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

Service Tax Appeal No. 85163 of 2020

(Arising out of Order-in-Appeal No. NA/CGST/A-I/MUM/179/2019-20 dated 26.09.2019 passed by the Commissioner of GST & Central Excise (Appeals), Mumbai-I)

M/s. Warburg Pincus India Pvt. Ltd. **Appellant**
7th Floor, Express Tower,
Nariman Point, Mumbai 400 021.

Vs.

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

Appearance:

Shri Vinay Jain, Advocate, for the Appellant
Shri S.B.P. Sinha, Superintendent, Authorised Representative for the Respondent

CORAM:

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

Date of Hearing: 01.02.2023
Date of Decision: 08.03.2023

FINAL ORDER NO. A/85351/2023

This appeal is directed against the order in appeal no NA/CGST/A-I/MUM/ 179/2019-20 dated 26.09.2019 of the Commissioner (Appeals), GST and Central Excise, Mumbai-I. By the impugned order Commissioner (Appeals) has held as follows:

"ORDER

5.1. In view of the above discussion and finding, I modify the Order-in-Original No. CGST Mum-South/Refunds/RKS/61-62/2018-19 dated 15.11.2018, passed by Asstt. Commissioner (Refunds), CGST, Mumbai South, as under:

(i) I hold that out of rejected refund claim of Rs. 40,19,282/- the appellant is eligible for refund claim of Rs. 16,16,022/- and the OIO is set aside to the said extent.

(ii) Denial of Refund to the extent of Rs. 24,03,260/- is upheld.

5.2 Appeal No. V2(A-I)/136/CGST/MS/ 2018-19 is disposed of in the said terms."

2.1 The appellant providing "Banking and other financial services". They filed two refund claim of RS. 14,44,091/- for the period April 2005 to Dec. 2005 and Rs. 38,44,130/-for the period from January 2006 to September 2006 with the erstwhile Service Tax Commissionerate on the ground that they were not in a position to utilize the cenvat credit of the duty service Tax taken on input services used in providing output services exported without payment of service tax. Both the claims were rejected vide two O-I-Os dated 03.04.2007 and 06.08.2007. Aggrieved appellant filed the appeal to Commissioner (Appeal) which were rejected by order in appeal dated 06.05.2010

2.2 Against O-I-A dated 06.05.2010 preferred an appeal in the CESTAT, West Zonal Bench, Mumbai. The Hon'ble CESTAT, West Zonal Bench Mumbai vide order A/1401/15/STB dt. 13.05.2015 remanded the matter to original authority observing as follows:

- Claimant was eligible to avail the Cenvat credit of the input services for the period prior to 14.03.2006 and being eligible to claim refund of the unutilized Cenvat Credit, the claimant cannot be denied the same and set aside the impugned to this extent.
- Claimant's counsel had shown willingness to produce all the documents before the lower authorities, the matter was remanded back to the adjudicating authority for the limited purpose of quantification of the correct amount of refund to be paid based on the documents which may be submitted by the claimant.

2.3 In the remand proceeding the original authority vide the Order in Original dated 15.11.2018 sanctioned refund of Rs. 12,68,939/- and disallowed the refund of Rs. 40,19,282/- stating as follows:

i. At the time of filing the return for the period April 2006 to Sept. 2006, the claimant has not shown any opening balance of Cenvat Credit or Education Cess in the month of April 2006, thus implying that the claimant did not have any unutilized Cenvat Credit lying in their account by the end of March 2006. Thus the claimant's refund claim (of

the unutilized Cenvat Credit) for the period from April 2005 to March 2006 total amounting to RS. 23,83,160/-(Rs. 14,44,091/- for April 2005 to December 2005 and Rs. 9,39,069/- for January 2006 to March 2006) is liable for rejection.

ii. The claimant has availed cenvat on input services of rent a cab, maintenance & Repair, cleaning services, mandap keeper services, internet charges & Dry cleaning services in respect of hotels, erection / commission and installation charges, catering services, telephone services, insurance services, manpower recruitment services, etc. These services have no nexus with the output services. Further in some cases the invoice is not in appellant's name, invoice is not submitted and excess credit is claimed. Therefore Cenvat credit of Rs. 16,36,122/- is disallowed.

