
(2021) 10 CESTAT CK 0026

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 40095 Of 2021

M/s. Terex India Pvt. Ltd.

APPELLANT

Vs

Commissioner Of GST And CE

RESPONDENT

Date of Decision : 11-10-2021

Acts Referred:

Central Goods and Services Tax Act, 2017 — Section 142(3), 142(8), 142(8)(a)
Central Excise Act, 1944 — Section 11B(2)
Central Excise Rules, 2002 — Rule 22

Citation : (2021) 10 CESTAT CK 0026

Hon'ble Judges : Sulekha Beevi C.S., J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. Brief facts are that the appellant is engaged in the manufacture and export of mining machineries. They also provide business support services for which they were paying service tax and they filed ST-3 returns. During the period 11/12/2017 to 12/12/2017 and 21/12/2017 to 22/12/2017, the appellant's premises were visited by the Audit Officers. It was noticed by them that the appellant had received services from their parent company situated in USA. It appeared that the appellant is liable to pay service tax on the amount paid to the parent company under Reverse Charge Mechanism (RCM in short) for the period from 4/2015 to 4/2017 as a recipient of service. A spot memo dated 18.01.2018 was issued to the appellant directing the appellant to pay Rs..11,03,876/- being the service tax on Business support services on foreign remittances under RCM.. The appellant paid the amount along with interest vide challan dated 22.01.2018. The appellant was eligible to avail credit of the service tax paid as these were input services used for their manufacturing activity. However, since the period was after 01.07.2017, consequent to the implementation of CGST Act, 2017, the appellant was unable to avail the credit and utilize the credit as admissible under Cenvat Credit Rules, 2004 as amended. The appellant also was unable to transfer the credit to TRAN-1 credit, as the date of filing TRAN-1 had

expired on 27/12/2017. They then filed refund claim for Rs.11,03,876/-. The original authority rejected the refund claim holding that as per Section 142 (8) (a) of the CGST Act, 2017, credit is not admissible and therefore not eligible for refund in cash. The appellant preferred appeal before the Commissioner (Appeals), who upheld the order of the original authority.

2, On behalf of the appellant learned Counsel Ms. D. Naveena, appeared and argued. She adverted to paragraph-5 of the impugned order and submitted that the department does not dispute that the appellant is eligible for Cenvat Credit if the service tax was paid on or before 30.06.2017 i.e., before introduction of GST Act, 2017. The refund has been denied resorting to 142(8) (a) of the GST Act, 2017, alleging that the input tax credit is not eligible as the amount is paid as recovery of arrears. She referred to relevant part of Section 142 which reads as under:-

"Section 142 of GST Act 2017: Miscellaneous Transitional Provisions (CHAPTER XX- TRANSITIONAL PROVISIONS)

(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:

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.

(4) Every claim for refund filed after the appointed day for refund of any duty or tax paid under existing law in respect of the goods or services exported before or after the appointed day, shall be disposed of in accordance with the provisions of the existing law:

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.

(5) Every claim filed by a person after the appointed day for refund of tax paid under the existing law in respect of services not provided 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.

(6) (a) every proceeding of appeal, review or reference relating to a claim for CENVAT credit initiated whether before, on or after the appointed day under the existing law shall be disposed of in accordance with the provisions of existing law, and any amount of credit found to be admissible to the claimant shall be refunded to him 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 and the amount rejected, if any, shall not be admissible as input tax credit under this Act:

Provided 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;

(b) every proceeding of appeal, review or reference relating to recovery of CENVAT credit initiated whether before, on or after the appointed day under the existing law shall be disposed of in accordance with the provisions of existing law and if any amount of credit becomes recoverable as a result of such appeal, review or reference, 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.

(7) (a) every proceeding of appeal, review or reference relating to any output duty or tax liability initiated whether before, on or after the appointed day under the existing law, shall be disposed of in accordance with the provisions of the existing law, and if any amount becomes recoverable as a result of such appeal, review or reference, the same shall, unless recovered under the existing law, be recovered as an arrear of duty or tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act.

(b) every proceeding of appeal, review or reference relating to any output duty or tax liability initiated whether before, on or after the appointed day under the existing law, shall be disposed of in accordance with the provisions of the existing law, and any amount found to be admissible to the claimant shall be refunded to him 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 and the amount rejected, if any, shall not be admissible as input tax credit under this Act.

