CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
Single Member Bench

Service Tax Appeal No. 85448 of 2016

(Arising out of Order-in-Appeal No. NGP/EXCUS/000/APPL/440/15-16 dated 27.11.2015 passed by the Commissioner of Central Excise & Customs (Appeals), Nagpur)

M/s. Kolland Developers Pvt. Ltd. **Appellant**
SP Infocity, Sector – 1, Khapri,
MIHAN SEZ, Nagpur.

Vs.

Commissioner of Central Excise, Nagpur **Respondent**
Telangkhedi Road, Civil Lines,
Post Box No.81, Nagpur 440 001.

Appearance:

Shri Manoj Chauhan, Chartered Accountant, for the Appellant
Shri Prabhakar Sharma, Superintendent, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

Date of Hearing: 17.08.2022
Date of Decision: 17.08.2022

FINAL ORDER NO. A/85814/2022

This appeal has been directed against order-in-appeal No. NGP/EXCUS/000/APPL/440/15-16 dated 27.11.2015 passed by the Commissioner of Central Excise & Customs (Appeals), Nagpur. By the impugned order, the Commissioner (Appeals) has held as follows:-

"22. The relevant date for refund is the date of provision of services and can in no way be taken as the date of filing of refund claim. 1 find that the approval was granted by the Development Commissioner, SEEPZ-SEZ, Mumbai on 27.08.2010 whereas the services were received prior to the approval by the competent authority. It was necessary for the appellant to comply with the conditions stipulated in the notification to avail the benefit of the said notification, which I find the appellant failed to do so. Hence, the applicant has failed to meet out the basic mandatory requirement for claiming refund of service tax that is the approval.

SS

This is mandatory requirement and not procedural lapse which is condonable.

……….…..

…………….

<u>*ORDER*</u>

I hereby uphold the impugned Order in Original No. 04/2014/Refund/ST/Dn.Mihan dated 24.03.2015 passed by the Assistant Commissioner, Central Excise, Customs & Service Tax, Division Mihan, Nagpur, and reject the appeal of the appellant."

2.1 This appeal was earlier heard by this Tribunal and the Tribunal had vide its final order No. A/87886/2016-WZB/SMB dated 10.06.2016 dismissed the appeal filed by the appellant observing as follows:-

*"**4.** I have gone through the rival submissions. I find that in the case of Mahindra Engineering Services (supra), cited by the counsel, the argument that the said notification is an exemption notification and therefore, at the time to avail the exemption, the conditions of notification have to be fulfilled, was not taken by the Revenue. In the instant case, I find that the Notification No. 12/2013 provides the exemption by way of refund. To avail the exemption, the assessee must fulfil the conditions of the notification at the time of availing the services. In the instant case, admittedly the appellants had not got the impugned services approved by the Approval Committee. In view of the above, at the time of availing services the condition 3(I) of the notification was not fulfilled. In such circumstances, refund cannot be granted. Accordingly, the appeal is dismissed."*

2.2 Against this order, the appellant filed appeal before the Hon'ble High Court of Bombay, Nagpur Bench, in Central Excise Appeal No.06 of 2019. Hon'ble High Court has vide its order dated 15.11.2021 held as follows:-

*"**5.** On hearing the Learned Counsel for the parties and after giving due consideration to their respective submissions we are of the view that the Learned Member of the Tribunal was not justified*

SS

in distinguishing the earlier decision of the Tribunal rendered in the case of Mahindra Engineering Services Ltd. (supra) on the ground that the argument that all conditions of the said Notification had to be fulfilled while availing the exemption in question. The Tribunal in Mahindra Engineering Services Ltd. (supra) while considering the effect of Notification No. 9/2009 had in paragraph 6 of its order held that said Notification did not require the approval from the Approval Committee to be obtained prior to providing the services in question. It also noted that the refund claimed therein had been filed after approval was granted by the Approval Committee. This was held to be sufficient compliance with the requirements of Notification No. 9/2009. The appellant before the Tribunal had also raised a contention that the conditions of Notification No. 9/2009 were similar to the conditions in Notification No. 12/2013. We find that the impugned order of the Tribunal does not consider the latter contention raised by the appellant for if that contention were to be accepted by the Tribunal, it either ought to have followed its earlier view in Mahindra Engineering Services Ltd. (supra) or if it was not inclined to do so, it ought to have referred the question to a Larger Bench as held in Mercedes Benz (India) Pvt. Ltd. (supra). Even otherwise we find that merely because a particular argument was not raised when the earlier proceedings were decided would not be a sufficient ground to disregard an earlier adjudication made on merits. It would be open for the Tribunal in subsequent proceedings to doubt the correctness of the view earlier taken and refer the question to a Larger Bench but it would not be permissible to disregard the earlier view on the ground that a particular contention was not raised when the earlier order was passed.

