CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

Service Tax Appeal No. 52470 of 2016

(Arising out of Order–in-Appeal No. 59-ST-DLH-2014 dated 29.03.2014 passed by Commissioner (Appeals), CE, New Delhi)

M/s. MetLife Global Operations Support Center Private Limited **.....Appellant**
Building-1, Info Space
Plot Number – 20/21,
SEZ, Section – 135,
Noida – 201 304..

Versus

Commissioner, Service Tax **.....Respondent**
Division – VII, 37,
2nd Floor, Nehru Place,
New Delhi – 110 019.

APPEARANCE:
Shri Sparsh Bhargava & Shri Abhishek Boob, Advocates for the Appellant
Shri K. Poddar, Authorized Representatives for the Department

CORAM :
HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

Date of Hearing : **December 10, 2020**
Date of Decision : **December 22, 2020**

FINAL ORDER No.: 51652/2020

JUSTICE DILIP GUPTA

M/s MetLife Global Operations Support Center Private Limited[1] has filed this appeal for setting aside the order dated March 29, 2014 passed by the Commissioner (Appeals), Central Excise, Delhi[2], by which the order dated March 28, 2013 passed by the Assistant Commissioner of Service Tax, New Delhi [3]

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1 the appellant
2 the Commissioner (Appeals)
3 the Assistant Commissioner

rejecting the five refund claims filed by the appellant, has been affirmed and the appeal has been dismissed.

2. The appellant is operating as a unit of M/s Seaview Developers Ltd. in a Special Economic Zone[4]. It was granted approval to operate as a SEZ unit by the office of the Development Commissioner, Noida Special Economic Zone by a letter dated June 19, 2008, subject to the provisions of The Special Economic Zones Act, 2005[5] and The Special Economic Zone Rules, 2006 [6] made thereunder for undertaking the authorized operations "BPO (ITES)" i.e. Business Process Outsourcing (Information Technology and Enabled Services).

3. The appellant claims that during the period March, 2009 to June, 2010 it was engaged in 100 percent export of services from its SEZ unit and that it did not have any operations in the Domestic Tariff Area. It further claims that it was involved in the provision of Business Process Outsourcing[7] services and other support services to customers located outside India and that the aforesaid services were "authorized operations" in terms of the letter dated June 19, 2008.

4. In order to advance benefit to establishments operating from SEZ, the Central Government granted service tax exemption on the taxable services provided to a Developer or a Unit to carry on the authorized operations in a SEZ. It needs to be noted that till March 2, 2009 the SEZ units were not required to pay any service tax on the input services consumed by them within SEZ in terms of a notification dated March 31, 2004 issued under section

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4 SEZ
5 SEZ Act
6 SEZ Rules
7. BPO

93 of the Finance Act, 1994[8]. However, by a notification dated March 3, 2009 such exemption was granted by way of refund of service tax. The said notification was amended by a notification dated May 20, 2009. It provided unconditional exemption from payment of service tax on all the services consumed wholly within SEZ, but on services consumed partly or wholly outside the SEZ, the exemption was granted by way of refund. In order to claim refund, it was mandatory for all the SEZ units to get the input services, for which refund was claimed and used by them for performing the authorized operations approved by the Unit Approval Committee[9] of the SEZ unit. It transpires that the appellant deposited service tax in terms of these notifications.

5. The appellant subsequently submitted five applications claiming refund of the service tax paid under the notification dated March 3, 2009 as also notification dated May 20, 2009 that amended the said notification dated March 3, 2009. The refund period, the date of application, the date of the notification and the amount involved in the five refund applications are as follows:

S. No.	REFUND PERIOD	DATE OF REFUND APPLICATION	NOTIFICATION DATE	AMOUNT IN RUPEES
1.	03.03.2009 to 19.05.2009	25.09.2009	03.03.2009	13,70,050
2.	20.05.2009 to 30.09.2009	19.11.2009	20.05.2009	25,56.766
3.	01.10.2009 to 31.12.2009	08.04.2010	20.05.2009	11,28,484
4.	01.01.2010 to 31.03.2010	02.07.2010	20.05.2009	18,45,467
5.	01.04.2010 to 30.06.2010	30.09.2010	20.05.2009	13,08,361
TOTAL				**82,09,128**

8 the Finance Act
9 UAC

6. However, a show cause notice dated December 14, 2011 was issued to the appellant, requiring the appellant to show cause as to why the refund claims should not be rejected under the provision of section 11B of the Central Excise Act, 1944[10]. The show cause notice pointed out certain deficiencies and also provided a list of documents that had not been filed. They are as follows:

> "1. Copies of input invoices used in authorized operations are not submitted with the claims. Certified true copies of the same may be provided.
> 2. Certified true copies of lists of input services duly approved by the Unit Approval Committee of SEZ, S.T. 3 returns, and Balance Sheets.
> 3. The Unit Approval Committee has not approved input services namely Mandap Keeper services, Club of Association Services, Life Insurance Services, Cable Services, Courier Services, Air Travel Agent Services, Agent Services, and Out Door Catering Services used outside the Zone as used in authorized operations. Despite that you have claimed refund of services tax paid against these services. It may be clarified that as to why refund claims against these services should not be rejected.
> 4. As to why all claims in r/o outdoor catering service be treated as used outside the zone and therefore be rejected in absence of birfurcation of Outdoor Catering Services used outside and inside the zone.
> 5. As to why refund claim of service tax paid on services consumed wholly inside the SEZ after the amendment by Notification No. 15/2009-ST dated 20.05.2009 be rejected.
> 6. The refund claims should have been accompanied by the documents for having paid the service tax. In this regard, you have submitted only 'Input Service Invoice Register' (in a computerized statement format without copies any input invoices) and copy of bank statement. A sample check of these two documents revealed that Input Service Invoice Register reflects only date of payments in addition to details of invoice. It does not reveal amount and mode of payment. While cross checking these dates of payments with the bank statement, in the month of March'09, payments were made on 29.03.2009 against the invoices mentioned at Sr. No. 2 to 68 of the register whereas no such payments are reflected in the bank statement on 29.03.2009. Likewise, all the other dates of payments are also not tallied with the bank statement in absence of other details such as amount and mode of payments, name of service provider in the bank statement etc. therefore, it may be clarified that as to why all the refund claims should not be rejected on this ground.
> 7. It may also be satisfied/established that the said specified services have actually been used in relation to the authorized operations in the Special Economic Zone. Therefore, the party is hereby called upon to show cause to the Assistant Commissioner, Service Tax Division-II, 7th Floor, Block No. 11, CGO Complex, Lodhi Road, New Delhi 110003 within 7 days of receipt of this notice as to why the refund claims should not be rejected under the provisions of Section 11B of Central Excise Act, 1994 as made applicable to Service Tax by virtue of section 83 of the

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10 the Excise Act

Finance Act."

