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

Excise Miscellaneous Application No. 85220 of 2022
(On behalf of Appellant)
and
Excise Appeal No. 957 2012

(Arising out of Order-in-Appeal No. YDB/24/LTU/MUM/2012 dated 28.02.2012 passed by the Commissioner of Central Excise & Service Tax (Appeals), LTU, Mumbai)

M/s. Pfizer Limited **Appellant**
(Formerly known as Wyeth Limited)
Platina, Level 6, Plot No. C-59,
G-Block, Bandra-Kurla Complex,
Bandra (E), Mumbai 400 051.

Vs.

Commissioner of CE & ST (LTU), Mumbai **Respondent**
29th floor, Centre-I, World Trade Centre,
Cuffe Parade, Mumbai 400 005.

Appearance:

Shri Arun Jain, Advocate, for the Appellant
Shri Sanjay Hasija, Superintendent, Authorised Representative for the Respondent

CORAM:

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

Date of Hearing: 14.03.2022
Date of Decision: 14.03.2022

FINAL ORDER NO. A/85206/2022

PER: SANJIV SRIVASTAVA

This miscellaneous application has been filed by the applicant/appellant for change in their name from Wyeth Limited to Pfizer Limited, as the said Wyeth Limited stood merged with Pfizer Limited i.e. the applicant herein, pursuant to the order dated 31.10.2014 of Hon'ble Bombay High Court. Accordingly the miscellaneous application is allowed and consequently the name of the appellant in the cause title of the appeal is amended to read as "**Pfizer Limited**" instead of "Wyeth Limited".

2.1 This appeal is directed against Order-in-Appeal No. YDB/24/LTU/MUM/2012 dated 28.02.2012 of the Commissioner of Central Excise & Service Tax (Appeals), LTU, Mumbai, upholding the order of the Deputy Commissioner of Central Excise & Service Tax, LTU, Mumbai, rejecting the refund claim.

2.2 The appellant herein is one of the two units of the main company of Wyeth group. Wyeth Ltd. having registered office in Mumbai took registration as input service credit distributer and has distributed certain credits to the appellant unit amounting to Rs.18,89,971/-. The input credit so distributed was in respect of advertisement services.

2.3 During the course of audit, it was observed that the credit distributed to the appellant pertained to the services which were not in respect of the goods manufactured by them and the appellant was therefore asked to reverse the credit.

2.4 The appellant, as suggested, reversed the entire credit by way of making debit of this amount in their account. However, such debit was made under protest and there is no dispute in respect of the debit so made under protest.

2.5 Subsequently in 2010 the appellant filed a refund claim for seeking refund of the amount so debited by them under protest, quoting the judgment of Bangalore bench of the Tribunal in the case of ECOF Industries Pvt. Ltd. [2010 (17) STR 515 (Tri.-Bang.)]. This refund claim has been rejected by the Deputy Commissioner by his order referred in para 2.1 above and appeal against that order has been rejected by the Commissioner (Appeals) by the impugned order. Hence this appeal.

3.1 We have heard Shri Arun Jain, Advocate, for the appellant and Shri Sanjay Hasija, Superintendent, Authorised Representative for the Revenue.

3.2 Arguing for the appellant, learned counsel submits that

- During the relevant period, there was no condition in the Cenvat Credit Rules which obligated that input credit distributor should distribute credit of input services by taking into account the services in respect of the particular unit, i.e. input service pertained to unit A of the input credit service distributor, then the credit of that service could have been distributed to that unit only and not to any other unit of the same input service credit distributer.

- This condition was subsequently introduced in 2012 whereas their case is of 2017. Accordingly the credit distributed to them by input credit distributor cannot be faulted with. However, under persuasion from the audit, they had debited the said amount in their books of account under protest.
- Subsequently they filed this refund claim which has been rejected. The rejection of the refund claim is contrary to the decision of the Bangalore bench in the case of ECOF Industries Pvt. Ltd. (supra) which has been upheld by the Hon'ble Karnataka High Court reported in [2011 (23) STR 107 (Kar.)]. This decision has been followed by the Tribunal in Nestle India Ltd. [2017 (5) GSTL 294 (Tri.-Mumbai)].
- The lower authorities have not raised any other ground while rejecting the refund claim.

3.3 Learned Authorised Representative submits as follows:

- In the present case though the appellant has reversed the cenvat credit as per the persuasion by audit, they did not further challenge by way of an appeal before the Commissioner (Appeals).
- In absence of any appeal before the Commissioner (Appeals), the refund claim filed by the appellant seems to be time-barred as has been held in the following decisions:
  - Vijay Marine Services [2010 (252) ELT 378 (Tri.-Mumbai)]
  - Vijal Marine Services [2016 (337) ELT 335 (Bom.)]
  - Neptune Wires P. Ltd. [1988 (36) ELT 388 (Bom.)]
- Further the refund claim needs to have been examined for unjust enrichment.

