# CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

Regional Bench – Court No. III

## Service Tax Appeal No.40279 of 2017

(Arising out of Order-in-Appeal No.230/2016 (STA-II) dated 28.11.2016 passed by the Commissioner of Service Tax (Appeals-II), Chennai)

**M/s.Rockey Marketing (Chennai) Pvt. Ltd. : Appellant**
3/8,Mayor Sambandam Street
Ragarajapuram
Kodambakkam
Chennai 600 024.

**VERSUS**

**The Commissioner of Service Tax, : Respondent**
II Commissionerate
Newry Towers, 2054-1
II Avenue, Anna Nagar West,
Chennai 600 040.

**APPEARANCE:**

Shri G. Natarajan, Advocate
For the Appellant

Ms. Sridevi T., JC (AR)
Shri Arul C. Durairaj, Superintendent (AR)
For the Respondent

**CORAM : HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)**
**HON'BLE MR. P. ANJANI KUMAR,, MEMBER(TECHNICAL)**

**FINAL ORDER NO. 40936 / 2020**

DATE OF HEARING: 28.10.2020

DATE OF PRONOUNCEMENT:03.11.2020

**PER: SULEKHA BEEVI C.S**

Brief facts of the case are that the appellants had entered into a Business Solutions Agreement and another Business Promotion Agreement with M/s.Amazon Ltd. As per the Business Solutions Agreement, the appellants have to store various merchandizes in the Amazon warehouse and facilitate dispatch of the goods. In this

connection, Amazon was providing BSS and warehousing services. Service tax was collected from the appellants by M/s.Amazon for such services provided to appellant. These are input services for the appellant. As per the Business Promotion Agreement entered with M/s.Amazon, the appellants had to sell different products at the prices fixed by M/s.Amazon through various promotion sales. The profit forgone by the appellants by participating in such promotion sales was compensated by M/s.Amazon. On this compensation received by them being a consideration for declared services as per Section 66E (e) of the Finance Act,1994, the appellants were paying service tax. The appellants were thus engaged not only in trading but also providing taxable service. The appellants utilized input services provided by M/s.Amazon for engaging in trading as well as providing taxable service. From June 2014, they started availing input tax credit for the period commencing from April 2014 and took credit upto October 2015 on the service tax collected from them by M/s.Amazon on Business Support Service and Storage and Warehousing services. They were advised that they were not eligible to avail credit on such service tax paid to M/s.Amazon and therefore they, as an abundant caution to avoid penal proceedings, reversed the credit by making cash payment along with interest for the input tax credit availed by them during this period. This was informed to the department vide their letter dt. 17.12.2015. Later, they obtained legal advice that they would be eligible to take proportionate credit on the taxable services provided by them. Since the appellants had utilized the input services for trading (exempted services) as well as

taxable output services, they opted for reversal of proportionate credit as provided under Rule 6 (3A) (ii) of Cenvat Credit Rules, 2004. As the credit reversed was in excess of the proportionate credit to be reversed, they have filed refund claim of Rs.47,38,050/- and Rs.6,17,934/- on 17.2.2016, being the balance of credit wrongly reversed (paid in cash) by them. After due process of law, the original authority rejected the refund claim entirely. In appeal, the Commissioner (Appeals) held that appellants have to reverse/pay credit along with interest as per Rule 6(3A) (i) @ 7% of the value of exempted services and therefore are eligible for refund of only Rs.4,31,586/- and appropriate interest. Aggrieved by such order, the appellants are now before this Tribunal.

2. On behalf of the appellant, Ld.counsel Shri G. Natarajan appeared and argued the matter. He submitted that the appellants had not maintained separate accounts of the input services used for exempted services (trading) and taxable output services. Under a wrong advice, reversed the entire input service credit by way of paying cash. On receiving proper legal advice, they filed the refund claims of excess payment made to the tune of Rs.47,38,050/- and Rs.6,17,934/- on 17.2.2016 after complying the formula prescribed under Rule 6 (3A) (ii). The Commissioner (Appeals) held that the appellants would be eligible for refund of Rs.4,31,586/- along with interest observing that Rule 6(3A) (ii) is not applicable and that the appellant has to pay / reverse credit as prescribed under Rule 6 (3A) (i) for the reason that the appellant has not complied with the

procedure of intimating the department with regard to their option. It was argued by the Ld. counsel that the said condition of intimating the department is only a procedural requirement and the substantive right of credit cannot be denied. To support his argument, he relied upon the following case law :

(1) Philips Carbon Black Ltd. & Others Vs CCE & ST Durgapur – 2020 (1) TMI 530-CESTAT Kolkata

(2) JSW Steel Ltd. Vs CCE Salem - 2019 (4)TMI 169 – CESTAT Chennai

(3) Alstom T&D India Ltd. Vs CGST & CCE Chennai – 2019 (370) ELT 625 (Tri.-Chennai)

It is submitted by him that in the above decisions, the Tribunal has held that department cannot force upon the assessee to reverse credit under Rule 6(3) (i) merely for the reason that no intimation was given to the department with regard to their option to reverse the credit when no separate accounts have been maintained.

