

(2021) 08 CESTAT CK 0011

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 50148 Of 2020

M/s. Panasonic Energy India Co. Ltd.

APPELLANT

Vs

Commissioner Of Customs Central Excise And Central GST,
Indore

RESPONDENT

Date of Decision : 06-08-2021

Acts Referred:

Central Goods and Services Tax Act, 2017 — Section 140(1), 140(3), 140(4), 142, 142(3), 142(6)(a)
Service Tax Rules, 1994 — Rule 2(1)(d), 2(1)(d)(EEC), 6(7CA), 6
Customs Act, 1962 — Section 2(26), 12, 29, 30, 38, 148
Sale of Goods, 1930 — Section 26
Finance Act, 1994 — Section 64, 66B, 67, 94
Central Goods and Services Tax (Amendment Act), 2018 — Section 28(a), 28(b)(1), 28(c)(1)
Constitution of India, 1950 — Article 14
Cenvat Credit Rules, 2004 — Rule 18

Citation : (2021) 08 CESTAT CK 0011

Hon'ble Judges : Rachna Gupta, J

Bench : Single Bench

Advocate : Mahesh Sharma, Yashveer Singh

Final Decision : Allowed

Judgement

1. The present appeal has been filed against the Order-in-Appeal No.182-19-20 dated 31.10.2019. The relevant facts for the adjudication of this

appeal are as follows:-

1.1 The appellant, prior to Implementation of GST, was holding Central Excise Registration as they were engaged in manufacture of dry battery cells.

The appellant was also holding service tax registration for the purpose of discharging service tax liability under reverse charge mechanism and was

availing the benefit of Cenvat Credit on inputs, input services and capital goods

under Cenvat Credit Rules, 2004 (hereinafter refer to as CCR 2004).

1.2 On 23rd October, 2018 appellants filed a refund claim of Rs.5,25,267/- on the ground that the said amount was paid after the Notification

No.15/2017 and 16/2017-ST both dated 13th April, 2017 requiring appellant to pay the Service Tax which alongwith interest of Rs.1,10,572/- on

service tax, and SBC were paid on 17.10.2018 towards service tax on ocean freight for Bill of Entries filed by appellant during 23.04.2017 to

30.06.2017. These payments were eligible for Cenvat Credit. However, post GST roll out w.e.f. 01.07.2018, the appellant could not avail said Cenvat

Credit as such filed for the refund in terms of section 142 (3) read with section 142 (6) (a) of CGST Act, 2017, but the Department observed that

since due to the aforesaid both Notifications, the appellant had enough time for payment of service tax on ocean freight of CIF Value of the imports

and to indicate the same in their ST-3 returns to be filled upto 31st August, 2017, but the appellant failed to indicate the same or to revise the same at

the appropriate time that the refund was proposed to be rejected vide show cause notice No.462 dated 18.02.2017. The said rejection was confirmed

vide Order-in-Original No.02/2019-20 dated 16 May, 2019 on the ground that GST Act do not provide the Cenvat Credit of Krishi Kallyan CESS

(KKC)and that the amount of the claim was paid by the appellant out of its own violation. The said order has been upheld vide the order under

challenge rejecting the appeal. Still being aggrieved, the appellant is before this Tribunal.

2. I have heard Shri Mahesh Sharma, learned Counsel for the appellant and Shri Yashveer Singh, learned Authorised Representative for the respondent.

3. It is submitted on behalf of the appellant that appellant has imported goods on CIF basis and accordingly, was not the service recipient of the

shipping company as such was not liable to pay service tax on ocean freight for the imports made by it during April, 2017 to June 2017. It is also

mentioned that it made the payment of said service tax amounting to Rs.5,25,267/- with interest and Cess but only due to the Notification No. 15 and

16 of 13th April 2017. Learned Counsel has submitted that in terms of the following decisions such tax was not payable at all:

a) M/s.Messars Sal Steel Ltd. reported in 2019 (9) TMI 1315

b) M/s. Polycab India Limited reported in 2020 (2) TMI 410

3.1 It is further submitted that similar view stands taken qua in GST regime also on import related to Ocean Freight, wherein it was held that the same

is not legally payable by following decisions:-

1) Bharat Oman Refineries Ltd reported in 2020 (8) TMI 568 (Gujrat High Court)