6. *Since we prima facie find that the appellant was justified in relying upon the earlier decision of the Tribunal in Mahindra Engineering Services Ltd. (supra) and that the Tribunal was not justified in disregarding its earlier order, we find that re-consideration of the proceedings by the Tribunal is warranted in this backdrop. Accordingly the substantial question of law as framed is answered by holding that the Customs, Central Excise and Service Tax Appellate Tribunal ought to have considered the effect of its earlier decision in Mahindra Engineering Services Ltd.*

SS

(supra). If it was of the opinion that said view required re-consideration, the option of referring that question to a Larger Bench ought to have been exercised. In view of the aforesaid answer the following order is passed :

(i) The order dated 10-6-2016 passed by the Customs, Excise and Service Tax Appellate Tribunal, Mumbai in Appeal No. ST/85448/16 is set aside.

(ii) The proceedings are remanded to the Tribunal to decide the appeal afresh on its own merits and in accordance with law. Since the proceedings pertain to the year 2016, the Tribunal is requested to decide the same expeditiously within a period of four months from the production of a copy of this order.

(iii) Central Excise Appeal No. 6/2019 is allowed in aforesaid terms leaving the parties to bear their own costs."

3.1 I have heard Shri Manoj Chauhan, Chartered Accountant, for the appellant and Shri Prabhakar Sharma, Superintendent (Authorised Representative) for the Revenue.

3.2 Arguing for the appellant, learned counsel states that:-

- Appellant herein is a co-developer of SEZ.
- They had filed a refund claim as per Notification No.12/2013-ST dated 01.07.2013. The said refund claim has been rejected for the reason that the appellant has not complied with Clause 3(I) of the said exemption notification which provides as follows:-
  "(I) The SEZ Unit or the Developer shall get an approval by the Approval Committee of the list of the services as are required for the authorized operations (referred to as the 'specified services' elsewhere in the notification) on which the SEZ Unit or Developer wish to claim exemption from service tax."
- This issue has been considered by this Tribunal vis-à-vis the same exemption notification in the following cases and the Tribunal has held in favour of the appellant:-
  - Se Forge Ltd. [2019 (365) ELT 560 (Tri.-Chennai)]
  - Wabco India Ltd. [2021 (54) GSTL 37 (Tri.-Chennai)]

SS

- Divis' Laboratories Ltd. [2021 (54) GSTL 400 (Tri.-Hyd.)]
- Lowe's Services India Pvt. Ltd. [2021 (3) TMI 230 – CESTAT Bangalore]
- EYGBS (India) LLP [2022 (4) TMI 1208 – CESTAT Bangalore

- The only ground for denial of the refund claim is for the reason that the services against which service tax was paid by the appellant and claimed as refund were not approved by the Approval Committee as required. However, subsequently at the time of refund claim all such services have been approved.
- In view of the settled position in law vis-à-vis the same notification and the decisions, the appeal be allowed.

3.3 Arguing for the Revenue, learned AR submits that:-

- Notification No.12/2013 and Notification No.09/2009-ST dated 03.03.2009 are distinctly different from each other and hence the Tribunal was justified in dismissing the appeal in the earlier instance. Pointing out the above distinction he stated:-

  "(I) (A) Notification No. 12/2013 dated 01.07.2013 has a provision of exemption from payment services tax on the specified services by two way:-

  (i) Exemption by way of refund of Service Tax paid on the specified services received by the SEZ unit or developer and used for authorized operations. (Paragraph 2)

  (ii) Exemption by way of ab initio non payment of Service Tax on the specified services received by the SEZ unit or the developer and are used exclusively for authorized operation. (Proviso to Para 2)

  (B) whereas Notification No. 09/2009 dated 03.03.2009 has provision of exemption of service tax paid on the specified services by way of Refund only (Clause (c) of Para 1 of notification). There is no provision of ab initio exemption from payment of Service Tax.

