CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 89033 of 2018

(Arising out of Order-in-Appeal No. MUM-DGPM-WRU/APP-275/2017-18 dated 29.06.2018 passed by the Principal Additional Director General, DGPM, WRU, Mumbai)

M/s Capgemini Technology Service India Ltd. .... Appellant
Ackruti Softech Park, MIDC Cross Road No. 21,
Andheri (E), Mumbai – 400093

Versus

Commissioner of CGST, Mumbai East .... Respondent
9th Floor, Lotus, Parel (E), Mumbai - 400012

Appearance:

Shri Prasad Paranjape, Advocate for the Appellant

Shri Piyush Bade, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86780/2023

Date of Hearing: 09.10.2023
Date of Decision: 09.10.2023

Per: S.K. Mohanty

Briefly stated, the facts of the case are that the appellant herein is engaged in providing various taxable services defined under the Finance Act, 1994 and for that purpose they themselves have registered with the Service Tax Department. During the disputed period, the appellant had filed an application before the jurisdictional Service Tax authorities claiming refund of Service Tax of Rs.10,58,10,484/- under Rule 5 of the CENVAT Credit Rules, 2004 read with Notification No. 27/2012-C.E. (N.T.) dated 18.06.2012. The refund application was disposed of by the Dy. Commissioner of Service Tax vide order dated 30.01.2017 in sanctioning the amount of Rs.8,51,67,603/- and rejected the refund claim amounting to

Rs.2,06,42,881/- in terms of Rule 5 ibid read with Section 11B of the Central Excise Act, 1944. The said original order dated 30.01.2017 was reviewed by the Department and vide Review Order dated 20.04.2017, the Reviewing Committee has directed the concerned officer for filing an appeal before the learned Commissioner (Appeals) under Section 84 of the Finance Act, 1994. The appeal filed by the Revenue was decided by the learned Principal Additional Director General, CGPM, WRU, Mumbai (Pr. ADG) in terms of CBEC Order No. 17/2017-S.T. dated 28.11.2017 issued in exercise of the powers conferred upon it by Section 83A of the Finance Act, 1994 read with Rule 3 of Service Tax Rules, 1994 appointing him as the competent authority for deciding the case. The said Pr. ADG disposed of the case by issue of impugned order dated 29.06.2018 in rejecting the original order and negating the order to the effect it has allowed the refund benefit amounting to Rs.8,51,67,603/- sanctioning in favour of the appellant. Feeling aggrieved with the impugned order dated 29.06.2018, the appellant has preferred this appeal before the Tribunal.

2. Learned Advocate appearing for the appellant submitted that the show-cause notice at paragraph 5 had proposed for rejection of the refund claim in terms of Rule 9(c) of the Place of Provision of Services Rules, 2012, whereas the learned Pr. ADG has rejected the refund benefit by applying Rule 4 of the said Rules. Thus, learned Advocate submitted that the learned Pr. ADG has travelled beyond the scope of show-cause notice inasmuch as the show-cause notice had only proposed for denial of the refund benefit as an intermediary, whereas the learned Pr. ADG has taken entirely different ground for allowing the appeal in favour of the Revenue. Further, learned Advocate has submitted that the issue arising out of the impugned order is no more *res integra* inasmuch as on identical facts Department's appeals rejected by the learned Commissioner (Appeals) were accepted by the Department and no appeal has been preferred against such decisions. In this context, learned AR also fairly concedes that for different period from July, 2012 to June, 2015, the Department has sanctioned the refund benefit in favour of the party by relying upon the order dated 27.06.2018 passed by the

learned Commissioner of CGST & Central Excise (Appeals-II), Mumbai. Thus, the learned Advocate appearing for the appellant submitted that the Department cannot adopt pick and chose theory for acceptance of the order sanctioning refund in some of the cases and for denial of refund in some other cases.

3. On the contrary, the learned AR appearing for the Revenue has reiterated the findings recorded in the impugned order.

4. On perusal of the case records, we find that the show-cause notice dated 20.07.2015 had proposed for denial of the refund benefit, holding that the appellants are an intermediary and as such, their case falls under Rule 9(c) ibid and as such, the services provided by them do not fall under the category of 'Export of Service' for the purpose of grant of the refund benefit. The original authority while adjudicating the show-cause notice dated 20.07.2015 had dropped the proposals made therein and had considered that the services provided by the appellant qualify as 'Export of Service' for the purpose of grant of benefit of the refund provided under Rule 5 ibid read with Notification issued thereunder. However, on appeal filed against the said original order by the Revenue, the learned Pr. ADG has taken entirely a different view and accepted the appeal filed by the Revenue holding that the appellant should not be entitled for refund in terms of Rule 4 ibid. Hence, it is evident that the learned Pr. ADG has gone beyond the scope of show-cause notice. It is settled law that show-cause notice is the foundation on which the Department must build up its case and the Department cannot urge new grounds/points which were never raised in the show-cause notice. It is also settled by the Hon'ble Supreme Court that Review proceedings cannot go beyond the grounds taken in the show-cause notice, as held in the cases of *CCE, Nagpur Vs. Ballarpur Industries Ltd. – 2007 (215) ELT 489 (SC), Commissioner of Central Excise, Chandigarh Vs. Shital International – 2010 (259) ELT 165 (SC) and CCE, Bhubaneswar-I Vs. Champdany Industries Ltd. – 2009 (241) ELT 481 (SC)* that the show-cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest. Thus, Revenue

cannot take a new ground at the appellate stage which was not canvassed in the show-cause notice issued by the Department. Further, the law is well settled in the case of *Bajaj Auto Ltd. Vs. Union of India – 2003 (151) 23 (Bom)* that the ground taken in appeal pursuant to appellate order cannot travel beyond the ground mentioned in the show-cause notice. In the circumstances of the present case, since the learned Commissioner (Appeals) has traveled beyond the scope of the show-cause notice and applied entirely the different rule for rejection of refund benefit in favour of the appellant, we are of the considered view that the impugned order cannot sustain for judicial scrutiny.

5. Further, we also find that the Assistant Commissioner (Review) in his letter dated 12.07.2023 addressed to the Dy. Commissioner (AR), CESTAT, Mumbai has confirmed that the Department has not filed any appeal against the Order-in-Appeal No. NVK/38-40/RGD/2018 dated 14.03.2018 passed by the learned Commissioner (Appeals). However, learned Advocate pointed out that the Order-in-Appeal No. referred in the said letter dated 12.07.2023 is incorrect and the same should be read as Order-in-Appeal No. PK/601 to 602/ME/2018 dated 27.06.2018. The learned AR appearing for the Revenue fairly concedes the point raised by the learned Advocate for the appellant. Since the legal point discussed by the learned Commissioner (Appeals) in the order dated 27.06.2018 has been accepted by the Department, in our considered opinion, Department cannot agitate the same matter subsequently for a contrary decision. In this context, we find that the law is well settled as in the case of *Commissioner of Central Excise, Allahabad Vs. Surcoat Paints (P) Ltd. – 2008 (232) ELT 4 (SC),* the Hon'ble Supreme Court have held that once the Department accepts the benefits available to an assessee in any one case, then it cannot agitate the same issue for subsequent assessee(s).

6. In view of the foregoing discussions, we do not find any merits in the impugned order passed by the learned Pr. ADG in rejecting the refund benefit due to the appellant. Therefore, by setting aside the

impugned order, the appeal is allowed in favour of the appellant with consequential relief, if any, as per law.

(Dictated and pronounced in open court)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha