IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Service Tax Appeal No. 41316 of 2018

(Arising out of Order-in-Appeal No. 134/2018 (CTA-II) dated 23.3.2018 passed by the Commissioner of Central Tax (Appeals – II), CGST & Central Excise, Chennai)

M/s. TVM Edible Oil Refineries **Appellant**
B-43, SIPCOT Industrial Complex
Gummiddipoondi 601 201.

Vs.

Commissioner of GST & Central Excise **Respondent**
Chennai Outer Commissionerate
Newry Towers, No. 2054, I Block, II Avenue
12th Main Road, Anna Nagar
Chennai – 600040.

APPEARANCE:

Dr. M. Manimaran, Advocate for the Appellant
Shri M. Ambe, DC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 40697/2024 dated 20.06.2024
Interim order No. 40003/dt. 26.6.2023
Date of Hearing: 13.06.2023
Date of Decision: 26/06/2023

Per M. Ajit Kumar,

This is an appeal filed by M/s. TVB Edible Oil Refineries against Order in Appeal No. 134/2018 (CTA-II) dated 23.3.2018 passed by the Commissioner of Central Tax (Appeals – II), Chennai.

2. Brief facts are that the appellants manufacture edible oil. They have filed refund claim for Rs.1,86,175/- on 26.10.2016 being the service tax paid on development charges collected by SIPCOT. As per section 104 of the Finance Act, 1994, no service tax is leviable in respect of taxable service provided or agreed to be provided by a State Industrial Corporation or undertaking to industrial units by way of grant

of long-term lease of 30 years or more for industrial plots during the period commencing from 1st day of June 2006 and ending with 21st day of September 2016. The refund pertains to service tax collected in October 2015. The refund claim was rejected on the ground that as per section 104(3) of Finance Act, 1994, refund claim had to be filed within six months from the date on which the Finance Bill 2017 received the assent of the President. Since the assent of the President for the Finance Bill, 2017 was given on 31.3.2017, consequently in terms of section 104(3) of the Act, the refund had to be preferred by the appellant within 30.9.2017. However, the claim was preferred only on 26.10.2017 and hence was found to be time-barred. Aggrieved by the decision vide Order in Original No. 245/2017 (RE) dated 18.12.2017, the appellant preferred appeal before Commissioner (Appeals) who vide the impugned order has rejected the appeal filed by the appellant. The appellants have hence come before us assailing the impugned order.

3. No cross-objection has been filed by the Respondent-department.

4. We have heard Dr. M. Manimaran, learned counsel for the appellant and Shri M. Ambe, learned AR for the Revenue.

5. The learned counsel for the appellant has submitted that the delay in filing the claim was due to certain confusion as to whether they (appellant) have to file the claim or it was to be filed by SIPCOT. Subsequently, due to some holidays and the concerned officer being on leave, the claim was filed with few days delay. They have stated that the claim has been filed within the time limit as per section 11B of

the Central Excise Act, 1944 made applicable to Service Tax refunds. Hence the learned Commissioner (Appeals) could not have rejected their appeal and should have sanctioned the refund claim. He placed reliance on the following judgments in their favour:-

(i) Makers Mart Vs. CCE and Service Tax, Jaipur reported in 2016 (44) STR 126 (Tri. Del.)

(ii) M/s. APK Identification, Noida Vs. CCE, Noida reported in 2012 (27) STR 20 (Tri. Del.)

(iii) M/s. Vedanta Ltd. Vs. CCE, Bhubaneswar reported in 2017 (345) ELT 577 (SC)

(iv) Intas Pharma Ltd. Vs. Commissioner of Service Tax, Ahmedabad reported in 2013 (32) STR 543 (Tri. Ahmd.)

6. Shri M. Ambe, learned AR has stated that the claim is time-barred in terms of section 104(3) of the Finance Act, 1994 and that as per the knowledge of the section, there was no discretion available on the original authority to have considered any delay in filing of the clam. Section 104 specifically dealt with the issue of refund. Section 11B of the Central Excise Act would not be applicable in this case. He prayed that the appeal may be dismissed.

7. We have heard both the parties. We find that the only issue to be decided is whether the refund claim filed by the appellant would be covered under section 104(3) of the Finance Act, 1944 or under section 11B of the Central Excise Act, 1944 as made applicable to service tax vide Section 83 of the Finance Act, 1994.

7.1 For a proper understanding of the issue involved, it would be beneficial to extract Section 104 of the Finance Act, 1944 below:-

> *"SECTION 104 .(1) Notwithstanding anything contained in section 66, as it stood prior to the 1st day of July, 2012, or in section 66B, no service tax, leviable on one time upfront amount (premium, salami, cost, price, development charge or by whatever name called) in respect of taxable services provided or agreed to be provided by a State Government*

industrial development corporation or undertaking to industrial units by way of grant of long term lease of thirty years or more for industrial plots, shall be levied and collected during the period commencing from the 1st day of June,2007 and ending with 21st day of September, 2016 (both days inclusive).

(2) Refund shall be made of all such service tax which has been collected, but which would not have been so collected, had sub-section (1) been in force at all times.

(3) Notwithstanding anything contained in this Chapter, an application for claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill, 2017 receives the assent of the President."

8. We find that as per the Hon'ble Supreme Court in its landmark judgment in ***Rohitash Kumar & Ors. v Om Prakash Sharma & Ors [(2013) 11 SCC 451],*** covering the interpretation of statutes, held that a legal enactment must be interpreted in its plain and literal sense. Inconvenience or hardship is not a ground for the court to interpret the plain language of the statute differently, to give relief. The relevant portion of the judgment is extracted below.

