



सत्यमेव जयते

आयुक्त का कार्यालय, (अपीलस)

Office of the Commissioner,

केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय

Central GST, Appeal Commissionerate- Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

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क फाइल संख्या : File No : V2(ST)90/North/Appeals/2019-20/146507014654

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-002-APP-002-20-21

दिनांक Date : 20.04.2020 जारी करने की तारीख Date of Issue: 08/06/2020

श्री अखिलेश कुमार, आयुक्त (अपील) द्वारा पारित

Passed by Shri Akhilesh Kumar, Commissioner (Appeals) Ahmedabad

ग _____ आयुक्त, केन्द्रीय GST, अहमदाबाद North आयुक्तालय द्वारा जारी मूल आदेश : दिनांक : से सृजित

Arising out of Order-in-Original: GST-06/Refund/14/AC/AMP/Baxter/2019-20, Date: 08/08/2019 Issued by: Assistant Commissioner, CGST, Div: VI, Ahmedabad North.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the Appellant & Respondent

M/s. Baxter Pharmaceuticals India Private Limited

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

I. Any person aggrieved by this Order-In-Appeal issued under the Central Excise Act 1944, may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

\भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.



ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35- षोबी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में दूसरा मंजिल, बहुमाली भवन, असारवा, अहमदाबाद, गुजरात 380016

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhavan, Asarwa, Ahmedabad-380016 in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।



One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 35फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।

For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores, Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

→Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(6)(i) इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

(6)(i) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

II. Any person aggrieved by an Order-in-Appeal issued under the Central Goods and Services Tax Act, 2017/Integrated Goods and Services Tax Act, 2017/Goods and Services Tax (Compensation to States) Act, 2017, may file an appeal before the appropriate authority.



ORDER-IN-APPEAL

This appeal has been filed by M/s Baxter Pharmaceuticals, Ramdas Road, Off. Sindhu Bhavan Road, Bodakdev, Ahmedabad [hereinafter referred to as "appellant"] against Order-in-Original No.GST-06/Ref/14/AC/AMP/Baxter/2019-20 [hereinafter referred to as "impugned order"] passed by the Assistant Commissioner of CGST, Division-VI, Ahmedabad North [hereinafter referred to as "adjudicating authority"].

2. Briefly stated, the facts of the case are that the appellant has filed a refund claim of Rs.1,07,47,547/- on 31.12.2018 under the provisions of Section 142(3) of Central Goods and Service Tax Act, 2017 [CGST Act]. The backdrop for filing the said refund claim is that during investigation/inquiry by the Directorate General of Goods and Service Tax Intelligence (DGGSTI), Zonal Unit, Ahmedabad, a short payment of Service Tax under Reverse Charge Mechanism (RCM) in respect of some of the services from outside India for the period 2014-15 to 2016-17 was noticed. Accordingly, Service Tax amounting to Rs.1,07,47,547/- along with interest and penalty was paid by the appellant under various Challans during October 2018 to December 2018. It has been claimed that the Service Tax amounting to Rs.1,07,47,547/- paid by appellant under RCM is eligible as Cenvat credit and they could not take such credit during GST period after 01.07.2017, they had filed refund of said Service Tax amount in question under Section 142(3) of CGST Act. It is observed by the adjudicating authority that the appellant has not paid the Service Tax in question for the period from 2014-15 to 2016-17 by suppressing the fact and paid the Service Tax along with interest and penalty under Section 78 of the Finance Act, 1994 only on being pointed out by the DGGSTI; that if the DGGSTI has not carried out the investigation and not pointed out the non-payment of Service Tax, the appellant would have evaded the payment of Service Tax. As it appeared that the appellant is not eligible for Cenvat Credit on such payment of Service Tax under the provisions of Rule 9(1)(bb) of the Cenvat Credit Rules, 2004, a Show Cause Notice was issued to the appellant for denying the refund claim. Later on, vide the impugned order, the adjudicating authority has rejected the said refund claim.

3. Aggrieved with the impugned order, the appellant has filed the instant appeal on the grounds that:

- They have claimed refund of Service Tax paid based on Rule 9(1)(e) of CCR; that the payment of such Service Tax is eligible as Cenvat and as they could not take the credit of payment in GST regime, refund of the said amount is eligible under Section 142(3) of CGST Act.
- The adjudicating authority has denied the credit as per provisions of Rule 9(1) (bb) of CCR which is not applicable to their case; that the said Rule is applicable for provider of output service, whereas in the instant case, Service Tax was paid by the recipient of service under RCM.