(8) (a) 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;

(b) 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 refundable to the taxable person, the same shall be refunded to him in cash under the said law, notwithstanding anything to the contrary contained in the said law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 and the amount rejected, if any, shall not be admissible as input tax credit under this Act."

3.1 As per Section 142 (8) (a), only if the amount is recovered pursuant to assessment or adjudication proceedings, the input tax credit would not be admissible under the CGST Act. In the present case, there has been no assessment or adjudication proceedings. Section 142(8)(a) of GST Act, provides for the recovery of arrears pursuant to assessment or adjudication proceedings. As per the erstwhile Central Excise Act, 1994, assessment falls under Chapter 2 and adjudication proceedings under chapter 6. In the present case the spot memo was issued by the audit officers under Rule 22 of the Central Excise Rules, 2002. Hence, there was neither any adjudication nor any recovery so as to demand the payment made by the appellant as recovery of arrears. The present situation falls beyond the scope of Section 142 (8)(a) of GST Act, 2017.

3.2 When the department admitted that the credit is eligible, then the same ought to have been refunded to the appellant as the appellant could not carry forward the credit to TRAN-1. In terms of Section 140 of the GST Act, 2017, the appellant indeed was eligible to transfer the credit as TRAN-1 credit. Only because the last date for availment as TRAN-1 credit falls on 27.12.2017, the appellant was unable to carry forward the Cenvat Credit to the GST regime. The credit then ought to have been refunded in cash. It is submitted by the learned Counsel that availment of eligible credit as TRAN-1 credit has been held to be an indefeasible right in a plethora of cases

(a) In the case of Adfert Technologies Pvt. Ltd. Vs UOI and Others. -2020 (32) GSTL 726 (P&H), it has been held that transitional credit being a vested right, it cannot be taken away on procedural or technical grounds. This order has been upheld by the Hon'ble Supreme Court in the case of UOI & Ors. Vs. Adfert Technologies Pvt. Ltd.-2020 (34) GSTL J138 (S.C.).

(b) The Hon'ble Madras High Court in the case of Tara Exports Vs. UOI - 2019 (20) GSTL 321 (Mad.), has held that GST laws contemplate seamless flow of tax credits on all eligible inputs. Even under the old taxation laws, it is a settled legal position that substantive input credits cannot be denied or altered on account of procedural grounds.

(c) It was further held that accumulated credit cannot be said to have been wiped out unless there is a specific order under which it lapses. Further, credit which cannot be utilized is refundable in cash. Reliance in this regard is also placed on the following:-

- i) Leo Prime Comp. Pvt. Ltd. Vs. Dy. Commr. of Central Excise, Puducherry - 2020 (373) ELT 820 (Mad.),
- ii) Orchid Health Care Vs. UOI - 2013 (290) ELT 504 (Mad.),
- iii) UOI Vs. Slovak India Trading Co. Pvt. Ltd. - 2006 (201) ELT 559 (Kar.),
- iv) UOI Vs. Slovak India Trading Co. Pvt. Ltd. - 2008 (223) ELT A170 (S.C.),
- v) K.G. Denim Ltd. Vs. CESTAT, Chennai - 2017 (7) GSTL 422 (Mad.)

d) Therefore, in view of the above, it is stated that the refund application ought to be allowed. In this regard, reliance is also placed on second proviso to Section 142 (3), and Section 142 (6) (a), which provides that any amount of credit found to be admissible to the claimant, shall be refunded to him in cash. The aforesaid principle is applicable in the present case also. Reliance in this regard is placed on Toshiba Machine (Chennai) Pvt. Ltd. Vs. Commr. of Central Tax, Chennai - 2019 (27) GSTL 216 (Tri.-Chenn.) and M/s. Fine Automotive and Industrial Radiators Pvt. Ltd. Vs. The Commissioner of GST.

4. The learned AR Shri Arul C. Durairaj, Superintendent, appeared for the department. He supported the finding in the impugned order. He submitted that the legislature has consciously included this provision under Section 142(8) for the reason that unless the tax is paid correctly, the assessee is not eligible to credit. The appellant herein not having paid the tax correctly during the relevant years is not eligible to credit. He also stated that the input tax credit is not a vested right and relied upon the decision of the jurisdictional High Court in the case of M/s. P.R. Mani Electronics Vs UOI and Others in a writ petition No.8890/2020 dated 13.07.2020.

