CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 20423 of 2016

(Arising out of Order-in-Appeal No. 529/2015 dated 21/12/2015 passed by Commissioner of Service Tax(Appeals), BANGALORE)

Microsoft India R&D Pvt Ltd Global Technical Support Centre, Level 2-6,signature Building, Block-e, Embassey Golf Links Business Park, Off Intermediate Ring Road BANGALORE - 560071 KARNATAKA	Appellant(s)

VERSUS

Commissioner of Service Tax **BANGALORE SERVICE TAX- I** 1ST TO 5TH FLOOR, TTMC BUILDING,above BMTC BUS STAND,DOMLUR BANGALORE, - 560071 KARNATAKA	Respondent(s)

Appearance:

Shri Prasad Paranjape, Advocate **PDS LEGAL** 23/24, 2nd Floor, MITTAL CHAMBERS, 1st FLOOR NARIMAN POINT MUMBAI - 400021 MH	For the Appellant
Smt. D.S. Sangeetha, **Joint Commissioner(AR)**	For the Respondent

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER

HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20759 / 2020

Date of Hearing: 21/10/2020

Date of Decision: 21/10/2020

Per : S.S GARG

The present appeal is directed against the impugned order dt. 21/12/2015 passed by the Commissioner of Service Tax(Appeals) whereby the Commissioner has rejected the appeal of the appellant on time bar without going into the merits of the refund claim.

2. Briefly the facts of the present case are that the appellant is a 100% EOU – STPI. They have filed a refund claim on 30/09/2010 for Rs.1,24,27,040/- seeking refund of unutilized cenvat credit paid on the input services used for providing the output services exported during the period October 2009 to March 2010 under Rule 5 of CENVAT Credit rules, 2004 (CCR, 2004 for short) read with Notification No.5/2006-CE(NT) dt. 14/03/2006 as amended from time to time. Appellant was issued a show-cause notice dt. 11/11/2010 seeking to reject the refund claim filed by it under Rule 5 of CCR. After following the due process, the Assistant Commissioner vide Order-in-Original dt. 29/02/2012 issued on 09/03/2012 rejected the refund claim filed by the appellant. Aggrieved by the said order, appellant filed appeal before the Commissioner(Appeals) and the Commissioner(Appeals) rejected the same on the ground that it is barred by limitation.

3. Heard both sides and perused the records.

4. Learned counsel appearing for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the statutory provision as well as without considering the precedent decisions of the courts. He further submitted that the appellant never received the copy of the Order-in-Original till a photocopy of the same was received by Registered Post on 07/12/2012 and thereafter the appeal was filed on 05/02/2013 which is within a period of two months from date of receipt of the Order-in-Original thereby complying the provisions of Section 85(3A) of the Finance Act, 1994. All the assertions in the Order-in-Appeal are that the Order-in-Original was issued and dispatched but no comment is made about the delivery of the Order-in-Original to the appellant. Further the Commissioner (Appeals) during the hearing showed the proof of dispatch through Postal Authorities but proof of

receipt by the appellant was never produced and it is the appellant's contention that they never received the Order-in-Original purportedly dispatched by the respondent. He further submitted that the other two findings in the impugned order are that since the Order-in-Original was not returned undelivered, therefore it is assumed to have been delivered and secondly it is held that the Department has a practice to contact the assessee to deliver the undelivered articles. He further submitted that both the findings lack legal support inasmuch as no proof of delivery has been produced by the respondent or considered by the learned Commissioner(Appeals) and such assumptions are invalid in law. Learned counsel further submitted that the respondent never replied to several follow up letters dt. 11/07/2012, 21/08/2012 and 17/10/2012 written by the appellant enquiring about the status of the adjudication. But the Department did not give any reply to any of the letters written by the appellant. Learned counsel further submitted that under Section 37C of the Central Excise Act, 1944 read with Finance Act, 1994, it is stated that order is deemed to be served on the appellant when it is delivered by the post and in the present case, in the absence of proof of such delivery, the Department cannot claim to have delivered the Order-in-Original and the Department cannot expect the appellant to prove the negative that they have not received the Order-in-Original. In support of his submission, he relied upon the following decisions:-

a. Saral Wire Craft Pvt. Ltd. [2015(322) ELT 192 (SC)]
b. Margra Industries Ltd. [2006(202) ELT 244 (Tri. LB)]
c. R.P. Casting Pvt. Ltd. [2016(344) ELT 168 (Raj.)]
d. Vinod Choudhary [2016(336) ELT 388 (Raj.)]