- The appellant has made the payment of Service Tax along with interest and penalty voluntarily to avoid unwanted inquiries, dispute or demand without admitting any offence/violation of Service Tax law; Thus, the adjudicating authority has pass the impugned order on the basis of wrongly understood facts that the appellant has committed the offence with an intention to evade payment of Service Tax.
- The appellant has relied on following decisions in their favour in support of their submissions that Rule 9(1)(bb) is not applicable in their case. [i] JSW Steel Ltd [2009(14) STR 310-Tri.Chennai]; [ii] L.G.Balkrishnan & Bros Ltd [2010(18) STR 432-Tri.Chennai];
- The adjudicating authority's contention that the challans are not in the name of appellant is not sustainable and not correct as M/s Claris Injectable Ltd and M/s Baxter Pharmaceuticals India Pvt Ltd are the same entity.

4. Personal hearing in the matter was held on 12.02.2020. Shri Vaibhav Jajoo, Chartered Accountant, appeared for the hearing and reiterated the submission made in Appeal Memorandum. He further submitted additional submission during hearing along with case laws viz [i] Val Organics Pvt Ltd [2017 (5) TMI 279-CESTAT, Ahmedabad]; Apar Industries [2019-TIOL-2466-CESTAT AHM], Polygental Technologies Ltd [2018-TIOL-320-CESTAT-Mum], Ashok Iron Works [2019 (2) TMI 855-CESTAT Bangalore]; and 99 Games Online Pvt Ltd [2019-TIOL-748-CESTAT-Bang].

5. I have carefully gone through the facts of the case and submissions made by the appellant. The issue to be decided in the instant case is as to whether the appellant is eligible for refund of Service Tax pertaining to the period 2014-15 to 2015-16 paid under RCM during GST Regime, filed under Section 142(3) of CGST Act.

6. I find that in the instant case the appellant has filed the refund claim under Section 142(3) of the CGST Act on the grounds that since the Service Tax amounting to Rs.1,07,47,547/- paid by them under RCM is eligible as Cenvat credit and they could not take such credit during GST period after 01.07.2017, the only option left out them is to file refund of said Service Tax. The adjudicating authority has rejected the refund claim in question on the grounds that since the appellant has not paid the Service Tax in question during 2014-15 to 2015-16 by suppressing the facts of non-payment of such Service Tax under RCM, the challans under which the payment was made only after pointed out by DGGSTI is not a valid documents as per provision of Rule 9(1)(bb) of CCR.

7. I find that the provisions of Section 142(3) of CGST Act read as under:

(3) Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing



law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 (1 of 1944) :

Provided that where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse :

Provided further that no refund shall be allowed of any amount of CENVAT credit where the balance of the said amount as on the appointed day has been carried forward under this Act.

8. In the instant case, it is a fact on record that the appellant has made the payment of Service Tax for to the period 2014-15 to 2015-16 in the end of 2018 only after initiation of investigation by the DGGSTI officers. It is also a fact on record that the said payment of Service tax along with interest and penalty payable under Section 78 of the Finance Act, 1944 was made by the appellant on being pointed out by DGGSTI during their inquiry/investigation. The provision contained under Section 78 of the Finance Act, 1994 during relevant time is reproduced below:

SECTION [78. Penalty for failure to pay service tax for reasons of fraud, etc. — (1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent of the amount of such service tax :

Provided that in respect of the cases where the details relating to such transactions are recorded in the specified records for the period beginning with the 8th April, 2011 upto the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent of the service tax so determined :

Provided further that where service tax and interest is paid within a period of thirty days of —

(i) the date of service of notice under the proviso to sub-section (1) of section 73, the penalty payable shall be fifteen per cent of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded;

8.1 From the facts discussed above, it is clear that the non-payment Service Tax by reason by fraud or wilful mis-statement or suppression facts etc with the intent to evade payment of Service Tax and by paying the amount of Service Tax along with interest and penalty under proviso to Section *ibid*, the appellant has concluded the case without entering further litigation.

8.2. Section 142 (3) *ibid* states that the refund filed before, on or after 01.07.2017, for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of CEA. The Section *supra* clearly envisage that for getting a refund of eligible credit prior to 01.07.2017, the appellant should follow the procedure of existing law prescribed i.e in the instant case CCR and any amount eventually accruing to him



thereof shall be paid in cash. For getting refund of Cenvat Credit under existing law i.e under the CCR, one has to avail the Cenvat Credit first under the said Rules. The provisions under Cenvat Credit Rules do not allow refund of Cenvat Credit in cash, unless it is availed. In the circumstances, provision of Section 142 (3) of the CGST Act is not applicable to the appellant's case.

9. Further, I find that the adjudicating authority has denied the credit under the provisions of Rule 9(1)(bb) of the CCR which reads as under:

"(bb) a supplementary invoice, bill or challan issued by a provider of output service, in terms of the provisions of Service Tax Rules, 1994 except where the additional amount of tax became recoverable from the provider of service on account of non-levy or non-payment or short-levy or short-payment by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Finance Act or of the rules made thereunder with the intent to evade payment of service tax".