5. Heard both sides.

6.1 It is not in dispute that the appellants have been called upon to pay service tax under reverse charge mechanism. During the process of audit it was noticed that they have made certain foreign remittances and that they are liable to pay service tax for the input services received from their parent company. Consequently, they are eligible for credit. However, the said omission or default for not paying the tax under the reverse charge mechanism came to the knowledge of the appellant only after the Audit Officers pointed out the same. They immediately paid the amount on 22.01.2018. Though they were eligible for credit since the time to carry forward the Cenvat Credit to the GST regime had expired on 27.12.2017, the appellant could not follow the procedure to carry the Cenvat Credit to the GST regime. They then applied for refund of the said credit. The discussion of the Commissioner (Appeals) in this regard is noteworthy and reproduced as under:-

"5. The appellants have also claimed that to deny input tax credit such amount should have been recovered as an arrear of tax under CGST Act, 2017. The Contention of the appellant is that as they have paid the due Service Tax under

the existing law, it is not recovery as arrears under CGST Act, 2017. Further, post the introduction of G.S.T., the appellant having left with no option to claim the above credit under the CENVAT Credit Rules with also no scope to report the same under Transitional Credit while migrating to GST. Also they have claimed that tax has been paid by the appellant themselves and not collected from others, the refund in cash was payable under Section 142 (3) of CGST Act, 2017. Though the contention of the appellant that they would be eligible for Cenvat Credit if it was paid before June 2017 is true, the fact is that the appellant have paid the due Service Tax with interest only in January 2018 when the Transitional provisions for allowing credit of such tax paid under existing law has lapsed in 27.12.2017. So their claim for input tax credit was not entertainable and rightly rejected by the LAA in the impugned order."

[emphasis supplied]

6.2 The refund claim has been rejected resorting to 142 (8) (a) of GST Act, 2017. The provision has already been noticed in earlier paragraphs. The department is of the view that the payment made by the appellant is consequent to an assessment/adjudication proceeding and therefore, when recovered as an arrears of tax, the appellant is not admissible for the input tax credit under the GST Act, 2017. On bare perusal of Section 142 (8), it can be seen that this sub-section (8) provides for recovery of arrears of tax after the implementation of GST Act, 2017. It deals with the provisions for assessment/adjudication proceedings that are carried out under the erstwhile law after introduction of GST. The section states that in such proceedings for recovery of arrears, the assessee will not be getting the benefit of any input credit for adjustment under GST Act, 2017. In the present case, there is no credit that requires to be adjusted to the GST Act, 2017. The entire tax paid is claimed as credit under the existing law. The sub-section states that input tax credit will not be available under GST Act. It does not say that credit is not eligible under existing law (erstwhile law). This means in consequent to recovery of arrears in assessment/adjudication proceedings no input credit can be availed under GST Act, 2017. To be more clear, if there are any arrears to be recovered under the existing law, the same can be recovered by invoking the transitional provisions of the GST Act, however, input tax credit will not be admissible under the GST Act, The ingredients of Section 142 (8) (a) is as under:-

- a) Amount of tax is recoverable consequent to an assessment or adjudication proceedings;
- b) Such amount has not been recovered under the existing law;(erstwhile law)
- c) Such amount can be recovered as an arrear of tax under CGST Act, 2017.
- d) On the amount so recovered, input tax credit will not be admissible under the CGST Act, 2017.

6.3 Further, as rightly argued by the learned Counsel for the appellants, the

above provision deals with recovery of arrears under the erstwhile law after implementation of CGST Act, 2017. In the present case, there is no assessment/ adjudication tax as contemplated under the provisions of the erstwhile law. The appellant has paid the tax when pointed out by the Audit Officers. Such payment does not fall under recovery of arrears of tax by an assessment or adjudication proceedings. The sub-section (8) to Section 142 only means that after assessment or adjudication proceedings if an assessee pays the tax so determined, he cannot claim the benefit of availment of credit under the CGST Act, 2017.

6.4 Section 142 (3) is the transitional provision for claim of refund after the introduction of GST Act, 2017. It says that refund claims of any amount paid under the erstwhile law have to be disposed according to the provisions of the erstwhile law and the amount has to be paid in cash. The appellants have paid the tax under the erstwhile law. In the present case, the claim is only for refund and not proceedings for assessment or adjudication. In such a scenario, only sub-section (3) of section 142 will be attracted. Rejection of the refund claim by referring to sub-section (8) of Section 142 of CGST Act, 2017 is mis-placed. For these reasons, rejection of refund is unjustified.

7. The impugned order is set aside. The appeal is allowed with consequential reliefs, if any, as per law.

(Order pronounced in the Open Court on 11.10.2021)