7. The appellant filed a reply to the show cause notice explaining why the appellant was entitled to refund of the service tax paid by the appellant.

8. However, the Assistant Commissioner by order dated March 28, 2013 rejected the five refund applications filed by the appellant.

9. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals) who, by order dated March 29, 2014 dismissed the appeal.

10. It is against the aforesaid order of the Commissioner (Appeals) that the present appeal has been field before the Tribunal.

11. Shri Sparsh Bhargava assisted by Shri Abhishek Boob, learned Counsel for the appellant submitted that the five refund applications filed by the appellant for seeking refund of the service tax paid on input services received by the unit of the appellant established in SEZ have been rejected for alleged non-compliance of several conditions prescribed in the notifications dated March 3, 2009 and May 20, 2009, but in view of the provisions of section 26 of the SEZ Act read with rules 22 and 31 of the SEZ Rules, the claim for refund could not have been rejected. The Commissioner (Appeals), therefore, committed an illegality in placing reliance upon the two notifications issued under section 93 of the Finance Act as they have no application to units in SEZ, in view of the decisions of the Andhra Pradesh High Court in **GMR Aerospace**

Engineering Ltd. vs. **Union of India**[11] and a Division Bench judgement of this Tribunal in **DLF Assets Pvt. Ltd.** vs. **The Commissioner, Service Tax, Delhi-I**[12]. Learned counsel, in the alternative, made detailed submissions on each of the issues raised in the order passed by the Commissioner (Appeals). These submissions shall be dealt with at the time these issues are examined.

12. Shri K. Poddar, learned authorized representative of the Department, however, supported the impugned order and submitted that in view of the provisions of rule 47 of the SEZ Rules, the modalities regarding refund are governed by the provisions of the Finance Act and so the conditions prescribed in the two notifications dated March 3, 2009 and May 20, 2009 for seeking exemption of service tax would have to be fulfilled. Learned authorized representative also submitted that a provision providing for exemption from service tax has to be construed strictly and a person who claims exemption has to establish that he is entitled to it. In support of this contention, learned authorized representative relied upon two decisions of the Supreme Court in **M/s L R Brothers Indo Flora Ltd.** vs. **Commissioner of Central Excise** [13] and **Commissioner of Customs (Import), Mumbai** vs. **Dilip Kurmar & Co.**[14]**.**

13. The submissions advanced by learned counsel for the appellant and the learned authorized representative of the Department have been considered.

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11 2019(31) GSTL 596 (AP)
12 MANU/CE/0131/2020
13 2020-TIOL-145-SC-CUS
14 2018 (361) ELT 577 (SC)

14. In order to appreciate the contentions, it would be appropriate to refer to the relevant provisions of the SEZ Act and the SEZ Rules framed thereunder.

15. Section 26 of the SEZ Act deals with exemptions, drawbacks and concessions to every Developer and entrepreneur. The relevant provisions are reproduced below:

> **"26. Exemptions, drawbacks and concessions to every Developer and entrepreneur.—**
> **(1)** Subject to the provisions of sub-section (2), every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions, namely:—
> (a) **********
> (b) **********
> (c) **********
> (d) **********
> (e) exemption from service tax under Chapter V of the Finance Act, 1994 (32 of 1994) on taxable services provided to a Developer or Unit to carry on the authorized operations in a Special Economic Zone;
> (f) **********
> (g) **********
> **(2)** The Central Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions, concessions, drawback or other benefits shall be granted to the Developer or entrepreneur under sub-section (1)."

16. Section 51 of the SEZ Act provides overriding effect to the provisions of the SEZ Act and it is reproduced below:

> **"51. Act to have overriding effect —** The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

17. Section 55 of the SEZ Act gives power to the Central Government to make rules for carrying out the provisions of the Act. In exercise of the aforesaid power, the Central Government made The Special Economic Zones Rules, 2006.

18. Rule 22 contained in Chapter (IV) of the SEZ Rules deals with terms and conditions for availing exemptions, drawbacks and concessions to every Developer and entrepreneur for authorized operations.

19. "Authorised operations" have been defined in section 2(c) of the SEZ Act to mean operations which may be authorized under sub-section (2) of section 4 and sub-section (9) of section 15 of the SEZ Act.

20. Rule 31 deals with the exemption from payment of service tax and is reproduced below:

> "31. The exemption from payment of service tax on taxable services under Section 65 of the Finance Act, 1994 (32 of 1994) rendered to a Developer or a Unit (including a Unit under construction) by any service provider shall be available for the authorized operations in a Special Economic Zone."

21. The contention advanced by learned counsel for the appellant is that the notifications dated March 3, 2009 and May 20, 2009 would not be applicable to the case of the appellant as the appellant is exempted from payment of service tax under the provisions of section 26(1)(e) of the SEZ Act read with rule 31 of the SEZ Rules. The submission is that the appellant may have deposited the service tax pursuant to the notification dated March 3, 2009, but when the appellant is exempted from levy of service tax as the unit of the appellant is situated in SEZ and it had undertaken authorized operations only in accordance with the letter dated June 19, 2008 issued by the Development Commissioner, Noida Special Economic Zone, it is entitled to refund of the service tax.

