CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 85566 of 2019

(Arising out of Order-in-Appeal No. MUM/DGPM/WRU/APP-176/17-18 dated 18.05.2018 passed by the Principal Additional Director General, DGPM, Customs & Central Excise, Western Regional Unit, Mumbai)

Zodiac Clothing Company Limited **.... Appellants**
Nyloc House, 254, D-2, Dr. Annie Besant Road
Worli, Mumbai – 400 030.

VERSUS

Commissioner of CGST & Central Excise Mumbai Central **.... Respondent**
4th Floor, GST Bhavan,
115, M K Road, Churchgate
Mumbai – 440 020.

APPEARANCE:

Shri R.V. Shetty a/w Shri S.R. Shetty, Advocates for the Appellants

Shri A.K. Shrivastava, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85867/2024

DATE OF HEARING: 07.05.2024
DATE OF DECISION: 06.09.2024

PER: M.M. PARTHIBAN

This appeal has been filed by M/s Zodiac Clothing Company Limited, Mumbai (herein referred to as 'the appellants' for short) against the Order-in-Appeal No. MUM/DGPM/WRU/APP-176/17-18 dated 18.05.2018 (referred to, as 'the impugned order') passed by the Principal Additional Director General, DGPM, Customs & Central Excise, Western Regional Unit, Mumbai.

2.1 Brief facts of the case, leading to this appeal, are summarized herein below:

2.2 The appellants herein, *inter alia*, are engaged in the export of goods. They had been filing refund claims periodically in respect of input service of 'Banking/Courier/TTA Commission' and 'Commission

paid to the Foreign Agent' under Business Auxiliary Service (BAS)' which are used in export of goods for the respective period, by claiming refund under Notification No.41/2007-S.T. dated 06.10.2007, as amended. In respect of such refund claims filed for the period April, 2008 to December, 2008 in six claims on different dates, the refund claim filed on 31.03.2009 relating to the period October, 2008 to December, 2008, was rejected by the original authority vide Order-in-Original No. RK/R-61/2010 dated 25.03.2010. Further, in respect of refund claim filed on 31.03.2010 for an amount of Rs.17,17,480/-, in respect of refund of Service Tax paid in respect of input service 'Commission paid to the Foreign Agent' which are used in export of goods during 01.04.2009 to 06.07.2009, was partly allowed to the extent of Rs.91,275/- relating to the period 01.07.2009 to 06.07.2009 and the refund claimed for rest of the amount of Rs.16,26,205/- relating to the period 01.04.2009 to 30.06.2009 was rejected by original authority vide Order-in-Original No. KCK/R-197/2010 dated 22.01.2010. In an appeal preferred by the appellants against the above said original orders, the learned Commissioner (Appeals-IV), Mumbai by upholding the said original orders dated 25.03.2010 and 22.01.2010, had rejected the appeal filed by the appellants vide Order-in-Appeal No.173/174 dated 21.05.2013.

2.3 When the appellants had preferred an appeal before the Tribunal, during the first round of litigation, the Tribunal vide its Final Order No. A/2563-2564/15/SMB dated 17.06.2015 had observed that both the lower authorities have not carefully verified certain facts and remanded the matter for passing fresh order as follows:

> *"5. I have carefully considered the submissions made by both the sides. The present two appeals filed by the Appellants related to refund of Rs.9,81,612/- and Rs.16,17,016/-. Appeals in respect of refunds including the above two amounts were rejected by the Ld. Commissioner appeals on the following grounds:*
>
> *(i) The appellants have availed drawback by which contravened the condition of the notification no. 41/2007-ST.*
>
> *(ii) The refund claim is time barred as the same was filed by the appellants beyond the stipulated time of six months.*
>
> *(iii) The nexus in respect of commission with exports service could not be established.*