  (II) (A) The exemption either by way of ab initio exemption from payment of service tax or by refund of Service Tax is

SS

subject to condition and procedure which is mentioned at Paragraph 3 of the Notification.

(B) The exemption by way of Refund is subject to conditions mentioned under Clause (a) to (d) of Paragraph 1 and Clause (a) to (i) of Paragraph 2 of the Notification.

(III) (A) Para 3 of the Notification 12/2013 clearly mention that the exemption shall be given effect to in the following manner. The term "following manner" is used which is of utmost significance. The term manner literally means 'the way in which something is done', which states about the chronology of steps which needs to be followed while claiming exemption. Further, This chronology of steps is of mandatory nature which is indicated by using word 'Shall' in the conditions.

(B) The conditions mentioned under Notification No. 09/2009 are required to be mandatorily followed but not in a specified manner. All the conditions required to be followed prior to claiming exemption by way of Refund.

(IV) (A) The reason for the conditions to be followed in the specified manner under Notification No. 12/2013 is due to the fact that exemption is provided by way of ab initio exemption from payment of Service Tax on the specified services for the authorized operations. If no sequence of procedure in the specified manner is followed as per notification then it would create a situation of illegality.

Example:- If any assessee wishes to avail exemption under the notification by way of 'ab initio exemption from payment of Service Tax' but not get approval by the Approval Committee of the list of services (referred to as specified services) as are required for the authorized operations which is one of the mandatory condition for claiming exemption. In such situation, Service Tax liability would arise as per the point of taxation rule and non payment of the same, under the belief that approval from the approval committee would be subsequently taken, would be an illegality at least for the period till approval is not granted.

Therefore, the term 'following manner' has been used in the notification purposely to avoid or prevent such situation. Further, also with a view to maintain discipline in such

SS

exemption matter, this manner of procedure is applied in both cases of exemptions and is applied mandatorily.

(B) The conditions mentioned under the notifications (09/2009) are applicable on the issue of refund of Service Tax only. Although, it cannot be inferred that any kind of manner or sequence is to be followed while claiming refund if all conditions are fulfilled, it appears to be logical to get an approval of specified service from approval committee prior to initiating service activity. The Courts have shown leniency and allowed refund in many cases when all the conditions are simply followed.

(V) (A) The claim of refund shall be filed within one year from the end of the month in which actual payment of service tax was made.

(B) The claim of refund shall be filed within 6 months from the end of the month in which actual payment of service tax was made."

4.1 I have considered the impugned order along with the submissions made in appeal and during the course of argument, as per the direction of the Hon'ble High Court.

4.2 The issue involved is not whether these services against which refund claim has been filed as per Notification No.12/2013 were input services of the appellant for undertaking the development work in SEZ. Lower authority has allowed the refund claim in respect of the same services which were received post the approval granted by the Approval Committee. The only issue that needs to be considered is whether the refund application can be allowed in respect of the services which were received prior to the approval granted by the Approval Committee.

4.3 In the case of Divi's Laboratories Ltd. (supra), considering the same issue, the Tribunal has observed as follows:-

*"**12.** After considering the rival contentions, the appeal record and the referred case laws, I observe and held as follows :*

The issue that arises for consideration in the appeal is about exemption from service tax on the services rendered to the SEZ units.

SS

According to the appellant, the impugned services were utilized for authorized operations by the recipient SEZ units, there was no necessity to pay any service tax. The Department, however, alleged that though the exemption provided under the SEZ Act is contained in the Notification dated March 3, 2009, but the service as that of ocean freight was not covered under the approved list.