22. It has, therefore, to be seen whether the conditions stipulated in the notifications dated March 3, 2009 and May 20, 2009 would at all apply to the appellant since the appellant claims that it is situated in a SEZ and has carried out authorized operations only.

23. Section 26(1) of the SEZ Act provides that subject to the provisions of sub-section (2), every Developer shall be entitled to exemptions and the exemption at (e) exempts every Developer from service tax under Chapter-V of the Finance Act on taxable services provided to a Developer or unit to carry on the authorized operations in a SEZ. "Authorised operations" have been defined in section 2(c) of the SEZ Act to mean operations authorised under sections 4 and 15 of the SEZ Act. It is not in dispute that the unit of the appellant is operating SEZ and by a letter dated June 19, 2008, the Development Commissioner extended all the facilities and entitlements admissible to a unit in SEZ, subject to the provisions of the SEZ Act and the SEZ Rules for establishment of a unit at SEZ for undertaking the authorised operations. The authorized operations have been specified as "BPO (ITES)". Section 51 of the SEZ Act provides for an overriding effect to the provisions of the SEZ Act. The provisions of section 26 of the SEZ Act read with rule 31 of the SEZ Rules thus, have overriding effect over anything inconsistent contained in any other law for the time being in force, which would include the Finance Act. Thus, when the services rendered by the appellant are fully exempted from service tax in terms of the provisions of the SEZ Act, the condition of exemption by way of refund imposed under the notifications issued under the Finance

Act would be inconsistent with the provisions of the SEZ Act. It also needs to be noted that the SEZ Act was enacted in 2005, much after the enactment of the Finance Act in 1994. Section 26(2) of the SEZ Act does provide that the Central Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions shall be granted to a Developer under sub-section (1), but what is important to notice is that the word "prescribe" means prescribed by the rules made by the Central Government under the SEZ Act, in view of the definition of "prescribed" under section 2(w) of the SEZ Act. The notifications dated March 3, 2009 and May 20, 2009 have been issued under section 93(1) of the Finance Act and not under section 26(2) of the SEZ Act.

24. This issue as to whether the exemption notifications issued under section 93 of the Finance Act would be applicable to units in SEZ carrying on authorised operations or whether the exemption provided for in section 26(1)(e) of the SEZ Act would govern them was examined by the Telangana and Andhra Pradesh High Court in **GMR Aerospace Engineering Limited**. The second petitioner, a Developer of GMR Hyderabad Aviation SEZ, entered into a sub-lease agreement with the first petitioner for rendering certain services. It, however, claimed exemption on the ground that under section 26(1)(e) of the SEZ Act, every Developer was entitled to exemption from service tax under Chapter-V on the Finance Act on taxable services provided to a Developer or unit to carry on the authorized operations in a SEZ and the same was not dependent upon the conditions stipulated in notifications issued under section 93 of the Finance Act. It is in this context that the

Andhra Pradesh High Court observed that the notifications issued under section 93 of the Finance Act cannot be considered for determining whether a unit situated in SEZ qualifies for exemption. The observations are as follows:

> **"22.** It may be noted that sub-section (1) of section-26 begins with the words "subject to the provisions of sub-section (2)". Sub-section (2) authorizes the Central Government to prescribe the manner in which and the terms and conditions subject to which exemptions shall be granted to the developer or entrepreneur under sub-section (1).
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> **23. As rightly pointed out by Sri S. Niranjan Reddy, learned senior counsel appearing for the petitioner, the word —prescribe‖ appearing in sub-section (2) of section 26 has to be understood with reference to the definition of the word "prescribed" appearing in section 2(w) of the SEZ Act, 2005.** Section 2(w) of the Act reads as follows:
>
> > "prescribed means prescribed by rules made by the Central Government under this Act."
>
> **24. Therefore, the terms and conditions subject to which the exemptions are to be granted under sub-section (1) of section 26 should be prescribed by the Rules made by the Central Government under the SEZ Rules, 2006 issued in exercise of the power conferred by section 55 of the SEZ Act.** It is not necessary to extract rule 22, since there is no dispute about the fact (1) that the petitioners have complied with the prescriptions contained in rule 22 of the SEZ Rules, 2006, and (2) that rule 22 of the SEZ Rules, 2006 does not stipulate the filing of Forms A1 and A2 as prescribed in the three Notifications issued under section 93 of the Finance Act, 1994.
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> **29.** The contention of Smt. Sundari R. Pisupati, learned senior standing counsel is that there is no inconsistency between (i) the terms and conditions prescribed in the Notifications issued under section 93 of the Finance Act, 1994, and (ii) the terms and conditions prescribed in rules 22 and 31 of the SEZ Rules, 2006, and that therefore, section 51 of the SEZ Act, 2005 cannot be pressed into service. But this contention is unacceptable.
>
> **30.** This is for the reason that section 26(1) of the SEZ Act made the entitlement to certain exemptions subject to provisions of sub- section (2) of section 26. Section 26(1) did not make the entitlement of a developer to certain exemptions, subject to the provisions of something else other than the provisions of sub-section (2). Therefore, the firth respondent cannot read section 26(1) to mean that the exemptions listed therein are (1) subject to the provisions of sub-section (2) of section 26, and (2) also subject to the terms and conditions prescribed in the Customs Act, 1962, the Customs Tariff Act, 1975, the Central Excise Act, 1944, the Central Tariff Act, 1985 and the Finance Act, 1994. This is especially so, since the authority of the Central Government to prescribe the terms and conditions subject to which exemptions may be granted under section 26(1), flows

