IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO. 2 R. K. PURAM, NEW DELHI - 110066

Date of Hearing: 23/09/2013
Date of Decision: 26.9.2013

M/s Divine Wellness Pvt Ltd.

Vs.

C.C.E. & ST, Kanpur

APPEAL No. ST/56457/2013 – CU [SB]


Appearance

Shri Ashish, CA - for the Appellant
Shri R. Puri, DR - for the Respondent

CORAM

Hon’ble Mr. Sahab Singh, Member (Technical)

FINAL Order No. 57728 dated 23.09.2013

“The refund is liable to be sanctioned after it is verified that input services have gone into the export services and it has to be seen from the concerned invoices........ Since the refund pertain to October, 2010 to March, 2011, there may be cases where input services were received in January and February, 2011 in that case it cannot be said that services has been utilized in respect of the services which are exported prior to receipt of particular input services in previous quarter. As per the decision of the Hon’ble High Court, the matter is required to be verified.” [Para 8]

Per Sahab Singh, Mr.:

1. This appeal is filed by M/s. Divine Wellness Pvt. Ltd., hereinafter referred to as appellant against the order – in – Appeal No. CC (A)/CUS/83/2012, dated 28.02.2013 passed by the CCE & ST, Kanpur – II. Brief facts of the case are that appellants are registered with service tax Department under category of “Health Club and Fitness Centre, Management Consultants, Business Auxiliary Services,
Transport of goods by road, Advertising Space or Time Legal Consultancy Service”. They filed a refund claim on 24.08.2011 claiming refund of Rs. 10,92,185/- under Rule 5 of Cenvat Credit Rules, 2004. On scrutiny of the claim, it was observed that some part of the claim pertains to different Division of the Commissionerate and accordingly, the claim was returned to the appellants on 05.09.2011. The revised claim for Rs. 4,52,840/- for the period 01.10.2010 to 31.03.2011 was received in the office of the Asst. CCE on 18.11.2011. On scrutiny of the refund claim, it was found by the original authority that the appellants have not fulfilled the conditions of Rule 5 of Cenvat Credit Rules, 2004 read with Notification No. 5/2006 – CE, dated 14.03.2006 and as such it was the view of the Department that the refund was not admissible to the appellants. Accordingly, Show Cause Notice was issued to the appellants, which was adjudicated by the original authority vide order – in- original dated 18.05.2012 under which the claim was rejected. The appellants filed an appeal before the Commissioner (Appeals) who vide impugned order has also rejected their appeal. The appellants have challenged the impugned order in the present appeal.

2. Ld. Advocate appearing for the appellants submits that they have claimed the refund in respect of those input services which are used for providing of export services. He submits that as a major part of the services were exported and very small part was cleared for domestic consumption, they had unutilized CENVAT credit in their CENVAT account and they are eligible to claim the refund under Rule 5 of the Cenvat Credit Rules, 2004 read with Notification No. 5/2006 – CE, dated 14.03.2006. He submits that mainly the refund has been rejected on the ground that Bank Realisation Certificate in respect of export of services were not submitted by the appellants. He submitted that they are exporting yoga services and fitness services to the individual as per various packages and the payments are received from each individuals and the bank in their statement has given the total amount received in foreign exchange in respect of complete financial year and from which the total amount received in foreign exchange comes to Rs. 3,12,495/- during the relevant period of the refund claim. Therefore, this contention of the Revenue is not sustainable. He further submits that Revenue also rejected the claim on the ground that value of export services is much less as compared to the total credit availed by them during the relevant period. He submits that under the Notification, the formula is prescribed for claiming refund under Rule 5, according to which the ratio of export turnover to total turnover is multiplied by the CENVAT credit the amount for eligibility of refund. He submits that according to this formula only they have claimed the refund and amount in question is calculated on the basis of formula. He also relies upon the CBEC Circular No. 120/01/2010 – ST, dated 19.02.2010 according to which, one-to-one co-relation is not required for sanctioning of refund under Rule 5 of the Cenvat
Credit Rules, 2004. He therefore, submits that they are eligible for the refund claimed by them.

3. Ld. Departmental Representative appearing for the Revenue submits that under Rule 5 of the Cenvat Credit Rules, 2004, refund is to be allowed in respect of input services which are used in the export of the output services. The appellants have not given any such evidence to prove that services in respect of which refund has been claimed have gone into that part of the services exported. He further submits that both the lower authorities have examined the conditions of the Notification and has come it the conclusion that refund claimed by the appellant is not admissible to them. He, therefore, submits that appeal filed by the appellants is not sustainable.