In order to appreciate the contentions advanced by Learned Counsel for the appellant and the Learned Authorized Representative of the Department, it will be appropriate to refer to the relevant provisions. Section 26 of the SEZ Act deals with exemptions, drawbacks and concessions to every Developer and entrepreneur. The relevant provisions are reproduced below :

*"**26. Exemptions, drawbacks and concessions to every Developer and entrepreneur. -** (1) Subject to the provisions of sub-section (2), every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions, namely :-*

(a) xx xx xx

(b) xx xx xx

(c) xx xx xx

(d) xx xx xx

(e) exemption from service tax under Chapter V of the Finance Act, 1994 (32 of 1994) on taxable services provided to a Developer or Unit to carry on the authorized operations in a Special Economic Zone;

(f) xx xx xx

(g) xx xx xx

(2) The Central Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions, concessions, drawback or other benefits shall be granted to the Developer or entrepreneur under sub-section (1)."

SS

Section 51 of the SEZ Act further provides overriding effect to the provisions of the SEZ Act and it is reproduced below :

*"**51. Act to have overriding effect.** - The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."*

Section 55 of the SEZ Act gives power to the Central Government to make rules for carrying out the provisions of the Act. In exercise of the aforesaid powers, the Central Government made "The Special Economic Zones Rules, 2006" Rule 31 deals with the exemption from payment of service tax and is reproduced below :

"The exemption from payment of service tax on taxable services under Section 65 of the Finance Act, 1994 (32 of 1994) rendered to a Developer or a Unit (including a Unit under construction) by any service provider shall be available for the authorized operations in a Special Economic Zone."

Further Notification No. 9/2009-Service Tax, dated March 3, 2009 reads as follows :

G.S.R. 146(E) - In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), and in supersession of the Notification of the Government of India, Ministry of Finance (Department of Revenue), No. 4/2004-Service Tax, dated the 31st March, 2004, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), dated the 31st March, 2004, vide, G.S.R. 248(E), dated the 31st March, 2004, except as respects things done or omitted to be done before such supersession, the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services specified in clause (105) of section 65 of the said Finance Act, which are provided in relation to the authorised operations in a Special Economic Zone, and received by a developer or units of a Special Economic Zone, whether or not the said taxable services are provided inside the Special Economic Zone, from the whole of the service tax leviable thereon under section 66 of the said Finance Act :

SS

Provided that -

(a) xx xx xx

(b) xx xx xx

(c) the exemption claimed by the developer or units of Special Economic Zone shall be provided by way of refund of service tax paid on the specified services used in relation to the authorised operations in the Special Economic Zone :

(d) xx xx xx

(g) xx xx xx

(f) xx xx xx

(g) xx xx xx

2. xx xx xx"

Proviso (c) to the aforesaid Notification dated March 3, 2009 was amended by Notification dated May 20, 2009. The amended proviso (c) is reproduced below :

"(c) the exemption claimed by the developer or units of Special Economic Zone shall be provided by way of refund of service tax paid on the specified services used in relation to the authorised operations in the Special Economic Zone except for services consumed wholly within the Special Economic Zone;"

As noticed above, Section 26(1) of the SEZ Act provides that subject to the provisions of the sub-section (2), every Developer shall be entitled to exemptions and the exemption at (e) exempts every Developer from service tax under Chapter-V of the Finance Act on taxable services provided to a Developer or unit to carry on the authorized operations in a SEZ. Section 51 of the SEZ Act provides for an overriding effect to the provisions of the SEZ Act. The provisions of Section 26 read with Rule 31 of the SEZ Rules thus, have overriding effect over anything inconsistent contained in any other law for the time being in force, which would include the Finance Act. It needs to be noted that the Notification dated March 3, 2009 has been issued in exercise of the powers conferred

SS

by Section 93 of the Finance Act. Thus, when the services rendered by the appellant are fully exempted from service tax in terms of the provisions of the SEZ Act, the condition of exemption by way of refund imposed under the Notification issued under the Finance Act would be inconsistent with the provisions of the SEZ Act. It also needs to be noted that the SEZ Act was enacted in 2005, much after the enactment of the Finance Act in 1994.

This issue was examined by the Telangana and Andhra Pradesh High Court in GMR Aerospace Engineering Limited and Another v. Union of India and Others [2019 (8) TMI 748 = 2019 (31) G.S.T.L. 596 (A.P.)].

The Andhra Pradesh High Court observed as follows :

"22. It may be noted that sub-section (1) of section 26 begins with the words "subject to the provisions of sub-section (2)". Sub-section (2) authorizes the Central Government to prescribe the manner in which and the terms and conditions subject to which exemptions shall be granted to the developer or entrepreneur under sub-section (1).