"19. In Bengal Immunity Co. Ltd. v. State of Bihar & Ors., AIR 1955 SC 661 it was observed by a Constitution Bench of this Court that, if there is any hardship, it is for the legislature to amend the law, and that the Court cannot be called upon, to discard the cardinal rule of interpretation for the purpose of mitigating such hardship. If the language of an Act is sufficiently clear, the Court has to give effect to it, however, inequitable or unjust the result may be. The words, 'dura lex sed lex' which mean 'the law is hard but it is the law.' may be used to sum up the situation. Therefore, even if a statutory provision causes hardship to some people, it is not for the Court to amend the law. A legal enactment must be interpreted in its plain and literal sense, as that is the first principle of interpretation.

20. In Mysore State Electricity Board v. Bangalore Woolen, Cotton & Silk Mills Ltd. & Ors., AIR 1963 SC 1128 a Constitution Bench of this Court held that, 'inconvenience is not' a decisive factor to be considered while interpreting a statute.

21. In Martin Burn Ltd. v. The Corporation of Calcutta, AIR 1966 SC 529, this Court, while dealing with the same issue observed as under:–

'A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a Court likes the result or not.'

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(See also: The Commissioner of Income Tax, West Bengal I, Calcutta v. M/s Vegetables Products Ltd., AIR 1973 SC 927; and Tata Power Company Ltd. v. Reliance Energy Limited & Ors., (2009) 16 SCC 659).

Therefore, it is evident that the hardship caused to an individual, cannot be a ground for not giving effective and grammatical meaning to every word of the provision, if the language used therein, is unequivocal."

(emphasis added)

We find that the appellant admits that his refund claim arises due to the provisions of section 104 (1) of the Finance Act, 1994. In such a situation the section cannot be read in a manner that sub-section (3) of section 104 does not exist so as to take the claim under section 11 B of the Central Excise Act 1944, as made applicable to service tax. When the provisions of Section 104 itself is a complete section which deals with a situation relating to the provision of an exemption and also provides for an application to claim the refund of service tax arising there under, then section 104 (3) must prevail.

8.1 We find that when two provisions of an Act are in conflict and one of them deals specifically with the matter in question while the other is of more general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one. The specific prevails over the general; it does not matter which was enacted first. The Hon'ble Supreme Court has referred to this rule of construction expressed in the maxim, *generalia specialibus non derogant*, which means that when there is a conflict between a general and a special provision, the latter shall prevail. [See **Commissioner of Income Tax, Patiala & Ors Vs M/s Shahzada Nand & Sons & Ors.** [1966 AIR 1342 / 1966 SCR (3) 379] and in **State Of Gujarat & Anr. Etc. Etc vs Patel Ranjibhai Dhanbhai & Ors.** (1979 AIR 1098 / 1979 SCR (3) 788)]. Further, there is nothing in the general provision, expressed or implied, indicating that section 104 of the Finance Act, 1994 is subordinate to that of Section 11B of the Central Excise Act, 1944 as made applicable to service tax, and has to give weight to it.

8.2 The Tribunal being a creature of statute cannot travel beyond the specific provisions of the statute and condone the delay in filing the claim when such a provision does not exist in the statute itself. The Apex Court in the case of **K.S. Venkataraman & Co. v. State of Madras** (1966 2 SCR 229) held:

> "There is, therefore, weighty authority for the proposition that a tribunal, which is a creature of a statute, cannot question the vires of the provisions under which it functions."

9. We have examined the judgments cited by the appellant in their favor and listed in para 5 above. We find that the judgment of the Hon'ble Tribunal in 'Makers Mart' and in 'APK Identification' (supra), relate to cases where the exemption notification gave discretion to the taxpayer to file a refund claim within 6 months or such extended period as the Assistant Commissioner of Customs shall permit. Such a discretion is not available with the proper officer in this case and is hence distinguished. In 'Vedanta Ltd' (supra) the issue related to goods that were short shipped and the judgement was rendered by the Hon'ble Supreme Court in the peculiar facts of that case. The appellant has also not brought out how the judgment applies to this case. In 'Intas Pharma', the issue related to goods that were consumed within a SEZ. Here too the Assistant Commissioner of Customs had a discretion to accept the refund claim belatedly and hence the issue is distinguished. Hence, we find that the judgments cited by the appellant

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are not relevant to the issue under consideration and the legal issues have been discussed elaborately above.

10. In the light of the facts as discussed above, we find that the refund claim is squarely covered by the provision of Section 104(3) of the Finance Act, 1994 and the claim should have been filed within six months from the date on which the Finance Bill 2017 received the assent of the President as stated therein. Since the claim has been filed beyond the six months' time limit, it merits to be rejected.

11. Based on the facts as discussed above, the impugned order is upheld. The appeal stands dismissed.

(Pronounced in open court on 26/06/2023)

Separate Order.

(M. AJIT KUMAR)
Member (Technical)

(SULEKHA BEEVI C.S.)
Member (Judicial)

Rex

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Order : Per Ms. Sulekha Beevi C.S.

I have perused the order recorded by brother Member (Technical) and would prefer to record a separate order as I disagree with the findings recorded by brother Member (Technical).

