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

REGIONAL BENCH - COURT NO. 2

**Service Tax Appeal No. 22163 of 2015**

(Arising out of Order-in-Appeal No. COC-EXCUS-000-APP-102-15-16 dated 22.07.2015 passed by the Commissioner of Central Excise, Customs and Service Tax (Appeals – I), Cochin.)

**M/s. Cresent Constructions**
Door No. 12/101 H, Vazhakkaka South,
Kakkanad Post Kochi,
Kerala-682 030. ..........**Appellant(s)**

Versus

**The Commissioner of Central Excise and Service Tax**,
C R Building,
I. S. Press Road,
Cochin, Kerala - 682 018. .........**Respondent(s)**

**APPEARANCE:**

Mr. Raghavendra B Hanjer, Advocate for the Appellant.

Mr. Vinod Kumar Garhwal, Superintendent (AR) for the Respondent.

**CORAM:**

**HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)**

**Final Order No. 20784/2026**

Date of Hearing: 17.06.2026

Date of Decision: 17.06.2026

**PER: P.A. AUGUSTIAN**

The issue in the present appeal is regarding eligibility of the appellant to claim refund of service tax paid by mistake.

2. Appellant is engaged in constructions activity and undertaken construction of an Engineering College for M/s. Kerala Muslim Educational Association ('KMEA' for short). Accordingly, the Appellant discharged the service tax in respect of all the services provided by them during 2008-09 and 2009-10 including the service tax on

construction of college for KMEA without knowing the fact that the services provided to KMEA are not taxable. However the Customer of the appellant KMEA informed that being a charitable trust, they are not subject to service tax as per the Circular No.80/10/2004-S.T. dated 17.09.2004. Since appellant paid service tax against the construction carried out for KMEA also, appellant filed a refund claim on 14.10.2009 seeking refund of Rs.12,09,576/- which has paid by them by mistake from September 2008 to July 2009. However show cause notice was issued on 28.12.2009 and Adjudication Authority as per Order-in-Original dated 11.02.2010, rejected the refund claim alleging lack of documentary evidence; time bar & alleging unjust enrichment in terms of Section 11B of the Central Excise Act, 1944. Aggrieved by said order, an Appeal was filed before the Commissioner (Appeals) and Commissioner (Appeals) as per the impugned order rejected the appeal vide impugned order dated 22.07.2015. Thereafter present appeal is filed.

3. When the appeal came up for hearing, Learned Counsel for the appellant submits that the impugned Order of the Ld. Commissioner (Appeals) travelled beyond the scope of the show cause notice. Show cause notice was issued mainly on the allegation /ground of non-production of documents with regard to payment of service tax in respect of construction of college building for KMEA, time bar and principles of unjust enrichment. However, the impugned order has been issued mainly on the ground that the Appellant has not produced any record to prove that the engineering college is an institution established for charitable purpose and not for any gainful purpose and hence, held that the Appellant is not eligible for exemption from service tax since the activity of the Appellant is a commercial construction. On the other hand, the show cause notice itself admitted the fact that the construction services were utilized by the College established by KMEA which is a charitable society registered under the Travancore Cochin Literary Scientific and Charitable Societies Registration Act XII of 1955 and hence, exempted from payment of service tax. Under these circumstances, the observation of the Ld. Commissioner (Appeals) going contrary to the averments in the show

cause notice and impugned order is unsustainable in law. Learned Counsel further submits that the law is settled that Appellate Authorities cannot travel beyond the scope of the case set up in the show cause notice. In this regard, Learned Counsel relied on the following decisions:-