23. As rightly pointed out by Sri S. Niranjan Reddy, Learned Senior Counsel appearing for the petitioner, the word "prescribe" appearing in sub-section (2) of section 26 has to be understood with reference to the definition of the word "prescribed" appearing in section 2(w) of the SEZ Act, 2005.

Section 2(w) of the Act reads as follows :

> *"prescribed means prescribed by rules made by the Central Government under this Act."*
> *24. Therefore, the terms and conditions subject to which the exemptions are to be granted under sub-section (1) of section 26 should be prescribed by the Rules made by the Central Government under the SEZ Rules, 2006 issued in exercise of the power conferred by section 55 of the SEZ Act. It is not necessary to extract rule 22, since there is no dispute about the fact (1) that the petitioners have complied with the prescriptions contained in rule 22 of the SEZ Rules, 2006, and (2) that rule 22 of the*

SS

SEZ Rules, 2006 does not stipulate the filing of Forms A1 and A2 as prescribed in the three Notifications issued under section 93 of the Finance Act, 1994.

29. The contention of Smt. Sundari R. Pisupati, Learned Senior Standing Counsel is that there is no inconsistency between (i) the terms and conditions prescribed in the Notifications issued under section 93 of the Finance Act, 1994, and (ii) the terms and conditions prescribed in rules 22 and 31 of the SEZ Rules, 2006, and that therefore, section 51 of the SEZ Act, 2005 cannot be pressed into service. But this contention is unacceptable.

30. This is for the reason that section 26(1) of the SEZ Act made the entitlement to certain exemptions subject to provisions of sub-section (2) of section 26. Section 26(1) did not make the entitlement of a developer to certain exemptions, subject to the provisions of something else other than the provisions of sub-section (2). Therefore, the firth respondent cannot read section 26(1) to mean that the exemptions listed therein are (1) subject to the provisions of sub-section (2) of section 26, and (2) also subject to the terms and conditions prescribed in the Customs Act, 1962, the Customs Tariff Act, 1975, the Central Excise Act, 1944, the Central Excise Tariff Act, 1985 and the Finance Act, 1994. This is especially so, since the authority of the Central Government to prescribe the terms and conditions subject to which exemptions may be granted under section 26(1), flows only out of sub-section (2) of section 26. The word "prescribe" is verb. Generally no enactment defines the word "prescribe" but the SEZ Act, 2005 defines the word "prescribe" under section 2(w) to mean the rules framed by the Central Government under the SEZ Act, 2005. The space is also not left unoccupied, as the Central Government has issued a set of rules known as "the Special Economic

SS

Zones Rules, 2006", wherein the Central Government has prescribed the terms and conditions for grant of exemptions under rule 22. Therefore, there is no question of comparing the terms and conditions prescribed in rule 22 with the terms and conditions prescribed in the Notifications issued under any one of the five enactments listed in section 26(1) to find out whether there was any inconsistency.

34. The benefit of exemptions granted under the Notifications issued under section 93 of the Finance Act, 1994, are available to any one and not necessarily confined to a unit in a special economic zone. Section 93 of the Finance Act, in that sense is a general power of exemption available in respect of all taxable services. But, section 26(1) is a special power of exemption under a special enactment dealing with a unit in a special economic zone. Therefore, the Notifications issued under section 93 of the Finance Act, 1994 cannot be pressed into service for finding out whether a unit in a SEZ qualifies for exemption or not."

This Tribunal in DLF Assets Pvt. Ltd., placed reliance upon the aforesaid decision of the Andhra Pradesh High Court in GMR Aerospace Engineering Ltd., and observed that the conditions set out in the notification dated March 3, 2009 were not required to be examined in view of the provisions of the SEZ Act. The relevant portion of the decision is reproduced below :

"18. The contention advanced by the Learned Counsel for the appellant has force. As noticed above, section 26(1) of the SEZ Act provides that subject to the provisions of the sub-section (2), every Developer shall be entitled to exemptions and the exemption at (e) exempts every Developer from service tax under Chapter-V of the Finance Act on taxable services provided to a Developer or unit to carry on the authorized operations in a SEZ. Section 51 of the SEZ Act provides for an overriding effect to the provisions of the SEZ Act. The provisions of section 26 read with rule 31 of the SEZ Rules thus, have overriding effect over anything