2) MCPI P. Ltd. Reported in 2020 (3) TMI 725 (Calcutta High Court)

3.2 Ld. Counsel also mentioned that since the said service tax was paid and since no fraud, or suppression existed on part of the Appellant, no penalty

was to be imposed on it. This means that the credit was otherwise legally available for any tax paid belatedly. However, on account of introduction of

GST regime, the said credit was to be given as cash refund under Section 142 (3) of the CGST Act, 2017. At the same time, be that as it may, after

introduction of GST regime, Section 142 (6) (a) of the CGST Act, 2017 is specifically enacted to provide for cash refund in case where any credit

becomes due and available to an assessee after introduction of GST regime. The appellant referred to the following case law:-

a) Oswal Castings P. Ltd. Reported in 2019 (24) GSTL 649 (Tri.- Chan)

The order under challenge is, accordingly, prayed to be set aside and appeal is prayed to be allowed.

4. While rebutting these submissions, it is submitted by learned DR that the payment of service tax has admittedly been made post rolling out of GST

Act. The payment was otherwise made on appellant's own violation. This has rightly been held that eligibility for Cenvat Credit due to payment of

duties on own violation is different from the eligibility for said credit in pursuance to any proceeding of appeal review or reference. Accordingly

applicability of Section 142 (6) (a) of CGST Act, 2017 is denied to the present case. Eligibility about refund of KKC CESS has also been rightly

denied. Submitting that there is no infirmity nor any illegality in the findings of the order of Commissioner (Appeals) that the present appeal is prayed

to be dismissed.

5. After hearing both the parties and perusing the record, I am of the opinion that to adjudicate about the entitlement of the appellant for the refund of

duty paid by him admittedly for the period prior GST Act, 2017 which rolled out on 1st July, 2017, but paid on 17.10.2018, the legal position first need

to be understood:-

1. As far as who is liable to pay Service Tax
2. Whether the contract was CIF or it was on FOB basis makes any difference as far as the payment of service tax liability is concerned.
3. Whether the appellant has paid the service tax rightly under Notification No.15 and 16 of 2017.
4. and finally as to whether the appellant is entitled for refund even in terms of section 142 of CGST Act.

5.1 Under Rule 2(1)(d) of the Service Tax Rules, the expression "person liable for paying service tax" has been defined. By virtue of Notification

No. 2/2017-S.T., dated 12-1-2017, the Central Government has inserted Clause (EEC) under Rule 2(1)(d) thereby laying down that the person in India

who complied with Section 29, 30 or 38 read with Section 148 of the Customs Act, 1962 with respect to goods transported by a vessel from a place

outside India upto the Custom Station of clearance in India was the person liable to pay service tax on such services.

5.2 By virtue of Notification No. 15/2017-S.T., the Central Government has substituted certain Explanations in the original Notification No. 30/2012-

S.T., dated 20-6-2012. Explanation-V so substituted/inserted vide this Notification No. 15/2017-S.T. provides that the importer as defined under

Section 2(26) of the Customs Act shall be the person liable to pay service tax in respect of services provided by a person located in non-taxable

territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India upto the Custom station

of clearance in India. By virtue of Explanation-V so inserted, it would mean that the importer of goods would be liable for paying service tax on ocean

freight in case where the service of transportation of goods in a vessel was provided by the vessel owner/operator to the overseas supplier-seller in

CIF transactions.

5.3 By Notification No. 16/2017-S.T., Clause (EEC) of Rule 2(1)(d) of the Service Tax Rules has been substituted, and there also the importer as

defined under Section 2(26) of the Customs Act is made liable to pay service tax on ocean freight in cases like CIF transactions. A new sub-rule i.e.

sub-rule (7CA) has also been inserted in Rule 6 of the Service Tax Rules by this Notification, thereby providing that the value of the ocean freight

may be calculated at the rate of 1.4% of the sum total of CIF for paying service tax thereon. Thus, the effect of the amendments vide the other

Notification No. 16/2017-S.T. is also the same i.e. an importer like the Petitioner is made the person liable to pay service tax on ocean freight in case

of CIF transactions, though the service of transportation of goods in CIF transactions is rendered by the ship owner/operator to the overseas

seller/supplier, and not to the local importer.