From the records and submissions made by the Ld. Counsel. It is observed that both the refund claims pertaining to the period after 07.12.08, and ***the condition of non-availment of drawback had been omitted vide the notification no. 33/2008-ST dated 07/12/08therefore I am of the view that refund in the present case which is for the period on or after 07/12/2008 should not have been rejected for the reason that the appellants had availed drawback****. During the period on or after 07/12/2008 the condition of non availment of drawback was not existing. As regard time bar I observed that first claim of Rs. 9,81,612/- is for the quarter ending December, 2008 and refund application could have been filed by 30th June, 2009 whereas the appellants' refund claim was filed on 31/03/2009 which is well within the time period as stipulated in the Notification No.41/2007-S.T. Therefore Ld. Commissioner wrongly rejected the claim on time bar. As regard nexus of commission service with the export I am of the view that the service is of overseas commission agent who provides services exclusively related to export of goods, therefore even by stretch of imagination it cannot be said that overseas commission agent's service is used for the purpose other than for export. The Appellants also submitted details in Annexure–C to this appeal which establish the nexus between the commission agent service and export goods. As regard the rejection of refund claim of Rs. 16,17,016/- on the ground of time bar I have observed that the Appellants have admittedly filed the refund claim on 31/03/2010 i.e., after the issuance of Notification No. 17/2009-ST, therefore the refund claim deemed to have been submitted under Notification No. 17/2009-S.T.****The Ld. Commissioner (appeals) gravely erred, firstly mentioning that the application was filed before 07/07/2009 which is factually incorrect and secondly when refund claim was admittedly filed on 31/03/2010****, it was wrong on the part of Commissioner to hold that the Appellants have filed refund claim under the previous notification no.41/2007-ST and for this reason benefit of public notice No.07/2010 dated 04/03/2010 was not extended to the Appellant****. In view of my above observations, I am of the view that the Appellants are legally entitled for the refund as claimed before this Tribunal. However, it appears that both the lower authorities have not carefully verified the above discussed facts therefore committed serious error in rejecting the refund of Rs.9,81,612/- and Rs.16,17,016/-.***

5.1 As per may above observation and discussions, I find that since the lower authorities have failed to consider the above factual aspects, matter needs to be remanded for reconsideration. I, therefore, remand the matter to the original adjudicating authority for passing a fresh order keeping my above observations in mind and after verification of the factual submissions made by the appellants."

(Emphasis supplied)

2.4 In de novo adjudication proceedings, in respect of the refund claim filed on 31.03.2009 relating to the period October, 2008 to December, 2008, the original authority vide Order-in-Original No.

Refund/KS/271/2015 dated 06.01.2016 had sanctioned refund of Rs.9,81,612/-. Further, in respect of refund claim filed on 31.03.2010 for an amount of Rs.16,17,016/-, in respect of refund of Service Tax paid in respect of input service 'Commission paid to the Foreign Agent' which are used in export of goods during 01.04.2009 to 30.06.2009, it was rejected by original authority vide the said Order-in-Original dated 06.01.2016. In an appeal preferred by the appellants against the above said original order, appellants have claimed refund Rs.16,17,016/- in the appeal proceedings before the learned Principal Additional Director General, DGPM, Customs & Central Excise, Western Regional Unit, Mumbai. In the impugned Order-in-Appeal dated 18.05.2018, learned Pr. ADG have upheld the said original order dated 06.01.2016, and he had rejected the appeal filed by the appellants.

2.5 Being aggrieved with the said appellate order, the appellants had preferred an appeal before the Tribunal along with request by way of Miscellaneous application seeking condonation of delay in such delayed filing. The Tribunal in the Final Order No. A/86531/2019 dated 26.07.2019,did not appreciate the inordinate delay of 169 days on account of resignation of one of their employees and had not found it fit for condonation of delay. Accordingly, both the miscellaneous appeal for condonation of delay and main appeal in the case was dismissed. Even the Miscellaneous application preferred by the appellants for rectification of mistake (RoM) No. 85075 of 2020, the same was also dismissed on the ground that there is no mistake apparent in the said order and the said application is devoid of merit vide Miscellaneous Order No. M/85127/2020 dated 13.02.2020. Against such order of the Tribunal, the appellants have preferred Central Excise Appeal No.6 of 2021 before the Hon'ble High Court of Bombay, who in their judgement dated 22.06.2023 had restored the appeal before CESTAT to its original number and directed to decide the same on merits. On the basis of the same, and upon filing of a miscellaneous application for restoration vide ROA application No. 85504 of 2023, the Tribunal had taken note of the directions of the Hon'ble High Court of Bombay for fresh decision vide Miscellaneous Order dated 18.01.2024 as follows:

> *"5. I find that the Hon'ble High Court has already restored the appeal before CESTAT to its original number and directed to decide the same on merit. Therefore, the present application seeking*

restoration of the appeal dismissed earlier, is infructuous; accordingly, allowed to be withdrawn. In the result, the miscellaneous application for ROA is dismissed being withdrawn."

3. Accordingly, when the matter was listed on 07.05.2024, the case was taken up for hearing on the basis of the directions given by the Hon'ble Bombay High Court for final disposal of the same.

