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Indirect Tax Alert

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Judgment under Pre-GST era

M/s Suretex Prophylactics India Pvt. Ltd. & Ors. v. The Commissioner of Central Excise, Service Tax & Customs & Ors.[1]

Issues for consideration

- Whether the Appellants are entitled to seek refund under rule 5 of Cenvat Credit Rules, 2004 (CCR) both prior to and from April 1, 2012, without reference to limitation of time period?
- Whether the time prescribed under section 11B of Central Excise Act, 1944 (CE Act) is applicable for claiming refund of Cenvat credit?
- Whether Tribunal is correct in holding that the relevant date for computation of time limit is end of quarter in which FIRCs are received?

Discussion

- The Appellant is engaged in the manufacture and export of rubber contraceptives and is a 100 percent Export Oriented Unit (EOU) holding a Private Bonded Warehousing licence. The Appellant is also availing the facility of Cenvat credit under the CCR and filed 3 claims of refund under rule 5 of the CCR for the period April 2007 - June 2007, July 2007 - September 2007 and October 2007 - December 2007.
- The Respondent rejected the refund claims on the grounds of limitation. On filing an appeal, the Commissioner (Appeals) set aside the said order on the ground that limitation prescribed under section 11B of the CE Act does not apply in situations involving refund of accumulated Cenvat credit.
- The Respondents thereafter filed an appeal before the Hon'ble CESTAT, which was allowed, and the order passed by the Commissioner (Appeals) was set aside. The CESTAT restored order of the Original Authority stating that a refund claim must undergo the scrutiny of limitation provided under the CE Act. Aggrieved by the decision, the Appellant moved the Hon'ble High Court.
- The Hon'ble High Court observed as follows:
  - On perusal of rule 5 of the CCR which was in force till March 31, 2012, it was noted that where any manufacturer is exporting the final product without payment of duty, the Cenvat credit of such inputs or input services shall remain unutilised in his records. This

[1] TS-273-HC-2020(RAJ)-NT – The Hon'ble High Court of Rajasthan

accumulated credit can be utilised for payment of excise duty on goods cleared for home consumption or export on payment of duty or payment of service tax on output service. In absence of the ability to utilise the Cenvat credit, the refund of such credit can be claimed subject to fulfilment of conditions.

- Several notifications[2] were issued by the Central Government to amend provisions in respect of refund of unutilized Cenvat credit under Rule 5 of CCR. Clause 6 of the notification dated March 14, 2006 clearly states the period specified in Section 11B of CE Act would squarely be attracted in respect of the claims made for refund of Cenvat credit. The said clause 6 is also mentioned in the subsequent notification issued dated June 18, 2012.
- Reliance was placed upon the judgment pronounced by the Hon'ble Supreme Court in the case of *Union of India & Ors.* v. *Uttam Steel Limited*[3] wherein it was held that limitation period prescribed under section 11B of the CE Act should be strictly applied to refunds claimed under rule 5 of the CCR and its requirements cannot be dispensed with.
- Further, as per section 83 of the Finance Act 1994, the provisions section 11B of the CE Act shall equally be applicable to claims of refund filed by service providers.
- Perusing the notification dated March 14, 2006 the Court observed that the time limit must be computed from the last date of the last month of the quarter which would be the relevant date for examining the validity of the claim within the limitation prescribed under section 11B of the CE Act.

Judgment

- The limitation period prescribed under section 11B of CE Act is applicable to refund claim of unutilised Cenvat credit under rule 5 of CCR.
- The relevant date for computation of the time limit for applications filed for claiming refund under rule 5 of CCR shall be the end of the quarter in which FIRCs are received.

Dhruva Comments:

Interpretation of the term 'relevant date' is a vital element in understanding applicability of a levy, period of limitation for raising demands, entitlement to refund etc.

The decision upholds the correct interpretation of law and the time-limit for claiming refund would be governed by the provisions of section 11B of CE Act.

Judgment under GST era

M/s Shree Motors v. The Union of India & Ors.[4]

Issue for consideration

Whether the Petitioner is entitled to avail transitional credit after the expiry of specified time period even though Form GST Tran-1 was not submitted?