2. The facts having been narrated I do not think it necessary to go into the detail.

3. The appellant filed a refund claim for Rs.1,86,175/- of the refund of service tax paid on development charges collected by SIPCOT. The refund claim was filed in terms of Section 104 of the Finance Act, 1994. The section has already been reproduced. As per the said section, the claim for refund has to be filed within a period of 6 months from the date on which the Finance Bill, 2017 receives the assent of the President. The said bill was assented to by the President of India on 31.03.2017. Thus, the refund claim has to be filed on or before 30.09.2017. However, the claim has been filed by the appellant only on 26.10.2017. There is a delay of less than one month in preferring the claim in terms of the period stipulated in Section 104.

4. It is submitted by the Ld. Counsel for appellant that communication dated 22.09.2017 issued by SIPCOT informing that the appellant has to prefer the refund claim was received by the appellant only on 26.09.2017. Thus the communication dt. 22.09.2017 was issued by SIPCOT advising the appellant to claim service tax had reached them with delay. They then approached the department to obtain the refund. They were advised to produce

documentary evidence for payment of service tax to the tune of Rs.1,86,175/- to the Government. They approached the SIPCOT to get the documents as proof of deposit of service tax with the Government. There was delay in getting certificate from SIPCOT. This is because the concerned SIPCOT officer who is authorized to sign the certificate confirming payment of service tax had gone on leave and rejoined duty only on 20.10.2017. After obtaining the necessary documents, appellant thus filed refund claim only on 26.10.2017. Ld. Counsel submitted that the delay occurred for no laches or negligence on the part of the appellant. Section 104 does not mention as to who has to apply for the refund. The appellant was under the impression that SIPCOT would claim the refund and pass it on to the appellant. Appellant only after receiving the communication from SIPCOT, understood that they have to file the refund claim. The delay has occurred as the appellant did not get the necessary documents evidencing payment of service tax from SIPCOT. Without prejudice to the above, Ld. Counsel submitted that Section 11B of Central Excise Act, 1944 provides the period of one year for filing the refund. The said section is made applicable to service tax vide Section 83 of the Finance Act, 1994.

5. On perusal of Section 104, it provides for exemption of service tax leviable on one time upfront amount (premium, salami, cost, price, development charge or by whatever name called) in respect of taxable services provided or agreed to be provided by a State Government Industrial Development Corporation or Undertaking to Industrial units. The exemption is allowed by way of refund for the period from 01.06.2007 upto 21.09.2016. The exemption intends to give benefit to industrial units. The exemption by way of refund

extends to a period of about 10 years. It is not stated in the section as to who has to file refund claim. If it was clearly stated that (service provider) SIPCOT could obtain the refund and pass it on to the industrial units / assessees, the intention of granting the exemption would have achieved its purpose. When the exemption did not mention the person who has to file the refund, the appellant had to first approach SIPCOT to get necessary documents for filing the refund claim. When the exemption / refund period is so long of about 10 years, it is indeed difficult for an assessee to obtain documents for filing a refund claim within a short period of six months. I am of the view that if there is no delay in filing the refund claim on the part of the appellant and if the claim is filed within reasonable time after receiving information from SIPCOT, the refund ought to be granted.

6. A similar view was taken by the Hon'ble Jurisdictional High Court in the case of ***Grand Technologies Vs Assistant Commissioner of GST & CEX Puducherry*** – 2022 (67) G.S.T.L. 359 (Mad.). The Hon'ble High Court observed as under :

> "**25.** The sequence of events as narrated above reveals to me that the petitioner is not guilty of any violation, except perhaps, an error in its understanding of Section 104. The decisions cited on behalf of the petitioner wherein a wrong forum has been approached by those petitioners but condoned by the Court, are inapplicable in this matter, since the error is not one of approaching the wrong officer within the same Department.
>
> **26.** In this case, the petitioner has filed the claim before PIPDIC which is altogether a different entity. However, the mere fact that the entity approached was PIPDIC and not an officer of the Department does not, in the light of the reasoning adduced above, persuade me to take a view adverse to the petitioner as I believe that such a conclusion would be hyper-technical.

27. Thus, while reiterating yet again that the impugned order does take one plausible view, I set it aside, invoking, and in exercise of powers vested in this Court under Article 226 of the Constitution of India. The request of the petitioner shall be processed by the respondents and a decision taken on the merits of the claim for refund, within a period of four weeks from date of uploading of this order."

7. Therefore, I hold that appellant is eligible for refund. The impugned order is set aside. The appeal is allowed.

Sulekha Beevi
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

<u>DIFERENCE OF OPINION</u>

In view of the difference of opinion between the Members, the following questions are framed for resolution :

(1) Whether the appeal is to be dismissed by upholding the impugned order as held by Member (Technical) ?

OR

(2) Whether the appeal is to be allowed by setting aside the impugned order as held by Member (Judicial) ?

(pronounced in court on 26.06.2023)

(AJIT KUMAR)
MEMBER (TECHNICAL)

Sulekha Beevi
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

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PER D. M. MISRA

8. Heard both sides at length. The following points of difference have been referred to the Third Member:

"Whether the appeal is to be dismissed by upholding the impugned order as held by Member (Technical)?

OR

Whether the appeal is to be allowed by setting aside the impugned order as held by Member (Judicial)?"

9. The facts of the case have been narrated by the Ld. Member (Technical) in the beginning of Interim Order, hence, not necessary to be re-stated.