2.4 Aggrieved appellant, filed appeal to Commissioner (Appeal) which has been disposed of as per the impugned order referred in para 1, above.

2.5 Aggrieved appellant has filed this appeal.

3.1 I have heard Shri Vinay Jain, Advocate for the appellant and Shri B P Sinha, Superintendent, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits as follows:

- Disallowance of Cenvat Credit refund on the ground that credit is not reflected in the ST-3 return is unsustainable. In view of the decisions in case of
  - Broadcom Research Pvt Ltd [2016 (42) STR 79 (T-Bang)] affirmed at [2016 (43) STR 321 (Kar.)]
  - Jagdamba Polymers Ltd. [2010 (253) ELT 626 (Tri. Ahmd.)]
  - Morning Star India Pvt Ltd [2017-TIOL-3942-CESTAT-Del]
  - Serco Global Services Pvt Ltd [2015 (39) STR 892 (Tri. Del.)]
- Appellants couldn't have filed revised returns for the period April 2005 to March 2006 since the time limit for filing revised returns had already lapsed.

- In the impugned order has held that there is a time limit for availing the cenvat credit. The time limit for availing the cenvat credit has been introduced only from Financial Year 2014-15 onwards and prior to the said period there was no restriction / outer limit on availing the Cenvat credit.
- Refund of unutilised cenvat credit cannot be rejected merely on the ground that the same is not reflected in the service tax return.
- The Appellants have availed the cenvat credit in the books of accounts and in the Cenvat credit register maintained. Therefore, the genuinity of the transactions and eligibility of Cenvat credit can be verified by the department and it is not alleged that input services are ineligible services. Therefore, substantial benefit of refund cannot be denied in the present case
- Alternatively, without prejudice to others submissions, the Appellants submit that if it is held that Appellants have not availed the cenvat credit, then the Appellants would be eligible for rebate of input services used for export of services in view of Notification No. 12/2005-ST. It cannot be the case of the department that the Appellant is not eligible for rebate under Notification No. 12/2005-ST as well as refund under Rule 5 of CCR, 2004.
- Refund of unutilised Cenvat credit cannot be denied to exporter of services

3.3 Learned authorized representative reiterates the findings recorded in the impugned order.

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

4.2 On the issue for which appeal has been filed impugned order records the findings as follows:

"4.1 To begin with I would discuss the finding of the Adjudicating Authority OIO to the effect that refund claim amounting to Rs. 23,83,160/- is liable for rejection as in the ST 3 returns for the period April, 2006 to September, 2006, the opening balance of Cenvar Credit was zero. Appellants have contended that though they had received the services but they had not availed the

credit. Considering that there is a time limit for availment of credit and appellants had an option to file the revised return, their contention that under the circumstances credit should be deemed to have been availed has no legal basis and disallowance of refund claim amounting to Rs. 23.83.160/- by the Adjudicating Authority merits to be upheld accordingly."

4.3 Original authority in his order has recorded as follows:

15. I find that the claimant had filed refund claims under Rule 5 of the CENVAT Credit Rules, 2004, which reads as under:

"Where any input or input service is used in the manufacture of final products which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate product cleared for export, or used in providing output service which is exported, the CENVAT credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer or provider of output service towards payment of,

(i) duty of excise on any final product cleared for home consumption or for export on payment of duty; or

(ii) service tax on output service,

and where for any reason such adjustment is not possible, the manufacturer or the provider of output service shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification:

Provided that no refund of credit shall be allowed if the manufacturer or provider of output service avails of drawback allowed under the Customs and Central Excise Duties Drawback Rules, 1995, or claims rebate of duty under the Central Excise Rules, 2002, in respect of such duty; or claims rebate of service tax under the Export of Service Rules, 2005 in respect of such tax.

Provided further that no credit of the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act shall be utilised for payment of service tax on any output service.

Explanation: For the purposes of this rule, the words "output service which is exported" means the output service exported in accordance with the Export of Services Rules, 2005.