5.4 Since the challenge is to the provisions empowering the Central Government to collect and recover service tax on Ocean Freight and the

Petitioners have challenged such provisions only in respect of the CIF contracts, it is necessary to consider what is "ocean freight", what is

"CIF", and how the CIF is different from the FOB contracts.

5.5 In the international trade, the goods are bought and sold by way of two different modes/methods, namely, the CIF contract and FOB contract.

Therefore, I must give a fair idea about both these modes/methods, is necessary.

5.6 FOB (i.e. Free on Board) is a contract of sale between the foreign supplier and the local importer, where the importer would engage the

vessel/ship owner or operator for importing goods into India. In the FOB contract, the service of transportation of goods by ship or vessel is received

by the importer in India, whereas such service is rendered by the owner/operator of the foreign going vessel.

5.7 In the case of CIF contract, the overseas supplier would engage the vessel owner/operator for the transportation of goods to India. The hiring of

the vessel/ship and also payment of the transportation charges i.e. ocean freight of such vessel owner/operator are made by the overseas supplier in

the CIF contract. The service of transportation of goods by vessel is thus received by the overseas supplier from the foreign going vessel

owner/operator in the CIF contract.

5.8 In the aforesaid context, I may refer to a decision of the Supreme Court in the case of Phulchand Exports Ltd. v. O.O.O. Patriot, (2011) 10 SCC

300, wherein Hon'ble Supreme Court has explained what is CIF contract and what are the obligations upon a seller under a CIF contract as:

5.9 In C.I.F. and F.O.B. Contracts (Fourth Edition) by David M. Sassoon dealing with essence of C.I.F. contracts, it is stated that essential feature of

a C.I.F. contract is that delivery is satisfied by delivery of documents and not by

actual physical delivery of the goods. Shipping documents required under a C.I.F. contract are bill of lading, policy of insurance and an invoice.

5.10 In *Johnson v. Taylor Bros. 6*, Lord Atkinson in the House of Lords explained the meaning of C.I.F. contract as under :

“when a vendor and purchaser of goods situated as they were in this case (Seller in Sweden and buyers in England) enter into a

CIF contract, such as that entered into in the present case, the vendor in the absence of any special provision to the contrary is bound by

his contract to do six things. First, to make out an invoice of the goods sold. Second, to ship at the port of shipment of goods of the

description contained in the contract. Third, to procure a contract of affreightment under which the goods will be delivered at the

destination contemplated by the contract. Fourth, to arrange for an insurance upon the terms current in the trade which will be available

for the benefit of the buyer. Fifthly, with all reasonable dispatch to send forward and tender to the buyer these shipping documents, namely,

the invoice, bill of lading and policy of assurance, delivery of which to the buyer is symbolical of delivery of the goods purchased, placing

the same at the buyer's risk and entitling the seller to payment of their price.”

6. In light of this distinction Section 26 of the Sale of Goods, 1930 Act draws relevance which reads as follows :

“S. 26. Risk prima facie passes with property. - Unless otherwise agreed, the goods remain at the seller's risk until the property

therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether

delivery has been made or not :

Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as

regards any loss which might not have occurred but for such fault :

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as bailee of the goods of the other

party.”

6.1 The title of Section 26 shows that the rule provided thereunder is the prima facie rule subject to the agreement otherwise between the parties. This

is clearly indicated by the expression “unless otherwise agreed” with which the section begins. The parties to the contract are, thus, free to by-

pass the prima facie rule provided in Section 26 by making agreement otherwise. The prima facie rule in Section 26 is that the goods remain at the

seller’s risk until the property in the goods is transferred to the buyer. But when the property in the goods is transferred to the buyer the goods are

at the buyer’s risk whether delivery has been made or not. The above rule has some exceptions. The first proviso provides that where delivery of

goods has been delayed due to the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not

have occurred but for such fault. The second proviso is further subject to the first proviso and provides that nothing in the section shall affect the

duties or liabilities of either seller or buyer as bailee of the goods of the other party.