10. Before proceeding further, it is necessary to address the issue whether the above reference is in accordance with the provisions of law and within the authority conferred on the Third Member to decide the points of difference. The relevant provision governing the circumstances and procedures in resolving the difference of opinion between the Members of a Bench is prescribed under Section 129C(5) of the Customs Act, 1962, which reads as below:

"Section 129C. Procedure of Appellate Tribunal. –

(1) --------------
(2) -------------
(3) -------------
(4) -------------

(5) If the members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority; but if the members are equally divided, they shall state the point or points on which they differ and make a reference to the President who shall either hear the point or

points himself or refer the case for hearing on such point or points by one or more of the other members of the Appellate Tribunal and such point or points shall be decided according to the opinion of the majority of these members of the Appellate Tribunal who have heard the case, including those who first heard it."

11. The Hon'ble Gujarat High Court in the case of ***Colortex vs. UOI: 2006 (198) ELT 169 (Guj.)*** interpreting the Section 129C(5), held as under:

> ***"16.*** *Section 129C(5) of the Act requires that where Members of Tribunal differ in opinion on any point, in the first instance, the point shall be decided according to the opinion of the majority; only in the event where the Members are equally divided, the Members are obliged to state the point or points on which they differ and make a reference to the President who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other Members of the Tribunal, and such referred point or points shall be decided according to the opinion of the majority of these members who have heard the case, including those who first heard it.*
>
> ***17.*** *The provision is therefore comprised of two parts. In a case where the Bench consists of two or more than two members and there is difference of opinion amongst the members who constitute the Bench, the point of difference has to be decided according to the opinion of the majority, where there is a majority. While the latter part of the provision stipulates that where the Bench consists of two members or more than that but of even number, and the members are equally divided, it is incumbent upon such members to set out the point or points on which they differ. Upon such point or points of difference being stated a reference is required to be made to the President who, on the administrative side, is required to pass an order for placing the case for hearing either before himself or before any other member or other members, as the facts and circumstances of the case may require, but the case, upon such a reference being made, can be heard by the President or the Member or Members only on the point or points of difference stated by the original Bench which heard the appeal. The President or the Third Member does not derive any independent jurisdiction and has no powers to decide the appeal in entirety.*
>
> ***18.*** *The legislative intent discernible from a plain reading of the provision is to ensure that the appeal or appeals are to be*

disposed of only by the Bench originally assigned the appeal or appeals as ordered by the President on the administrative side. This becomes clear from a conjoint reading of sub-sections (1) and (4) of Section 129C of the Act. Sub-section (5) of Section 129C of the Act stands out in contrast and does not permit disposal of the appeal. In fact, after the President or the Third Member, who is assigned the case for hearing on the point or points of difference, renders his opinion, the appeal goes back to the Bench which originally heard the appeal and has to be decided in accordance with the majority opinion. This becomes absolutely clear when the concluding portion of the provision is read which talks of deciding according to the opinion of the majority of the members who have heard the case, including those who first heard it.

19. *Therefore, the members who expressed dissenting opinions are bound by the statute to state the point or points of difference and make reference after making such a statement. To use the words of the learned President "an omnibus order" cannot take place of the statement on point or points of difference between the members. The entire appeal(s) cannot be referred.*

20. *There is one more reason as to why the legislature in its wisdom has provided for this requirement, viz., stating the point or points of difference as a pre-condition for making the reference. In a given case, and it is not unknown that, though the members may express dissenting views they might ultimately arrive at the same conclusion, or there could be a situation where by a different process of reasoning the same conclusion may be arrived at by the members constituting the Bench. In such a case there would be no point or points of difference on which a reference could be made, though there might be a different line of reasoning adopted by each of the members constituting the Bench. The decision in case of A.N. Seth (supra) on which reliance has been placed on behalf of respondent No. 2 is an illustration of such an eventuality. As can be seen from the facts recorded at page 856 of the reports though both the members took different views ultimately both the members agreed that the intention of the assessee (in that case) at the time of sale of plots was to sell the land with a view to earn the profits and that the gains were liable to be taxed as revenue income. In fact the appeals were allowed by the Tribunal and there was no difference of opinion stated for reference to the President. The second question which was there before Delhi High Court was in the context of the aforesaid difference in reasoning adopted by both the members and hence while answering the second question the Delhi High Court observed thus :*

> *"In other words, the Members disagreed in the reasoning adopted by them in arriving at a conclusion on the point for determination in the appeal, but agreed with each other on the conclusion on the point. As they were agreed about the final conclusion on the point for determination in the appeal viz. that the profits made by the assessee should be subjected to income-tax, they did not make any reference".*

The said decision is no authority for upholding the action on part of the Division Bench.

***21.** Therefore, the necessity for stating point or points of difference. In absence of such a statement any reference made would be invalid and cannot be termed to be a mere procedural irregularity. The observations made by the Tribunal (Original Bench) while passing the order on 6-12-2005 are not in accordance with the legal requirements of Section 129C(5) of the Act. After referring to the judgment of Patna High Court in Hanutram Chandanmul (supra) the Bench has chosen not to follow the ratio of the said decision in the following words :*

> *"However, in the case before us it is not the appeal or appeals which have been referred to third Member, but only the point of difference as to whether the appeals merited rejection in the light of the view recorded by Member (Technical) or the appeals merited acceptance in the order recorded by Vice-President".*

All that can be said about this observation is that it belies comprehension. In one breath the learned Members seek opinion of Third Member as to allowability or rejection of the appeals and also that the appeals have not been referred. Possibly the learned Members have not appreciated the true import of provision of Section 129C(5) of the Act."