> only out of sub-section (2) of section 26. The word "prescribe" is verb. Generally no enactment defines the word "prescribe" but the SEZ Act 2005 defines the word "prescribe" under section 2(w) to mean the rules framed by the Central Government under the SEZ Act, 2005. The space is also not left unoccupied, as the Central Government has issued a set of rules known as "the Special Economic Zones Rules, 2006", wherein the Central Government has prescribed the terms and conditions for grant of exemptions under rule 22. Therefore, there is no question of comparing the terms and conditions prescribed in rule 22 with the terms and conditions prescribed in the Notifications issued under any one of the five enactments listed in section 26(1) to find out whether there was any inconsistency.
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> **34.** The benefit of exemptions granted under the Notifications issued under section 93 of the Finance Act, 1994, are available to any one and not necessarily confined to a unit in a special economic zone. Section 93 of the Finance Act, in that sense is a general power of exemption available in respect of all taxable services. But, section 26(1) is a special power of exemption under a special enactment dealing with a unit in a special economic zone. **Therefore, the Notifications issued under section 93 of the Finance Act, 1994 cannot be pressed into service for finding out whether a unit in a SEZ qualifies for exemption or not."**
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> **(emphasis supplied)**

25. This Tribunal in **DLF Assets Pvt. Ltd.**, placed reliance upon the aforesaid decision of the Andhra Pradesh High Court in **GMR Aerospace Engineering Ltd.**, and observed that the conditions set out in the notification dated March 3, 2009 were not required to be examined in view of the provisions of the SEZ Act. The relevant portion of the decision is reproduced below:

> "18. The contention advanced by the learned Counsel for the appellant has force. As noticed above, section 26(1) of the SEZ Act provides that subject to the provisions of the sub-section (2), every Developer shall be entitled to exemptions and the exemption at (e) exempts every Developer from service tax under Chapter-V of the Finance Act on taxable services provided to a Developer or unit to carry on the authorized operations in a SEZ. Section 51 of the SEZ Act provides for an overriding effect to the provisions of the SEZ Act. The provisions of section 26 read with rule 31 of the SEZ Rules thus, have overriding effect over anything inconsistent contained in any other law for the time being in force, which would include the Finance Act. It needs to be noted that the Notification dated March 3, 2009 has been issued in exercise of the powers conferred by section 93 of the Finance Act. **Thus, when the services rendered by the appellant are fully exempted from service tax in terms of**

> **the provisions of the SEZ Act, the condition of exemption by way of refund imposed under the Notification issued under the Finance Act would be inconsistent with the provisions of the SEZ Act.** It also needs to be noted that the SEZ Act was enacted in 2005, much after the enactment of the Finance Act in 1994.
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> 21. **Thus, what follows is that the Commissioner was not justified in examining whether the conditions set out in the Notification dated March 3, 2009 were satisfied or not for grant of any exemption from service tax.** Section 26(2) of the SEZ Act does provide that the Central Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions shall be granted to the Developer under sub-section (1) but what is important to notice, and as was also observed by the Andhra Pradesh High Court, the word "prescribe" would mean "prescribed by rules made by the Central Government under the SEZ Act," in view of the definition of "prescribed" under section 2(w) of the SEZ Act. The Notification dated March 3, 2009, which has been issued under section 93 of the Finance Act, therefore, has no application."
>
> **(emphasis supplied)**

26. Learned authorized representative of the Department has, however, placed reliance upon sub-rule (5) of rule 47 of the SEZ Rules that was inserted w.e.f August 5, 2016 to contend that the aforesaid two notifications issued under Finance Act would be applicable.

27. This submission of learned authorized representative of the Department cannot be accepted. It is by a notification dated August 5, 2016 that in rule 47, sub-rule (5) was inserted after rule (4) and the same is reproduced below:

> "**47(5)** Refund, Demand, Adjudication, Review and Appeal with regard to matters relating to authorized operations under Special Economic Zones, Act, 2005, transactions and goods and services related thereto, shall be made by the Jurisdictional Customs and Central Excise Authorities in accordance with the relevant provisions contained in the Customs Act, 1962, the Central Excise Act, 1944 and the Finance Act, 1994 and the rules made there under of the notifications issued there under."

28. Sub-rule (5) of rule 47 has no retrospective application and, therefore, it is only w.e.f August 5, 2016 that the notifications issued under section 93 of the Finance Act may be applicable to

units situated in SEZ carrying out authorized operations under the SEZ Act. The refund applications were filed by the appellant much before August 5, 2016 and in fact the Assistant Commissioner had rejected the refund applications by order dated March 28, 2013 and the Commissioner (Appeals) had also dismissed the appeal by order dated March 29, 2014. Sub-rule(5) of rule 47 of the SEZ Rules had not been inserted by that time.

29. Learned counsel for the appellant, in such circumstances, submitted that in view of the substantive provisions of the SEZ Act regarding exemption from payment of service tax, the respondent is obliged to refund the amount of service tax collected on input services received by the SEZ unit of the appellant and rejection of the refund claims would result in illegal retention of money by the State which would be violative of the provisions of article 265 of the Constitution of India.

30. The appellant had filed refund applications contending that it was entitled to refund of the service tax deposited since the appellant was exempted from levy of service tax. It has been found that the appellant was not required to deposit service tax in view of the provisions of section 26(1) of the SEZ Act. The appellant is, therefore, entitled to refund of the service tax since the refund applications have been rejected for the reason that the conditions specified in the notifications issued under section 93 of the Finance Act have not been satisfied. The two judgments of the Supreme Court in **L R Brothers** and **Dilip Kumar** would, therefore, not help the Department.

31. However, doubts have been expressed by the Commissioner (Appeals) regarding the deposit of service tax by appellant since the input service invoice register and the bank statements did not co-relate on account of different TDS rates in the transactions.

32. Learned counsel for the appellant submitted that the refund claim was rejected by the Commissioner (Appeals) even after noticing that the bank statements and the input service register were available on record.

33. The input service invoice register contained details of the mode of payment, cheque number, cheque realisation date/date of online transfer and the appellant had also highlighted the relevant bank entries from the bank statements to establish the co-relation. The TDS challans and TDS returns establishing the TDS deduction were also available and could be verified. Thus, the refund claim should not have been rejected on this ground and in case of any doubts, the Commissioner (Appeals) could have sought a clarification from the appellant. During the course of hearing of the appeal, the appellant also submitted a certificate issued by a chartered accountant regarding co-relation between the input service invoice register and the bank statements. It is for this reason that the learned counsel for the appellant stated that an opportunity may now be granted to the appellant to establish the co-relation before the Commissioner (Appeals).