9.1 As per Rule ibid, CENVAT credit shall be taken by the manufacturer or the provider of output service on the basis of any documents viz supplementary invoice, bill or challan, except the amount of tax became recoverable on account of non-levy or non-payment or short payment etc by reason of fraud or willful mis-statement or suppression of facts or contravention of any of the provisions of the Finance Act, 1944.

9.2 It is fact on records that the short payment of Service Tax was detected by the DGGSTI at the time of investigation/inquiry against the appellant. Accordingly, by admitting the tax liability as a service recipient under Reverse Charge Mechanism, the appellant had made the payment of Service Tax along with applicable interest and penalty under Section 78 of the Finance Act, 1994. By accepting payment of penalty under Section 78 ibid along with the tax liability and interest itself prove that the appellant has contravened the provisions of the Act by reason of fraud or collusion or wilful mis-statement or suppression of facts. Under these circumstances, the documents viz challans under which the payment made come under exclusion part of Rule 9(1) (bb) of the Rule supra and accordingly, the Cenvat credit in question is not admissible to them.

9.3 The appellant has contended that the said Rule is not applicable to their case as per judgment of various case laws viz. [i] JSW Steel Ltd [2009(14) STR 310-Tri.Chennai]; [ii] L.G. Balkrishnan & Bros Ltd [2010(18) STR 432-Tri.Chennai]. During Personal Hearing, they further relied following case laws in support of their arguments. [i] Val Organics Pvt Ltd [2017 (5) TMI 279-CESTAT, Ahmedabad]; Apar Industries [2019-TIOL-2466-CESTAT AHM] Polygental Technologies Ltd [2018-TIOL-320-CESTAT-Mum] Ashok Iron Works [2019 (2) TMI 855-CESTAT Bangalore]; and 99 Games Online Pvt Ltd [2019-TIOL-748-CESTAT-Bang].

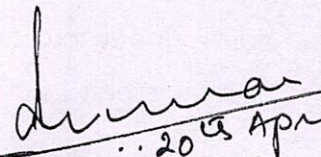
9.5 I have perused the case laws relied on in the Appeal Memorandum. In JSW Steel Ltd and L.G. Balkrishnan & Bros Ltd case, supra, the Hon'ble Tribunal has held that the invoices issued to the appellants by the input service provider did not



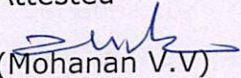
attract clause (b) of sub-rule (1) of Rule 9 as the said clause, in fact, did not apply to service tax at all. Rule 9(1) (bb) of CCR came into effect from 31.03.2011. The period involved in the said case is prior to introduction of the said Rule. I have also gone through the case laws relied on by the appellant during Personal Hearing. I observe that the said judicial disciplines are allowed the assessee's case where the Cenvat Credit under CCR were availed by them as a service recipient in similar situation before GST regime and denied by the original authority/appellate authority under the provisions of Rule 9(1)(bb) ibid which are distinguishable from the facts of the instant case. In the case at hand, the appellant has made payment as a service recipient during GST regime and seek refund as they could not avail the Cenvat Credit. As discussed in para 7 and 8 above, either provisions of CCR or Section 142(3) of CGST Act allows any refund where Cenvat Credit was not availed. Besides that, they have accepted that the non-payment was due to malafide intention and accordingly paid penalty under Section 78 of the Finance Act, 1994.

10. Further, I find that Section 142(8)(a) of the CGST Act clearly stated that "where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day, under the existing law, any amount of tax, interest, fine or penalty becomes recoverable from the person, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act". In the instant case, the appellant had paid the amount in question with interest and penalty in respect of short-payment of Service Tax pertains to the year 2014-15 and 2015-16 only in the year 2018 i.e in the GST era as arrears of pending dues. Under the circumstances, the argument of the appellant that they are eligible for Cenvt Credit on payment of Service Tax in question does not have any merit even at GST regime. On this ground also, their argument with respect of eligibility of Cenvat credit and refund thereof fails.

11. In view of above discussion, I find that the adjudicating has rightly denied the refund claim filed by the appellant. Accordingly, I reject the appeal filed by the appellant. The appeal stands disposed of in above terms.


 (Akhilesh Kumar)
 Commissioner (Appeals)
 Date : .04.2020

Attested


 (Mohanan V.V)
 Superintendent (Appeal),
 CGST, Ahmedabad.



By RPAD.

To,
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Copy to:-

1. The Chief Commissioner, CGST, Ahmedabad Zone .
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner, System, CGST, Ahmedabad North
4. The Assistant Commissioner, CGST, Division VI, Ahmedabad North
5. Guard File.
6. P.A.



