed of in terms of sub-section (2) of the said section, as amended in 1991. This consequence, learned counsel says, is unjust, unreasonable and arbitrary. There is no reason why a person who becomes entitled to refund of duty as a result of appellate or court order should also be made to apply and satisfy all the requirements of sub-sections (1) and (2) of Section 11B (amended) when he is entitled to* *such refund as a matter of right. Sri Nariman submits that if a manufacturer/assessee, who succeeds in vindicating his claim after a long fight - may be, upto this Court - and applies for refund is asked to satisfy that he has not passed on the burden of tax to another, he would rather keep quiet than fighting the levy. There would be no incentive for him to file the appeal/appeals or approach the higher courts which also involves substantial expense. If after all this fight and expense, he is to be denied the refund on the ground that he has passed on the burden of duty to third parties, why should he fight and spend money for fighting the litigation, says the counsel. Sri Sorabjee and Sri Salve too emphasised this aspect and said that this situation would lead to many an undesirable consequence. The assessing/approving officer (original authority) would become the monarch; whatever he says would be the law since there would be nobody interested in challenging his order. Illegal levies would become the order of the day. Such a situation, the learned counsel point out, is neither in the interest of law nor in the interest of consumer or the larger public interest. It is accordingly submitted that it would be just and proper that the amended Section 11B is held not to take in refund claims arising as a consequence of appellate or a superior court order. We do not think it is possible to agree. Such a holding would run against the very grain of the entire philosophy underlying the 1991 Amendment. The idea underlying the said provisions is that no refund shall be ordered unless the claimant establishes that he has not passed on the burden to others. Sub-section (3) of the amended Section 11B is emphatic. It leaves no room for making any exception in the case of refund claims arising as a result of the decision in appeal/reference/writ petition. There is no reason why an exception should be made in favour of such claims which would nullify the provision to a substantial degree. So far as "lack of incentive" argument is concerned, it has no doubt given us a pause; it is certainly a substantial plea, but there are adequate answers to it. Firstly, the rule means that only the person who has actually suffered loss or prejudice would fight the levy and apply for refund in case of success*."

In view of the above and the provisions as contained in Subsection 1, 2 and 3 of Section 11B, the refund claim needs to verified for correctness by the Assistant Commissioner, and his satisfaction recorded after causing due verification.

5. With the above modification, the order of the Commissioner (Appeals) is upheld and the appeals disposed of.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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