CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL ALLAHABAD

REGIONAL BENCH - COURT No. I

Service Tax Appeal No.71003 of 2018-ST[SM]

(Arising out of Order-in-Appeal No. NOI-EXCUS-001-APP-1888-17-18 dated 21/03/2018 passed by Commissioner, Central Tax (Appeals) Noida)

M/s Pan Business Lists Pvt. Ltd. **.....Appellant**

(E-31 Sector-8 Noida-201301 U.P.)

VERSUS

Commissioner of Service Tax **....Respondent**

(Service Tax Division-1, Noida, E-5 Sector-1, Noida)

WITH

Service Tax Appeal No.71024 of 2018-ST[SM]

(Arising out of Order-in-Appeal No. NOI-EXCUS-001-APP-1887-17-18 dated 21/03/2018 passed by Commissioner, Central Tax (Appeals) Noida)

M/s Pan Business Lists Pvt. Ltd. **.....Appellant**

(E-31 Sector-8 Noida-201301 U.P.)

VERSUS

Commissioner of Service Tax **....Respondent**

(Service Tax Division-1, Noida, E-5 Sector-1, Noida)

APPEARANCE:

Shri Rajesh Mohna Advocate, for the Appellant
Shri Shiv Pratap Singh & Shri Gyanendra Kumar Tripathi, Authorized Representatives for the Respondent

CORAM:

HON'BLE SMT. ARCHANA WADHWA, MEMBER (JUDICIAL)

FINAL ORDER NOs. - 70897-70898/2019

Date of Hearing : 14.03.3019
Date of Pronouncement : 26.04.2019

PER: ARCHANA WADHWA

Both the appeals are being disposed of by a common order as the issue involved in both of them is identical, though the impugned orders are separate. However for the sake of brevity, the facts relating to Appeal No.ST/71024/2018 are being adverted to.

2. After hearing learned advocate Shri Rajesh Mohna appearing for the appellants and Shri Shiv Pratap Singh learned A.R. for the Revenue, it is seen that the appellants are engaged in the business of development and export of computer software. As the appellant was availing services of a foreign entity, proceeding were initiated against them for recovery of service tax of Rs.14,27,649/-. The said demand was confirmed by the Original Adjudicating Authority as also by Commissioner (Appeals). However on appeal the orders passed by the Lower Authorities were set aside and the appellant's appeal was allowed with consequential relief vide Final Order No.ST/A/71033/2016-CU[DB] dated 03.11.2016. As consequence of allowing of the appeal the appellant filed a refund application before the Lower Authorities for grant of refund of the amount deposited by them.

3. The appellants were issued a show cause notice proposing to deny the refund claim, which culminated into an order passed by the Assistant Commissioner of Service Tax, allowing a part of the refund claim and confirming the balance amount of demand, which was falling within the limitation period. While passing the said order the Adjudicating Authority observed that inasmuch as the Tribunal had allowed the assessee's appeal only on the ground of limitation, the service tax demand falling within the limitation period has to be confirmed and accordingly proportionate refund claim was rejected. The said order of rejection of refund claim stands upheld by Commissioner (Appeals). Hence the present appeal.

4. For better appreciation of the Tribunal's order, the operative portion of the said order is reproduced below:-

> *"6. Having considered the rival contentions, we find that entire demand in the show cause notice is raised by invoking proviso to Sub-section (1) Section 73 of the Finance Act, 1994. The requirement under said proviso is that suppression or misstatement etc. is to be established and intention to evade Service Tax is to be established separately for invoking said proviso. The appellants are service receiver and they are entitled for credit of Service Tax paid as service receivers, and as a result, it could not be established by Revenue that the appellant had intention to evade payment of Service Tax. Since, the intention to evade payment of Service Tax could not be established through the said show cause notice, the said proviso was not invocable. As a result the entire demand has become bad in law. Therefore the show cause notice is not sustainable. Since the show cause notice is not sustainable, the subsequent proceedings arising out of the same are also not sustainable. We, therefore, set aside the impugned Order-in-Original and Order-in-Appeal and show cause notice with consequential relief."*

5. As is seen from the above entire demand confirmed against the assessee was set aside by the Tribunal. The Original Adjudicating Authority as also the Appellate Authority has observed that the Tribunal has only set aside the demand on the ground of time bar as such the demand falling within the limitation period has to be upheld and deposit of the same by the appellant cannot be refunded.

6. As is seen from the above reproduced order of the Tribunal, the show cause notice initially issued to the appellant proposing confirmation of demand has been held to be unsustainable. Further it stands observed by the Tribunal that since the show cause notice is not sustainable, subsequent

proceedings arising out of the same are also not sustainable. Accordingly Tribunal set aside the impugned Order-in-Appeal and impugned Order-in-Original and allowed the appeal with consequential relief. The effect of the said order of the Tribunal is that even the show cause notice issued proposing confirmation of demand has been held to be unsustainable. I really fail to understand that if the show cause notice, which is starting point of initiation of proceedings against the assessee has been held to be unsustainable, how a part of the demand falling within the limitation period can be confirmed by the Lower Authorities, in the absence of any show cause notice.

Otherwise also I find that once the impugned orders confirming the demand have been set aside by the Tribunal *in toto*, the Lower Authorities cannot reexamine the same and cannot hold that part of the demand falling within the limitation period has to be confirmed and as such, is not required to be refunded. This is a clear contempt of the Tribunal's order. If the Revenue was of the view that the said order of the Tribunal is not correct, it was open to them to file an appeal their against before the higher Appellate Forum. However, having allowed the said order of the Tribunal to attain finality, it was not open to the Lower Authorities to interpret the same, in such a manner so as to confirm a part of the demand falling within the limitation period and to reject the refund of the same. There is no ambiguity in the said order of the Tribunal which in very clear terms has held in favour of the assessee and has set aside the order confirming the demand against the assessee. As such, I find no justification in the impugned order of the Authorities below.

7. Identical is the issue in the case of Pan Business Lists Pvt. Ltd. Appeal No.ST/71024/2018-ST[SM]. However the Lower Authorities have adopted the additional ground of time bar by observing that the refund application stands filed on 02.11.2016 whereas the Tribunal order was passed on 03.11.2016. I find no

merits in the reasoning of the Lower Authorities admittedly the application for refund was filed prior to the order of the Tribunal and has to be held as having been filed well within time. Otherwise also I find that the same was within the limitation period from the relating date as prescribed under Section 11B of the Act.

8. In view of the foregoing discussions the impugned orders are set aside. Both the appeals are allowed with consequential relief to the appellant.

(Order pronounced in the open court on – 26.04.2019)

Sd/-
(Archana Wadhwa)
Member (Judicial)

Lks