

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO. 3

Service Tax Appeal No. 10511 of 2020

(Arising out of OIA-KCH-EXCUS-000-APP-032-2020 dated-27/02/2020 passed by Commissioner of Central Excise, Customs and Service Tax-KUTCH (GANDHIDHAM))

ISHWAR CONSTRUCTION COMPANY

53-55, Silver Arc, Plot No.57, Sector-8
Kutch
Kutch, Gujrat

.....Appellant

VERSUS

C.C.E.-KUTCH (GANDHIDHAM)

Central Excise & Service Tax Commissionerate,
Central Excise Bhavan Plot No. 82, Sector 8, Gandhidham(Kutch)
Gandhidham(Kutch), Gujarat

.....Respondent

Appearance:

Shri Sudhanshu Bissa, Advocate appeared for the Applicant
Shri Vijay G Iyengar, Assistant Commissioner (AR) for the Respondent

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

Final Order No. A/ 10275 /2023

DATE OF HEARING: 10.10.2022

DATE OF DECISION: 09.02.2023

RAMESH NAIR

The brief facts of the case are that against the appellant in a case of alleged nonpayment of service tax department conducted the inquiry and investigation, the appellant during such inquiry and investigation deposited sum of Rs. 25 Lacs on 24.01.2007 ,19.02.2007 and 27.02.2007. As outcome of the investigation and adjudication the demand of Rs 1,33,2,110/- was confirmed vide OIO no. 18/COMMR/2009 dated 09.10.2009 The appellant filed appeal with stay application before this tribunal vide stay order No S/1224/WZB/AHD/2010 dated 11.10.2010. This tribunal allowed the stay application in the appellant's favour. Subsequently, the appeal was also allowed by this Tribunal vide final order No. A/12081/2018 dated 14.12.2018. After the appellant succeeded before this Tribunal , a refund claim was filed by the Appellant for sum of Rs. 25 Lacs and also lodged claim for interest on Rs. 25 Lacs that had been lying with the Revenue during the intervening period.

1.2 The Assistant Commissioner of CGST decided the refund claim by OIO No. 2/UrbanRef/2019- 20 dated 16.04.2019 and sanctioned the refund of pre-deposit of Rs. 25 Lacs and also interest thereon aggregating to Rs. 5,55,093/-.The Assistant Commissioner allowed the interest from

22.01.2010 on the basis that the period during which the amount of Rs. 25 Lacs could be considered as deposit/pre-deposit would commence from the date on which appeal was filed before this Hon'ble Tribunal i.e. 22.01.2010. As per the sanctioned order, the appellant have received Rs. 25 Lacs as well as Rs. 5,55,093/- as per the said order dated 16.04.2019. Thereafter, the Revenue filed an appeal before the Commissioner (Appeals) with a prayer to set aside the OIO dated 16.04.2019 to the extent of sanctioned interest of Rs. 5,55,093/-. The Learned Commissioner (Appeals) allowed the appeal of the Revenue holding that the appellant is not eligible for the interest. Therefore, the present appeal filed by the Appellant.

2. Shri Sudhanshu Bissa, Learned Counsel appearing on behalf of the Appellant submits that there has not been any order validly made by a competent Officer demanding Rs. 5,55,093/- sanctioned and paid in the appellant's favour as interest on the deposit of Rs. 25 Lacs made way back in January and February, 2007 and therefore there cannot be any demand or recovery of Rs. 5,55,093/- from the appellant .

2.1 He further submits that assuming without admitting that the Assistant Commissioner sanctioned and Paid Rs. 5,55,093/- erroneously, a notice under Section 73 of the Finance Act, 1994 is a statutory requirement for recovery of any such erroneous refund. A notice for recovery of any amount erroneously refunded has to be issued within the period laid down under Section 73 of the said Finance Act, 1994. He placed reliance on the following judgments :-

- Grasim Industries Ltd vs. CCE , Bhopal – 2011 (271) ELT 164(SC)
- CCE, Coimbatore Vs. Pricol Ltd – 2015 (320) ELT 703 (Mad.)
- Doothat Tea Estate Kanoi Plantation (P) Ltd vs. CCE, Shillong – 2001 (135) ELT 386 (Tri. Kolkata)
- James Robainson India Pvt Ltd vs. Commr. C.Ex. , vapi – 2009 (234) ELT 297 (Tri. Ahmd)
- T.T. G Industries vs. CCE Raipur – 2014 (303) ELT 133(Tri. Del)
- CCE, Calcutta-I vs. Bells Control Ltd - 1999 (110) ELT 804 (Tribunal)

2.2 He further submits that Government of India has issued a clarification through the CBEC by way of Circular No. 984/8/2014- CX dated 16.09.2014 and directed all Revenue officer to refund with interest any amount deposited by an assessee during pendency of any dispute and appeal proceedings. He referred to Para 5 of the Circular according to which the assessee is entitled to refund of the amount deposited along with

interest at the prescribed rate when any appeal was decided in assessee's favour.

3. Shri Vijay G Iyengar, Learned Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. I have carefully considered the submission made by both sides and perused the records. The limited issue is that in case of deposit made by the appellant during investigation for the refund of the same whether the appellant is entitled for the interest or otherwise. I find from the OIO that Adjudicating Authority allowed the interest @ 6% on 7.5% of the total service tax amount, relying upon the CBEC Circular No. 984/8/2014- CX dated 16.09.2014. On going through the said circular I find that the same was issued with reference to the amended Section 35F and Section 35FF in the Finance Budget, 2014. As per the amended provision the appellant is required to pay 7.5 % of the total amount of service tax as mandatory pre-deposit. With this provision a provision was made under Section 35F for grant of interest on the said 7.5 % mandatory pre – deposit @ of 6 % from the date of deposit till the date of refund of such pre-deposit in case the appellants succeeds in their appeal.

4.1 As per the facts of the present case , the appellant have paid Rs. 25 Lacs Suo moto during the investigation of the case way back in January and February, 2007. Therefore, the amended provision of 35F /35FF prevailing in 2014 is not applicable in the case of any deposit made prior to enactment of Finance Act, 2014. The Circular was also issued with reference to the new provision of 35F/35FF therefore the Adjudicating Authority has gravely erred on applying said Circular.

4.2 In the present case as regard submission of Learned Counsel that order of Commissioner (Appeals) is not correct and legal on the ground that the department has not issued protective show cause notice for recovery of interest amount which was already sanctioned and paid to the appellant. therefore the order is not sustainable . In this regard I find that the Commissioner (Appeals) has decided the appeal against an appealable order passed by the Adjudicating Authority, the non issuance of protective show cause notice does not create any estoppels to the Learned Commissioner (Appeals) for passing the Order in Appeal. Therefore the contention the appellant is not acceptable. The recovery of the erroneous refund is the separate proceeding which is not the subject matter in the present appeal. Therefore the same cannot be dealt with in this case. All the judgments relied upon by the appellant are related to the issuance of

protective show cause notice. I find that this is not the case of recovery of erroneous refund whereas the Revenue before the Commissioner (Appeals) had challenged the sanction of interest of Rs. 5,55,093/-. Therefore, the judgment which is on recovery of erroneous refund are not relevant in the present case.

4.3. As per above discussion and finding, I find that the Learned Commissioner has correctly held that the appellant is not liable for interest of Rs. 5,55,093/- in terms of Section 35F.

5. Accordingly, I do not find any infirmity in the impugned order, hence the same is upheld. Appeal is dismissed.

(Pronounced in the open court on 09.02.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

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