CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70400 of 2021

(Arising out of Order-in-Appeal No.GZB/EXCUS/000/APPL-MRT/281/2019-20 dated 31.03.2021 passed by Commissioner (Appeals), Central Goods & Service Tax, Meerut)

Commissioner, CGST, Ghaziabad **.....Appellant**
(CGST, Meerut, Camp Office CGO Complex-I
Kamla Nehru Nagar, Ghaziabad)

VERSUS

M/s C & DS **....Respondent**

(Unit-31 (UP Jal Nigam)

A-311, Govind Puram, Ghaziabad)

APPEARANCE:

Shri Chandra Mohan Pathak, Advocate (written request) for the Appellant
Shri Manish Raj, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70275/2023

DATE OF HEARING : 12.12.2023
DATE OF DECISION : 12.12.2023

SANJIV SRIVASTAVA:

This appeal is filed against Order-In-Appeal No.GZB/EXCUS/000/APPL-MRT/281/2019-20 dated 31.03.2021. By the impugned order Commissioner (Appeals) has allowed the appeal filed by the respondent against the Order-In-Original denying him the refund claim of Rs.57,71,039/- by setting aside Order-In-Original No.06/R/D-I/GZB/2020-21 dated 18.08.2020 stating that the refund claim is time barred.

2.1 The respondent is engaged in providing 'work contract service' falling under Section 65 of the Finance Act, 1994. During the course of the audit it was found that the appellant had deposed the amount claim as refund pursuant to an audit objection raised by the Department during the period 03.06.2012 to 25.09.2017. Pursuant to the audit objection respondent deposited the said amount.

2.2 After the deposit of the amount a show cause notice dated 30.08.2018 was issued for short payment of service tax of the same amount.

2.3 This show cause notice was adjudicated vide order 25.03.2019 dropping the proceedings initiated.

2.4 As a consequence of this Order-In-Original respondent filed the refund claim which has been adjudicated by the Original Authority holding the refund claim to be time barred.

2.5 Respondent filed an appeal to the Commissioner (Appeals) which has been allowed in their favour.

2.6 Aggrieved Revenue has filed this appeal stating that the refund claim is time barred and for this reason Order-In-Appeal is not legal and proper.

3.1 When so ever this matter got fixed for hearing respondent filed an application for adjournment on the ground that the department has been split into two parts namely UP Jal Nigam (Gramin) & UP Jal Nigam (Nagriya) and they will have to search for the documents, papers of the old period. They have been requesting for adjournment of more than 06 (six) months.

3.2 Today also Counsel for respondent submitted a letter seeking another eight-nine months time. Further in the same letter he has submitted that, respondent had deposited the said amount under protest and requested for rejection of Revenue's appeal.

3.3 As we find the issue is in narrow compass and this appeal can be taken up for decision exparte in terms of Rule 21 of CESTAT (Procedure) Rules, 1982 reproduced below:

> *"Rule 21. Hearing of The appeals ex-parte*
> *Where on the day fixed for hearing of the appeal or on any other day to which the hearing is adjourned the appellant appears and the respondent does not appear when the appeal is called for hearing, the tribunal may hear and decide the appeal ex-parte."*

3.4 This appeal is taken up for consideration after hearing the Departmental Representative, who reiterates the grounds taken in the appeal memo.

4.1 We have considered the impugned order along with the submissions made in the appeal and during the course of argument.

4.2 Undisputedly the proceedings initiated against the respondents by the show cause notice of 2018 have been dropped by the Additional Commissioner vide his Order-In-Original dated 29.03.2019. This fact is also recorded by the original authority in his Order-In-Original stating as follows:-

> *"I find that the said SCN was adjudicated by the Additional Commissioner, CGST, Ghaziabad vide OIO No 24/ADC/ST/GZB/2019 dated 29.03.2019 wherein it is stated that there is no question of any short payment of Service Tax or undervaluation as per Section 67 of the Finance Act, 1994 by the party for the period 15-16 to June, 2017, as there was no service tax liability on the party and dropped the proceedings initiated vide said show cause notice"*

4.3 From the above observation undisputedly there was no service tax liability on the party hence there was no question of short payment. The amount deposited by the appellant continues to remain as deposit without acquiring the character of tax without the same being appropriated against the tax liability. Commissioner (Appeal) has in his order referred to the decision of Hon'ble Madras High Court decision in the case of **Commissioner of C.Ex., Chennai-II Versus Ucal Fuel Systems Ltd. reported in 2007 (216) E.L.T. 370 (Tri.-Chennai)** allowed this finding. The relevant para of Commissioner (Appeals) order is reproduced below for ready reference:-

> *"The Hon'ble High Court of judicature at Madras in the case of Commissioner of C. Ex., Chennai-II Versus Ucal Fuel Systems Ltd. [2014 (306) ELT. 26 (Mad.)] had held as below-*
> *Refund - Admissibility of - Amount paid dunng investigation - Amount in question not paid towards Excise duty, but only by way of deposit during investigation - Section 11B of Central Excise Act, 1944 not applicable. [paras 6, 7]*
> *Interest on delayed refund - Amount paid during investigation Interest at 6% per annum payable from date of deposit till date of payment - Section 11BB of Central Excise, Act, 1944. [para 6]*
>
> *Therefore, the amount deposited by the appellant remained only a revenue deposit/ pre-deposit with the government, and the appellant was entitled to the refund of the said amount/deposit along with interest from the date(s) of deposit till the payment of the same."*

