

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH

Service Tax Appeal No. 70697 of 2019

(Arising out of Order-in-Appeal GZB/EXCUS/000/APPL-MRT/89/2019-20 dated 12.07.2019 passed by the Commissioner (Appeals), Central Goods & Services Tax, Meerut)

M/s. Krishna Construction Co.,

.....Appellant

Flat No. 402, T 7,
J-Block, South City Garden,
Lucknow (U.P.)-226018

Versus

**The Commissioner of Central
Goods and Service Tax,**

.....Respondent

C.G.O. Complex-II, Kamala Nehru
Nagar, Ghaziabad (U.P.)

APPEARANCE:

Shri Rajnish Kumar Varma, Advocate for the Appellant
Shri Madhukar Anand, Authorized Representative of the Department

CORAM:

**HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

Date of Hearing: 03.08.2022

Date of Decision: 17.08.2022

FINAL ORDER No. 70133/2022

JUSTICE DILIP GUPTA:

This appeal has been filed by M/s Krishna Construction Co.¹ to assail the order dated 12.07.2019 passed by the Commissioner (Appeals), Meerut² by which the appeal filed by the appellant against the order dated 28.01.2018 passed by the Assistant Commissioner has been dismissed. The order dated 28.01.2018 seeks to reject the refund claim of Rs. 72,96,702/- filed by the appellant on the ground of limitation, unjust enrichment and also for violation of the provisions

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- 1. the appellant**
 - 2. the Commissioner (Appeals)**

of section 102 (1),(2) and (3) of the Finance Act 1994³ as made applicable to service tax matters by section 83 of the Finance Act.

2. The appellant is a partnership firm engaged in the construction of complex for Government, Local authority or a Governmental authority. During the period for which refund has been claimed, the appellant was providing construction service for the following projects to the Central Public Works Department⁴, Lucknow:

- (i) construction of permanent infrastructure for BOP, SSB at Karkhola under Batallian Hq., Kheri;
- (ii) Development of permanent infrastructure of 39 Batalian Hq., Palia;
- (iii) construction of A-1 Type school building, 9 nos. staff quarters and boundary wall etc. for Kendriya Vidyalaya, Pilibhit (U.P.).

3. The appellant availed exemption from payment of service tax under entry no. 12 of the Notification dated 20.06.2012 in respect of construction service provided to Government or Governmental authority. The said entry no. 12 of the Notification is reproduced below:

12. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of –

- (a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;
- (b) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);
- (c) a structure meant predominantly for use as (i) an

3. the Finance Act
4. CPWD

educational, (ii) a clinical, or (iii) an art or cultural establishment;

- (d) canal, dam or other irrigation works;
- (e) pipeline, conduit or plant for (i) water supply (ii) water treatment, or sewerage treatment or disposal; or
- (f) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause 44 of section 65B of the said Act;

4. Subsequently, exemption in respect of (a), (c) and (f) of the entry no. 12 was withdrawn by amending the Notification dated 20.06.2012 by issuance of a Notification dated 01.03.2015 that was made effective from 01.04.2015. The relevant portion of the said Notification is reproduced below:

- 1. In the said notification,-
 - (i) -----
 - (ii) in entry 12, items (a), (c) and (f) shall be omitted;**
 - (iii) -----
 - (iv) -----

5. However, the above exemption was restored on further amendment of the Notification dated 20.06.2012, by insertion of entry no. 12A in the Notification dated 01.03.2016. The relevant entry is reproduced below:

(iv) after entry 12, with effect from the 1st March, 2016, the following entry shall be inserted, namely-

"12A. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of -

- (a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;

(b) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment; or

(c) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause (44) of section 65 B of the said Act;

under a contract which had been entered into prior to the 1st March, 2015 and on which appropriate stamp duty, where applicable, had been paid prior to such date:

provided that nothing contained in this entry shall apply on or after the 1st April, 2020”

6. Thus, service tax was payable during the period from 01.04.2015 to 29.2.2016 on such services provided to the Government, Local authority or Governmental authority.

7. Subsequently section 102 (1) was introduced by Finance Bill 2016 to provide for retrospective exemption to construction service for the period commencing from 01.04.2015 to 29.02.2016. This section also provided for refund of service tax paid during this period to be filed within six months from the date of enactment of the Finance Bill, 2016, i.e., 14.05.2016.

8. The appellant, pursuant to the aforesaid retrospective amendment, filed a refund claim for Rs. 72,96,702/- on 05.10.2017 for the period from 01.04.2015 to 29.02.2016. The Department noticed some defects in the said refund claim and returned the same to the appellant. The appellant re-submitted the completed refund claim on 22.01.2018.

9. On scrutiny of the refund claim, the Assistant Commissioner rejected the refund claim by order dated 28.11.2018 for the following reasons:

- (i) Refund claim was barred by limitation as it was filed much after the limitation prescribed under Section 102

of the Act;

- (ii) The incidence of service tax was passed on to their customers; and
- (iii) Service was not provided to Government, local authority or the Governmental authority, hence no exemption was available and service tax was correctly paid.