- These grounds though not part of the authorities below are questions of law and could be taken up by him at this stage.
- Therefore the appeal needs to be dismissed.

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

4.2 Rule 7 of the Cenvat Credit Rules, 2004 at the material time read as follows:-

*"7. **Manner of distribution of credit by input service distributor.** The input service distributor may distribute the CENVAT credit in respect of the service tax paid on the input service to its manufacturing units or units providing output service, subject to the following conditions, namely: -*

(a) the credit distributed against a document referred to in rule 9 does not exceed the amount of service tax paid thereon:

(b) credit of service tax attributable to service used in a unit exclusively engaged manufacture of exempted goods or providing of exempted services shall not be distributed;

(c) credit of service tax attributable to service used wholly in a unit shall be distributed only to that unit; and

(d) credit of service tax attributable to service used in more than one unit shall be distributed pro rata on the basis of the turnover during the relevant period of the concerned unit to the sum total of the turnover of all the units to which the service relates during the same period.

Explanation 1. - For the purposes of this rule, "unit" includes the premises of a provider of output service and the premises of a manufacturer including the factory, whether registered or otherwise. Explanation 2.- For the purposes of this rule, the total turnover shall be determined in the same manner as determined under rule 5.

Explanation 3.- (a) The relevant period shall be the month previous to the month during which the CENVAT credit is distributed.

(b) In case if any of its unit pays tax or duty on quarterly basis as provided in rule 6 of Service Tax Rules, 1994 or rule 8 of Central Excise Rules, 2002 then the relevant period shall be the

quarter previous to the quarter during which the CENVAT credit is distributed.

(c) In case of an assessee who does not have any total turnover in the said period, the input service distributor shall distribute any credit only after the end of such relevant period wherein the total turnover of its units is available."

4.3 This rule was subsequently substituted by Notification No. 18/2012-CE(NT) dated 17.03.2017, w.e.f. 01.04.2012, to read as follows:-

"7. Manner of distribution of credit by input service distributor- The input service distributor may distribute the CENVAT credit in respect of the service tax paid on the input service to its manufacturing units or units providing output service, subject to the following conditions, namely:

(a) the credit distributed against a document referred to in rule 9 does not exceed the amount of service tax paid thereon; or

(b) credit of service tax attributable to service used in a unit exclusively engaged in manufacture of exempted goods or providing of exempted services shall not be distributed."

4.4 We are concerned with the period prior to 2012. The rule as it existed at the material time has been interpreted by the Bangalore bench in the case of ECOF Industries (supra) which has held as follows:-

*"**7.** Para 2.3 of the Master Circular referred to by the ld. Advocate reads as under :-*

"2.3. An 'input service distributor' is an office or establishment of a manufacturer of excisable goods or provider of taxable service. It receives tax paid invoices/bills of input services procured (on which Cenvat credits can be taken) and distributes such credits to its units providing taxable services or manufacturing excisable goods. The distribution of credit is subject to the conditions that, - (a) the credit distributed against an eligible document shall not exceed the amount of service tax paid thereon, and (b) credit of service tax attributable to services used in a unit either exclusively manufacturing exempted goods or exclusively providing exempted services shall

not be distributed. An input service distributor is required (under Section 69 of the Act, read with Notification No. 26/2005-S.T.) to take a separate registration."

8. *The combined reading of the Rule 7 and the clarificatory Circular dated 23-8-2007 clearly shows that there are only two restrictions regarding the distribution of the credit. The first restriction is that the credit should not exceed the amount of Service Tax paid. The second restriction is that the credit should not be attributable to services used in manufacture of exempted goods or providing of exempted services. There are no other restrictions under the rules. The restrictions sought to be applied by the Department in this case in limiting the distribution of the Service Tax credit made in respect of the Malur Unit on the ground that the services were used in respect of the Cuttack Unit finds no mention in the relevant rules. As such, restricting the distribution of Service Tax credit in a manner as has been done by the impugned order of the lower appellate authority (original authority had approved of such distribution) cannot be upheld. In case the Department wants to place such restriction as is sought to be placed in the case, the rule is required to be amended."*