34. This certificate dated May 8, 2019 issued by the chartered accountant may be placed by the appellant before the Commissioner (Appeals) for establishing the co-relation between the input service invoice register and the bank statements, so that

the Commissioner (Appeals) can record a fresh finding on this issue after examination of the documents on record.

35. Learned counsel for the appellant, in the alternative, submitted that even otherwise the reason given by the Commissioner (Appeals) that the conditions stipulated in the notifications dated March 3, 2009 and May 20, 2009 had not been complied to reject the refund applications are incorrect.

36. To appreciate the findings of the Commissioner (Appeals) and the submissions made by learned counsel for the appellant and the learned authorized representative of the Department, it is necessary to examine the two notifications dated March 3, 2009 and May 20, 2009 that were issued under section 93 of the Finance Act.

37. It would be seen that prior to May 20, 2009 but after March 2, 2009 the exemption could be claimed by way of refund of service tax paid on the specified services used in relation to the authorized operations in the SEZ. However, proviso (c) to the notification dated March 3, 2009 was amended by notification dated May 20, 2009. The amended proviso (c) stipulates that the exemption claimed by a Developer or Unit of SEZ shall be provided by way of refund of service tax paid on the specified services, except for services consumed wholly within the SEZ. Thus, w.e.f May 20, 2009 if the authorised services were consumed wholly within the SEZ, no service tax was required to be paid.

38. The appellant has placed the findings of the Commissioner (Appeals) on the seven issues and the gist is as follows:

S. No.	ISSUE	FINDINGS OF COMMISSIONER (APPEALS)
1.	Refund in respect of certain input services not duly approved by Unit Approval Committee	Proviso (a) of Clause 1 of Refund Notification clearly provides that exemption from service tax is only in respect of services duly approved by Unit Approval Committee.
2.	Availment of CENVAT Credit	i. First two refund claims have been rejected on the basis that once a unit of SEZ has availed CENVAT Credit, it loses the benefit of exemption; ii. There is no provision under the Notification to resume the exemption benefit again by reversing the credit already taken.
3.	Time limit for filing of refund	In absence of admissible documentary evidence, it could not be established that 4 refund claims (except 2nd refund claim) were filed within stipulated time of 6 months.
4.	No documentary evidence to satisfy condition no. 2(a) of Refund Notification	On a perusal of provisions of notification, it is clear that SEZ unit is eligible for exemption only in cases where they are the same person who are liable to pay service tax under section 68(2) of Finance Act 1994 and who have actually paid the service tax
5.	Nexus of input services with the 'authorized operations'	i. Condition No. 2(h) of refund notification provides that exemption is available only where services are actually used in relation to authorized operations; ii. Mere approval by the Unit Approval Committee is not enough to establish nexus; iii. It is impossible to segregate the admissible and inadmissible invoices.
6.	Input service invoices are dated prior to the date of refund notification	In respect of 1st refund claim, as most input service invoices are dated prior to 03.03.2009, i.e. the date of refund notification. The refund claim is liable to the rejected for the reason that none of the notifications will have retrospective effect unless expressly provided.
7.	Refund admissible only in case where services not wholly consumed within SEZ	Notification dated 20.05.2009 provides that refund can be claimed only in respect of services wholly consumed outside SEZ.

39. Each of these seven issues will be taken up separately.

Issue No. 1

40. This issue relates to proviso (a) of the notification dated March 3, 2009. It provides that the Developer or Units of SEZ shall get the list of services specified in section 65(105) of the Finance Act as are required in relation to the authorized operations in the SEZ, approved from the UAC.

41. It has been pointed out by learned counsel for the appellant that the output services rendered by the SEZ unit of the appellant were only for authorized operations. The contention of the learned counsel for the appellant, therefore, is that not only does the impugned order not contain any specific finding or quantification, but even otherwise the requirement of grant of approval by the UAC cannot be considered as a mandatory condition to override the exemption that has been granted under section 26 of the SEZ Act and the SEZ Rules framed thereunder. It is, therefore, the contention that the Commissioner (Appeals) committed an illegality in rejecting the refund applications filed by the appellant.

42. Learned authorised representative has, however, submitted that the appellant is not entitled to the refund.

43. The records indicate that the appellant had during the relevant period only one operating unit in the SEZ. All the input services were, therefore, used by the appellant for the authorized operations, namely, BPO(ITES) as per the specific condition prescribed under the SEZ Act for seeking exemption from service tax and the letter dated June 19, 2008. The output services

rendered by the SEZ unit of the appellant is for authorized operations. It is not the case of the Department that the output services have been used for services other than authorised operations nor any finding to this effect has been recorded. Thus, the service tax paid on all input services used for rendition of such output services are available for claim of refund in terms of the substantive provisions of the SEZ Act.

44. In any case, the conditions imposed by the notifications issued under the provisions of the Finance Act are merely directory in nature.

45. This issue has been considered time and again. In **Mast Global Business Services India Pvt. Ltd.** Vs. **Commissioner of Central Tax**[15], the Tribunal held that the SEZ Act had an overriding effect, in view of the provisions of section 51 of the SEZ Act, over all other laws and, therefore, the ground for rejecting the refund claims was not tenable in law and even otherwise, approval from UAC was only procedural in nature and not a mandatory condition. The relevant portion of the decision of the Tribunal is reproduced below:

> "The other grounds on which the refund claims have been rejected by the impugned order is that the appellant has not produced the approved list of specified input services from the UAC to SEZ which is a mandatory condition as per the Commissioner (Appeals). In reply to this argument, the learned counsel submitted that in view of the settled legal position by various decisions relied upon by him, condition in respect of approval from UAC of SEZ is not a mandatory requirement as the SEZ Act vide Section 51 of SEZ Act will have overriding effect over the provisions of any other law**. Therefore, keeping in view, the intention of the Government in enacting the SEZ Act and giving special fiscal concessions to SEZs, I am of the considered opinion that this is only a procedural and is not a mandatory condition**

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15. 2018-TIOL-3115-CESTAT-BANG

