CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Service Tax Appeal No. 53311 of 2018

(Arising out of order-in-appeal No. IND-EXCUS-000-APP-185/18-19 dated 28.06.2018 passed by the Commissioner (Appeals), Customs, Central Goods, Service Tax & Central Excise, Indore).

M/s NRK Homes Pvt. Limited **Appellant**
302, 3rd Floor, NRK Business Park
Block B-1, PU4, SCH No. 54, A. B. Road
Indore (M.P.)

VERSUS

Commissioner of Central Goods and Service Tax, Excise and Customs **Respondent**
Post Box No. 10, Manik Bagh Road
Manik Bagh Palace, Indore, (M.P.).

APPEARANCE:

None for the appellant
Shri P. Juneja, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 50388/2020

DATE OF HEARING/DECISION: 24.01.2020

ANIL CHOUDHARY:

The appellant is absent on call today. This matter was earlier heard by me on 16.05.2019, when the Counsel for the appellant and learned Authorised Representative was heard and the order reserved. However, order could not be recorded and this matter was re-fixed for hearing. As the Counsel did not appear on the previous date on 19.12.2019, the matter is fixed for today for final hearing and disposal.

2. Heard the learned Authorised Representative for the Department and perused the record.

3. The appellant is a builder at Indore and registered with the Service Tax Department under the category of 'construction of residential complex service'. They have been depositing tax on the advance received from the prospective buyer(s) of the premises (units) and filing return regularly. They constructed residential project at Nepania and deposited service tax on the advances received from the customers from time to time. However, the project got delayed due to unavoidable circumstances and some of the customers demanded refund, by cancelling their contract of purchase. The appellant refunded the total amount received from such customer(s), including the amount of service tax (which was already deposited with the department).

4. Rule 6(3) of the Service Tax Rules provide – where an assessee had issued an invoice, or received any payment against the service provided which is not so provided by him either wholly or partially for any reason, or where the amount of invoice is renegotiated due to deficient provision of service, or on terms contained in a contract, the assessee may take the credit of such excess service tax paid by him, if assessee (a) has refunded the payment or part thereof so received for the service provided to the person from whom it was received or (b) have issued a credit note for the value of the service not so provided to the person to whom such an invoice have been issued.

5. Para 'D' of sub para 3 of return format Sl. No. DA-3 provides for adjustment of such service tax paid earlier, where services are not so provided under the heading 'by adjustment of excess amount paid earlier as service tax and adjusted by taking credit of such excess service tax paid, in this period under Rule 6(3) of Service Tax Rules. Similar facilities of adjustment, is provided at Sl. No. DB-4, E4 and F4 of return, for adjustment of krishi kalian cess, education cess and secondary and higher education cess, respectively.

6. As the refund to the buyers of flat, resulted in excess payment of service tax in terms of Rule 6(3) of Service Tax Rules, but such amount could not be adjusted as provided, since the amount to be adjusted was in excess of the liability on account of service tax during the subsequent period. Upon introduction of GST (from 01.07.2017) such excess amount of credit could not be further adjusted and accordingly was required to be refunded. Accordingly, the appellant filed refund claim on 21.07.2017. The refund claim was rejected vide order-in-original dated 05.03.2018 on the ground of time bar.

7. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals) who was pleased to record the observation by allowing the appeal by way of remand to the adjudicating authority, on the following observations and issue (1) Rule 6(3) of Service Tax Rules adjustment of excess paid earlier as tax by taking credit to which no finding have been recorded by the adjudicating authority and thus nothing has been verified as to whether the appellant have actually returned the amount of service tax to their

customers or not. Further, observed that in case of adjustment being not available there have been excess credit of service tax, refund can be filed under Section 11B read with Section 83 of the Finance Act. As the refund with regard to period involved 2014-15 to 2016-17, the adjudicating authority have erred that the entire claim including for the normal period of one year, is without proper and due examination of facts. Appellant is required to first clear the stipulation under provision of Section 11B read with Section 83 of the Finance Act, before any refund amount is sanctioned. Therefore, the adjudicating authority is directed to examine carefully as to whether the appellant have returned the excess amount of service tax to their customers as sub clause (a) & (b) of Rule 6(3) of Service Tax Rules or not.

8. Being aggrieved, the appellant is before this Tribunal on the ground that refund of the unadjusted credit under Rule 6(3) is available to them without any time bar. There is no time bar prescribed under Rule 6(3) for such adjustment, and it is only due to repeal of the provision of service tax on implementation of the CGST Act, that such credit became unadjustable and consequently appellant have to file refund claim. Further, Section 142 of CGST specifically provides for refund of service tax during service tax regime, in respect of service is not provided. Learned Counsel have also relied upon the ruling of Hon'ble Karnataka High Court in **K.V.R. Constructions vs. Commissioner of Central Excise, Bangalore – 2010 (17) STR 6 (Kar.)** wherein the assessee had paid service tax for construction activity, though they were not liable to pay

service tax, they applied for refund on 28.03.2008 of tax paid from 2005-06 to 2006-07. The refund claim was rejected on the ground of limitation, having been filed beyond one year, as per Section 11B of the Act. However, the finding was recorded that **KVR Construction** was not liable to pay service tax. The Hon'ble High Court allowing the writ petition held that Section 11B provided for refund of duty, and admittedly the sums deposited by **KVR Construction** is held to be a deposit and not duty, and therefore there was no necessity for the assessee to have made a claim invoking Section 11B of the Act for refund. Further, the Assistant Commissioner of Central Excise under misconception of law, assumed that Section 11B of the Act is applicable so as to decline the claim of the petitioner for refund of the amount deposited, on the premise that the claim was beyond the period of limitation. The Hon'ble High Court held that the impugned order passed by the Assistant Commissioner denying refund to be unsustainable and further allowed the writ petition alongwith direction to grant the refund.

9. The appellant alongwith synopsis of arguments have also submitted evidence, being copy of their ledger account and also the photocopy of their bank account in support of their contentions that the refund to their customers have been granted. The appellant have also attached copy of their ST-3 return in support of their contentions.

10. Learned Authorised Representative appearing for the Revenue have relied on the impugned order.

11. Having considered the rival contentions, I find that the Court below have erred in denying the refund to the appellant. The appellant have bonafidely taken credit under Rule 6(3) of Service Tax Rules on account of service not provided, as they have refunded amount to their customers including the service tax on cancellation of purchase agreement. I find that admittedly Revenue has never objected to taking credit by the appellant under the scheme of the Service Tax Rules. Further, Section 142(5) of CGST Act, 2017 specifically provided for refund of tax paid during Service Tax regime in respect of services not provided, to be paid or disbursed in cash. Further, the finding of Court below is erroneous also in view of the law laid by the Karnataka High court in **KVR Construction** (supra).

12. Accordingly, this appeal is allowed and the impugned order is set aside. The appellant is held entitled to refund of the unadjusted credit lying in their cenvat credit register, as also reflected in their ST-3 return as on 30.06.2017. The adjudicating authority is directed to disburse the refund amount within a period of two months from the date of receipt of copy of this order alongwith interest as per Rules.

(Dictated and pronounced in open Court)

(Anil Choudhary)
Member (Judicial)

Pant