SS

inconsistent contained in any other law for the time being in force, which would include the Finance Act. It needs to be noted that the Notification dated March 3, 2009 has been issued in exercise of the powers conferred by section 93 of the Finance Act. Thus, when the services rendered by the appellant are fully exempted from service tax in terms of the provisions of the SEZ Act, the condition of exemption by way of refund imposed under the Notification issued under the Finance Act would be inconsistent with the provisions of the SEZ Act. It also needs to be noted that the SEZ Act was enacted in 2005, much after the enactment of the Finance Act in 1994.

21. Thus, what follows is that the Commissioner was not justified in examining whether the conditions set out in the Notification dated March 3, 2009 were satisfied or not for grant of any exemption from service tax. Section 26(2) of the SEZ Act does provide that the Central Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions shall be granted to the Developer under sub-section (1) but what is important to notice, and as was also observed by the Andhra Pradesh High Court, the word "prescribe" would mean "prescribed by rules made by the Central Government under the SEZ Act," in view of the definition of "prescribed" under section 2(w) of the SEZ Act. The Notification dated March 3, 2009, which has been issued under section 93 of the Finance Act, therefore, has no application."

13. *Learned Authorized Representative of the Department has, however, placed reliance upon sub-rule (5) of Rule 47 of the SEZ Rules that was inserted w.e.f. August 5, 2016 to contend that the aforesaid two notifications issued under Finance Act would be applicable. This submission of Learned Authorized Representative of the Department cannot be accepted. It is by a notification dated August 5, 2016 that in Rule 47, sub-rule (5) was inserted after sub-rule (4) and the same is reproduced below :*

"47(5) Refund, Demand, Adjudication, Review and Appeal with regard to matters relating to authorized operations under Special Economic Zones, Act, 2005, transactions and goods and services related thereto, shall be made by the Jurisdictional Customs and

SS

Central Excise Authorities in accordance with the relevant provisions contained in the Customs Act, 1962, the Central Excise Act, 1944 and the Finance Act, 1994 and the rules made thereunder of the notifications issued thereunder."

Sub-rule (5) of Rule 47 has no retrospective application and, therefore, it is only w.e.f. August 5, 2016 that the notifications issued under Section 93 of the Finance Act may be applicable to units situated in SEZ carrying out authorized operations under the SEZ Act. In any case, the conditions imposed by the notifications issued under the provisions of the Finance Act are merely directory in nature.

14. *This issue has been considered time and again. In Mast Global Business Services India Pvt. Ltd. v. Commissioner of Central Tax [2018-TIOL-3115-CESTAT-BANG], the Tribunal held that the SEZ Act had an overriding effect, in view of the provisions of Section 51 of the SEZ Act, over all other laws and, therefore, the ground for rejecting the refund claims was not tenable in law and even otherwise, approval from UAC was only procedural in nature and not a mandatory condition. The relevant portion of the decision of the Tribunal is reproduced below :*

"The other grounds on which the refund claims have been rejected by the impugned order is that the appellant has not produced the approved list of specified input services from the UAC to SEZ which is a mandatory condition as per the Commissioner (Appeals). In reply to this argument, the Learned Counsel submitted that in view of the settled legal position by various decisions relied upon by him, condition in respect of approval from UAC of SEZ is not a mandatory requirement as the SEZ Act vide Section 51 of SEZ Act will have overriding effect over the provisions of any other law. Therefore, keeping in view, the intention of the Government in enacting the SEZ Act and giving special fiscal concessions to SEZs, I am of the considered opinion that this is only a procedural and is not a mandatory condition as held by the Commissioner (Appeals). Further the decisions relied upon by the appellant clearly hold that the SEZ Act has a overriding effect over other laws. Therefore, this ground on the basis of which refund claims have been rejected is not tenable in law."