> **as held by the Commissioner (Appeals). Further the decisions relied upon by the appellant clearly hold that the SEZ Act has a overriding effect over other laws. Therefore, this ground on the basis of which refund claims have been rejected is not tenable in law**."
>
> **(emphasis supplied)**

46. In **M/s. ONGC Mangalore Petrochemicals Limited** vs. **Commissioner of Central Excise & Central Tax, Mangalore Commissionerate[16],** the Tribunal again held:

> "6. After considering the submissions of both the parties and perusal of the material on record, I find that the appellant being SEZ is entitled to refund of Service Tax paid on input service used for authorized operations. Further, I find that as per Notification No. 12/2013-ST dated 01.07.2013, the only requirement is that the appellant is required to file the list of approved services which have been used by them for authorized operations. Further, in this case, I find that the appellant has subsequently obtained the approval from the Unit Approval Committee of the SEZ and the said certificate is placed on record but the Commissioner (A) has held that the said approval was obtained from the competent authority on 25.10.2011 and therefore, after the approval, he has allowed the refund and prior to that he has rejected the same. **Further, I find that in view of the settled legal position by various decisions relied upon by the appellant, conditions of approval from UAC is not a mandatory requirement as per SEZ Act vide section 51 of the SEZ Act which has an overriding effect over the provisions of any other law.** Further, I find that it is only a procedural requirement to get the approval from the Unit Approval Committee and is not a mandatory condition as per the SEZ Act which has an overriding effect over other laws."
>
> **(emphasis supplied)**

47. In **SE Forge Ltd.** vs. **Commissioner of Central Excise, Coimbatore[17],** a Division Bench of the Tribunal observed that in view of the provisions of section 26 of the SEZ Act, the notifications issued under the Finance Act cannot deprive a person from exemption of service tax. The Tribunal further held that the requirement for obtaining approval of UAC is only a procedural

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16. 2019-VIL-140-CESTAT-BLR-ST
17. 2019 (365) E.L.T. 560 (Tri.- Chennai)

requirement for claiming the substantive benefit of exemption from service tax. The Department was, therefore, not justified in rejecting the claim. The relevant portion of the decision is reproduced below:

> ”5. The issue that arises for consideration is whether the appellant is eligible for refund of service tax paid on Renting of Immovable Property Service. The original authority has rejected the refund on the ground that on the date offiling of the refund claim, the said services, viz; Renting of Immovable Property Services were not approved by the Development Commissioner, as required under Notification No. 9/2009 as amended. As per the notification, exemption is allowed in relation to authorised operations in SEZ, provided the developer or units of SEZ shall get the list of services which are required in relation to the authorised operations approved from the Approval Committee. The appellant although requested for approval of 106 services initially, the Assistant Commissioner had approved only 37 services which was only default list or rather a general list applicable to all SEZ. It is seen that Development Commissioner has approved the list including Renting of Immovable Property Services vide letter dated 15-9-2009. It is not disputed that Renting of Immovable Property Service was availed by the appellant for the disputed period. The invoices shows the payment of service tax on such services. The Approval Committee has approved such services vide their letter dated 15-9-2009. The requisite for obtaining approval is only a procedure to be complied with, for the substantive benefit of exemption from payment of service tax. When the services have been approved, the benefit of exemption cannot be denied. **Section 26 of the SEZ Act, lays down provisions for exemption from duties and taxes. Section 51 of the said Act provides for overriding effect. Therefore the immunity provided from paid service tax cannot be taken away by the procedural prescriptions of Notification No. 9/2009 or 15/2009**. These notifications are calibrated to enable recipients of taxable services of SEZ, etc., to get benefit of exemption of the service tax. In any case, since the appellants have obtained approval for the said services, we find that the error would only be a procedural infraction which can be condoned. **The substantive benefit cannot be denied for a procedural lapse**. The claim of Rs. 967/- being given up by appellant is not considered in this appeal.”
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> **(Emphasis supplied)**

48. Thus, the Commissioner (Appeals) was not justified in rejecting the refund claims on this ground.

Issue No. 2

49. This issue relates to proviso (e) of the Notification dated March 3, 2009 that provides that for claiming this exemption, the

unit of a SEZ should not have taken CENVAT credit paid on the specified services used in relation to the authorized operations in the SEZ. The Commissioner (Appeals) rejected the first two claims stating that once a unit of a SEZ availed CENVAT credit, it cannot avail the benefit of exemption as there is no provision in the notification to claim the benefit by reversing the credit already taken.

50. The contention of learned counsel for the appellant is that this was not a ground taken in the show cause notice and, therefore, the refund claim could not have been rejected on this ground. Learned counsel has also pointed out that CENVAT credit inadvertently taken had been reversed prior to the filing of the refund claim and since reversal of CENVAT credit before its utilization is equivalent to non-availment of CENVAT credit, the condition of non-availment of CENVAT credit stands fulfilled.

51. The contention advanced by learned counsel for the appellant deserves to be accepted. Reversal of CENVAT credit prior to its utilization is as good as not availing CENVAT credit. In **Mast Global Business Services India Pvt. Ltd.,** the Tribunal observed that if CENVAT credit has been reversed without utilization, it would amount to not taking the credit. The observations are as follows :

> "6.2 Now, coming to the second ground on which the refund claims have been rejected by the impugned order is that the appellant has availed the cenvat credit and hence he is not entitled to file the refund claim. In this regard, I find that the appellant has already reversed the Cenvat credit without any utilization and it has been shown in ST-3 return filed for the period April 2015 to September 2015 and once he has reversed the CENVAT credit without utilization, it 22 tantamount to not taking credit in view of the various decisions relied upon by the appellant and the benefit of exemption would be admissible on reversal of CENVAT credit."

