CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 2149 of 2012

[*Arising out of Order-in-Appeal No. 221/2012 dated 08/05/2012 passed by the Commissioner of Central Excise (Appeals), Mangalore. & on remand from the Hon'ble High Court of Karnataka against Tribunal's Final Order No.20838/2017 dated 5.6.2017.*]

P. Mahadeva — Appellant(s)
No.6, 'G' Block, Ramakrishna Nagar,
Mysore – 570 023.

VERSUS

Commissioner of Central Tax,
Mysuru Commissionerate — Respondent(s)
No. S-1 & S2, Vinaya Marga
Siddhartha Nagar
Mysuru – 570 011.
Karnataka

Appearance:

Mr. PRADYUMNA G.H. ADVOCATE — For the Appellant
BVC & CO, 1st Floor,
No. 371 8th Main,
Sadashiva Nagar,
BANGALORE – 560 080.
KARNATAKA

Mr. Gopakumar,
Joint Commissioner (AR) — For the Respondent

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Date of Hearing: 06/07/2021
Date of Decision: 09/07/2021

Final Order No. 20546 / 2021

Per : S.S GARG

The present appeal has been received by way of remand from the Hon'ble High Court vide its order dated 26.2.2021 whereby the Hon'ble High

Court has remanded the matter to the Tribunal for deciding the same on merits. The Hon'ble High Court has allowed the appeal of the appellant to the extent that the said refund claim was not barred by limitation. The appellant filed appeal against the impugned order dated 8.5.2012 passed by the Commissioner (A) whereby the Commissioner (A) has rejected the appeal of the appellant and upheld the Order-in-Original.

2. Briefly the facts of the present case are that appellant had undertaken the activity of trenching and laying of cables under/alongside roads for their customers' viz., BSNL and TATA Teleservices during the period from 16.6.2005 to 16.9.2008. The officers of the Central Excise, Mysore proceeded against him for non-payment of service tax in respect of trenching work undertaken by him. During the course of investigation, a statement of the appellant was recorded by the Superintendent of Central Excise dated 27.11.2007 under the provisions of Section 14 of the Central Excise Act read with Section 83 of the Service Tax Act and subsequently the appellant deposited an amount of Rs.6,09,087/- towards service tax. Thereafter, appellant came to know that the Government of India has issued Circular No.123/5/2010-TRU dated 24.5.2010 clarifying that the activity of trenching and laying cables alongside road is not a taxable activity and cannot be levied to service tax under erection, commissioning and installation service. Accordingly appellant filed a refund claim of Rs.6,09,087/- with the Deputy Commissioner vide letter dated 17.8.2010. Thereafter, the Deputy Commissioner issued a show-cause notice dated 23.9.2010 proposing to reject the said claim being hit by limitation in terms of Section 11B of the Central Excise Act and that the appellant did not produce documentary evidence to prove that the burden of service tax paid by him had not been passed on to their customers. The original authority rejected the refund claim being barred by limitation. Aggrieved by the Order-in-Original, the appellant filed appeal before the Commissioner (A) who upheld the Order-in-Original. Thereafter, the appellant filed appeal before the Tribunal and the Tribunal vide its Final Order No.20838/2017 dated 5.6.2017 rejected the appeal and upheld the orders of the lower authorities with regard to the question of limitation. Thereafter, the appellant challenged the order of the CESTAT before the Hon'ble High Court

of Karnataka, who vide its order dated 26.2.2021 in Civil Appeal No.43/2018 has allowed the appeal filed by the appellant holding that the refund claim was not hit by limitation and has remanded the matter with a direction to decide the case in accordance with the provisions of law.

3. Heard both the parties and perused the records.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that there is no dispute about the fact that the impugned activity was not taxable and this is evident from a common order i.e., Order-in-Appeal No.95/2009 dated 17.3.2009 passed by the Commissioner (A), Mangalore wherein demands were set aside in different appeals filed by the parties who had undertaken similar activity as the appellant in the present case. He further submitted that as far as limitation is concerned, the Hon'ble High Court has held that the claim of the appellant was not hit by limitation. He further submitted that the documents placed by the appellant in the form of letters issued by both the service recipient i.e., BSNL and Tata Teleservices Limited make it abundantly clear that no service tax had been charged and collected in respect of work orders for the relevant period. He further submitted that on perusal of the work orders issued by BSNL for the relevant period clearly suggests that no service tax was neither charged nor collected by the appellant. He further submitted that all the requisite conditions specified in Section 11B of the Central Excise Act had been fulfilled by the appellant and therefore, appellant is entitled to the refund of duty deposited by him.

5. On the other hand, the learned AR fairly conceded that the Hon'ble High Court vide its order dated 26.2.2021 has allowed the appeal of the appellant and held that refund claim of the appellant was not hit by limitation. He further submitted that the Circular No.123/5/2010-TRU dated 24.5.2010 issued by the Board is not applicable to the case of the appellant because the period involved in the appeal is prior to the issuance of the said Circular. He further submitted that both the authorities have held that the Circular issued by the Board is prospective and cannot be made applicable

with retrospective date. In support of this submission, he relied upon the following decisions.

- M/s. Chalet Hotels Ltd. vs. Commissioner of Central Tax, Bengaluru East: 2019 (6) TMI 571 – CESTAT Bangalore.
- M/s. M.G.M. International Exports Ltd. vs. The Assistant Commissioner of Service Tax, Chennai: 2021 (4) TMI 1167 – Madras High Court

6. In contra, the learned counsel for the appellant submitted that the beneficial Circular should be applied retrospectively while oppressive circular should be applied prospectively. To buttress his submission, he placed reliance on the following decisions:

- Suchitra Components Ltd. vs. Commissioner of Central Excise, Guntur: 2007 (208) ELT 321 (SC)
- Oriental Trimex Ltd. vs. Commissioner of Central Excise, Noida: 2018 (363) ELT 398 (Tri.-Chennai)

7. After considering the submissions of both the parties and perusal of the material on record, I find that there is no dispute regarding the taxability of the impugned activity. Further, I find that even before the issuance of the said Circular by the Board, the Tribunal Chennai in the case of Indian Hume Pipe Company Limited vs. CST, Trichy as reported in 2008 (12) STR 363 (Tri.-Chennai) has held that the impugned activity is not taxable under the category of "Erection, Commissioning and Installation Service". Further, I find that the Commissioner (A) vide its Order-in-Appeal No.95/2009 dated 17.3.2009 relied upon the decision of the Tribunal in the case of Indian Hume Pipe Company Limited cited supra and dropped the demand for similar activity as is involved in the present case. As far as limitation is concerned, the Hon'ble High Court has already held that refund claim was not barred by limitation. Now coming to the issue of unjust enrichment, I find that the appellant has placed on record the letters issued by both the service recipient i.e., BSNL and TATA Teleservices in Annexure - D and E which makes it abundantly clear that no service tax has been charged and collected in respect of work orders during the relevant period. Further, I find that on perusal of the work orders in Annexure - F issued by BSNL for the relevant period, it clearly suggests that no service tax was

neither charged nor collected by the appellant. Further, I find that authorities relied upon by the learned AR is not applicable in view of the judgment of the Hon'ble High Court of Karnataka dated 26.2.2021.

8. In view of my discussions above, the impugned order is set aside and the appeal is allowed with consequential relief.

(Order was pronounced in Open Court on **09/07/2021**.)

(S.S GARG)
JUDICIAL MEMBER

rv