SS

15. *It was also held in M/s. ONGC Mangalore Petrochemicals Limited v. Commissioner of Central Excise & Central Tax, Mangalore Commissionerate [2019-VIL-140-CESTAT-BLR-ST], the Tribunal again held :*

"6. After considering the submissions of both the parties and perusal of the material on record, I find that the appellant being SEZ is entitled to refund of Service Tax paid on input service used for authorized operations. Further, I find that as per Notification No. 12/2013-S.T., dated 1-7-2013, the only requirement is that the appellant is required to file the list of approved services which have been used by them for authorized operations. Further, in this case, I find that the appellant has subsequently obtained the approval from the Unit Approval Committee of the SEZ and the said certificate is placed on record but the Commissioner (A) has held that the said approval was obtained from the competent authority on 25-10-2011 and therefore, after the approval, he has allowed the refund and prior to that he has rejected the same. Further, I find that in view of the settled legal position by various decisions relied upon by the appellant, conditions of approval from UAC is not a mandatory requirement as per SEZ Act vide section 51 of the SEZ Act which has an overriding effect over the provisions of any other law. Further, I find that it is only a procedural requirement to get the approval from the Unit Approval Committee and is not a mandatory condition as per the SEZ Act which has an overriding effect over other laws."

16. *In view of the entire above discussion, the finding of Commissioner (Appeals) that since ocean freight service has been included in the list of services with SEZ services authorities only on 27-11-2017 i.e. subsequent to their refund application, the retrospective application cannot be allowed is not sustainable. Learned Commissioner is held to have failed to appreciate the judicial precedents. Order under challenge accordingly is hereby set aside. Consequent thereto both the appeals are ordered to be allowed."*

Similarly, in the case of Wabco India Ltd. (supra), the Tribunal has held as follows:-

SS

*"**5.** The issue that arises for consideration is whether the refund claim filed by the appellant is time-barred. The Notification No. 12/2013-S.T., dated 1-7-2013 states that the refund has to be filed within period of one year. In terms of Section 26(1)(e) of SEZ Act, an assessee is eligible for exemption on taxes and duties. Such exemption can be availed ab initio, while procuring the input services or after the services are procured on payment of service tax by availing refund as per the Notification No. 12/2013. The appellant has opted for applying for refund as per the notification. The department has rejected the refund claim stating that it is barred by limitation, as mentioned in the notification. The question as to whether the time-limit prescribed in the notification would prevail over Sections 51 and 26(1)(e) of the SEZ Act was considered by the Hon'ble Telengana and Andhra Pradesh High Court in the case of M/s. GMR Aerospace Engineering Ltd. v. Union of India reported in 2019 (8) TMI 748. The Division Bench of the Tribunal in the case of M/s. DLF Assets Pvt. Ltd. v. Commissioner, Service Tax, Delhi-I reported in 2020 (11) TMI 35-CESTAT NEW DELHI. It was held that the conditions of the notification cannot be pressed into application to deny the refund to a SEZ Unit. Para 21 of the said decision reads as under :-*

"Thus, what follows is that the Commissioner was not justified in examining whether the conditions set out in the Notification dated March 3, 2009 were satisfied or not for grant of any exemption from service tax Section 26(2) of the SEZ Act does provide that the Central Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions shall be granted to the Developer under sub-section (1) but what is important to notice, and as was also observed by the Andhra Pradesh High Court, the word "prescribe" would mean "prescribed by rules made by the Central Government under the SEZ Act," in view of the definition of "prescribed" under section 2(w) of the SEZ Act. The Notification dated March 3, 2000, which has been issued under section 93 of the Finance Act, therefore, has no application."

This Tribunal in the case of M/s. ATC Tyres Pvt. Ltd. v. Commissioner of GST & CE, Tirunelveli reported in 2021-VIL-106-CESTAT-CHE-ST had considered the very same issue of limitation

SS

mentioned in the Notification No. 12/2013-S.T. It was held that Section 51 of SEZ Act has an overriding effect and, therefore, the conditions mentioned in the notification cannot be applied so as to deny the refund when substantial conditions prescribed in the SEZ Act have been fulfilled."

