THIRD MEMBER'S DECISION

EXCISE APPEAL NO. 50574 OF 2019

M/s Vedanta Limited **Appellant**

Versus

Commissioner of Central Goods & Service Tax, Jodhpur-I **Respondent**

Appearance

Shri Alok Aggarwal, Shri Shubham Tyagi, Shri Sunil Gupta and Ms. Vertikka K Kashyap, Advocates for the Appellant

Shri P. Juneja, Authorised Representative for the Respondent

Date of Hearing: 25.11.2019
Date of Decision: 27.11.2019

Miscellaneous Order No. 50/2019

Per Dr. D M Misra:

1. Heard both sides.

2. The present matter has been referred to third member by Hon'ble President on account of difference of opinion in the Bench comprising of Hon'ble President and Hon'ble Member (Technical) on the issue whether the appeal filed by the Appellant against the Order passed by the Assistant Commissioner dt. 29.08.2017 was within the time limit prescribed under Section 35(1) of Central Excise Act, 1944 and accordingly the Appeal be remanded to the Commissioner(Appeals) for deciding the case on merit or further enquiry is necessary to ascertain the date of communication of the Order.

3. To appreciate the point of difference, it is necessary to narrate the facts in brief even though elaborated in the order of the Hon'ble President.

4. The Appellant has filed the refund claim on 30th May, 2017 on account of excess oil cess paid during the period June, 2016 to August,

2016 and January, 2017 to March, 2017 amounting to Rs. 19.43 Crores (approx.). The show cause notice was issued to the appellant on 09.08.2017 proposing rejection of the refund claim to which they filed their reply to the said notice. Consequently, the Adjudicating Authority heard the Appellant on 21st August, 2017 and issued the order on 29th August, 2017.

5. The appellant had also filed a refund claim earlier on 24th March, 2017 on the same issue for an amount of Rs. 117.00 crores (approx.) and on rejection of the said refund claim by the Asst. Commissioner they filed an appeal before the learned Commissioner (Appeals), who in turn, allowed their appeal vide order dated 08th June, 2018. Also, another refund claim amounting to Rs. 1.70 crore filed subsequently was allowed on 23.07.2018 and it was received on 31.07.2018.

6. Since the second refund claim dated 30th May 2017, where hearing was completed on 21st August, 2017 but the order was not received, the Appellant approached the Adjudicating Authority on 02nd August, 2018 to ascertain the status. They were informed by the department that the order was already issued on 29th August, 2017. Consequently, the Appellant on 03rd August, 2018 requested the Adjudicating Authority for providing a copy of the order, since the same was not received by them. A copy of the order dated 29.08.2017 was handed over to them on 06th August, 2018 and also attested copy of the order was received by them on 11th August, 2018 through speed post. Consequently they filed the appeal on 04th September, 2018 before the Commissioner (Appeals).

7. The learned Commissioner (Appeals) on finding that the appeal was filed after a delay of approximately 308 days, sought information from the field formation on the actual date of communication of the

order to the appellant. On the basis of a report dated 20.11.2018 of the Adjudicating Authority and also the communication dated 04.12.2018 received from the postal Department Jodhpur, the learned Commissioner (Appeals) concluded that the order dated 29.08.2017 was delivered/communicated to the appellant on 12.09.2017. Consequently, observing that there is inordinate delay of 308 days from the date of communication of the order in filing the Appeal, hence the Appeal has been filed beyond the time period prescribed under Section 35(1) of CEA,1944, accordingly rejected the appeal.

8. Before the Tribunal the learned Advocate for the appellant has argued that since the order was communicated to them on 06^{th} August, 2018 for the first time and the appeal was filed on 04^{th} September, 2018, therefore, the rejection of the appeal by the learned Commissioner (Appeals) is bad in law. To ascertain the actual date of communication of the order dated 29.08.2017, an Interim Order was passed by this Tribunal on 11.04.2019 directing the Revenue to file appropriate affidavit to answer the averments made in the affidavit filed by the Lawyers of the Appellants, enclosed with appeal paper book. Consequently, the Assistant Commissioner filed an affidavit on 09^{th} May, 2019 and forwarded speed post register as well as dispatch register maintained during the relevant period at the Division office.

