IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. III

Service Tax Appeal No. 42114 of 2017

(Arising out of common Order-in-Appeal Nos. 58 to 62/2017 dated 13.07.2017 passed by the Commissioner of Central Excise (Appeals-I), Coimbatore at Madurai, Central Revenue Building, Lal Bahadur Shastri Marg, Madurai – 625 002)

M/s. V.V. Mineral (100% EOU) **: Appellant**
No. 4/160 – D 25, Harbour Construction Road,
Muthaiyahpuram, Tuticorin – 628 005

VERSUS

The Commissioner of Central Excise **: Respondent**
Central Revenue Building, Tractor Road, NGO 'A'
Colony, Tirunelveli – 627 007

WITH

(i) Service Tax Appeal No. 42115/2017 (M/s. V.V. Mineral, EOU);

(Arising out of common Order-in-Appeal Nos. 58 to 62/2017 dated 13.07.2017 passed by the Commissioner of Central Excise (Appeals-I), Coimbatore at Madurai, Central Revenue Building, Lal Bahadur Shastri Marg, Madurai – 625 002)

(ii) Service Tax Appeal No. 42116/2017 (M/s. V.V. Mineral, EOU);

(Arising out of common Order-in-Appeal Nos. 58 to 62/2017 dated 13.07.2017 passed by the Commissioner of Central Excise (Appeals-I), Coimbatore at Madurai, Central Revenue Building, Lal Bahadur Shastri Marg, Madurai – 625 002)

(iii) Service Tax Appeal No. 42117/2017 (M/s. V.V. Mineral, EOU);

(Arising out of common Order-in-Appeal Nos. 58 to 62/2017 dated 13.07.2017 passed by the Commissioner of Central Excise (Appeals-I), Coimbatore at Madurai, Central Revenue Building, Lal Bahadur Shastri Marg, Madurai – 625 002)

(iv) Service Tax Appeal No. 42118/2017 (M/s. V.V. Mineral, EOU);

(Arising out of common Order-in-Appeal Nos. 58 to 62/2017 dated 13.07.2017 passed by the Commissioner of Central Excise (Appeals-I), Coimbatore at Madurai, Central Revenue Building, Lal Bahadur Shastri Marg, Madurai – 625 002)

APPEARANCE:

Shri S. Venkatachalam, Advocate for the Appellant

Shri Vikas Jhajharia, Authorized Representative for the Respondent

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)

FINAL ORDER NOs. 42427-42431 / 2021

DATE OF HEARING: 26.10.2021

DATE OF DECISION: **29.10.2021**

Order :

The issue involved in all these appeals being the same, they are heard together and are disposed of by this common order.

2. The appellants are registered as a 100% Export Oriented Unit (EOU) and are exporting garnet /super garnet falling under Chapter 25 of the Central Excise Tariff Act, 1985. They filed refund claims in 2015 for the Service Tax paid by them on Clearing and Forwarding Agency Service, Port Service and Customs House Agent Service which were used by them for exporting their goods. The refund claims were filed in terms of Notification No. 41/2012-S.T. dated 29.06.2012. As per clause (g) of paragraph 3 of the said Notification, a claim has to be filed within a period of one year from the date of export. During the relevant period, the Explanation to Notification No. 41/2012-S.T. dated 29.06.2012, effective from 01.07.2012, for claiming rebate of Service Tax paid on taxable services received by an exporter of goods and used for the export of goods, reads as under:

> *"Explanation. - For the purposes of this notification,-*
>
> *(A) "specified services" means -*
>
> *(i) in the case of excisable goods, taxable services that have been used beyond the place of removal, for the export of said goods;*
>
> *(ii) in the case of goods other than (i) above, taxable services used for the export of said goods;*
>
> *but shall not include any service mentioned in sub-clauses (A), (B), (BA) and (C) of clause (l) of rule (2) of the CENVAT Credit Rules, 2004;*
>
> *(B) "place of removal" shall have the meaning assigned to it in section 4 of the Central Excise Act, 1944 (1 of 1944); …"*

3. As seen above, the Notification allowed rebate of Service Tax paid on taxable services which have been used beyond the place of removal of the goods exported. The Department was of the view that after Let Export Order is issued, it is the responsibility of the shipping line to ship the gods to the foreign buyer. The exporter has no control over the goods and then the transfer of property or sale can be said to have taken place at the port where the shipping bill is filed. The place of removal then will be the port. The rebate / refund of Service Tax for services used beyond the port only is eligible and not for services used up to the port. The appellant had claimed refund of the Service Tax paid on the input services used by them till the port.