16. I further, find that with respect to the above definition, the notification in effect at the time of filling of the claim by the claimant was Notification no. 05/06-C.Ex.(N.T.) dated 14.03.2006. At paras 4 & 5 of the Appendix to the above notification certain conditions are laid down as under:

> *"4. The refund is allowed only in those circumstances where a manufacturer or provider of output service is not in a position to utilize the input credit or input service credit allowed under Rule 3 of the said rules against goods exported during the quarter or month to which the claim relates (hereinafter referred to as the given period).*
>
> *5. The refund of unutilized input service credit will be restricted to the extent of the ratio of export turnover to the total turnover for the given period to which the claim relates."*

17. From the documents available on record, I find that the claimant had filed an amendment in their registration on 26.06.2006 for the purpose of inclusion of 'Banking and Other Financial Services' which are covered under Clause65(12)(a)(vi) of Finance Act, 1994 and are taxable in terms of Section 65(105)(zm) of Finance act, 1994.

18. From the ST-3 returns filed by the claimant for the period April'2005 to September 2006 and submitted to this office on 30.7.2018 during the course of the personal haring, I find the following:

(i) The claimant has not provided any Cenvat credit details with respect to Banking and Other financial Services (BOFS) or any other services in the ST-3 returns for the period April 2005 to March'2005.

(ii) Consequent to including BOFS in their registration w.e.f. 26.06.2006, the claimant has shown the details of BOFS in their return for the period April 2006 to Septemeber'2006.

(iii) At the time of filing the return for the period April 2006 to September 2006, the claimant has not shown any opening balance of Cenvat Credit or Education cess in the month of April 2006, thus implying that the claimant did not have any unutilized Cenvat credit lying in their account by the end of

March'2006. The Cenvat details as filed by the claimant at para 5 (page 5) of the ST-3 return for the period April'2006 to September 2006 is reproduced below:

5. Credit details for Service Tax provider/recipient.

(A) Cenvat Credit details

Details of Credit	*April*	*May*	*June*	*July*	*August*	*September*
[1]	*[2]*	*[3]*	*[4]*	*[5]*	*[6]*	*[7]*
Opening Balance		*242,771*				
Credit availed on inputs						
Credit availed on capital goods						
Credit availed on input services	*242,771*	*2,78,062*	*165,760*	*390,034*	*1,600,567*	*170,857*
Credit received from input service distributor						
Total credit availed	*242,771*	*520,833*	*686,593*	*1,076,627*	*2,677,194*	*2,848,051*
Credit utilized towards payment of service tax						
Closing balance	*242,771*	*520,833*	*686,593*	*1,076,627*	*2,677,194*	*2,848,051*

(B) Education cess credit details

Details of Credit	*April*	*May*	*June*	*July*	*August*	*September*
[1]	*[2]*	*[3]*	*[4]*	*[5]*	*[6]*	*[7]*
Opening Balance		*4,850*	*10,405*	*13,694*	*21,500*	*53,531*
Credit on education cess availed on goods						
Credit on education	*4,850*	*5,555*	*3,289*	*7,806*	*32,031*	*3,479*

cess availed on services						
Credit on education cess utilized for payment of service tax						
Closing balance	*4,850*	*10,405*	*13,694*	*21,500*	*53,531*	*57,010*

19. In view of the discussions as in para 18 above, and also from para 5 (page 5) of the ST-3 return filed by the claimant for the period April2006 to September 2006 (table as reproduced in para 18 above), it is evident that the opening balance of cenvat credit and education cess was zero i.e. nil. I thus find that since the opening balance in the claimant's Cenvat account as on 01.04.2006 was nil, there was no cenvat credit lying unutilized in the claimant's Cenvat account on 01.04.2006 and thus the claimant's refund claim (of the unutilized Cenvat credit) period from April'2005 to March'2006 total amounting to Rs. 23,83,160/- (Rs.14,44,091/- for April 2005 to December 2005 and Rs.9,39,069/- for January 2006 to March'2006) is liable for rejection.

4.4 Tribunal has while remanding the matter to the original authority for consideration of the documents and records observed as follows:

"6. We have considered the submissions made at length by both sides and perused the records.

