IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 24.02.2021
CORAM :

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Ms.Justice R.N.MANJULA

Civil Miscellaneous Appeal No.1303 of 2020

The Commissioner of GST & Central Excise,
Chennai South Commissionerate
MHU Complex,
No.692, Anna Salai,
Nandanam, Chennai - 600 035. ... Appellant

Vs

M/s.Sutherland Global Services Pvt. Ltd.,
No.383, Velachery Tambaram Road,
Vijayanagaram,
Chennai - 600 042. ... Respondent

Civil Miscellaneous Appeal filed under Section 35G of Central Excise Act, 1944 r/w. Section 83 of Finance Act, 1944 against the impugned order of the Hon'ble Tribunal in Final Order No.40611/2018 dated 14.03.2018 on the file of the Customs, Excise & Service Tax Appellate Tribunal, Chennai and against the order of the Commissioner of Central Excise (Appeals), Chennai-34, dated 30.06.2010 made in Order in Appeal No.132 to 139/10 (MST) and 125/10(P) and against the order of the Assistant Commissioner of Service Tax III Division, Chennai-18, dated 05/12/2008 and made in C.No.IV/16/178/STC/2007 RF-STC(R).

For Appellant : Mr.V.Sundareswaran
Standing Counsel

For Respondent : Mr.Joseph Prabakar

JUDGMENT
(Delivered by T.S.Sivagnanam,J)

This appeal filed by the revenue under Section 35G of the Central Excise Tax, 1944 [hereinafter referred to as “CST Act”] is directed against the order dated 14.03.2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai ['the Tribunal' for brevity] in Final Order No.40611/2018.

2.The appeal has been admitted on 18.09.2020 to decide the following substantial questions of law:

> "i) Whether, the Tribunal was justified in allowing the refund of the accumulated CENVAT Credit when the Output Service of Call Centre provided by the Assessee was exempted under the Notification, having been exported to foreign country, ignoring the effect of Rule 6 of the CENVAT Rules 2004?
> ii) What is the interpretation and interplay of Rules 5 and 6 of CENVAT Rules and can a refund under Rule 5 be granted by the Excise Department Authorities even though the Services exported out of India are exempted from payment of any Duty?"

3.The assessee is a 100% export oriented unit and Software Technology Park of India [STPI] registered with the Service Tax Department under the "Business Auxillary Service"[BAS] and the assessee exports taxable services like Call Centre Service and Technical Support Service. The assessee claimed refund under Rule 5 of the CENVAT Credit Rules, 2004 [hereinafter referred to as "CCR"]. The original authority rejected the claim of refund partially since the output services are not eligible for availing the credit. The services were rent-a-cab service, event management and video production service, clearing and forwarding services, operation, repairs and maintenance supply [water supply] and in respect of import of service availed prior to 01.03.2006 for which claim was made in November 2006. The original authority opined that the first four category of services as mentioned above are not eligible input services since there is no corresponding output service that arises out of those input services. With regard to the fifth category of service, the output service having been exempted during the period from 01.03.2006 in terms of notification No.8/2003-ST dated 20.06.2003, claim having been made in November 2006 is not sustainable.

4.The assessee being aggrieved by the order-in-original dated 15.12.2008 filed an appeal before the Commissioner of Central Excise [Appeals], Chennai [hereinafter referred to as "Commissioner [Appeals]]. The said appeal was allowed by order dated 30.06.2010 following an earlier order in so far as it related to the refund of CENVAT credit on exempted output service relating to the period prior to March 2006 for which claim was made by the assessee in November 2006. In respect of the other four claims for refund, the Commissioner [Appeals] remanded the matter to the adjudicating authority to follow the guidelines issued by the Board in Circular No.120/1/2010-ST dated 19.01.2010. The revenue being aggrieved by the order passed by the Commissioner[Appeals] filed an appeal before the Tribunal which was dismissed by the impugned order.

5.Mr.V.Sundareswaran, learned Standing Counsel vehemently contend that under the very scheme of the CCR, 2004, an assessee is not entitled to take CENVAT credit of the service tax paid on input services used for provision of exempted service. In this regard, the learned counsel referred to Rule 2(e) of the CCR, which defines 'exempted services'. Further, it is contended that any output service provided, providing a taxable service which is unconditionally exempted by way of notification is barred from taking CENVAT credit irrespective of the fact that the said service is provided to domestic clients and to foreign clients and if such output service provider takes such credit, then it would result in wrong availment of credit. The learned counsel has drawn our attention to notification No.8/2003-ST dated 20.06.2003 and the relevant provision of the CCR and sought to draw a distinction by comparing Rule 5 with that of Rule 6 of CCR and the statutory Form A prescribed under Rule which is the application for refund of CENVAT credit under Rule 5 of CCR, 2004. Based on the above, it is submitted that the Tribunal erroneously rejected the revenue's appeal.