9. The Hon'ble President on perusal of the Registers, analysis of the evidences on record and the affidavit filed by the Assistant Commissioner arrived at the conclusion that the order has been communicated to the appellant only on 06^{th} August, 2018 and thus the appeal filed before the learned Commissioner (Appeals) on 04.09.2018 is not beyond the period of limitation prescribed under Section 35(1) of Central Excise Act, 1944; whereas the Hon'ble Member (Technical)

was of the opinion that further inquiry in the matter required to be carried out.

10. The learned Advocate, Shri Sunil Gupta advancing the argument on behalf of the Appellant has submitted that on receipt of a favourable Order in the Appeal against the rejection of first refund claim from the office of the Commissioner (Appeal) on 8th June, 2018, and also since their third refund claim for Rs. 1.70 crore was also sanctioned by the Assistant Commissioner on 23rd July, 2018, they approached the Adjudicating Authority to ascertain the status of the second refund claim filed on 30th May, 2017 for Rs. 9.34 crores, where the hearing was completed on 21.08.2017. They came to know that the order on the said refund claim was issued on 29th August, 2017. A copy of the same was requested on 03.08.2018 to initiate necessary action on the same, which was handed over to them on 06th August 2018 and also attested copy of the same was sent by speed post, received by them on 11th August 2018. It is his contention that they have not received the order prior to 6th August, 2018.

11. Assailing the report of the Asst. Commissioner relating to delivery of the order through speed post on 1st September, 2017 bearing no. ER924187517IN, relied by the Ld. Commissioner(Appeals) in the impugned Order, it is his contention that no doubt the said speed post was received by them from the Range Office, but the content in the envelop was different. It is his contention that the envelope with speed post No. ER924187517IN is of the size 23cm×10cm in which the letter dated 01.09.2017 relating to some other subject addressed to the Appellant by the Range Superintendent was delivered. It is his contention that the Order-in-Original which is of eleven pages legal paper size of cannot fit into the said small size

window envelope of 23cm×10cm. This fact is corroborated when the order dated 29.08.2017 was received by them against speed post No. ER956930766IN on 11.08.2018 from the Division Office in an envelope of 27cm×12cm size and the weight is approximately 90 grams with a higher postal charge. Also, he has submitted that the order has not been delivered in accordance with Section 37C of the Central Excise Act, 1944, therefore, the date of communication be considered as 06th August, 2018 hence, the appeal is within time.

12. The learned Authorised Representative for the Revenue has submitted that the relevant Speed post, dispatch register and postal envelopes have been examined by the Tribunal. He has contended that there is no dispute of the fact that the speed post bearing no. ER924187517IN dated 01.09.2017 has been dispatched from the Range Office, Balotra but the content of the said envelope is under dispute. He has submitted that in the affidavit of the Assistant Commissioner, it is mentioned that it is a common practice to send the post through Range Office to minimise the postal expenses; which should be understood to mean that it is a common practice to send office dak and some letters by hand delivery to the assessees through the Range Office to minimise the expenses of sending the same by post from the Division office. He has submitted that from the postal charge and size of the envelope with the speed post bearing no. ER924187517IN, it is clear that the adjudication order dated 29.08.2017 could not have been sent in the said envelope as the window envelope cannot contain the Order in legal paper size. It is his contention that, however, there could not be any manipulation and forgery on the part of the staff on the record. He has further submitted to decide the case on merit.

13. I have carefully considered the submission advanced by both the sides and perused the records.

14. The limited issue involved in the present reference for determination is whether the order dated 29.08.2017 was delivered to the appellant on 12.09.2017 or the order was delivered on 06th August, 2018 by hand delivery/11th August, 2018 through speed post, and the time limited prescribed under Section 35(1) of CEA, 1944, has been adhered to or otherwise.

15. The relevant dispatch register and speed post register maintained at the Division office have been placed before the Bench earlier and also today for examination. Besides the envelope bearing the speed post no. ER924187517IN issued on 01.9.2017 and the envelope bearing speed post no. ER956130766IN with its contents received by the Appellant on 11.8.2018 are also presented. The size of the former envelope is of 23cm×10cm and is a window envelope, whereas the second one is of 27cm×12cm size. On examination of these envelopes, it has been fairly accepted by all concerned that the first envelope is not fit enough to contain the order dated 29.08.2017, which of eleven pages and legal size paper. Also the postal charges levied for speed post of both letters are different, the second one with higher charge the weight being 90gms, therefore, the order dated 29.08.2017 could not have been dispatched in the envelope containing speed post no. ER9241875719IN, for which minimum speed post charge is levied.