4. Heard both the sides.

5. I find that under Rule 5 of the Cenvat Credit Rules, 2004 any input services used in providing output services which is exported the CENVAT credit in respect of input services shall be allowed to be utilized towards payment of service tax on such output services and where for any reason such adjustment is not possible, the provider of output services shall be eligible for refund of such amount subject to safeguard some conditions and limitations as specified by the Central Govt. The Notification No. 5/2006 – CE dated 14.03.2006 has been issued under Rule 5 of the Cenvat Credit Rules providing the various conditions and safeguards in respect of such refund claim. Under this Notification, the refund is admissible when the output service is exported in accordance with procedure laid down under Export of Services Rules, 2005. The export is complete when the foreign exchange remittances are received in India. Therefore, the Revenue has raised the issue of non – realisation of foreign exchange in respect of the services on which refund has been claimed by the appellants. I find that the appellants have produced a certificate from the bank i.e. Bank Realisation Certificate for the whole financial year 01.04.2010 to 22.03.2011. In this case, the services are provided to the individual recipient service as yoga services, which are used by the individuals according to various packages taken by them. Each individual has made the payment during the course of the year and bank was able to provide the total payment received in the entire year. From this certificate, the payments received from October, 2010 to March, 2011 can also been seen and quantified. Therefore, the objection of the Revenue that the Bank Realisation Certificate has not been produced in respect of individual receipt is not sustainable, particularly, when the appellants have produced the entire Bank Realisation Certificate for the complete financial year.

6. The second argument of the Revenue is that the refund claim by the appellants amount to Rs. 4,52,840/-, while the value of export services is limited to Rs.
1,92,912/-. I find that under this Notification, the amount of refund is governed by the formula under which unutilized credit is multiplied by ratio of export turnover and total turnover and therefore this contention of the Revenue will not have any force if the amount of refund claim satisfies this formula as provided in the Notification.

7. The Ld. Advocate also relies on the decisions of this Tribunal in the case of Dileep Industries (P) Ltd. Vs. CCE, Jaipur – I reported in 2013 (30) S.T.R. 701 (Tri – Del.) and in the case of Capiq Engineering Pvt. Ltd. Vs. CCE, Vadodara reported in 2011 (22) S.T.R. 366 (Tri. – Ahmd.). I find that the refund under Rule 5 of Cenvat Credit Rules, 2004 is governed by the conditions and safeguards under Notification No. 5/2006 – CE dated 14.03.2006 and the denial of refund to the appellants in cited cases may not be on the same ground in each refund as in the present case. In the case of Dileep Industries Ltd., supra, it is not clear on what ground the refund was denied by the lower authorities and in the case of Capiq Engineering Pvt. Ltd., the assessee was 100% EOU which fact is not applicable in the present case and the credit was denied on the ground that some of the services were not used in a particular quarter in respect of which the refund was claimed. Therefore, the facts of these cases are distinguishable from the present case as in the present case refund was denied on a different ground.

8. The appellant also relied on the Board circular, according to which one-to-one correspondence relation between input services and the services exported. I find that Hon'ble High Court of Karnataka in the case of Shell India Ltd. Vs. CCE, Bangalore reported in 2012 (28) S.T.R. 87 (Kar.) has held as under (Para 7) :

“In other words, it is not only necessary to verify that a particular kind of input service is consumed for providing a particular kind of output service but it is a necessary to ensure that the eligible service received under various invoices have actually gone into consumption for providing the exported output service in question and not utilized for other purposes.”

I find in view of these observations of the Hon'ble High Court of Karnataka, the refund is liable to be sanctioned after it is verified that input services have gone into the export services and it has to be seen from the concerned invoices also particularly in the present case. Since the refund pertain to October, 2010 to March, 2011, there may be cases where input services were received in January and February, 2011 in that case it cannot be said that services has been utilized in respect of the services which are exported prior to receipt of particular input services in previous quarter. As per the decision of the Hon'ble High Court, the matter is required to be verified. In the light of the observations of the Hon'ble High Court of Karnataka, the matter is remanded back to the original authority for
re – verification of the claim and to decide the matter after affording an opportunity of hearing of the appellant.

9. Appeal is disposed of by way of remand.

Pronounced in Court on 26.09.2013