CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 03

EXCISE Appeal No. 12890 of 2019

[Arising out of OIA-CCESA-SRT-APPEAL-PS-368-2019-20 dated 30/08/2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I]

NAVIN FLUORINE INTERNATIONAL LTD .....**Appellant**
Surat Navsari Road, Bhestan
Surat
Gujarat

VERSUS

C.C.E. & S.T.-SURAT-I .....**Respondent**
New Building...Opp. Gandhi Baug,
Chowk Bazar,
Surat,
Gujarat-395001

APPEARANCE:
Shri Mehul Jiwani, C.A for the Appellant
Shri Vinod Lukose, Superintendent, Authorized Representative for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR

FINAL ORDER NO.A / 10544 /2022

DATE OF HEARING: 18.05.2022
DATE OF DECISION: 18.05.2022

RAMESH NAIR

The brief facts of the case are that the appellant in respect of input service through the Head Office, claimed the refund under Notification No. 41/2012- ST against export of goods. The refund claim was disposed of by informing that the refund claim should be filed by the appellant in their jurisdiction. The appellant subsequently filed the refund claim in their jurisdiction which was rejected on the ground of time bar. The rejection order was challenged by the appellant before the Commissioner(Appeals) which was upheld. Thereafter, they filed appeal before the Tribunal in Appeal No. ST/11997-12001/2017, meanwhile the appellant have availed the Cenvat Credit on the input service for which the refund claim was filed. The show cause notice was issued on 29 November, 2018 proposing denial of Cenvat Credit on the ground that the appellant have taken the Cenvat Credit suo-moto as they have also filed the refund claim. The Adjudicating

Authority has disallowed the Cenvat Credit. Against the order in original dated 23 May, 2019, the appellant filed an appeal before the Commissioner (Appeals) which was rejected vide impugned order. Hence the present appeal.

2. Shri Mehul Jiwani, Learned Chartered Accountant appearing on behalf of the appellant submits that the appellant have taken the Cenvat Credit on the strength of ISD invoices issued by the head office. He submits that even though the refund claim was filed but the same was rejected and subsequently on the issue of refund Tribunal in their appeal, vide Final Order No. A/10419-10423/2018 dated 28.02.2018 disposed of the appeal as infructuous on the ground that the appellant have taken the Cenvat Credit. He submits that since the issue of refund does not exist and the appellant refund stand rejected, the appellant have taken credit rightly. He also submits that this is not the case of re-credit as the appellant have taken credit first time. He also submits that the order in original as well as order in appeal are beyond the show cause notice as in the Show Cause Notice the only allegation is that credit was taken suo-moto whereas in the order in original and order in appeal it was also held on the ground that the credit was taken beyond 1 year. He submits that in case of credit on ISD invoices no time limit is prescribed. Moreover, the invoice was issued prior to the amendment. He submits that the original invoice issued by the service provider was prior to the amendment whereby the limitation of 1 year was prescribed for this reason also the limitation of 1 year is not applicable as per various judgments. He placed reliance on the following judgments:

- STI INDUSTRIES Vs. COMMR OF C.E, DAMAN-2014 (302) E.L.T.433 (Tri. Ahmd.)
- MALLAK SPECIALITIES PVT. LTD. Vs. COMMR. OF C.E., RAIGADH-2018 (2) TMI 539-CESTAT, MUMBAI
- COMMISSIONER Vs. RELIANCE PORTS AND TERMINALS LTD.-2016 (334) E.L.T. 630 (Guj.)

- COMMISSIONER OF C.EX., NAGPUR Vs. BALLARPUR INDUSTRIES LTD.- 2007 (215) E.L.T. 489 (S.C)
- M/S MYLAN LABORATORIES LTD. Vs. COMMISSIONER OF CENTRAL TAX-VISAKHAPATNAM-GST-2019 (5) TMI 1427- CESTAT HYDERABAD
- VIJAY KUMAR SRIVASTAW AND ALOK MASTERVBATCHES LTD Vs. C.C.E & S.T. –DAMAN- 2021 (4) TMI 804- CESTAT AHMEDABAD
- GLOBAL CERAMICS PVT. LTD., M/S. B.R. CERAMICS(P) LTD. Vs. THE PRINCIPAL COMMISSIONER OF CENTRAL EXCISE, DELHI-1-2019 (5) TMI 1432- DELHI HIGH COURT
- SOPARIWALA EXPORTS PVT. LTD. Vs. COMMISSIONER OF C.EX., VADODARA-I -2013(291) E.L.T.70 (Tri.-Ahmd.)
- ICMC CORPORATION LTD. Vs. CESTAT, CHENNAI-2014 (302) E.L.T.45 (Mad.)
- S.SUBRAHMNYAN & CO. Vs. COMMISSIONER OF C.EX., VADODARA-2011 (3) TMI 396-CESTAT, AHMEDABAD

3. Shri Vinod Lukose, Learned Superintendent (Authorized Representative) for the Revenue reiterates the findings of the impugned order. He further submits that appellant have taken suo-moto credit despite they were pursuing the refund before this tribunal therefore, during that period the appellant were not eligible for taking credit.

4. I have carefully considered the submissions made by both the sides and perused the records. I find that the Cenvat Credit was denied by both the lower Authorities on the ground that they have taken credit suo-moto. I am unable to understand what is the meaning of suo-moto where the appellant have taken the credit first time at the time the refund stand rejected. The appellant had two option either to pursue the refund or to take the credit which is permissible as per Cenvat Credit Rules, 2004. Since the appellant’s claim stand rejected and on that submission their appeal also disposed of by this tribunal. According they have taken the Cenvat Credit after disposal of the appeal there is nothing survive in the department’s

case. As regard the ground taken by the Lower Authority on limitation, I find that the said allegation was not made in the show cause notice. Therefore, the appellant cannot be expected to make any presentation on the issue which was not raised in the show cause notice. Secondly, it is admitted fact that the appellant have taken the Cenvat Credit of ISD invoice and in case of ISD invoice no time limit has been prescribed. It is a settled law that if the invoice is of dated prior to amendment inserting the 1 year time limit, in such case the limitation on 1 year shall not apply, for this reason also the ground of the Lower Authority on limitation does not survive. Hence I do not find anything wrong in availment of Cenvat Credit by the appellant.

5. Hence, the impugned order is set aside. Appeal is allowed.

(Dictated & Pronounced in the open Court)

RAMESH NAIR
MEMBER (JUDICIAL)

Palak