7. The issue to be decided in this case is whether the. appellant is eligible for the refund of an amount availed as Cenvat credit on the inputs services which were received by the appellant during the period April 2005 to September 2006 for providing output services which are exported."

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11. The revenue aggrieved by such an order preferred an appeal before the Hon'ble High Court of Bombay. Their Lordships rejected the contention of the Revenue by holding as under :-

"9. The above finding of the CESTAT cannot be faulted because substituted Rule 5 of the Cenvat Credit Rules, 2004 does not make any distinction between exports made prior to 14-3-2006 or after 14-3-2006. In other words, as per the substituted Rule 5 refund of unutilized cenvat credit in respect

of exports effected in the past is available to the manufacturer as well as provider of output service. Proviso to Rule 5 as it stood prior to the amendment on 14-3-2006 clearly provides that refund of unutilized credit is available to the manufacturer as also by the provider of output service subject to the conditions set out therein. As noted earlier the appellant fulfills all other conditions. Thus, reading the Rule 5 as it stood prior to its amendment, as a whole, it is evident that refund of unutilized credit is allowable not only to manufacturers but also available to providers of out put service."

12. In our considered view, an identical issue and in respect of the very same provision, having been settled by the jurisdictional, High Court; we need not look any further. Respectfully following the ratio laid down by the Hon'ble High Court, we hold that the. appellant is eligible to avail the Cenvat credit of the input services for the period prior to 14.03.2006 and being eligible to claim refund of the unutilised Cenvat credit, he cannot be denied We set aside the impugned order to this extent on the same. this point."

4.5 From the perusal of the above order of tribunal while remanding the matter it is evident that tribunal has held that the appellant is eligible to avail the Cenvat Credit of the input services for the period prior to 14.03.2006. It is not even the case of revenue that the CENVAT Credit is not available in respect of these services however said credit has not been reflected in the return filed by the appellant during the period 2005-06 or as opening balance in the ST-3 return filed for the period April to September 2006. As per (D) ENCLOSURES:- (iv) of Form 'A', appended to Notification No. 5/2006-CE (NT) dated 14.03.2006 following have been prescribed as documents for the purpose of refund under rule 5;

"(iv) Relevant extracts of the records maintained under the Central Excise Rules, 2002, the CENVAT Credit Rules, 2004, or the Service Tax Rules, 1994, as the case may be, evidencing taking of CENVAT credit, utilization of such credit in payment of excise duty or service tax and the balance unutilized credit during the given period."

From perusal of the above it is evident that ST-3 return has not been mentioned as the document relevant for the purpose of considering the admissibility of the credit and the refund. Accordingly rejection of refund claim by referring to the ST-3 return, cannot be justified, provided the fact of the admissibility and availability of the credit claimed as refund can be determined from the records maintained under the Central Excise Rules, 2002, the CENVAT Credit Rules, 2004, or the Service Tax Rules, 1994. Rule 5 of the Service Tax Rules, 1994 provide as follows:

Rule 5. Records –

(1) The records including computerised data, as maintained by an assessee in accordance with the various laws in force from time to time shall be acceptable.

(2) Every assessee shall furnish to the Superintendent of Central Excise at the time of filing of return for the first time or the 31st day of January, 2008, whichever is later, a list in duplicate, of-

(i) all the records prepared or maintained by the assessee for accounting of transactions in regard to,-
   a. providing of any service,
   b. receipt or procurement of input services and payment for such input services;
   c. receipt, purchase, manufacture, storage, sale, or delivery, as the case may be, in regard of inputs and capital goods;
   d. other activities, such as manufacture and sale of goods, if any.

(ii) all other financial records maintained by him in the normal course of business;

Thus appellant could have produced any of the record as above to claim the refund of CENVAT Credit as per Rule 5.