6.2 The obligations upon a seller under a C.I.F. contract are well known, some of which are in relation to goods and some of which are in relation to

documents. In relation to goods, the seller must ship goods of contract description on board a ship bound to the contract destination. If there is a late

shipment or the seller has put goods on board a ship not bound to the contract destination as stipulated, in our view, the logical inference that must

necessarily follow is that the seller has not put on board goods conforming to a contract destination.”

7. Reverting to the facts of the present case, it is observed that it is not the case of the Respondents that importers like the Petitioners have received

services of sea transportation from the shipping lines. The Respondents have however pleaded that in case of the Indian importers receiving goods on

the land mass of the country by virtue of CIF arrangements, they “indirectly” receive sea transportation service also; and therefore obligation to

pay service tax can be shifted to them.

8. First, the Indian importers like the Petitioners have contracted for purchase and delivery of goods, and under CIF contract where the lump sum

amount is paid for delivery of the goods on the land mass of the country; and what the importers receive in India is the goods, and not any service.

Secondly, liability to pay tax cannot be fastened on a person if the charging provision does not charge or levy the tax; because a charging section has

to be strictly interpreted, and not by way of inferences or presumptions about any indirect benefit to a person.

9. In *Commissioner, Surat-I v. Patel Vishnubhai Kantilal & Co.*, 2012 (28) S.T.R. 113 (Guj.), the Honâ??ble High Court has considered relevant

case law on this proposition in paras 19 to 22 of this judgment and held at para 22 that the rule of construction of a charging section is that before

taxing any person it must be shown that he falls within the ambit of the charging section by clear words used in the section. If a person has not been

brought within the ambit of the charging section by clear words, he cannot be taxed at all.

10. When the Respondents have admitted that the importers in India are not persons receiving service of sea transportation, and that it is the

Respondentâ??s case that the Indian importers were â??indirectlyâ? receiving such service and hence were persons liable to pay service tax on

such service; it is clearly a case where the Respondents propose to charge service tax from the third parties i.e. the Indian importers by implication,

and not by clear words of the charging section. The impugned provisions creating a charge of service tax on third parties though the Act of the

Parliament provides for levy and collection of tax either from the person providing service or from the person receiving service are beyond the

charging provision, and also beyond the Rule making power of Section 94 of the Finance Act.

11. Even if it is assumed that service tax can be recovered from a third party like the Indian importers in CIF contracts, there is no machinery

provided for valuation of such service, and therefore also the impugned Rules and Notifications are unenforceable. It is an admitted position of fact

that the Petitioners do not have any information about the actual amount of ocean freight paid by the overseas sellers/suppliers to shipping lines. The

invoices and purchase orders when service tax is to be computed and assessed on the â??valueâ? of the service as laid down under the machinery

provision of Section 67 of the Finance Act, no service tax can be assessed and charged from third parties like the Indian importers in CIF contracts,

because â??valueâ?? of sea transportation service is not available with them in CIF contracts.

12. Now coming to the two notifications of year 2017 under which the payment of Service Tax has been made in October, 2018. It is observed that

the Notifications had been subject matter of challenge in a batch of writ applications, the lead matter being the Mohit Minerals Pvt. Ltd. v. Union of

India and 1 Others [Special Civil Application No. 726 of 2018, decided on 23rd January, 2020] [2020 (33) G.S.T.L. 321 (Guj.)]. The Court in Mohit

Minerals (supra) and allied petitions declared the Notifications as ultra vires the Integrated Goods and Services Tax Act, 2017 on the ground that the

same lacked legislative competency. Both the Notifications referred to above were declared to be unconstitutional.

13. In view of the aforesaid discussion, the writ application succeeds and is hereby allowed. The Notification Nos. 15/2017-S.T. and 16/2017-S.T.

making Rule 2(1)(d)(EEC) and Rule 6(7CA) of the Service Tax Rules and inserting Explanation-V to reverse charge Notification No. 30/2012-S.T. is

struck down as ultra vires Sections 64, 66B, 67 and 94 of the Finance Act, 1994; and consequently the proceedings initiated against the writ applicants

by way of show cause notice and enquiries for collecting service tax from them as importers on sea transportation service in CIF contracts are hereby

quashed and set aside with all consequential reliefs and benefits.