6.Mr.Joseph Prabakar, learned counsel for the respondent sought to sustain the order passed by the Tribunal by pointing out that the Tribunal rightly took note of the distinction brought out in the language adopted in Rule 5 and Rul6 of the CCR and the Tribunal also took note of the earlier decisions of the other Hon'ble High Courts and rightly dismissed the appeal filed by the revenue.

7.We have elaborately heard Mr.V.Sundareswaran, learned Senior Standing Counsel appearing for the appellant/revenue and Mr.Joseph Prabakar, learned counsel appearing for the respondent/assessee.

8.The legal issue which is brought before this Court to be decided which have framed as substantial questions herein above has been considered in the earlier decisions rendered by the Hon'ble High Courts. It appears that the earliest of the decision was in the case of Repro India Limited vs. Union of India [2009 (235) ELT 614(Bom)]. This decision was relied on by the High Court of Himachal Pradesh in the case of Commissioner of Central Excise vs. Drish Shoes Ltd. [2010 (254 ELT 417 (HP)]. The substantial questions of law which were framed for consideration in the said decision were identical to that of the substantial questions of law which have been framed in this appeal though the language adopted may be slightly different. The Court after elaborately considering the scheme of the CCR, taking note of Rules 3, 5 and 6 held that it is clear from a bare reading of Rule 5 of the CCE that a manufacturer who exports final product which are exempt can claim refund of CENVAT.

9.The revenue filed an appeal against the above decision before the Hon'ble Supreme Court which was dismissed, Commissioner vs. Drish Shoes Ltd. [2018 (360) ELT A191(SC)]. Similar view was taken by the High Court of Judicature at Bombay in Union of India vs. Sharp Menthol India Ltd. [2011 (270) ELT 212 (Bom)], wherein the Hon'ble Court referred to the decision in Repro India Limited and held that the assessee therein was entitled for refund. In the said decision, elaborate discussion has been made with regard to the scheme of the Rules and the distinction which has to be drawn between Rule 5 and Rule 6 of the CCR. The decision in Sharp Menthol India Limited was affirmed by the Hon'ble Supreme Court in Union of India vs. Sharp Menthol India Limited [2015) 320 ELT A104(SC)].

10.In yet another decision of the High Court of Judicature at Bombay in the case of Commissioner of Central Excise & Cus., Aurangabad vs. Jolly Board Ltd. [2017 (50) STR 131 (Bom)], identical issue was considered and the Court held that the assessee was eligible for refund of unutilized CENVAT credit of duty paid in terms of Rule 5 of the CCE. In the said decision, the Court has referred to the decision in the case of Drish Shoes Limited and Repro India Limited. Identical view was taken by the High Court of Rajasthan in the case of Commissioner of CGST, Rajasthan vs. Medicamen Biotech Limited [2019 (368) ELT 324 (Raj.)].

11.Thus, the legal position as set out in the preceding paragraphs will clearly show that the asessee was entitled for refund. Further, we also find that the Tribunal has rightly interpreted the words used in Rules 5 and 6 by pointing out that the words used in Rule 6 are “exempted goods/services”, whereas Rule 5 does not use these words and uses the words “final product/output service”. Furthermore, the Tribunal also took note of the decision in the case of Repro India Limited and Drish Shoes Limited which we have referred supra. Further, the Tribunal also rightly took into consideration the effect of the notification No.8/2003-ST by pointing out that it is an exemption applicable within the territory of India and goods which are dutiable as well as exempted can be exported, so also, output services which are taxable and exempted can also be exported. Therefore, the Tribunal rightly held that the export need not necessarily confine to dutiable products or taxable services. The idea of Rule 5 was also clearly set out by stating that it is to avoid export of duty/taxes. Therefore, we find that there is no error in the order passed by the Tribunal.

12.Accordingly, the appeal filed by the revenue is dismissed and the substantial questions of law are answered in favour of the assessee. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1. Customs, Excise & Service Tax
   Appellate Tribunal,
   South Zonal Bench, Chennai

2. The Commissioner of GST & Central Excise,
   Chennai South Commissionerate
   MHU Complex, No.692, Anna Salai,
   Nandanam, Chennai - 600 035.

3. The Commissioner of Central Excise(Appeals),
   Chennai-34.

4. The Assistant Commissioner of Service Tax,
   III Division, Chennai-18.

+1cc to Mr.Joseph Prabakaran, Advocate, S.R.No.11444.

C.M.A.No.1303 of 2020

GP(CO)
CSR 24.03.2021