4.4 In their appeal Revenue has stated that refund claim has been filed after expiry of the period of limitation from the relevant date. On going through Section 11B of the Central

Excise Act we find that relevant date has been defined as follows:-

> *"(B) "relevant date" means, -*
>
> *(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -*
>
> *(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or*
>
> *(ii) if the goods are exported by land, the date on which such goods pass the frontier, or*
>
> *(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;*
>
> *(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;*
>
> *(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;*
>
> *(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;*
>
> *(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;*
>
> *(ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5A, the date of issue of such order;*
>
> *(eb) in case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;*

[(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;]"

4.5 In the present case the appellant relevant date for refund claim would not be the date of payment but the date of the decision for Order-In-Original. As refund claim has been filed within time the order of Commissioner (Appeals) cannot be faulted with.

4.6 In the case of Team Hr Services Pvt. Ltd Hon'ble delhi High Court has observed as follows:

"11. *Though there is no clarity of the circumstances under which the petitioner deposited the said sum of Rs. 2,38,00,000/- during audit/investigation but the undisputed position remains that the deposit was under protest and against anticipated liability and which liability though fructified by the respondents was set aside by the CESTAT and which order has attained finality. It is not the case of the respondents that the said deposit was voluntary or by way of self-assessment and which has been accepted by the respondents and in which case the respondents could perhaps have argued that the said deposit was voluntary and not refundable, as was the case in Commissioner of Income Tax, Bhopal v. Shelly Products, (2003) 5 SCC 461. On the contrary, the assessment done by the respondents and the demand raised in pursuance thereto, of Rs. 4,66,39,061/- and where against Rs. 2,38,00,000/- was adjusted, has been set aside in entirety and as of today there is no assessment which had attained finality assessing the liability of the petitioner to tax of Rs. 2,38,00,000/-. The respondents as State can recover and/or retain as* *tax only such amounts which are assessed and found due as tax and which assessment has attained finality. The respondents, as State, cannot retain even a single paise of the assessee, unless has been found due towards tax liability and which is not the case here. At the time when the amount of Rs. 2,38,00,000/- was deposited, there was no assessment and no demand.*

12. *The respondents are reminded of Article 265 of the Constitution of India prohibiting any tax to be levied or collected except by authority of law. The respondents have also not pleaded a case of the petitioner being not entitled to refund, on the ground of the petitioner having passed of the liability to another as illustrated in the Nine Judge Bench's judgment of the Supreme Court in Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536 = 1997 (89) E.L.T. 247 (S.C.). Allowing the respondents to retain the said amount, would also be in violation of Section 72 of the Contract Act, 1872, obliging a person to whom money has been paid by mistake or under coercion, repay the same. The said provision enshrines the principle of unjust enrichment and restitution and the respondents State, by refusing to refund the sum of Rs. 2,38,00,000/-, are purporting to unduly enrich themselves.*

13. *We may however mention that the Counsel for the petitioner also, perhaps to bring the case of the petitioner within the Circular relied upon, has sought refund of the amount by calling it "pre-deposit", when it was not deposited by way of pre-deposit but under protest, even before any demand was raised and while the petitioner was still being investigated against. Such deposits under protest, to ease the rigors which the Tax Authorities otherwise are entitled to impose, are not unknown and judicial notice has been taken thereof.*

However as long as the amount deposited is under protest and in which protest, as held in Mafatlal Industries Ltd. supra no grounds are required to be stated, no right thereto accrues in favour of the depositee till the depositee is held entitled in law thereto. Thus, the wrong nomenclature given by the petitioner to the deposit would not be a ground for allowing the respondents State to unduly enrich themselves. A Division Bench of this Court in Indglonal Investment and Finance Ltd. v. Income Tax Officer, (2012) 343 ITR 44 has held that refund provisions should be interpreted in a reasonable and practical manner and when warranted, liberally in favour of the assessee."

4.7 Hon'ble Bombay High Court has in case of **Nimish Engineering Pvt. Ltd [2015 (323) E.L.T. 56 (Bom.)]** observed as follows:

"5. *The basic dispute raised by the Revenue in this appeal is whether the Commissioner Central Excise (Appeals) and the CESTAT were justified in allowing the refund claim which was filed beyond the period of limitation.*

6. *From the facts narrated herein above, it is seen that the amounts in question were deposited by the assessee pursuant to the show cause notice issued by the Excise Authorities. Though the proceedings were dropped by the Deputy Commissioner vide order dated 27th February, 2002, the Revenue had challenged the said decision by filing an appeal before the Commissioner of the Central Excise (Appeals). Even before the appeal filed by the Revenue could be disposed of by the Commissioner of Central Excise (Appeals), the assessee had filed refund claim on 26th March, 2002. The appeal filed by the Revenue was* *dismissed by the Commissioner of the Central Excise (Appeals) on 31st January, 2003. Thus, in the present case, refund claim was filed by the assessee even before the appeal filed by the Revenue was disposed of by the First Appellate Authority. In these circumstances, the decision of the Tribunal in holding that the assessee was entitled to the refund of pre-deposit and rejecting the contention of the revenue that the claim of the assessee was time-barred cannot be faulted. Accordingly, the question raised in the appeal is answered in favour of the assessee and against the revenue."*

5.1 In view of the decisions as above we do not find any merits in this appeal filed by the revenue and dismiss the same.

(Dictated and pronounced in open court)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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