5. On the other hand, the learned AR defended the impugned order and submitted that the Department has produced the proof of dispatch by RPAD on 14/03/2012. She further submitted that the photocopy of the Order-in-Original was also sent to the same registered address to which the Order-in-Original was dispatched and the said photocopy of the Order-in-Original was received by the appellant on the same address and therefore according to the learned AR, it is presumed that the Order-in-Original was served on the appellant. She further submitted that the burden of proof that

the order was not received is on the appellant. In support of her submission, she relied upon the following decisions:-

i. CCE, Ludhiana Vs. Mohan Bottling Co. (P) Ltd. [2010(255) ELT 321 (P&H)]
ii. Jai Enterprises Vs. CC(Appeals), Chennai [2006(206) ELT 41 (Mad.)]
iii.P. Bhoormal Tirupati Vs. Addl. Collector of Customs, Madras [2000(126) ELT 65 (Mad.)]
iv. Singh Enterprises Vs. CCE, Jamshedpur [2008(221) ELT 163 (SC)]
v. V. Raja Kumari Vs. P. Subbarama Naidu and anr. (SC judgment dt. 02/11/2004 in Appeal (crl.) 887 of 1999.

6. We have considered the submissions made by both parties. Before we proceed to examine the question involved in this case, it would be apposite to take note of the relevant provisions of Section 37C of Central Excise Act, 1944 as applicable at the relevant time and the same is reproduced herein below:-

Section 37C. Service of decisions, orders, summons, etc. -

(1) Any decision or order passed or any summons or notices issued under this Act or the rules made thereunder, shall be served, -

a) by tendering the decision, order, summons or notice, or sending it by registered post with acknowledgment due, or by speed post with proof of delivery or by courier approved by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) to the person for whom it is intended or his authorised agent, if any;

b) if the decision, order, summons or notice cannot be served in the manner provided in clause (a), by affixing a copy thereof to some conspicuous part of the factory or warehouse or other place of business or usual place of residence of the person for whom such decision, order, summons or notice, as the case may be, is intended;

c) if the decision, order, summons or notice cannot be served in the manner provided in clauses (a) and (b), by affixing a copy thereof on the notice board of the officer or authority who or which passed such decision or order or issued such summons or notice.

> *(2) Every decision or order passed or any summons or notice issued under this Act or the rules made thereunder, shall be deemed to have been served on the date on which the decision, order, summons or notice is tendered or delivered by post or courier referred to in sub-section (1) or a copy thereof is affixed in the manner provided in sub-Section(1).*

7. The only issue involved in the present case is whether the learned Commissioner(Appeals) is right in rejecting appeal filed by the appellant on the ground that it is barred by limitation when the appellant claims that they were served with a copy of the order only on 07/12/2012 and the appeal is filed within 2 months and it should be considered as the appeal is within time or not. Further we find that as per the respondent, the Order-in-Original dt. 29/02/2012 was issued on 09/03/2012 and the appellant has filed the appeal before the Commissioner on 05/02/2013 which is beyond the period as prescribed in Section 85(3A) of the Finance Act, 1994. We further find that the Department has not been able to establish by any cogent evidence that the Order-in-Original was actually delivered to the appellant. Further we find that the appellant was not aware of the issuance of the Order-in-Original dt. 29/02/2012 and they wrote 3 follow-up letters dt. 11/07/2012, 21/08/2012 and 17/10/2012 enquiring about the status of the adjudication. These letters, in spite of the fact that they were received by the Department, were not responded to at all by the Department and the Department did not inform the appellant regarding the status of their adjudication. Not only this, the appellant has also filed a RTI application before the CBEC but the same has not yielded any result. Further we find that the LB of this Tribunal in the case of Margra Industries Ltd. cited supra has examined this issue in great detail and after examining all the judgments cited before the Larger Bench, the Larger Bench answered the reference as under:-

> ***11.*** *In light of the above we answer the reference as under :-*
>
> *(a) Dispatch of adjudication order by speed post/registered post would not amount to a valid service in the absence of proof of actual delivery of speed post.*
>
> *(b) The Sections in themselves indicate that there cannot be any simultaneous affixing of the order on the*

notice board and the affixing of the order has to be considered after failure of the first two modes.

8. Further we find that the High Court of Rajasthan in the case of R.P. Casting Pvt. Ltd. and Vinod Choudhary cited supra have also categorically held that the Department has to prove the delivery of the orders and dispatch of the order is not sufficient for the purpose of calculating the period of limitation for filing the appeal before the Commissioner(Appeals). Further we find that the case laws relied upon by the Department have already been considered by the Larger Bench as per the decision of the Larger Bench and after considering all those decisions, the Larger Bench has come to the conclusion that dispatch of adjudication order by speed post and registered post would not amount to actual service in the absence of proof of delivery.

9. In view of our discussion above, we are of the considered view that the impugned order is not sustainable in law. We set aside the impugned order and hold that the appeal of the appellant is within time from the date of receipt of Order-in-Original. The appeal is allowed and the case is remanded to the Commissioner(Appeals). The learned Commissioner(Appeals) is directed to decide the appeal on merits after following the principles of natural justice and after affording reasonable opportunity of hearing to the appellant.

(Operative portion of the Order was pronounced
in Open Court on **21/10/2020**)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

Raja...