In the case of SE Forge Ltd. (supra), the Division Bench at Chennai has held as follows:-

*"**5.** The issue that arises for consideration is whether the appellant is eligible for refund of service tax paid on Renting of Immovable Property Service. The original authority has rejected the refund on the ground that on the date of filing of the refund claim, the said services, viz; Renting of Immovable Property Services were not approved by the Development Commissioner, as required under Notification No. 9/2009 as amended. As per the notification, exemption is allowed in relation to authorised operations in SEZ, provided the developer or units of SEZ shall get the list of services which are required in relation to the authorised operations approved from the Approval Committee. The appellant although requested for approval of 106 services initially, the Assistant Commissioner had approved only 37 services which was only default list or rather a general list applicable to all SEZ. It is seen that Development Commissioner has approved the list including Renting of Immovable Property Services vide letter dated 15-9-2009. It is not disputed that Renting of Immovable Property Service was availed by the appellant for the disputed period. The invoices shows the payment of service tax on such services. The Approval Committee has approved such services vide their letter dated 15-9-2009. The requisite for obtaining approval is only a procedure to be complied with, for the substantive benefit of exemption from payment of service tax. When the services have been approved, the benefit of exemption cannot be denied. Section 26 of the SEZ Act, lays down provisions for exemption from duties and taxes. Section 51 of the said Act provides for overriding effect. Therefore the immunity provided from paid service tax cannot be taken away by the procedural prescriptions of Notification No. 9/2009 or 15/2009. These notifications are calibrated to enable recipients of taxable services of SEZ, etc., to get benefit of exemption of the*

SS

service tax. In any case, since the appellants have obtained approval for the said services, we find that the error would only be a procedural infraction which can be condoned. The substantive benefit cannot be denied for a procedural lapse. The claim of Rs. 967/- being given up by appellant is not considered in this appeal."

In the case of EYGBS (India) LLP (supra), the Tribunal has observed as follows:-

"5. I have considered the rival contentions and have gone through the orders relied upon during the course of arguments; and I am prima facie convinced that the Revenue has not denied the fact that the services in question were used by the SEZ unit for its authorized operations. Hence, the denial of refund for want of documents is not sustainable.

6.1 The Learned Bangalore Bench of the CESTAT in the case of M/s. Mast Global Business Services India Pvt. Ltd. (supra) has considered the case of a similarly placed taxpayer and held as under:

"6.1 After considering the submissions of both sides and perusal of material on record, I find that the show cause notices were issued on two grounds viz. certain input services are not covered in the definition of input service under Rule 2(l) of CENVAT Credit Rules and hence not eligible and secondly non-submission of documents required to process the claims. Further I find that Order-in-Original as well as impugned order, both have rejected the refund claims on other grounds which are not taken in the show-cause notices and therefore they have travelled beyond the show-cause notices which is not legally permissible in view of various decisions cited supra by the appellant. Further I find that the impugned order also violates the principles of natural justice because the appellant has not been given the reasonable opportunity to defend himself on the ground on which the refund claims have been rejected. The other grounds on which the refund claims have been rejected by the impugned order is that the appellant has not produced the approved list of specified input services from the UAC of SEZ which is a mandatory condition as per the Commissioner(Appeals). In reply to this argument, the learned counsel submitted that in view of the settled legal position by various decisions relied upon by him, condition in respect of

SS

approval from UAC is not a mandatory requirement as the SEZ Act vide Section 51 of SEZ Act will have overriding effect over the provisions of any other law. Therefore keeping in view the intention of the Government in enacting the SEZ Act and giving special fiscal concessions to SEZs, I am of the considered opinion that this is only a procedural and is not a mandatory condition as held by the Commissioner (Appeals). Further the decisions relied upon by the appellant clearly hold that the SEZ Act has a overriding effect over other laws. Therefore this ground on the basis of which refund claims have been rejected is not tenable in law."

6.2 I also find that in the other orders relied upon by the Learned Advocate for the appellant, more or less similar views have been expressed consistently by the co-ordinate Benches.

7. In view of the above, therefore, I do not see any reasons or justification to sustain the impugned order as well as the denial of refund."

4.4 I find that the issue is no longer res integra and the Tribunal has been consistently taking the view that till the time the services are input services for the developer, the refund claim made as per Notification No.12/2013 could not have been denied just for the reason that at the time of receipt of services, there was no approval of Approval Committee cannot be upheld.

5.1 Accordingly the appeal is allowed.

(Order pronounced in the open court)

S. Srivastava
(Sanjiv Srivastava)
Member (Technical)

tvu

SS