10. The appellant filed an appeal before the Commissioner (Appeals), but the Commissioner (Appeals) by order dated 12.07.2019 rejected the refund claim on the grounds of limitation and unjust enrichment only.

11. Shri Rajnish Kumar Varma, learned counsel for the appellant made the following submissions:

- (i) Service tax was not payable in view of the retrospective exemption. Thus, tax was collected without authority of law and limitation would not be applicable. In this connection reliance was placed on the decision of the Karnataka High Court in **Commr. of C. Ex. (Appeals), Bangalore vs. KVR Construction**⁵ and the decision of the Jharkhand High Court in **G.B. Engineers vs. Union of India**⁶;
- (ii) The State cannot enrich itself at the cost of the subject. In this connection reliance was placed on the decision of Punjab & Haryana High court in **Indian Oil Corporation Ltd. vs. Commissioner of C. Ex., New Delhi**⁷;
- (iii) The unjust enrichment provisions are not applicable as though the amount of service tax paid was initially collected from the customer, i.e., CPWD, but later on, CPWD deducted the amount of service tax amounting

5. 2012 (26) STR 195 (Kar.)

6. 2016 (43) STR 345 (jhar.)

7. 2010 (256) E.L.T. 232 (P&H)

to Rs. 40,92,246/- + Rs. 3,95,347/- (Rs. 44,87,593/-) from the subsequent bills of the appellant. It would, therefore, amount to not passing on the duty incidence of tax and unjust enrichment provisions would not apply;

(iv) The refund would not be hit by incidence of duty initially passed on when it was adjusted by CPWD against subsequent bills/payments. In this connection reliance was placed on the decision of Supreme Court in **Commissioner of Central Excise, Madras vs. Addition & Co. Ltd.**⁸; and

(v) Unjust enrichment provisions pertain to construction service and not sale of goods. Service tax is a destination based consumption tax. Hence, services are consumed at the first destination itself and no further supply of same is involved. In such a situation, there is no requirement of identifying the consumer who has consumed the tax, because the service tax is consumed at the first destination itself, i.e., at CPWD end.

12. Shri Madhukar Anand learned authorised representative appearing for the Department however, supported the impugned order and submitted that it does not call for any interference as admittedly the refund claim was filed beyond the period specified in section 102 (1) of the Finance Act.

13. The submissions advanced by the learned counsel for the appellant and the learned authorized representatives appearing for the Department have been considered.

8. 2016 (339) ELT 177 (S.C.)

14. It is not in dispute that the appellant had paid service tax for the period in dispute from 01.04.2015 to 29.02.2016 and that the appellant was entitled to refund of the same in view of the retrospective amendment by insertion of section 102 (1) in the Finance Act. This section itself provided for refund of service tax paid during this period provided it was filed within six months from the date of enactment of the Finance Bill i.e. 14.05.2016. The appellant had filed a refund claim for Rs. 72,96,702/- on 05.10.2017 for the period 01.04.2015 to 29.02.2016, pursuant to the aforesaid retrospective amendment. Though the Assistant Commissioner had rejected the refund claim on various counts, but the Commissioner (Appeals) restricted the rejection on the grounds of limitation and unjust enrichment only.

15. The first issue that arises for consideration in this appeal is as to whether the refund claim was filed within the stipulated period contemplated in section 102 (1) that was introduced by Finance Bill 2016. This section provided retrospective exemption to construction service for the period commencing from 01.04.2015 to 29.02.2016. At the same time, this section also provided that refund of service tax paid during the period from 01.04.2015 to 29.02.2016 has to be filed within a period of six months from the date of enactment of the Finance Bill 2016 i.e. 14.05.2016. It is not in dispute that the refund claim was actually filed on 05.10.2017 which is beyond the period of six months contemplated under section 102 (1) of the Finance Act.

16. The decision of the Karnataka High Court in **KVR Construction** and the decision of the Jharkhand High Court in **G.B. Engineers** relied upon by the learned counsel for the appellant would be of no benefit of the appellant in the present case. These were cases where

service tax was mistakenly paid though there was an exemption notification. In the instance case service tax was liable to be paid at the relevant time and it is only subsequently that by a retrospective amendment, exemption was granted with a specific condition that refund could be claimed by filing it within six months from the date of enactment of the Finance Bill 2016. The refund claim had, therefore, to be filed within six month from 14.05.2016, but it was filed beyond the said period.

17. The contention of the learned counsel for the appellant that since the limitation period of one year contemplated under section 11B of the Central Excise Act 1944 provides for filing of the claim within one year from the date of payment of tax, the refund claim filed by the appellant should be treated to have been filed within time as it was filed within one year cannot also be accepted for the reason that section 102 (1) of the Finance Act itself provides for a limitation period of six months for filing a refund claim.

18. Once the refund claim is held to be barred by time, the question of unjust enrichment would not arise.

19. The Commissioner (Appeals) was, therefore, justified in dismissing in the appeal. This appeal is, accordingly, dismissed.

(Order pronounced **17.08.2022**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)