4. Show Cause Notices were issued in 2015 proposing to reject the refund alleging that the appellant is not eligible for the refund of Service Tax on the input services used by them up to the port. The appellant then submitted letters dated 14.10.2015 before the Assistant Commissioner of Central Excise, Tuticorin Division informing that they have decided not to contest the issue and seeking permission to withdraw the refund claim; they requested to "return the refund claim along with documents." The Adjudicating Authority passed Orders-in-Original on various dates dropping further proceedings initiated under the Show Cause Notices and ordered for return of the claims, as requested by the appellant.

5. Thereafter, Notification No. 01/2016 dated 03.02.2016 came to be introduced amending Notification No. 41/2012-ST. so as to enable the refund of Service Tax for services used up to the place of removal. A proposal was made in the Finance Bill, 2016 so as to grant refund under Notification No. 41/2012 retrospectively with effect from 01.07.2012. The relevant paragraph reads as under:

> *"160. (1) The notification of the Government of India in the Ministry of Finance(Department of Revenue) number*

G.S.R. 519(E), dated the 29th June, 2012 issued under section 93A of the Finance Act, 1994 granting rebate of service tax paid on the taxable services which are received by an exporter of goods and used for export of goods, shall stand amended and shall be deemed to have been amended retrospectively, in the manner specified in column (2) of the Tenth Schedule, on and from and up to the corresponding dates specified in column (3) of the Schedule, and accordingly, any action taken or anything done or purported to have taken or done under the said notification as so amended, shall be deemed to be, and always to have been, for all purposes, as validly and effectively taken or done as if the said notification as amended by this sub-section had been in force at all material times.

(2) Rebate of all such service tax shall be granted which has been denied, but which would not have been so denied had the amendment made by sub-section (1) been in force at all material times.

(3) Notwithstanding anything contained in the Finance Act, 1994, an application for the claim of rebate of service tax under sub-section (2) shall be made within the period of one month from the date of commencement of the Finance Act, 2016."

(Emphasis added)

THE TENTH SCHEDULE

(See Section 160)

Notification No.	*Amendment*	*Period of effect of amendment*
(1)	*(2)*	*(3)*
G.S.R. 519(E), dated the 29th June, 2012 [No.41/2012-Service Tax, dated the 29th June, 2012]	*In the said notification, in the Explanation, - in clause (A), for sub-clause (i), the following sub-clause shall be substituted and shall be deemed to have been substituted, namely:—* *"(i) in the case of excisable goods, taxable services that have been used beyond factory or any other place or premises of production or manufacture of the said goods, for their export;";* *(b) clause (B) shall be omitted*	*1st day of July, 2012 to 2nd February, 2016 (both days inclusive).*

6. The appellant then, in 2016, re-filed all their refund claims which were earlier returned to them. Show Cause Notices of various dates were issued by the Department proposing to reject the refund claims alleging that as per Notification No. 41/2012-S.T., the refund claim has to be filed within one year from the date of export. That the present claims having been filed beyond the period of one year from the date of export, are barred by limitation. After adjudication, the Original Authority rejected the refund claims as time-barred. However, vide Order-in-Original No. 39/2016 (ST)(REF) dated 02.06.2016, the Original Authority observed that the refund claim in that case pertains to the period covering the exports from 12.01.2015 to 06.03.2015 and the claim filed on 22.03.2016 having been made within one year, is eligible and refund of Rs.4,41,560/- was sanctioned. Whereas, in the remaining cases, the refund claims were rejected as being time-barred.