Discussion

- The Petitioner filed a Writ Petition on failure in submission of Form GST Tran-1 (the Form) due to various system errors and technical glitches on the common portal which resulted in denial of transitional credit on goods held in stock on the appointed date i.e. July 1, 2017.
- Rule 117 of CGST Rules, 2017 provides a time limit of 90 days from the appointed date for carrying forward the credit of eligible duties available to the assessee on the day immediately preceding the appointed date. The said period was further extended by 90 days.
- However, the Petitioner was unable to submit the Form within the specified time period due to technical glitches on the common portal. Thereafter, the Petitioner approached the GST authorities with

[2] Notification no. 5/2006 – CE (NT) dated March 14, 2006, notification no. 27/2012 – CE (NT) dated June 18, 2012 and notification no. 14/2016 – CE (NT) dated March 1, 2016
[3] (2015) 13 SCC 209
[4] TS-273-HC-2020(RAJ)-NT – The Hon'ble High Court of Rajasthan

a request to allow manual submission of the Form, but the said request was not taken up by the authorities.

- The Petitioner had previously assailed validity of rule 117 of CGST Rules, 2017, which was declared intra vires by the Hon'ble High Court and issue pertaining to technical glitches was referred to Single Judge for adjudication. The learned Single Judge, following the decision in the case of *Jodhpur Truck Pvt. Ltd.* v. *Union of India & Ors.*[5], issued directions as under:
  - Petitioner should file a detailed representation before the GST Council as per rule 117(1A) of CGST Rules, 2017;
  - GST Council should dispose of the representation timely with a speaking order.
- The representation filed by the Petitioner was disposed of by the GST Council stating that Petitioner's case falls in category 'B-1' i.e. cases where the tax payer received the error – *'As per GST system log, there are no evidence of error or submissions/filing of Tran-1*. In such an event, the Petitioner was directed to reverse the transitional credit taken along with applicable interest.
- Aggrieved, the Petitioner filed a Writ Petition before the Hon'ble High Court of Rajasthan. After perusing the facts of the case, Hon'ble High Court observed the following:
  - The Petitioner was permitted to submit the Form online along with sufficient evidence that they had tried to upload the Form prior to December 27, 2017 and such an attempt had failed on account of technical glitches on the common portal. Further, the Petitioners were also required to submit a certificate / recommendation issued by the GST Council for allowing the submission of the Form.
  - A review of the representation submitted revealed that except for claiming of credit no material was submitted to prove that the Petitioner failed to upload the Form on the common portal due to technical glitches and such an attempt was made within the prescribed period.
  - Relying on GST Council's communication dated December 12, 2019, the Court noted that this case was referred to the IT Grievance Redressal Committee and it was decided that it fell within the ambit of 'B-1' category.
  - It was held that the Petitioner was not entitled to any relief due to failure in submission of any evidence of error or submission / filing of the Form.
  - Placing reliance on the judgment pronounced by the Hon'ble Supreme Court in the case of *Osram Surya (P) Ltd.* v. *Commissioner Central Excise, Indore*[6] this Court noted that by providing the time limit for filing the Form, the vested rights of Petitioner has not been taken away. What has been restricted is the time within which a person should enforce such a right.
  - The Court also observed that on maintenance / upholding of constitutional validity of rule 117 of the CGST Rules, 2017 which prescribes the limitation period, the plea pertaining to denial of vested right on account of the Petitioner's failure to submit the Form cannot be countenanced.
  - The Court also distinguished the reliance place by the Petitioner on various judgments since none of the cases involved specific directions issued to place material on record with regard to the technical glitches and attempt for submission of the Form.

Judgment

The Hon'ble High Court dismissed the Writ Petition filed by the Petitioner for allowing the availment of transitional credit.

Dhruva Comments:

The judgment passed in this case is contrary to the decision in the case of *Brand Equity Treaties Limited* v.