12. The aforesaid principle has been followed by the same High Court in the case of ***Amod Stampings Pvt Ltd. vs. CC: 2013 (289) ELT 421 (Guj.).***

13. Applying the principle laid down in the aforesaid judgments of the Hon'ble High Court to the reference in hand, it is clear that the appeal whether to be allowed or disallowed, has been referred instead of the exact point of difference leaving the

ultimate results of the appeal to be arrived at by the Bench subsequent to the opinion of the Third Member. The jurisdiction vested with the Third Member is to decide the point or points of difference; it cannot be extended further to reframe the issues and/or questions referred and express his opinion by interpreting and/or filtering the true underlying meaning of points/issues of differences referred. Such an exercise on the part of the Third Member would result in overstepping of the authority vested on him as Third Member, which is contrary to the statutory provision referred above. More or less somewhat a similar view has been expressed by the Hon'ble Bombay High Court in the case of ***M/s. Kelkar Trading Corporation vs. CCE, Mumbai-V–2016-TIOL-260-HC-MUM-CX***. which has been followed by the Mumbai Bench of this Tribunal in the case of ***CC (Import), Nhava Sheva vs. Sun Tex - 2020 (372) ELT 892 (Tri. Mum.)***.

14. In the result, the matter is sent back to the Ld. Members of the referral bench for stating/reframing the exact point(s) of difference for opinion of the Third Member.

15. Reference disposed of accordingly.

(D. M. MISRA)
MEMBER (JUDICIAL)

RA_Saifi

Customs, Excise & Service Tax Appellate Tribunal

This Bench while deciding the Appeal No. ST/41316/2018 formed a difference of opinion. The difference of opinion was referred by the Hon'ble President to the third Member (brother Shri D.M. Misra) who vide order dated 22.11.2023 referred the matter back to this Bench for reframing the exact point(s) of difference of opinion.

Pursuant to this, the Members who have heard the case initially reframed the points of difference and placed the same before Hon'ble President vide letter dated 12.12.2023. The Hon'ble President has again nominated Shri D.M. Misra, Member (Judicial) to hear the reframed points of difference as per the letter dated 3.1.2024. The reframed difference of opinion are as under:-

POINTS OF DIFFERENCE

(i) Whether the statutory time limit specified under the special provisions of section 104 of the Finance Act, 1994 for filing refund claim, is binding on a statutory authority and will prevail over the time limit stated in the general provisions of Section 11B of the Central Excise Act, 1944. Whereby the refund claim filed beyond six months' time limit merits rejection.

OR

(ii) Whether the judgment of the Hon'ble High Court of Madras in Grand Technologies Vs Assistant Commissioner of GST & CEX Pondicherry [2022 (67) GSTL 359 (Mad.) covers the issues raised by the appellant, whereby the appellant is eligible for the refund and the impugned order merits to be set aside.

(Pronounced in open court on 12.01.2024)

(**M. AJIT KUMAR**)
Member (Technical)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

Rex

Date of Hearing: 01/02/2024
Date of Decision: 31/05/2024

PER: DR. D.M. MISRA

16. Heard both sides at length.

17. The points of difference referred for opinion are as follows:-

POINTS OF DIFFERENCE

(i) Whether the statutory time limit specified under the special provisions of Section 104 of the Finance Act, 1994 for filing refund claim, is binding on a statutory authority and will prevail over the time limit stated in the general provisions of Section 11B of the Central Excise Act, 1944. Whereby the refund claim filed beyond six months' time limit merits rejection.

OR

(ii) Whether the judgment of the Hon'ble High Court of Madras in Grand Technologies Vs Assistant Commissioner of GST & CEX Pondicherry [2022 (67) GSTL 359 (Mad.) covers the issues raised by the appellant, whereby the appellant is eligible for the refund and the impugned order merits to be set aside.

18. The facts, in brief, are that the appellant paid an amount of Rs.40,29,750/- and applicable service tax of Rs.1,86,175/- to M/s. SIPCOT, Chennai on 23.10.2015 towards differential cost of the land. By virtue of Section 104 of the Finance Act, 1994 inserted w.e.f. 31.03.2017, the service tax on the said value of cost of the land paid to SIPCOT not leviable and if collected liable to be refunded. Consequently, they claimed on 26.10.2017 refund of the service tax of Rs.1,86,175/- paid by them earlier. On adjudication, the refund claim was held to be barred by limitation as prescribed under sub-section (3) of Section 104 of the Finance Act, 1994, as it was filed beyond the period of six months from the date on which the Finance Bill, 2017 received the assent of the President of India. Learned Member(Technical) referring to the provisions of Section 104 of the

Finance Act, 1994 and interpreting the same in the light of the judgment of Hon'ble Supreme Court in ***Rohitash Kumar & Ors. Vs. Om Prakash Sharma & Ors.*** case (supra) observed that the refund claim is barred by time limit prescribed under Section 104(3) of the Finance Act, 1994, hence not admissible. The learned Member(Judicial) on the other hand appreciating the cause of delay in getting certificate from SIPCOT and also considering the submission of the appellant that Section 11B of the Central Excise Act, 1944 provides a period of one year for filing the refund claim which is made applicable to service tax provisions vide Section 83 of the Finance Act, 1994 and also following the judgment of the jurisdictional High Court in ***Grand Technologies*** case (supra) observed that there is no delay in filing the refund claim on the part of the appellant when the claim is filed within a reasonable time after receiving information from the SIPCOT; hence she was of the view that refund is admissible to the appellant.