**(i) Jeevan Diesels & Electricals Ltd. Vs. CCE., Cus. & ST., Bengaluru-III - 2017 (353) E.L.T. 78 (Kar.)**

**(ii) State of Gujarat Vs. Shanti Exports Ltd. - 2017 (345) E.L.T. 65 (Guj.)**

**(iii) Servo Packaging Ltd. Vs. CESTAT, Chennai E.L.T. 6 (Mad.) 2016 (340)**

**(iv) CCE & Cus., Surat Vs. Sun Pharmaceuticals Industries Ltd. 2015 (326) E.L.T. 3 (S.C.)**

4. As regarding non-protection of the documents, Learned Counsel submits that though the appellant failed to produce a documents at the time of Adjudication, produced the copy of same while filing the present appeal including certificate dated 01.10.2015 issued by the Customer KMEA. As regarding allegation of unjust enrichment, Learned Counsel draws our attention to certificate issued by Chartered Accountant certifying that the amount was not charged from the customers and the service tax was paid by the appellant out of their funds. In this regard, Learned Counsel also draws our attention to the ledger account and the invoices issued by the appellant on 21.07.2009 evidencing that service tax was not collected from KMEA. Learned Counsel further draws our attention to the invoices issued by appellant to other customers also where they have carried out constructions and paid appropriate service tax as applicable by making entry in the invoices.

5. As regarding the delay in filing the refund application, Learned Counsel submits that there was no delay in submitting the refund application and as evident from the impugned order, the appellant had submitted the first refund application on 30.09.2009 and also produced copy of the covering letter bearing office seal dated 30.09.2009 as annexure A while submitting reply to show cause notice

on 21.01.2010. Learned Counsel further draws our attention to the statement of contract receipt from customers (KMEA) and payment of service tax paid during the relevant period of refund claim as reproduced below:-

| Quarter | Total Contract Receipt | Contract Receipt from KMEA | Contract Receipts from other Clients | Service Tax Paid for KMEA | Service Tax paid for other Clients | Total Service Tax Paid | Challan number and date |
|---|---|---|---|---|---|---|---|
| Ist Quarter 2008-09 | 2,11,39,233 | nil | 2,11,39,233 | nil | 8,70,936 | 8,70,936 | Challan No.14 04.07.08 |
| IInd Quarter 2008-09 | 1,58,20,201 | 30,00,000 | 1,28,20,201 | 1,23,600 | 5,28,192 | 6,51,792 | Challan No.17 06.10.08 |
| IIIrd Quarter 2008-09 | 1,92,72,039 | 86,66,121 | 1,06,05,918 | 3,57,044 | 4,36,964 | 7,94,008 | Challan No.10/ 03.01.09 |
| IVth Quarter 2008-09 | 1,85,40,025 | 1,09,96,557 | 75,43,468 | 4,53,058 | 3,10,791 | 7,63,849 | Challan No.63/ 31.03.09 |
| Ist Quarter 2009-10 | 1,55,55,098 | 66,95,968 | 88,59,130 | 2,75,874 | 3,64,996 | 6,40,870 | Challan No.12/ 03.07.09 |
| Total | 9,03,26,596 | 2,93,58,646 | 6,09,67,950 | 12,09,576 | 25,11,879 | 37,21,455 | |

6. Further submits that, from the above statement, the first payment of Rs.30 lakhs towards the service was received by the appellant in second quarter of 2008-09 (upto Sept) and out of that Rs.1,23,600/- was paid as service tax on behalf of KMEA vide challan no. 17 dated 06.10.2008. If the first refund application submitted by the appellant on 30.09.2009 is considered, said payment is also within the statutory period of one year and since all other payments are within the one year from the date of submission of refund claim, impugned order rejecting the claim as time barred is also unsustainable.

7. As regarding eligibility of KMEA to considered as charitable society, Learned Counsel draws our attention to the show cause notice where it is categorically stated that:-

> "The claim was forwarded to the Range Officer, Kalamassery Range for verification on 14.10.2009 and the same was received back vide O.C. No.733/2009 dated 25.11.2009 after verification, in which he has reported that the grounds for the refund application are set out in the claim is that the services were utilized by the said College established

by the Kerala Muslim Educational Society which is a charitable society registered under the Travancore-Cochin Literary Scientific and Charitable Societies Registration Act XII of 1955 and hence exempted from payment of Service Tax. The claim was subjected to detailed scrutiny

Section 65(105)(zzzza) defines Works Contract as:-

(i) the transfer of property involved in the execution of such contract is leviable to Tax as sale of goods and,

(ii) such contract is for the purpose of carrying out

(a) ………………….