[5] S.B.C.W.P. No. 15221/2019 dated November 1, 2019
[6] 2002 (9) SCC 20

Union of India[7] wherein it was held that period of 90 days for claiming transitional credit is directory and accordingly, the period of limitation of 3 years prescribed under the Limitation Act, 1963 would apply. Hence, all the taxpayers who were previously unable to file the Form GST Tran-1 can do so by June 30, 2020.

Considering various divergent rulings, the matter would soon reach the Apex Court for the final verdict.

Clarifications by Ministry of Commerce and Industry, Department of Commerce (SEZ section)

Important operational issues pertaining to Special Economic Zones (SEZs) / Export Oriented Units (EOUs) during the prevailing lockdown for COVID-19[8]

- The Department of Commerce had taken up certain important operational issues raised by the stakeholders across SEZs / EOUs during the prevailing lockdown for COVID-19 with the Directorate General of Export Promotion (DGEP), Department of Revenue.
- The details of issues raised by the stakeholders and the replies received from DGEP are summarized below:

A) Issues requiring immediate action:

Immediate refund of GST input tax credit (ITC) to DTA suppliers of SEZ units:

- Immediate refunds should be granted to DTA suppliers of SEZ units. There were cases where the refunds were pending for more than six months.
- List of such refund cases pending for more than six months should be submitted to DGEP along with details like name of DTA supplier, GSTIN, invoice details etc. so that concerned field formations can be informed for necessary actions.

Extension of e-way bill:

- The timelines fixed for e-way bills should be extended due to the restrictions on movement of goods due to lockdown.
- The validity period of e-way bills expiring during the period March 20, 2020 to April 15, 2020 has been extended till April 30, 2020 vide notification no. 35/2020-Central Tax dated April 3, 2020.
  [This has been further extended to May 31, 2020]

Release of export / import shipments from ports:

- Various measures are being taken by CBIC like 24x7 Customs functioning, single window helpdesk on the CBIC website, etc for facilitating Customs clearance amidst the COVID-19 crisis, waiver of late fee for delay in filing Bills of Entry vide notification no. 27/2017-Customs (N.T.) dated March 31, 2017 and temporarily dispensing with submission of bonds, vide circular no. 17/2020-Customs dated April 3, 2020. Various measures are also being taken by the zonal offices for clearances of shipments.
- Specific instances of such export / import shipment issues not yet resolved may be informed to the nodal officer of that Customs Zone / Formation for its redressal.

B) General Policy Issues:

GST on foreign currency charges

- In order to promote exports and to avoid cash flows for exporters, GST on foreign currency charges may be reduced / eliminated.
- A proposal in this respect has been forwarded to JS (TRU-I) for examination.

Ab-initio exemption from payment of GST by EOUs

- Imports by EOUs have been exempted from payment of IGST till March 31, 2021[9]. Further, for domestic procurements such supplies have been declared as deemed exports under

[7] W.P.(C) 11040/2018.
[8] No. K-43022/7/2020-SEZ (3145523) dated May 15, 2020
[9] Notification no. 16/2020-Customs dated March 24, 2020

section 147 of the CGST Act, 2017 and the receiver or supplier can claim the refund.

- The process for refund of ITC has also been made online w.e.f. September 26, 2019. The process is quite hassle free, online, and quick, hence there appears no requirement of granting ab-initio exemption from payment of GST on domestic procurement by EOUs.

Elimination of physical submission of documents for custom clearances

- There is no requirement for submission of physical documents at the time of import / export of goods by units / developers in SEZ or their representatives due to integration of Customs EDI (ICES) with SEZ Online system.
- Manual procedure of endorsing / validation of actions by officers both at the end of SEZ and Customs port in workflow involving of import / export has been automated by this integration thereby dispensing with the requirement of submitting various documents at the port of import / export.
- Specific instances may be provided so that concerned field formations can be informed for further actions.