16. Further, I find that the learned Commissioner (Appeals) on the basis of the report of the Adjudicating Authority dated 20.11.2018 arrived at the conclusion that the Order-in-Original dated 29.08.2017 has been sent by speed post no. ER9241875719IN dated 01.09.2017

and thus the procedure prescribed under Section 37C of the Central Excise Act, 1944 has been complied with since the speed post has not been returned by the postal authorities to the Department. Also, from the correspondences independently undertaken by the learned Commissioner (Appeal) with the postal Department it was revealed that the said speed post letter was delivered.

17. I find that the appellant even though not disputed the receipt of the said speed post letter no. ER9241875719IN dated 01.09.2017 but contended that it was a letter written by the Range Superintendent to the Appellant in the context of applicability of service tax on the License/royalty fees, and the said envelope did not contain the adjudication order dated 29.08.2017 issued by the Assistant Commissioner. The department could not place any evidence to rebut the said claim of the Appellant.

18. No doubt delivery through speed post in ordinary course be presumed to have been complied with the provisions of Section 37C of CEA, 1944 ,unless the speed post returned back by the postal authorities as undelivered, however, it is a rebuttable presumption and the addressee could rebut through evidences that the speed post has not been delivered to him. This principle has been laid down by the Hon'ble Madhya Pradesh High Court in the case of Indore Municipal Corporation vs. Commissioner of Central Excise, [2016 (338) ELT 567 (MP)].

19. In the present case the appellant could able to demonstrate and rebut the presumption that the order dated 29.08.2017 could not have been delivered to them through the speed post ER9241875719IN dated 01.09.2017 and in fact they have not been communicated about the said Order on 12.9.2017 as held by the Ld.

Commissioner(Appeals). Therefore, the finding of the learned Commissioner (Appeals) is unsustainable.

20. I find that in their separate orders, Hon'ble President and Hon'ble Technical Member have arrived at the same conclusion that the Order-in-Original is claimed to have been dispatched through Range office. Examination of the speed post register maintained at the division office indicates the speed post no. ER9241875719IN. In the affidavit of the Asst. Commissioner at para 2 it is stated that the order has been sent to Range office for delivery. Considering the categorical affirmation of the Asst. Commissioner in the affidavit that the Order was handed over to the Range for further delivery to the Appellant and the speed post no ER9241875719IN mentioned in the division office register on the information of the range, Hon'ble president after analysis of other circumstances arrived at the conclusion that the Order 29.8.2017 was not delivered to the Appellant on 12.9.2017 but on 06.8.2018, Whereas the Hon'ble Member (Technical) observed to initiate further inquiry at the Range Office.

21. In my opinion further verification of the speed post register, if at all maintained in the Range Office, would not yield any positive result in as much as the register in the Range office would also show the same speed post number. Receipt of the said speed post letter not disputed by the appellant. It is only the content of the speed post letter ER9241875719IN which is in dispute. An examination of the envelopes a man of ordinary prudence would definitely reach to the conclusion that the order dated 29.08.2017 could not have been dispatched in the envelope mentioning the speed post No. ER9241875719IN dated 01.09.2017.

22. As far as the role of the officers of the department is concerned in furnishing the report, it is not clear as to what short of verficaion conducted and whether it is ascertained the order dated 29.8.2017 remained to be dispatched at the Range office or at the Division office itself; the affidavit also does not disclose about the lapse relating to delivery of the Order. It only tries to explain the procedure followed and responded to the discrepancy pointed out by the Advocates in their affidavit. Thus, it remains with the authority to examine internally about the lapse on the part of the officers. But, as far as the appellant is concerned, they should not made to suffer as the order has been communicated only on 06th August, 2018, hence there is no delay in filing the appeal.

23. In these circumstances, I agree with the findings and conclusion of the Hon'ble President that order dated 29.08.2017 has been communicated to the Appellant only on 06.08.2018, and the Appeal has been filed before Commissioner(Appeals) within the time limit prescribed under Section 35(1) of CEA,1944. Consequently, the impugned Order deserves to be set aside and the matter be remanded to the learned Commissioner (Appeal) to decide the issue on merits.

24. This order may be placed before the Division Bench for passing the Final Order.

(Order pronounced in open court on **27.11.2019**)

(Dr. D M Misra)
Member (Judicial)

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