4. I have heard arguments advanced by both sides and perused the case records along with the paper books filed by both sides.

5. I find that the appeal in the present case is lingering for quite some time and needs to be addressed properly for its effective disposal. I also find that in the Final Order No. A/2563-2564/15/SMB dated 17.06.2015, some of the issues have already been decided and on the above basis, in the Order-in-Original dated 06.01.2016, part of the amount disputed earlier has been sanctioned as eligible refund and part amount was rejected as follows:

"10.1 The claimant vide letter dated 07.12.2015 have stated that the Revised Refund is claimed only after 07.12.2008, when the condition on Drawback was withdrawn., Further the Hon'ble Tribunal in its Order No. A/2563-2564/15/SMB dtd 19.08.2015 have inter alia stated that the refund claims pertains to the period after 07.12.2008; that the refund claim was filed well within the time period as stipulated in the Notification No. 41/2007-ST and that the overseas commission agent's service is used for export purpose. Further, as per amendments made to Notification No. 41/2007-ST by Notification No. 17/2008-ST dtd 01.04.2008, the services provided by a commission agent located outside India falling under Section 65(105)(zzb) is eligible for grant of Refund under the said Notification.

10.2 In view of above and the observations made by the Hon'ble Tribunal, I find that the claimant are eligible for grant of Refund claim of Rs. 9,81,612/- and accordingly I sanction the same.

11. I further find that claimant have filed revised Refund claim of Rs. 16,17,016/-, on 31.03.2010, for the period April, 2009 to June, 2009 under Notification No. 41/2007-ST dated 06.10.2007 as amended. However, the said Notification was superseded by Notification No. 17/2009-ST dated 07.07.2009 and it therefore appears that the Refund of service tax paid on services provided by Commission Agent located outside India, under Notification No. 41/2007-ST dtd 06.10.2007 was not applicable w.e.f 07.07.2009.

However, the CBEC vide Circular No. 354/256/2009-TRU dtd 01.01.2010 has clarified that "though Notification No. 17/2009-S.T., dated 7-7-2009 simplifies the refund scheme, the nature of benefit

given to the exporters remains as it was under Notification No. 41/2007-ST. Further, the new notification does not bar its applicability to exports that have taken place prior to its issuance. Therefore, the scheme prescribed under Notification No. 17/2007-S.T would be applicable even for such exports subject to conditions that (a) refund claim are filed within the stipulated period of one year, and (b) no previous refund claim has already been filed under the previous notification".

In view of above, new notification No. 17/2009-ST dated 07.07.2009 is applicable to the exports which had taken place prior to its issuance, but the Refund claims are filed after 07.07.2009 and that the refund claim shall be admissible only if the provisions and conditions of the said notification no. 17/2009-ST are fulfilled. Further the claimant vide their letter dated 07.12.2015, have stated the refund is claimed only on the commission agent services procured from foreign agents.

11.1 Further as regard, the claim of the claimant that Notification No. 41/2007-ST was substituted by Notification No. 17/2009-ST & Notification No. 18/2009-ST which were both dated 04.03.2010. Thus an application under the New Notifications has to be constructed harmoniously.

I find that the claimant have not followed the conditions mentioned at Sr No. 2,3, & 4 and have failed to comply with the conditions as mentioned in the proviso to Notification No. 18/2009-ST dated 07.07.2009 and as such their reasoning that their application under the New Notifications has to be constructed harmoniously ……

11.2 ……In view of the above, the service tax paid on Commission paid to foreign commissioner agent service for the period April, 2009 to June, 2009 and filed on 31.03.2010, under Notification No.41/2007-ST dated 06.10.2007 as amended is liable for rejection and accordingly I reject the Refund claim of Rs.16,17,016/-."

In the impugned order, the learned Pr. ADG, DGPM had upheld the above order of the original authority, by giving his findings that the refund claim filed by the appellants on 31.03.2010 in respect of service tax paid on services provided by the Commission Agency located outside India, for the period April, 2009 to June, 2009, is firstly not covered by the Notification No.41/2007-ST dated 06.10.2007, as it was superseded by Notification No.17/2009-ST dated 07.07.2009 and certain conditions of such notification dated 07.07.2019 was not fulfilled; and secondly, the refund claim was filed beyond six months' time from the end of the quarter relevant to such exports, under Notification dated 06.10.2007 on the basis of which the refund claim was filed.