52. This issue was again examined by the Tribunal in **Kony Labs IT Services Pvt. Ltd.** vs. **C. C., C. Ex. & S.T., Hyderabad-IV**[18] and after placing reliance on the decisions on the Supreme Court, observed that refund claim cannot be rejected if CENVAT credit had been reversed before the filing of the refund claim. The relevant of the portion of the decision is reproduced below :

> **********
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> **7. The main issue that possess for consideration before me is whether the appellants have fulfilled the condition 2(g) of the Notification 17/2011-S.T. when they have taken the Cenvat credit and reversed the same before filing the refund claim. One of the object of the notification is to make services to SEZ tax free. In the case of Precot Meridian Ltd., the Hon'ble Supreme Court had considered the issue whether the assessee can be considered to have fulfilled the substantive condition in the notification to claim the benefit of exemption when the Cenvat credit which was taken by the assessee has been reversed. The Hon'ble Apex Court** taking note of the judgments rendered in the case of Franco Italian Co. Pvt. Ltd. v. Commissioner [2000 (120) E.L.T. 792 (T.-LB)] as well as the judgments laid in the case of Hello Minerals Water Pvt. Ltd. v. Union of India [2004 (174) E.L.T. 422 (All.)] **held the issue in favour of the assessee.** Similar view was taken in the other judgments cited by the ld. Counsel for appellant. The gist of the issue which has been considered in these judgments is exactly the same. **The relevant discussion made in the case of Hello Minerals Water (P) Ltd. (supra)** is as under:
>
> > 17. The question as to whether manufacturer can be treated as not having taken credit on the inputs used in the manufacture of final products, even though it was originally taken but subsequently reversed, has been decided by a five Member Bench of the Tribunal in the case of Franco Italian Company Pvt. V. CCE [2000 (120) E.L.T. 792]. The aforesaid five members Bench of the Tribunal after taking into account the ratio laid down by the Supreme Court in the case of Chandrapur Magnet Wire (P) Ltd. v. CC, Nagpur [1996 (81) E.L.T. 3] has held as under :
> >
> > "6. Drawing similar analogy we consider that subject to the reversal of Modvat credit taken with regard to the inputs which were utilized in the manufacture of duty free goods, the manufacturer could avail of the Modvat credit as well as full duty exemption under applicable small scale exemption notification with regard to some specified goods. Reference is answered accordingly.
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> > 7. As a result the impugned order-in-appeal dated 28-1-1999 passed by the Central Excise is set

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18. 2017 (3) G.S.T.L. 475 (Tri.-Hyd.)

> aside and the appeal of Franco Italian Company (supra) is allowed subject to the conditions that Modvat credit taken of the duty paid on the inputs which were utilized in the manufacture of duty free goods, is reversed."
>
> 18. In view of the above decision we are of the opinion that reversal of Modvat credit amounts to non-taking of credit on the inputs. Hence the benefit has to be given of the notification granting exemption/rate of duty on the final product since the reversal of the credit on the input was done at the Tribunal's stage.

The relevant paragraph in the judgment of the Hon'ble Apex Court in Precot Meridian Ltd., is noted as under:

> 3. We note that five-Member Bench of the Tribunal in the case of 'Franco Italian Co. Pvt. Ltd. v. Commissioner' [2000 (120) E.L.T. 792 (T.-LB)] had taken the view that even if the Modvat credit was utilized but, thereafter, refunded, it would amount to not utilizing the said Modvat credit. Same view has been taken by the High Court of Allahabad in 'Hello Minerals Water (P) Ltd. v. Union of India' [2004 (174) E.L.T. 422 (All.)].
>
> 4. On a specific query put by the Court, we were informed that as far as the aforesaid two judgments are concerned, they were accepted by the Department and no appeal was filed there against. In the impugned judgment, the Tribunal has decided the issue in favour of the assessee relying upon the aforesaid two decisions."

53. In view of the aforesaid decisions, it has to be held that reversal of CENVAT credit prior to its utilization and prior to the filing of the refund application would amount to not availing CENVAT credit. This, in turn, would mean that the requirement for claiming exemption contemplated under proviso (e) of the Notification dated March 3, 2009 stands satisfied. The rejection of the refund claim on this ground by the Commissioner (Appeals) is, therefore, not justified.

Issue No. 3

54. This issue relates to the requirement set out in clause 2(f) of the Notification dated March 3, 2009. The Commissioner (Appeals) has held that in the absence of admissible documentary

evidence, it could not be established that the four refund claims (except the refund claim at serial No. 2) were filed within a period of six months stipulated in the aforesaid notification.

55. Learned counsel for the appellant submitted that this issue was not raised in the show cause notice and, therefore, could not have been made the basis for rejecting the refund claim. In any case, the date of payments appearing in the input service invoice register could be co-related with the bank statement to determine whether the refund claims were filed within the stipulated time period. The appellant has given details to demonstrate that the refund claims were filed within the stipulated time. The details have been provided in the appeal memo and are reproduced below :

S. No	**Refund Period**	**Notification under which refund filed**	**Amount (INR)**	**Date of first payment of Service Tax to the vendor**	**Date of filing the refund claim**
1.	3 Mar to 19 May 09	Notification dated 3 Mar 09	13,70,050	29 Mar 09	25 Sep 09
2.	20 May to 30 Sept 09	Notification dated 20 May 09	2,556,766	20 May 09	19 Nov 09
3.	Oct to Dec 09		1,128,484	10 Oct 09	08 Apr 10
4.	Jan to Mar 10		1,845,467	04 Jan 10	02 July 10
5.	Apr to Jan 10		1,308,361	01 Apr 10	30 Sep 10
Total			**8,209,128**		

56. Though, this issue did not form part of the show cause notice, yet a perusal of the details contained in the aforesaid table clearly indicate that the refund claims have been filed within six months from the date of payment of the service tax. In such circumstances the refund claims could not have been rejected on this ground.

Issue No. 4

57. This issue relates to the requirement set out in paragraph 2(a) of the Notification dated March 3, 2009. This provides that the exemption contained in the notification shall be subject to the condition that the person liable to pay service tax under sub-section (1) or sub-section(2) of section 68 of the Finance Act shall pay service tax as applicable on the specified services provided to the developer or units of SEZ and such person shall not eligible to claim exemption for the specified services. However, where the developer or unit of SEZ and the person liable to pay service tax are the same person, then in such cases exemption for the specified services shall be claimed by the person.