19. Section 104 of the Finance Act, 1994 inserted w.e.f. 31.03.2017 reads as below:

> *"SECTION 104 .(1) Notwithstanding anything contained in section 66, as it stood prior to the 1st day of July,2012, or in section 66B, no service tax, leviable on one time upfront amount (premium, salami, cost, price, development charge or by whatever name called) in respect of taxable services provided or agreed to be provided by a State Government industrial development corporation or undertaking to industrial units by way of grant of long term lease of thirty years or more for industrial plots, shall be levied and collected during the period commencing from the 1st day of June,2007 and ending with 21st day of September, 2016 (both days inclusive).*
>
> *(2) Refund shall be made of all such service tax which has been collected, but which would not have been so collected, had sub-section (1) been in force at all times.*
>
> *(3) Notwithstanding anything contained in this Chapter, an application for claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill, 2017 receives the assent of the President."*

20. On a plain reading of the said provision it is clear that a period of six months has been prescribed for refund of the service tax paid and it is different from the period of limitation prescribed under general

provision of refund prescribed under Section 11B of the Central Excise Act, 1944 as applicable to service tax matters. The said Section 104 has been introduced by the Government in the Union Budget as a policy decision in extending retrospective benefit on the levy of service tax on certain services rendered during the period from June 2007 to September, 2016; it also prescribed refund of service tax which has been collected but which should not have been so collected. It is stipulated under the said provision that an application for claim of refund of service tax should be made within a period of six months from the date on which the Finance Bill, 2017 received the assent of the President i.e.. 31.03.2017. Admittedly in the present case, the refund claim has been filed on 26.10.2017 i.e. beyond the period of six months stipulated under the said provision of the Finance Act, 1994. In the said Section 104 there is no reference to the general refund provisions under Section 11B of CEA,1944.

21. The first point of difference is, in claiming refund, whether the limitation of six months prescribed under Section 104(3) of the Finance Act,1994 or one year under Section 11B of the CEA,1944 is applicable to the refund filed by the appellant.

22. This issue is no more *res integra* as has been dealt by the Hon'ble Gujarat High Court at length in the case of ***Essar Bulk Terminal Salaya Ltd. Vs. UOI*** [2019(25) GSTL 521 (Guj.)]. In the said case, their Lordships have been confronted with the issue of refund of service tax paid in relation to construction of Salaya Port during the period 01.04.2015 to 29.02.2016 pursuant to Section 103 of the Finance Act, 1994. In the said case also, the refund claim was filed beyond six months from the date of assent of the Finance Bill, 2016 by the President of India. The said Section 103 of Finance Act, 1994 is more or less similarly worded with the present Section 104 of the Finance Act, 1994. After analysing the relevant provision of Section 104(3), their Lordships observed as follows:-

> *"**6.** Heard Learned Counsel appearing on behalf of the respective parties at length.*

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At the outset it is required to be noted that as such the petitioner has mainly prayed to quash and set aside the impugned order passed by the Learned CESTAT allowing the appeal and quashing and setting aside the Order-in-Appeal and confirming the order passed in OIO rejecting the refund claim of the petitioner. The main ground on which the first Authority as well as the Learned CESTAT has rejected the claim of the petitioner is that the application submitted by the petitioner for refund of claim was beyond the period of six months prescribed in sub-section (3) of Section 103 of the Finance Act, 1994. Therefore, the petitioner has prayed for other reliefs viz. (i) to declare Section 103(3) of the Finance Act, 1994 as arbitrary, unconstitutional and ultra vires to Article 14 of the Constitution of India; (ii) to read down sub-section (3) of Section 103 of the Finance Act, 2016 as mentioned in para 30(b) of the petition; (iii) to direct the respondents to compute six months' period within which the refund claim was to be filed in terms of Section 103 of the Finance Act, 1994, from the date the requisite certificate was issued by the Ministry of Shipping; (iv) directing the respondents to exclude the period from the date of application made to the Ministry of Shipping till the date of grant of requisite certificate by the Ministry of Shipping, while computing six months' period in terms of Section 103 of the Finance Act, 1994.

6.1 *While considering the aforesaid reliefs and the issue whether in the facts and circumstances of the case the Learned Tribunal is justified in rejecting the refund claim of the petitioner under Section 103 of the Finance Act, 1994 on the ground that the application submitted by the petitioner claiming the refund was barred by limitation as provided under sub-section (3) of Section 103 of the Finance Act, 1994. Section 103 of the Finance Act, 1994 is required to be referred to and reproduced which is as under :*

> ***"SECTION 103. Special provision for exemption in certain cases relating to construction of airport or port.*** *- (1) Notwithstanding anything contained in Section 66B, no service tax shall be levied or collected during the period commencing from the 1st day of April, 2015 and ending with the 29th day of February, 2016 (both days inclusive), in respect of services provided by way of construction, erection, commissioning or installation of original works pertaining to an airport or port, under a contract which had been entered into before the 1st day of March, 2015 and on which appropriate stamp duty, where applicable, had been paid before that date, subject to the condition that Ministry of Civil Aviation or, as the case may be, the Ministry of Shipping in the Government of India certifies that the contract had been entered into before the 1st day of March, 2015.*
>
> *(2) Refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at all material times.*
>
> *(3) Notwithstanding anything contained in this Chapter, an application for the claim of refund of service tax shall be*

made within a period of six months from the date on which the Finance Bill, 2016 receives the assent of the President."