7. The Department filed appeal against the grant of refund before the Commissioner (Appeals). The assessee also filed appeals aggrieved by the rejection of refund. The Commissioner (Appeals) vide order impugned herein allowed the Department appeal and rejected the appeals filed by the assessee holding that the refund claims are time-barred. It was also observed that the refund was not "denied", but the proceedings were dropped as the appellant requested for withdrawing the refund claims. That as the refund claims are not "denied", the Notification No. 01/2016 dated 03.02.2016 amending Notification No. 41/2012-S.T. will not apply. The appellant is thus before this Tribunal.

8.1 On behalf of the appellant, Learned Counsel Shri S. Venkatachalam appeared and argued the matter. He adverted to the definition of input service under Rule 2(l) of the CENVAT Credit Rules, 2004 and submitted that the definition of input service used the words 'up to the place of removal'. However, the Notification No. 41/2012-S.T. dated 29.06.2012 used the words 'beyond the place of

removal'. This caused much difficulty as the exporters could not claim refund of Service Tax used for exports. To rectify this mistake, the said Notification was amended and given retrospective effect with effect from 01.07.2012.

8.2.1 Learned Counsel for the appellant referred to sub-clause (2) of Section 160 of the Finance Act, 2016 and submitted that the interpretation of the word "denied" in the said clause has led to the controversy and rejection of the refund claims as time-barred. That the amendment has been made to have retrospective application with effect from 01.07.2012; the intention of the Government is to grant benefit of rebate for the input services used for export. That sub-clause (2) of Section 160 ibid. states that in cases where the refund has been denied for the reason of applying interpretation of the pre-amended Notification No. 41/2012, such refund claims have to be allowed.

8.2.2 He submitted that sub-clause (3) provides that an application for refund claim in situations where the refund has been denied, as above, has to be made within a period of one month from the date of commencement of the Finance Act, 2016. That the Department has taken the view that when the refund claims have been returned to the appellant, it is not a situation where the refund claims have been "denied". The appellant had filed the refund claims after the Budget of 2016. That even if the appellant had not requested for return of their refund claims, the same would have been rejected in view of the scenario of law that existed in the pre-amendment period.

8.2.3 Learned Counsel for the appellant stressed that the word used in the Finance Act, 2016 is not "rejected" but "denied". That the Department had issued Show Cause Notices earlier only by raising the issue of 'place of removal'. The refund claims were initially filed within the prescribed time-limit and there was no defect of being time-barred. However, when the claim was filed pursuant

to amendment of the Notification, it was rejected as time-barred. He submitted that in order to correct the mistake in Notification No. 41/2012-S.T., the amendment has been issued with retrospective effect. That the very purpose of the Finance Act, 2016 is to allow the refund of Service Tax which was "denied" by mistake of the pre-amended Notification No. 41/2012. The Department has wrongly interpreted the word "denied" used in the Finance Act, 2016 as "rejected". That it is not necessary under the amended Notification that to claim refund there should be an adjudication order which has resulted in rejection. Even if Show Cause Notice is issued denying the claim of refund for the reason that services have to be used 'beyond the place of removal' i.e., beyond the port, to be eligible for refund, it is not necessary to file a fresh refund claim. The Notification has to be applied while adjudicating the Show Cause Notice and the refund has to be granted to the appellant.

8.3 It is submitted by the Learned Counsel for the appellant that the Commissioner (Appeals) has failed to take note of the fact that the appellant had initially filed the refund claims within time. The re-presentation of the refund claims has to be considered in accordance with the Finance Act, 2016 and that therefore, the refund claims are not barred by limitation. That the amendment made by the Finance Act, 2016 retrospectively would nullify any earlier action of the Department since the Government has decided to rectify the mistake in Notification No. 41/2012-S.T. dated 29.06.2012 and to grant refund to exporters. After introduction of the Budget in 2016, the appellants immediately filed the refund claims in March 2016 even though one month time is given in Section 160 (3) of the Finance Act, 2016. The refund claims are therefore filed within the time-limit, as specified in the Finance Act, 2016. That when the Government has introduced the amendment with retrospective application and also granted opportunity to those exporters who would have been denied refund, the Department ought

not to have rejected the refund on flimsy grounds. The appellant, by requesting to return the refund claims, has not relinquished their right or remedy, but only sought to withdraw the claim to look for any other remedy. However, when the Government itself brought forth the remedy of retrospective amendment, the appellant has rightly sought the same by filing the refund claims accordingly.