58. The Commissioner (Appeals) has observed that a unit can claim exemption only in cases they are the same person who is liable to pay service tax and who has actually paid service tax.

59. Learned counsel for the appellant submitted that this was not the case taken up by the Department in the show cause notice and, therefore, this ground could not have been considered for rejecting the claim for exemption filed by the appellant.

60. It is seen that the primary objective of condition No. 2 (a) of the notification dated March 3, 2009 is to provide exemption benefit to a SEZ unit and not to the service provider of SEZ unit and, therefore, the restriction is basically on the service provider and not the SEZ unit. In this connection, it would also be relevant to refer to section 68(2) of the Finance Act. It provides for payment of service tax under a reverse charge mechanism and

since the appellant has not made any payment under the reverse charge mechanism, the said condition would not be applicable. The rejection of the refund claim on this ground is, therefore, not sustainable.

Issue No. 5

61. This issue relates to condition No. 2 (h) of the Notification dated March 3, 2009. It provides that to claim refund of the service tax paid on the specified services should actually have been used in relation to the authorized operations in the SEZ.

62. The Commissioner (Appeals) observed that the mere approval by UAC is not enough to establish nexus and it is impossible to segregate the admissible and inadmissible invoices.

63. Learned counsel for the appellant submitted that the appellant had carried out all the operations from the SEZ unit and, therefore, all the input services were used in relation to the authorized operations. Learned counsel also pointed out that no specific finding has been recorded in the impugned order about any input service having no nexus with the authorized operations.

64. There is no evidence on the record which may indicate that any operation was carried out by the appellant from any unit outside the SEZ. Thus, all input services were used in relation to the authorized operations. This issue was examined by the Tribunal in **Reliance Industries Ltd..,** vs. **Commissioner of C. Ex., Mumbai-I**[19]. The Tribunal found as a fact that the unit of the appellant operating in SEZ was the sole undertaking of the

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19. 2016 (41) S.T.R. 465 (Tri.-Mumbai)

appellant and the SEZ Act that provides for exemption of duties and taxes has an overriding effect when in conflict with other laws. The Tribunal, therefore, held that there can be no doubt that the services provided by the appellant were for authorized operations in SEZ.

65. In this connection, learned counsel for the appellant has also pointed out that a certificate issued by a chartered engineer that input services had been used in relation to authorized operations had also been placed before the Department.

66. The finding recorded the Commissioner (Appeals) on this issue, therefore, cannot be sustained.

Issue No. 6

67. This issue is that the input service invoices are prior to the date of refund notification. The Commissioner (Appeals) observed, in connection with the first refund claim, that most of the input service invoices were prior to March 3, 2009 and, therefore, the claim was liable to be rejected as the notification does not have a retrospective effect.

68. Learned counsel for the appellant submitted that it is the date of payment of service tax that is relevant and since all the payments were made after the date of the notification, the time of rendering of service or date of invoice is not relevant for claiming the refund.

69. This submission of learned Counsel for the appellant also deserves to be accepted, in view of the decision of the Tribunal in **Wardha Power Co. Ltd.,** vs. **Commissioner of Central Excise,**

Nagpur[20]**,** wherein emphasis was placed on clause 3 of the notification dated March 3, 2009 which states that the exemption benefit in the notification shall apply only in respect of service tax paid on the specified service on or after the date of publication of the notification in the Official Gadget. The relevant portion of the decision is reproduced below :

> "6.2 From para 3 of the notification quoted above, the only requirement for claiming refund is that service tax on the services should have been paid on or after 3-3-2009. It is immaterial when the services had been rendered. In other words, even if the services were rendered prior to 3-3-2009 but the recipient has paid the service tax on or after 3-3-2009, he can avail service tax refund as provided for in the Notification. Therefore, the argument of the department that the service tax refund will be available only for the services rendered on or after 3-3-2009 does not appear to have any legal basis. Therefore, this ground adduced by the Revenue is liable to be rejected."

70. Thus, the Commissioner (Appeals) committed an error in rejecting the refund applications for this reason since it is the date of making payments this is relevant.

Issue No. 7

71. The issue is whether refund claimed under Notification dated May 20, 2009 would be admissible only in cases where the services are not wholly consumed within the SEZ.

72. The Commissioner (Appeals) has referred to the Notification dated May 20, 2009 and concluded that refund can be claimed only in respect of services that are consumed outside SEZ.

73. Learned counsel for the appellant submitted the substantive benefit of the service tax exemption provided under section 26 of

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20. 2013 (30) S.T.R. 520 (Tri.-Mumbai)

the SEZ Act and rule 31 of the SEZ Rules cannot be denied by any procedural requirement under a notification.

74. This submission of learned counsel for the appellant deserves to be accepted.

75. The substantive benefit of service tax exemption provided under section 26 of the SEZ Act read with rule 31 of the SEZ Rules cannot be denied on procedural grounds. It is not in dispute that the appellant was not required to deposit service tax under the notification dated May 20, 2009, but service tax was deposited. It cannot be urged that the appellant is not entitled to claim refund because of a mistake in depositing service tax even if it was not required to be deposited. This issue has been examined while dealing with the applicability of the section 26(1) of the SEZ Act.

76. Thus, the Commissioner (Appeals) was not justified in rejecting the refund applications on this ground.

77. It, therefore, follows that the appellant would be entitled to claim refund provided, of course the appellant has deposited the service tax. Though, the appellant has placed documents to support the plea that service tax had been paid, but this factual aspect, as discussed above, is required to be remitted to the Commissioner (Appeals) for a fresh decision in the light of the documents to be provided by the appellant.

78. The impugned order dated March 29, 2014 passed by the Commissioner (Appeals) is, accordingly, set aside and the matter is remitted to the Commissioner (Appeals) to decide whether the

appellant had paid service tax on the services for which the appellant had claimed refund in the five applications submitted by the appellant. The appeal is **allowed** to the extent indicated above.

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Babita