6. On careful reading of the various orders passed by authorities below, I find that the issues to be addressed are as follows:

(i) whether the refund claim filed on 31.03.2010 by the appellants in respect of service tax paid on services provided by the Commission Agency located outside India, for the period April, 2009 to June, 2009, is admissible or not, in terms of the relevant Notifications in force and the applicable legal provisions thereof?

(ii) Whether the refund claim filed on 31.03.2010 is time barred?

7. There is an established internationally acceptable principle that taxes and duties should not be exported, to enable a level playing field in the international market for exports. Hence, indirect taxes on inputs and input services are to be refunded or rebated/reimbursed. As a number of input services are used in export of goods, the Government had provided a mechanism for such refund/remission of service tax involved in such exports. The instruction issued by the Ministry of finance dated 17.04.2008 is extracted and reproduced below:

"F. No. 341/15/2007-TRU
Government of India
Ministry of Finance
Department of Revenue
(Tax Research Unit)
*****

RoomNo.146G, North Block,
New Delhi, the 17th April, 2008.

Subject: Refund of service tax paid on taxable services used by exporters which are not input services but could be attributable to export activities - Regarding.

The Annual Supplement to the Foreign Trade Policy, 2004-09 announced on 19.4.2007 stated that service tax on services rendered and utilised by exporters would be exempted/remitted and the remission mechanism would be institutionalised after working out the modalities.

2. Committee of Secretaries (COS) examined the matter and decided that exemption from service tax could be notified and reimbursement of service tax based on receipts may be allowed provided linkage to export is established.

3. Accordingly, 16 taxable services have been notified and the service tax paid on these taxable services, which are attributable to exports even if they are not used as input services, shall be refunded to exporters [notification No.43/2007-ST, dated 29.11.07 and notification No.41/2007-ST, dated 06.10.07, as amended by notifications No.42/2007-ST, dated 29.11.07, No.03/2008-ST, dated 19.02.08 & No.17/2008-ST, dated 01.04.08].

4. Notifications No.41/2007-ST, dated 06.10.07 and No.43/2007-ST, dated 29.11.07 provide that the service tax paid on the specified taxable services by exporters shall be refunded in the prescribed manner subject to the conditions specified therein.

5. Board desires that refund of service tax paid on taxable services used by exporters for export goods should be disposed of expeditiously. The refund claims should be finalized within a maximum period of 30 days from the date of filing of refund claim. Commissioners are advised to put in place a system of review and monitoring the disposal of refund claims filed by the exporters.

6. Any refund claim filed by an exporter which is not disposed of within the maximum period of 30 days, for any reason whatsoever, should be reported by the Commissioner to the Chief Commissioner concerned in the proforma given below by the 10th of every month. If there is no such case, nil report should be sent. Sr. No. Name of the exporter Date of filing of refund claim Amount of refund sought Reason for delay in processing the refund claim

7. Details of refund claims which are not disposed of within 45 days from the date of filing, for whatsoever reasons, should be sent by the Commissioner to Member (Service Tax) in the above mentioned proforma by email at j.kulasekhar@nic.in so as to reach by 10th of the following month with copy to Chief Commissioner concerned. Special efforts may be taken to dispose of the refund claims filed by small and medium exporters expeditiously…"

On plain reading of the above instructions of the Ministry of Finance dated 17.04.2008, it transpires that service tax paid on input services used in exports are required to be refunded by a mechanism provided therein. Such refund of service tax paid was introduced as trade facilitation measure with an aim to expeditiously process and sanction the refund claims, by allowing the exporters to file periodically (for each quarter) and with close monitoring at the highest level in the CBEC's field formations. In order to avoid frivolous objections in sanction of such refund claim, such instructions have gone to the extent of stating that '16 taxable services (which) have been notified and the service tax paid on these taxable services, which are attributable to exports even if they are not used as input services, shall be refunded to exporters.' Notification No.41/2007-S.T. dated 06.10.2007 is one such notification extending the exemption to certain specified services, which was superseded by Notification No.17/2009-S.T. dated 07.07.2009 and further notification No.18/2009-S.T. dated 07.07.2009 were also issued. The second notification dated 07.07.20209 further facilitated by specifically including a number of taxable services for which refund claims can be submitted by exporters and the time period for filing such refund claims was made

for longer period of one year from the date of export of the relevant export of goods. It is also found that 'service provided by a commission agent located outside India and engaged under a contract or agreement or any other document by the exporter in India, to act on behalf of the exporter, to cause sale of goods exported by him' is covered under the taxable category of sub-clause (zzb) of Section 65(105) of the Finance Act, 1994 and it was provided as one of the eligible services on which refund is permitted in the aforesaid notifications.