Eliminate requirement of obtaining transhipment permission for movement of import cargo from port area of SEZ units in case of port based SEZs like Mundra

- Transhipment procedure for movement of goods from gateway port to SEZ is provided under SEZ Rules.
- As per the SEZ Rules, the fifth copy of the registered or assessed Bill of Entry (BOE) filed by an importer in SEZ will be submitted to Customs officer at the port of import and is itself treated as permission for transfer of goods to SEZ. No separate documents or transhipment bond is required to be filed, and the transhipment permission is stamped on the fifth copy of the BOE.
- The transhipment procedure already being much simplified, there is no requirement of doing away with transhipment permission for movement of import cargo from port area of SEZ units in case of port based SEZs like Mundra for its uniformity across all SEZs.

Permission to return diamonds to DTA without payment of customs duty due to loss of business

- As per section 30 of the SEZ Act, customs duty is chargeable on supply of any goods from SEZ to DTA. SEZ law does not extend any exclusion from payment of customs duty on such clearance from SEZ to DTA.

Issues related to Free Trade and Warehousing Zones (FTWZ)

- FTWZ units primarily provide warehousing services and other allied services like labelling, packing, repacking, etc. to their foreign supplier in FTWZ. The goods are owned by the foreign supplier and the unit in FTWZ only holds such goods on behalf of such foreign supplier. The place of supply of such services should be the place where such services are performed i.e. India, therefore GST is levied at the rate of 18%, irrespective of the recipient of service being outside India.

  However, in international practice taxes are not levied on such services rendered to foreign clients in FTWZ located in Dubai, Singapore, China, etc. Accordingly, additional inputs should be provided as far as international practices are concerned so that the matter can be further examined by CBIC.

- As per rule 24(2) read with rule 24(3) of the SEZ Rules, 2006, a DTA supplier who supplies goods to FTWZ is entitled to duty drawback subject to the payment being made from foreign currency account of the unit.

  The requirement of making the payment from forex account of unit in FTWZ to the DTA supplier does not seem to be feasible, since goods in FTWZ are held on behalf of foreign supplier and therefore, the payments are made directly in forex by the foreign supplier to the DTA and not by the FTWZ unit. Accordingly, a separate proposal in this regard should be sent for examination to CBIC.

– A proposal to file a consolidated BOE by a unit in FTWZ against goods imported by domestic consumers through e-commerce platforms is under examination.

ADDRESSES

Mumbai
11th Floor, One IndiaBulls Centre,
Tower 2B, 841, Senapati Bapat Marg,
Elphinstone Road (West),
Mumbai 400 013
Tel: +91 22 6108 1000 / 1900

Ahmedabad
B3, 3rd Floor, Safal Profitaire,
Near Auda Garden,
Prahladnagar, Corporate Road,
Ahmedabad - 380 015
Tel: +91-79-6134 3434

Bengaluru
Prestige Terraces, 2nd Floor
Union Street, Infantry Road,
Bengaluru 560 001
Tel: +91-80-4660 2500

Delhi / NCR
101 & 102, 1st Floor, Tower 4B
DLF Corporate Park
M G Road, Gurgaon
Haryana - 122 002
Tel: +91-124-668 7000

Pune
305, Pride Gateway, Near D-Mart, Baner,
Pune - 411 045
Tel: +91-20-6730 1000

Kolkata
4th Floor, Unit No 403, Camac Square,
24 Camac Street, Kolkata
West Bengal – 700016
Tel: +91-33-66371000

Singapore
Dhruva Advisors (Singapore) Pte. Ltd.
20 Collyer Quay, #11-05
Singapore 049319
Tel: +65 9105 3645

Dubai
WTS Dhruva Consultants
U-Bora Tower 2, 11th Floor, Office 1101
Business Bay P.O. Box 127165
Dubai, UAE
Tel: + 971 56 900 5849

New York
Dhruva Advisors USA, Inc.
340 Madison Avenue, 19th Floor, New York,
New York 10173 USA

KEY CONTACTS

Dinesh Kanabar
Chief Executive Officer
dinesh.kanabar@dhruvaadvisors.com

Ritesh Kanodia
ritesh.kanodia@dhruvaadvisors.com

Niraj Bagri
niraj.bagri@dhruvaadvisors.com

Ranjeet Mahtani
ranjeet.mahtani@dhruvaadvisors.com

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