(b) Construction of new building or civil structure or a part thereof, or a pipeline or conduit primarily for the purpose of Commerce or Industry or, ………….

It is claimed by the claimant that the claim for refund relates to Service Tax paid on Works Contract Service rendered to M/s Muslim Educational Society for the purpose of constructing their Engineering College at Edathala, Ernakulam District. An Engineering College is clearly not run for the purpose of Commerce or Industry. As such services rendered in this connection will not fall within the definition of 'Works Contract' and hence it is clear that no Service Tax is payable on the said service.

However, it is seen that the claimant has not produced any documents to prove that the amount claimed relates to the payment received in connection with the construction of Engineering College. It is also seen that no documents have been produced to prove that the incidence of duty has not been passed on to the customers. Moreover, the payments involved in Challan Nos.14 dated 05.07.2008 and 17 dated 10.10.2008 is hit by time bar".

8. Thus, there is no dispute that the KMEA is not liable to pay service tax and the payment is made by mistake on behalf of said customer (KMEA). Learned Counsel further submits that mere payment of an amount by appellant and acceptance of the same by department would not regularize such amount as duty if it was not actually payable and was paid by mistake. In such cases, provisions of Section 11B and 35B of Central Excise Act, 1944 is not applicable. As per the judgment of Hon'ble High Court of Karnataka in the matter of **Commr. of. C. Ex. (Appeals), Bangalore Vs. KVR Constructions –**

**2012 (26) S.T.R. 195 (Kar.),** such payment has to be treated as paid without any authority of law and it was maintained by Hon'ble Supreme Court in **Commissioner of Vs. KVR Construction – 2018 (14) G.S.T.L. J70 (S.C.).** Learned Counsel relied on the following decisions:-

***(i) RR Thulasi Builders (I) Pvt. Ltd. Vs. Commr. of CGST & CEx., Salem - (2025) 26 Centax 234 (Tri. - Mad)***

***(ii) Raj Construction Vs. CCE & CGST, Jaipur - 2022 (66) G.S.T.L. 450 (Tri. - Del.)***

***(iii) Parijat Construction Vs. CCE., Nashik - 2018 (9) G.S.T.L. 8 (Bom.)***

9. Learned Authorized Representative (AR) reiterated the finding in the impugned order and submits that there is no evidence on record to substantiate the claim of the appellant that they have submitted first refund application on 30.09.2009 as claimed and the application being barred by limitation, Adjudication Authority rightly dismissed the refund claim. As regarding documents produced by the appellant, Learned AR submits that since appellant has failed to produce the documents regarding their eligibility to claim refund accordance with law before the Adjudication Authority, impugned order is sustainable on the ground of unjust enrichment.

10. Heard both sides and perused the records.

11. I find that as per the order issued by Adjudication Authority, it is stated that when submitting reply to show cause notice, appellant had produced the refund claim submitted by them on 01.09.2010 and produced the same as Annexure A to refund application. There is no finding regarding submission of the said refund application on 01.09.2010 and whether it is rejected due to one reason or the other. Without considering such valid submission, it is held that refund application is filed beyond the period of limitation. Further I find that as per the statement relied by the appellant regarding payment of service tax, the remaining payments were made towards the service tax liability of the customer KMEA well within the period of limitation.

Thus, the finding that entire claim is barred by limitation is unsustainable. Further as regarding finding on unjust enrichment, though there are lapses on the part of appellant to produce evidence in support of unjust enrichment and the documents, considering the certificate issued by Chartered Accountant (CA) in the year 2015, the finding regarding unjust enrichment is also unsustainable. Since it was not produced before the Adjudication Authority and considering the facts and circumstances of the case, the impugned order is set aside and appellant is directed to produce the evidence regarding unjust enrichment including the invoices, ledger accounts and the CA certificate to that effect before Adjudication Authority and on production of such documents, Adjudication Authority shall consider the issue and appropriate order should be issued within three months from the date of receipt of such documents from the appellant.

12. Appeal is allowed by way of remand.

(Operative portion of the order was pronounced in Open Court
on conclusion of hearing.)

**(P. A. AUGUSTIAN)**
**MEMBER (JUDICIAL)**

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