6.2 *It is required to be noted that as such the service in question was subjected to service tax for the period between 1-4-2015 to 29-2-2016 and therefore, the service tax was allowable to be paid during the aforesaid period and infact the petitioner paid the same which was reimbursed by the petitioner to the service provider. However, by Finance Bill, 2016, Section 103 came to be inserted in Finance Act, 2014 and the exemption which was available prior to 1-4-2015 which as such was withdrawn between 1-4-2015 to 29-2-2016 came to be restored retrospectively. However, the very Section 103 of the Finance Act, 2014 provided that the assessee shall be entitled to the relief of all such service tax which has been collected but which would not have been so collected on sub-section (1) within force at all material times and it further provided that notwithstanding anything contained in the said Chapter, an application for claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill, 2016 receives the assent of Hon'ble The President. It is required to be noted that the assent of Hon'ble The President was received on 14-5-2016 and therefore, the application for claim of refund of the service tax was required to be made within a period of six months from 14-5-2016. In the present case admittedly the petitioner submitted the application for claim of refund of the service tax on 28-11-2016 i.e. much after the completion of six months' period from 14-5-2016. Thus, from the aforesaid and considering Section 103 of the Finance Act, 2014, it can be seen that a policy decision was taken by the Government to restore exemption retrospectively and allowing the refund of the service tax paid during the period between 1-4-2015 to 29-2-2016, provided the refund application is made within a period of six months from the date on which the Finance Bill, 2016 receives the assent of Hon'ble The President. Therefore, a conditional exemption and conditional refund was provided by policy decision contained in Section 103 of the Finance Act, 2014. It cannot be disputed that but for Section 103 of the Finance Act, 2014 and the exemption being granted retrospectively, the petitioner could not have as a matter of right claimed such exemption and/or even consequently the refund of the tax paid. As such the Union Government was not under any obligation to provide the exemption retrospectively and that too with refund of the tax already paid. By way of policy decision which was culminated into Section 103 of the Finance Act, 2014, such an exemption was provided retrospectively and the refund was provided, however subject to sub-section (3) of Section 103 of the Finance Act, 2014.*

23. On the issue of applicability of Section 11B of Central Excise Act, 1944 providing a longer period of limitation than prescribed in sub-section (3) of the Section 104 of the Finance Act, 1994 their Lordships held as follows:-

"6.8 *Now, so far as the reliance placed upon the decision of the Division Bench of this Court in the case of Cosmonaut Chemicals (supra) is concerned, the same shall not be applicable to the facts of the case on hand. In the case before the Division Bench, the Division Bench was considering the refund application submitted under Section 11B of the Central Excise Act, 1944, in which it is* *not provided that the application for refund shall be made before the expiry of one year (from the relevant date) and in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence. In sub-section (3) of Section 103 the words "the refund application shall be accompanied by the certificate issued by the Ministry of Shipping" is missing. Therefore, the aforesaid decision shall not be applicable with respect to the refund application claiming the refund under Section 103 of the Finance Act, 2014. Section 11B of the Central Excise Act, 1944 as such claiming the refund shall not be applicable in stricto senso as the petitioner is claiming the refund under Section 103 of the Finance Act, 2014 and the right to claim the refund is accrued under Section 103 of the Finance Act, 2014. Therefore, the conditions prescribed in Section 103 of the Finance Act, 2014 shall be applicable more particularly sub-section (3) of Section 103 of the Finance Act, 2014. But for Section 103 of the Finance Act, 2014, the petitioner could not have claimed the refund and therefore, the petitioner has to comply with all the conditions mentioned in Section 103 of the Finance Act, 2014. The time limit is provided under the Statute. Looking to the specific provision of Section 103 of the Finance Act, 2014 more particularly the specific provision contained in sub-section (3) of Section 103, even there is no scope for reading down the said provision as suggested in para 30(b) of the petition reproduced herein above. For the same reason even the decision of the Hon'ble Supreme Court in the case of Ajith Kumar (supra) relied upon by the Learned Counsel appearing on behalf of the petitioner shall not be applicable to the facts of the case on hand. At this stage it is required to be noted that in the present case the petitioner submitted the application to the Ministry of Shipping for issuance of the necessary certificate in accordance with the Notification No. 9/2016-S.T., dated 1-3-2016 for the purpose of exemption of service tax on port project sanctioned prior to 1-3-2015 only on 15-11-2016 (Page 213 of the compilation).*

At this stage it is required to be noted that even the petitioner asked the Gujarat Maritime Board to issue the certificate as required which thereafter was required to be sent to the Ministry of Shipping for its verification and issuance of the required certificate only on 13-9-2016 (Page 211 of the compilation) and even the Gujarat Maritime Board issued the required certificate on 29-10-2016 which thereafter was sent to the Ministry of Shipping for issuance of the required certificate on 15-11-2016.