8.1 Since there was certain doubts raised about the applicability of the superseding notification to the past exports made during the application of the earlier notification dated 06.10.2017, the Government had issued instructions on 01.01.2010 by clarifying that such refund benefits should be extended to those exports covered in the earlier period also. The extract of the said instructions dated 01.01.2010 is given below:

"Instruction
dated 1-1-2010

F.No. 354/256/2009-TRU
Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject: Relevant date for filing the refund claim under Notification No. 17/2009-S.T., dated 7-7-2009 - Regarding.

It may be recalled that the refund based service tax exemption scheme available to the exporters vide Notification No. 41/2007-S.T., dated 6-10-2007 was replaced during Budget 2009 by Notification No. 17/2009-S.T., dated 7-7-2009. One of the conditions appearing in clause (f) of para 2 of Notification No. 17/2009-S.T. is that "claim for refund shall be availed within one year from the date of export of the said goods". Doubts have been expressed whether the applicability of this notification would be only with respect to such exports which have taken place after the issuance of this notification or would apply also to exports prior to 7-7-2009.

2. The matter has been examined by the Board. In this regard, I am directed to state that though Notification No. 17/2009-S.T., dated 7-7-2009 simplifies the refund scheme, the nature of benefit given to the exporters remains as it was under Notification No. 41/2007-S.T. Further, the new notification does not bar its applicability to exports that have taken place prior to its issuance. Therefore, the scheme prescribed under Notification No. 17/2009-S.T. would be applicable even for such exports subject to conditions that (a) refund claims are filed within the stipulated period of one year; and (b) no previous refund claim has already been filed under the previous notification.

3. The above may please be brought to the notice of the trade and exporters through suitable public notice."

8.2 On careful perusal of the aforesaid instructions, it transpires that the Government had provided the refund of service tax involved in respect of exports, as a nature of benefit by simplifying the scheme further in providing certain minimum conditions such as (i) filing of refund claims within stipulated one year period, and (ii) that such refund claim has not been filed earlier with the departmental authorities.

8.3. From the findings of the authorities below for rejection of refund claim as detailed in paragraph 5 above, it is seen that the refund claim of the appellants was rejected on account of their claim not fulfilling the conditions 2, 3 & 4 of Notification No.18/2009-S.T. dated 07.07.2009 which relate to ceiling limit of refund, submission of half yearly returns and is application in respect of export of canalized items. In the present case, the facts on record show that the export goods are nowhere claimed by Revenue to be canalized item; and that the refund amount claimed was not questioned on the quantum of ceiling. Further, as the refund claim relate to exports of the period relating to April, 2009 to June, 2009, which have already been exported at the time of issue of the notification dated 07.07.2009, the conditions relating to submission of returns as specified therein are not relevant for denying the exemption. In fact, the instructions dated 01.01.2010 clearly provide the only two conditions to be seen for allowing refund claims viz., (i) filing within a stipulated period of one year and (ii) such refund having not been claimed in the past.

8.4 On perusal of the refund application dated 31.03.2010 filed by the appellants, it is clearly seen therein that at Sl. No.6, they have specifically declared that no refund on this account has been claimed or received by them earlier. Further, for the refund relating to the period April, 2009 to June, 2009 i.e., quarter ending 30.06.2009, the appellants have filed the refund on 31.03.2010, i.e., within stipulated one year period. Thus, I find that on account of both the conditions stipulated in the instructions dated 01.01.2010, the appellants fulfill the requirements for sanction of refund claim made before the departmental authorities. Further, there was no finding that these

conditions have not been fulfilled by the authorities below in the impugned order.

8.5 In view of the above discussions, I find that there is no merit in the impugned order to the extent that it had denied the refund claim of Rs.16,17,016/- by upholding the original order dated 06.01.2016. Accordingly, the impugned order dated 18.05.2018 is liable to be set aside as being factually incorrect and not legally sustainable. Accordingly, I set aside the impugned order and allow the refund of service tax paid on services provided by the Commission Agency located outside India, for the period April, 2009 to June, 2009 for an amount of Rs.16,17,016/-.

9. In the result, the impugned order dated 18.05.2018 is set aside and the appeal filed by the appellant is allowed in their favour by allowing refund of Rs.16,17,016/-.

(Order pronounced in the open court on 06.09.2024)

(M.M. PARTHIBAN)
MEMBER (TECHNICAL)

Sinha