8.4 He prayed that the appeals may be allowed.

9.1 Learned Authorized Representative Shri Vikas Jhajharia appearing on behalf of the respondent supported the findings in the impugned order. He specifically adverted to paragraph 16 of the impugned order to argue that the refund claims having been withdrawn by the appellant, it cannot be said that the refund was "denied" to the appellant. The proceedings were dropped in view of the said application for withdrawal by the appellant and therefore, the refund claims filed subsequently will not fall under the ambit of sub-section (2) to Section 160 of the Finance Act, 2016.

9.2 He argued that the impugned order does not call for any interference.

10. Heard both sides.

11. In Notification No. 41/2012 which was issued on 29.06.2012, the word used was 'beyond the place of removal'. When the definition of 'place of removal' as given in the Central Excise Act, 1944 is applied, the place where the goods are sold becomes the place of removal. The Department was of the view that only when the goods are loaded into the vessel for export, the transfer of property in goods takes place. So, the place where the sale takes place being the port, the place of removal is the port. That as per the pre-amended Notification No. 41/2012, the services used 'beyond the place of removal' are only eligible for refund. This anomaly was corrected by issuing the Notification No.

01/2016 dated 03.02.2016 by amending Notification No. 41/2012.The amendment was made to have retrospective application with effect from 01.07.2012.

12. In sub-clause (2) to Section 160 of the Finance Act, 2016 it is further stated that the refund of all such Service Tax shall be granted which has been denied, but which would not have been so denied had the amendment made by sub-section (1) of Section 160 been in force at all times.

13. It is clear that there was a mistake in Notification No. 41/2012, which stated that the taxable services that have been used 'beyond the place of removal' for the export of goods would be eligible for refund. When the definition of input service includes services which have been used 'up to the place of removal', the same ought to have been incorporated in Notification No. 41/2012. After realizing the mistake and the ineligibility of credit / refund/ rebate on input services used for the export of goods, the amendment has been introduced by the Government by the Finance Act, 2016.

14. The Department has interpreted the word "denied" used in sub-clause (2) of Section 160 of the Finance Act, 2016 to mean as "rejected". It is thus argued by the Learned Authorized Representative for the Department that there is no rejection of refund by the Adjudicating Authority in this. The proceedings were dropped as the appellant had requested for return of the refund claims. That only if there is rejection of the claim it can be said that the claim was denied. This view, in my opinion, is highly hypertechnical. When the amendment has been given retrospective application, wherever the Department has denied the refund claim, an assessee would be eligible for refund. It is not necessary that there should be an order of rejection of refund. If a litigation is at the stage of Show Cause Notice and there is a proposal for rejection, the Show Cause Notice has to be adjudicated after considering the amendment brought forth vide the

Finance Act, 2016. It cannot be then said that the Adjudicating Authority has to first reject the claim and thereafter assessee has to file a fresh claim under the amended Notification of 2016. So also, if an order of rejection is pending before the First Appellate Authority or the Tribunal, it is not required to dismiss the appeal and direct the appellant to file a fresh refund claim. Since the decision in the impugned order is to deny the refund claim, the First Appellate Authority or the Second Appellate Authority, as the case may be, has to consider the amendment brought forth by the Finance Act, 2016 and then decide the appeal. The intention of the Government is very much clear from the Notification which is to grant refund retrospectively with effect from 01.07.2012. This cannot be frustrated by clinging on to technical formalities.

15. In the present case, the appellant had requested to return the refund claims only to see if other alternate remedies were available to them. Meanwhile, the Notification corrected the situation. Therefore, the appellant has filed the refund claims pursuant to the amended Notification. The rejection of refund claim then, on the ground of limitation, denying the benefit intended by the amendment is not legal and proper.

16. From the above discussions, I hold that the rejection of refund cannot sustain and requires to be set aside, which I hereby do. The impugned order is set aside.

17. The appeals are allowed with consequential reliefs, if any, as per law.

(Order pronounced in the open court on **29.10.2021**)

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

Sdd