4.6 Appellant has in support of the contention raised by them relied on the decisions, wherein following has been held:-

Broadcom Research Pvt. Ltd. [2016 (42) STR 79 (Tri. Bang.)] affirmed at [2016 (43) STR 321 (Kar.)]-

"6. The next ground is that Cenvat credit shown in the ST-3 returns does not tally with the amount claimed in the refund

claims. In my opinion, the refund claim is not based on ST-3 returns and ST- 3 return is nothing but a report of transactions that have taken place over a period covered by the returns. On the ground that the figures in ST-3 returns were not correct or there was a substantial difference, refund claim cannot be rejected. For the purpose of consideration of refund claim, the relevant documents on the basis of which credit was taken, nature of service and its nexus and utilization of the service for there was some mistake in the ST-3 returns, substantive right of assessee for refund cannot be rejected. Therefore, I do not consider it necessary to consider the issue as to whether figures in ST-3 returns tallied with the amounts claimed in the refund claims or not."

Jagdamba Polymers Ltd. [2010 (253) ELT 626 (Tri. Ahmd.)]

"4. I have considered the submissions made by both the sides. I agree with the learned advocate that failure to reflect the Cenvat credit balance in the ER-1 return is only a procedural omission and in the normal course credit could not have been denied and should not have been denied on this ground. I also find that it is not the case of Revenue that appellant is not eligible for the Cenvat credit. Further, even assuming that appellant is not eligible for the credit because they failed to show it in the ER-1 return, yet in view of the decisions cited by the learned advocate which provide that credit can be taken at any time and it is not necessary that it should be taken immediately on receipt of the inputs or on payment of service tax to the service tax provider, credit would be admissible. I also find that the decisions cited by the learned advocate are squarely applicable to the facts of this case. Further, I find that the decisions cited by the learned SDR were considered by this Tribunal while rendering the decision in the case of M/s. Pierlite India Pvt. Ltd. Therefore, both the decisions cited by the learned SDR are not applicable."

Morning Star India Pvt Ltd [2017-TIOL-3942- CESTAT-Del]

"4. I have gone through the case records and the case relied upon by the appellant, refund claim cannot be denied on the ground that the Cenvat credit has not shown in their ST- 3

returns. The said view has been affirmed by this Tribunal in the case of Broadcom India Research Pvt. Ltd. Ltd. Vs. CST, Bangalore - 2016 (42) STR 79 2015-TIOL-2870-CESTAT- BANG

5. In view of the above observation, I hold that on the ground that the appellant has not shown Cenvat credit in their ST-3 returns, cannot be the ground to deny refund to the appellant."

Serco Global Services Pvt Ltd Vs [2015 (39) STR 892 (Tri. Del.)]

"5 We have considered the contentions of the appellant. In view of concession by the appellant that it was not pressing for refund of the credit taken prior to 16-5-2008, we are not dwelling upon the issue of admissibility or otherwise of refund of Cenvat credit taken, prior to 16- 5-2008, or upon the issue of classification. As regards the ground of rejection of refund for the period 16-5-2008 to June, 2008 that the ST-3 return for June, 2008 did not show any unutilized balance of Cenvat credit, it is to be made clear that refund is to be granted on the basis of the Cenvat credit available in the Cenvat Credit Account and not on the basis of the closing balance of Cenvat credit shown in ST-3 Return. Further the appellant submitted revised return showing correct closing balance of Cenvat credit but the same was ignored by the Adjudicating Authority. In this regard, we find that in the case of Jagdamba Polymers Ltd. v. C.C.E., Ahmedabad - 2010 (253) E.L.T. 626 (Tri.-Ahmd.) it has been held by CESTAT that omission to reflect the balance in ER 1 return is only a procedural error for which credit cannot be denied when there is no dispute about its eligibility. In the case of Ceolric Services v. C.S.T., Bangalore - 2011 (23) S.T.R. 369 (Tri.-Bang.), the Hon'ble CESTAT held as under"

4.7 In view of the decisions as above and the finding recorded by me in para 4.5, I am of the opinion that refund claim could not have been denied for this reason. It is stated/ unstated policy which govern the exports of goods or services across the globe that the local taxes should not be exported along with the goods or services exported.

5.1 I do not see any merits in the impugned order to this extent.

5.2 Appeal is allowed.

(Order pronounced in the open court on 08.03.2023)

(Sanjiv Srivastava)
Member (Technical)

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