6.9 *It is also required to be noted that the application dated 15-11-2016 by the petitioner seems to have been received by the Ministry on 22-11-2016 and thereafter immediately the Ministry of Shipping had issued the required certificate on 22-11-2016. Therefore, it cannot be said that there was any delay on the part of the Ministry of Shipping in issuing the required certificate. Under the circumstances also, the aforesaid decision of the Hon'ble Supreme Court in the case of Ajith Kumar (supra) shall not be applicable to the facts of the case on hand.*

6.10 *Now, so far as the submission on behalf of the petitioner that sub-section (3) of Section 103 of the Finance Act, 2014 is discriminatory and violative of Article 14 of the Constitution of India on the ground that the period provided under Section 11B of the Central Excise Act, 1944 shall be one year and the limitation prescribed under sub-section (3) of Section 103 of the Finance Act, 2014 is six months is concerned, the aforesaid has no substance. The petitioner is claiming the refund under Section 103 of the Finance Act, 2014. The right accrued in favour of the* *petitioner to claim the refund is under Section 103 of the Finance Act, 2014 and therefore, the limitation prescribed under Section 103 of the Finance Act, 2014 shall be applicable. The substantive right to claim the refund in favour of the petitioner would be under Section 103 of the Finance Act, 2014. Therefore, sub-section (3) of Section 103 of the Finance Act, 2014 cannot be said to be discriminatory and/or violative of Article 14 of the Constitution of India as contended on behalf of the petitioner.*

24. The afore said Judgment has been upheld by the Hon'ble Supreme Court rejecting the SLP filed by the assessee reported aa ***Essar Bulk Terminal Salaya Ltd. Vs. Union of India*** [2021 (47) G.S.T.L J18(SC)]. From the above, it is clear that the limitation of six months prescribed under Section 104(3) of Finance Act,1994 is applicable for refund application filed under the said provision.

25. Now, coming to the second point of reference, in my opinion, Hon'ble Single Member Bench of the Madras High Court rendered the judgment in the case of ***Grand Technologies*** (supra) in exercise of the writ jurisdiction conferred on the High Court in terms of Article 226 of the Constitution of India and moulded the relief accordingly, as is evident from the observation at para 24 of the said judgment, which is reproduced below:-

*"**24.** However, the power endowed upon this Court in terms of Article 226 of the Constitution of India is substantial and wide, facilitating one to adopt a holistic perspective of all issues in arriving at a decision. Thus, in deciding whether the petitioner's claim before PIPDIC could be considered as compliance of the condition under Section 104, I take succour from the following facts :*

(i) Section 104 was itself was enacted as a beneficial provision method. Legislature intended, in principle, that there shall be no levy of service tax in respect of services relating to grant of long term lease in excess of 30 years.

(ii) Admittedly, the transaction qua the petitioner and PIPDIC falls squarely within the factual and legal matrices envisaged under Section 104 and on this score, there is no dispute.

(iii) Also admittedly, the request of the petitioner for refund before PIPDIC was made on 6-3-2017 even before the Presidential assent has been received, which is on 31-3-2017. Thus, the petitioner cannot be faulted for lethargy, negligence or even ignorance of the law.

(iv) It has thereafter approached PIPDIC on 21-8-2017, 25-9-2017, 19-1-2018 and thereafter, since there was no response

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from PIPDIC, approached the Pondicherry Chamber of Industries on 12-2-2018 urging their intervention to persuade the Managing Director of PIPDIC to grant the refund. Again, the petitioner has demonstrated diligence in the follow-up action.

(v) As per my observations in Paragraph 24 above, there is no specification under Section 104 as to where such claims are to be made.

(vi) On 28-6-2018 a refund request was made to the Service Tax Department, within six months from date of receipt of rejection from PIPDIC.

(vii) Even the Service Tax Department does not reject the same outright and asks for copies of the returns to verify payment of tax. It was only in December that a show cause notice was issued proposing the rejection.

26. The Nine Judge Bench of the Hon'ble Supreme Court in the case of ***Mafatlal Industries Ltd. Vs. UOI*** [1997(89) ELT 247 (SC)] while laying down the principles governing the refund of tax under the statutory provisions observed that the said principles may not be adhered to in exercising jurisdiction under Article 226 of Constitution of India by High Courts and Article 32 by the Hon'ble Supreme Court. At para 99 of the said judgment their Lordships observed as:

"(i) Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff - whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter - by mis-interpreting or mis-applying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by mis-interpreting or mis-applying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactment before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. **While the jurisdiction of the High Courts under Article 226 - and of this Court under Article 32 - cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11B. ...."(emphasis supplied)**

27. Accordingly, the judgment of the Hon'ble High court of Madras in ***Grand Technologies'*** case cannot be applied by Tribunal in exercising

statutory power of Appeal conferred under section 86 Finance Act,1994. This view has been expressed by the Larger Bench of this Tribunal in the case of ***Veer Overseas Ltd.. Vs. CCE, Panchkula*** [2018(15)GSTL 59(Tri.LB].

28. In the result, I am of the opinion;(i) the time limit of six months prescribed under section 104 of the Finance Act,1994 is applicable to the refund filed on 26.10.2017 in view of principle laid down by Hon'ble Gujrat High court in ***Essar Bulk Terminal Salaya Ltd.'s*** **case** and upheld by the supreme court; (ii) on the second question, the judgment of Hon'ble High Court in ***Grand Technologies'*** case delivered in exercise of Jurisdiction under Article 226 of the Constitution, cannot be applied by the Tribunal or the departmental authorities in view of Larger Bench decision in ***Veer Overseas Ltd***.'s case.

29. The above opinion may be placed before the referral Bench for appropriate action/orders.

(Pronounced on 31/5/2024)

(D.M. MISRA)
MEMBER(JUDICIAL)

Raja...

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MAJORITY ORDER

The Third Member has agreed with the view of Member (Technical) that the refund claim is hit by time bar. In view thereof, the impugned order is upheld. The appeal is dismissed.

(pronounced in court on 20.06.2024)

(M. AJIT KUMAR)
Member (Technical)

Sulekha Beevi C.S 13/6/2024
(SULEKHA BEEVI. C.S)
Member (Judicial)

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