13.1 Since the Notification under which the payment was made have as such been struck down, any payment made pursuant thereto no more remains

under the scope of the charging section, i.e. it cannot be called as duty. Still retaining the said amount will therefore unjustly enrich the Department.

The consequence, accordingly, is that the appellant is entitled for the refund of the said amount.

13.2 Though the stand of Department is that the refund is qua amount paid by the appellant on Octoberâ?? 18 i.e. after 01.07.2017, and paid as

CGST amount, and the refund therefore is governed by GST law.

13.3 Be that as it may, there is some controversy regarding the â??transitional ITCâ? to be claimed under Section 140(1) of the CGST Act, 2017

which is claimed to have some vague reference that KKC cannot be taken as transitional ITC as CGST, while filing TRAN-1. In fact, qua Section

140(1) of the said Act, while the law permitted accumulated credit of KKC to be claimed as CGST ITC by way of transitional provisions, a

retrospective amendment has been made vide CGST (Amendment Act), 2018 in this regard, which is not yet operationalized till date.

13.4 That in terms of Notification No.2/2019-CT dated 29.01.2019, various

provisions of CGST (Amendment) Act 2018 have been brought into force w.e.f. 01.02.2019 however insofar as the present issue is concerned, Section 28 (b)(1) and Section 28 (c)(1) of the said act have not yet been brought into force. It may be appreciated that although under Section 140 (1) amendment has already been carried out stating that Cenvat Credit of eligible duties is permitted to be taken as transitional credit w.e.f. 01.02.2019 by virtue of Section 28 (a) of the GST (amendment) Act, 2018, however it may be appreciated that "eligible duties" is not defined for the purpose of Section 140 (1) of the CGST Act 2017 as on date at all.

13.5 That explanation 1 and explanation 2 wherein the term eligible duty was required to be construed for the purpose of subsection (1) of Section 140 of the CGST Act 2017 has not been brought into force at all as on date. The explanation 3 is to be understood, by its very text, to be referring to eligible duties and taxes as stated in Explanation 1 & 2 and not otherwise. In other words, since explanation 1 and 2 do not apply to Section 140 (1) at all but apply to Section 140(3), (4) etc, as on date, there is no change in the legal effect insofar as credit on various cess including Education Cess and SHE as well as KKC is concerned which is taken under Section 140(1) of the CGST Act, 2017.

13.6 That had it not been the case, there was no real reason to exclude Section 28(B) (1) and Section 28 (C) (1) of the CGST (amendment) Act, 2018 at all.

13.7 Accordingly, since as on date the transitional credit of E-Cess and SHE Cess and KKC is otherwise eligible under Section 140(1) inasmuch as the restrictive amendments have not yet been brought into force at all and since explanation 3 to Section 140 limits its operation to explanation 1 and 2 which do not deal with eligible duties for the purpose of Section 140(1) at all and since the term eligible duties is not defined for the purpose of Section 140(1) as on date. In any case, the entire discussion is utmost, academic, inasmuch as when Tax itself was not payable in the first place, as per the legal position as it exists, there is no reason why refund of such tax paid should not be allowed to the appellant.

13.8 At the same time, Be that as it may, after introduction of GST regime, Section 142(6)(a) of the CGST Act, 2017 is specifically enacted to provide for cash refund in case where any credit becomes due and available to an

assessee after introduction of GST regime. The appellant referred to the following case law:-

a) Oswal Castings P. Ltd. Reported in 2019 (24) GSTL 649 (Tri.- Chan)
MCPI Private Ltd. & Another vs. Union of India & Others

14. But I am of the opinion that the issue is covered by the decision in the case of Mohit Minerals Pvt. Ltd. Vs. Union of India & 1 Other [2020 (1)

TMI 974 â?" Gujarat High Court] where it was held that No tax is leviable under the Integrated Goods and Service Tax Act, 2007, on the ocean

freight for the services provided by a person located in a non-taxable territory by way of transportation of goods by a vessel from a place outside India

upto the customs station of clearance in India and the levy and collection of tax of such ocean freight under the impugned Notifications is not

permissible.