4.5 Further, Hon'ble Karnataka High Court upholding the above order has observed as follows:-

*"**8.** It is in this context, the definition of input service distributor makes it clear that a manufacturer or a producer of a final product or a provider of output service may have more than one unit and may be distributed in various parts of the country. It is in this background the definition of service distributor is defined as office of the manufacturer or producer of a final product or provider of output service which receives invoices issued under Rule 4A of the Service Tax Rules, 1994 towards purchases of input services and issues invoice, bill or, as the case may be, challan for the purposes of distributing the credit of service tax paid on the said services to such manufacturer or producer or provider, as the case may be. Therefore, the law mandates that the manufacturer who wants to avail the benefit of this service tax if he has more than one unit he should also*

get registered himself as a service provider and then, he would be able to collect all the input service tax paid in all its units and accumulate them at its head office and distribute the said credit to its various units. At the time of distribution, the manner of distribution is provided in Rule 7 which reads as under :-

> *"**Rule 7. Manner of distribution of credit by input service distributor.** — The input service distributor may distribute the CENVAT credit in respect of the service tax paid on the input service to its manufacturing units or units providing output service, subject to the following conditions, namely :-*
>
> *(a) the credit distributed against a document referred to in rule 9 does not exceed the amount of service tax paid thereon, or*
>
> *(b) credit of service tax attributable to service use in a unit exclusively engaged in manufacture of exempted goods or providing of exempted services shall not be distributed."*

Therefore, only two limitations are put for the distribution of credit by an input service distributor. Firstly, it cannot exceed the amount of service tax paid and secondly, the credit of service tax attributable to service used shall not be distributed in a unit exclusively engaged in the manufacture of exempted goods or providing of exempted services.

9. *In fact, the Board has issued a circular clarifying in this regard, which is extracted by the tribunal at para 7 which reads as under :-*

> *"Para 7. Para 2.3 of the Master Circular referred to by the ld. Advocate reads as under :-*
>
> *"2.3.- An 'Input service distributor' is an office or establishment of a manufacturer of excisable goods or provider of taxable service. It receives tax paid invoices/bills of input services procured (on which Cenvat credits can be taken) and distributes such credits to its units providing taxable services or manufacturing excisable goods. The distribution of credit is subject to the conditions that - (a) the credit distributed against an eligible document shall not exceed the amount of service tax paid thereon, and (b) credit of service tax attributable to services used in a unit either exclusively manufacturing exempted goods or exclusively*

providing exempted services shall not be distributed. An input service distributor is required (under Section 69 of the Act, read with Notification No. 26/2005-S.T.) to take a separate registration."

10. *Therefore, these are the only two limitations, which are imposed in Rule 7 preventing the manufacturer from utilizing the CENVAT credit, otherwise, he is entitled to the said credit. Merely because the input service tax is paid at a particular unit and the benefit is sought to be availed at another unit, the same is not prohibited under law. It is in this context, the manufacturer is expected to register himself as a input service distributor and thereafter, he is entitled to distribution of credit of such input in the manner prescribed under law. Therefore, the order passed by the tribunal is legal and valid and does not suffer from any legal infirmity and does not call for any interference and therefore it is dismissed."*

4.6 As per this decision, the reason for denial of cenvat credit in terms of the rule as it existed during the material time cannot be sustained. The same view has been expressed in the case of Nestle India Ltd. (supra) relying on the ECOF Industries judgment.

4.7 The grounds raised by the learned AR on issue of limitation and unjust enrichment do not carry forward the case of Revenue as we observed that these grounds were never taken by the original authority and Section 11B of the Central Excise Act, 1944 specifically provides as follows:-

*"**Section 11B. Claim for refund of [duty and interest, if any, paid on such duty]**. — (1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such [duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise and*

interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person :

Provided *that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act :*

Provided further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest."

4.8 In view of the specific provisions in Section 11B, the refund claim by the appellant could not have been denied on these grounds.

4.9 Further we observed that when the Revenue seeks to deny the credit distributed by the input credit distributor to amongst more than one office unit, then the credit is sought to be denied in a particular unit. For whatever reason the same credit would be admissible to another unit to whom this credit could have been properly distributed even after the amendment made in 2012, i.e. the total credit distributed to all the units remained the same, the only question can be with regard to the correctness of the credit distributed to a particular unit. If credit is sought to be denied at one place, input credit distributor should have been asked to distribute this credit to the other unit. Since this credit is admissible either to unit or its sister concern we do not find any merits in the argument advanced by the authorized representative on the unjust enrichment. The credit otherwise could not be expunged by any other method other than that provided in Rule 14 of the Cenvat Credit Rules from the books of account. The claim of learned AR that the debit made under protest and the communication of audit should be treated as an appealable order, cannot be acceded to.

5.1 In view of the above, we do not find any merits in the impugned order and set aside the same. Appeal is allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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