3. Ld. A.R Ms.Sridevi T. appeared for the department. She supported the findings in the impugned order. It is argued by her that since the appellants have not complied with the procedural requirement as per the provisions in the CCR, they have to reverse the credit as per Rule 6 (3) (i) and therefore order passed by the Commissioner is legal and proper.

4. Heard both sides. The appeal has been filed for refund of Rs.49,24,398/. On perusal of the impugned order, we find that the Commissioner (Appeals) has observed as under :

> "9. It is observed that the value of exempt service as determined by the appellant in view of Rule 6 (3D) (c) is Rs.11,68,48,502/- (10% of cost of exempt goods sold) on which the amount required to be reversed @ 7%

vide Rule 6(3) (i) is Rs.81,79,395/-. However, the appellant have reversed / paid Rs.86,10,981/- resulting in excess payment of Rs.4,31,586/-.

10. It is observed that the impugned reversal/payments were made in December, 2015 and the refund claim was filed in February,2016. Hence, the refund claim is not hit by time bar. Regarding unjust enrichment, it appears that appellant's claim that they have not passed on the incidence of the impugned amount to any other person is prima facie acceptable. However, this shall be proved by the appellant beyond pale of doubt with the support of documents and records."

From the above observation, it can be seen that the appellant has been compelled to reverse credit @ 7% of the value of exempted services under Rule 6 (3) (i) read with Rule 6 (3D) (c) only for the reason they have not followed the procedure of intimating the department with regard to the option exercised. The Tribunal in the case of *Philips Carbon Black Ltd*. (supra)has observed that non-comlinace with the procedure prescribed under Rule 6 (3A) of the CCR does not result in loosing substantive right to avail the option of reversing proportionate credit as envisaged in Rule 6(3) (i); That procedural lapse is condonable and denial of substantive right is unjustified. Similar view was taken by the Tribunal in the cases referred to by Ld. counsel for the appellants. In para-9 of the order in *M/s.Philips Carbon Black Ltd*. case (supra), the Tribunal as under :

"9. The issue can be looked at from another angle as well. Rule 6(1) of the CCR interalia provides that cenvat credit shall not be made available in respect of inputs used in the manufacture and clearance of exempted goods. The reason being that there is no tax cascading requiring elimination in such a situation. Therefore, the said Rule 6(1) is clearly not aimed at revenue maximization but credit neutralization. Rule 6(2) and Rule 6(3) of the CCR are only aimed at securing compliance with the substantive provision contained in Rule 6(1) of the CCR where common inputs are used in the manufacture of a dutiable and exempted final product. Reversal of proportionate cenvat credit in respect of the common input used in the manufacture of exempted goods is an option duly permitted under Rule 6(3)(ii) of the CCR itself. Non-compliance with the procedure prescribed under Rule 6(3A) of the CCR does not result in the manufacturer losing his substantive right to avail the option of reversing proportionate credit, as such procedural lapse is condonable and denial of substantive right on such procedural failure is unjustified in light of the decision of the Tribunal in the Cranes & Structural Engineers Case (supra). Therefore, the imposition of Rule 6(3)(i) of the CCR for demanding payment of 5%/6% of the sales value of electricity is even otherwise unsustainable."

5. From the above, we have no hesitation to hold that the view taken by the Commissioner (Appeals) that the appellant has to reverse credit as per Rule 6 (3) (i) is against the provisions of law. The appellant would be eligible for refund after reversal / paying of proportionate credit on exempted services by applying Rule 6 (3) (i). This amount however has to be verified. Appellant has furnished details of the credit availed and the amount reversed by them along with the letters issued to department. The indirect tax regime has been shifted from Service Tax to GST, appellant would be eligible for cash refund of such amount. However, we direct the lower authority to quantify the amount eligible for refund after complying with Rule 6 (3) (i) being the proportionate credit availed on exempted services. We find the issue under consideration in the appeal in favour of the assessee and against the Revenue. For the limited purpose of quantification of the amount eligible for refund, we remand the matter to the adjudicating authority. Needless to say that refund being of input service credit, the question of unjust enrichment does not arise. The appeal is allowed in above terms.

(Order pronounced in open court on 03.11.2020)

**(SULEKHA BEEVI C.S.)**
**MEMBER (JUDICIAL)**

**(P. ANJANI KUMAR)**
**MEMBER (TECHNICAL)**

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