15. This Court vide judgement and order passed in the case of Mohit Minerals Pvt. Ltd. Vs. Union of India [Special Civil Application No.726 of 2018

and allied petitions] declared the Entry No.10 of the Notification No.10/2017-Integrated Tax (Rate) dated 28th June, 2017 as ultra vires Section 5 (3)

of the Integrated Goods and Services Tax Act, 2017 as well as Article 14 of the Constitution of India. I may quote paras 254 & 255 of the judgement

rendered in the case of Mohit Minerals (supra). Paras 254 and 255 read as under:

â??254. In view of the aforesaid discussion, we have reached to the conclusion that no tax is leviable under the Integrated Goods and

Services Tax Act, 2007, on the ocean freight for the services provided by a person located in a non-taxable territory by way of

transportation of goods by a vessel from a place outside India upto the custom station of clearance in India and the levy and collection of

tax of such ocean freight under the impugned Notifications is not permissible in law.

255. In the result, this writ-application along with all other connected writ-applications is allowed. The impugned Notification No.8/2017

â?" Integrated Tax (Rate) dated 28th June, 2017 and the Entry 10 of the Notification No.10/2017 â?" Integrated Tax (Rate) dated 28th

June, 2017 are declared as ultra vires the integrated Goods and Service Tax Act, 2017, as they lack legislative competency. Both the

Notifications are hereby declared to be unconstitutional. Civil Application, if any, stands disposed of.â??

Say that since the Notification has been struck down as ultra vires, as a consequence of the same, the writ applicant seeks refund of the amount paid towards the IGST.

16. It is thus eminently clear from the aforesaid observations made in the impugned order that the duty, which was paid by the petitioner, which was otherwise not payable on the exported goods and therefore, rebate of such duty was not admissible in terms of Rule 18 of the Central Excise Rules.

However, the duty, which was paid by the petitioner is held to be treated as voluntary deposit. As per Section 142(3) of the GST Act, every claim for

the refund filed by any person before, on or after the appointed day i.e. 1-7-2017 for refund of any amount of Cenvat credit, duty, tax, interest or any

other amount paid under the existing law, should be disposed of in accordance with the provisions of existing law and any amount eventually accruing

to such person should be paid in cash. I am of the considered opinion that in view of this clear provision, the Respondent No. 2 ought to have directed

the sanctioning Authority to refund the amount of the duty refundable to the petitioner in cash instead of credit in Cenvat Account.

17. In case of M/s. Lanxess India Pvt. Ltd. (supra), the Commissioner (Appeals) has directed the sanctioning Authority to refund in cash. As per the

GST transition provisions, the balance of credit lying un-utilized in account as on 30-6-2017 only gets carried forward. Hence, in the present case also,

what was lying in Cenvat account of the petitioner before 10-7-2017 was to be carried forward in fresh account of Cenvat account after appointed

day i.e. 1-7-2017.

18. I shall now look into few decisions on the subject.

In Prabhat Cotton & Silk Mills Ltd. v. Union of India, reported in 1982 (10) E.L.T. 203 (Guj.), a Division Bench of this High Court while

interpreting the expression â??Indiaâ?? under Section 12 of the Customs Act, 1962, observed thus;

â??11. The first answer to this argument is that as per Section 12(1) duties of customs are levied on goods imported into or exported from

India and the expression â??Indiaâ?? in so far as Section 12 is concerned refers to the Indian landmass and not the Indian territorial

waters. This becomes evident on a true reading of Section 12(1) which reads as under :-

12. Dutiable goods. - (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall

be levied at such rates as may be specified under the Indian Tariff Act, 1934 (32 of 1934), or any other law for the time being in force, on

goods imported into, or exported from, India.

19. As a consequence of entire above discussion the point of adjudications as framed above all stands decided in favour of the appellant holding

appellants to be entitled for the refund of the amount of service tax paid by them on 17.10.2018. Resultantly the order under challenge is hereby set

aside. Appeal stands allowed with consequential benefit if any.

[Order pronounced in the open Court on 06.08.2021]